Taking the termination high road

Moral and punitive damages against employers who lack empathy or show maliciousness may be becoming more common

BACKGROUND

Bad faith and punitive damages were, at one time, an anomaly, but they appear to be arising with greater frequency. In addition, judges are not setting stringent thresholds for proving mental distress. While it may seem to some that there is little distinction between moral and punitive damages, it is more important than ever to clearly understand and avoid the kinds of conduct that will attract the ire of judges.

BY RISHI BANDHU

EMPLOYMENT CONTRACTS are a curious subspecies of contract law. As a commercial contract, the common law affords employers complete discretion to terminate relationships, provided reasonable notice is given. The reality, though, is that the employment relationship is characterized by a significant imbalance of power in favour of employers. Legislation attempts to correct that imbalance, particularly through employment standards and human rights laws, but gaps remain.

In any relationship characterized by an imbalance of power, abuse can result. In the employment context, the common law affords judges the ability to compensate employees with "moral damages" for mental distress caused by unfair or bad-faith employer conduct in the manner of dismissal. Punitive damages may also be levelled against an employer to send a message of condemnation and deterrence to other employers, provided that the employer has engaged in misconduct that is considered "independently actionable" from the failure to provide reasonable notice.

The distinction between moral and punitive damages lies in the purpose. Moral damages are intended to compensate for hurt feelings and punitive damages are intended to punish the employer. Conduct that may be characterized simply as unfair may attract moral damages, provided there is evidence of mental distress, while punitive damages are reserved for more egregious legal breaches. Some may argue, with good reason, that there isn't much of a distinction at all.

Hostility

Employees are particularly vulnerable at the time of termination, and often in the circumstances that lead to it. Two recent decisions out of British Columbia highlight the consequences of hostile behaviour at the time of termination.

Acumen Law Corporation v. Ojanen is a B.C. decision that highlights the consequences of hostile behaviour at the time of termination. The employer precipitously concluded that it had just cause for termination, sued the employee, and served her with the lawsuit in front of her colleagues. The employee, an articling student, was particularly vulnerable to the employer's serious allegations of misconduct, none of which could be proven. She was ultimately awarded $100,000 in general damages as a result of the bad faith and an additional $25,000 in punitive damages.

Fobert v. Medical Cannabis Resource Centre Inc. involved a young, short-service employee who made only $17.50 an hour. At the termination meeting, the employer's representative was hostile and made unsubstantiated allegations of financial mismanagement and offered the employee "500 bucks" as severance. That insensitivity resulted in an award of aggravated damages of $25,000 and punitive damages of $35,000 — a highly notable result considering her reasonable notice entitlement was only eight weeks' wages.

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Failing to pay statutory minimums

Increasingly, judges appear willing to punish employers for delaying statutory entitlements to termination and severance pay.

Chen v. MagIndustries Corp. is a recent example out of Ontario. The employee was the president and CEO of the defendant company. On termination, he was offered severance that exceeded his statutory entitlements. However, payment of the severance, including statutory amounts, was completely contingent on his execution of a release. As the employee declined the severance offer, his statutory entitlements were not paid. The court characterized that decision as "independently actionable" and "reprehensible," awarding $20,000 in punitive damages.

Judicial condemnation of an employer's failure to pay termination and/or severance pay on time is understandable given the obligations are minimum statutory entitlements. It is, however, surprising to some that violations of minimum employment standards laws would be considered "independently actionable." In particular, the legislation doesn't permit moral or punitive damages and wrongful dismissal damages entirely subsume termination and severance pay. Like human rights legislation, employment standards laws represent a complete code, which arguably excludes moral or punitive damages.

Litigation conduct

Courts are increasingly taking a dim view of aggressive litigation conduct, which can include an employer taking a position of just cause without any reasonable basis and then abandoning that position at some point prior to trial.

In 2019, the Ontario Court of Appeal affirmed the trial decision in *Ruston v. Keddco MFG. (2011) Ltd.*, which awarded $25,000 in moral damages and $100,000 in punitive damages for litigation conduct that included an unsuccessful and purely strategic counterclaim asserting fraud against the employee, for $1,700,000.

In *Humphrey v. Mené*, the court was unimpressed with the employer's behaviour during the employment relationship, which it characterized as toxic and abusive. It exaggerated performance issues and took a baseless position of just cause for termination, maintaining it for a year after the litigation was commenced. As a result of that allegation, it also delayed statutory entitlements to termination and severance pay. The court awarded $50,000 to compensate for mental distress and $25,000 in punitive damages.

Lack of transparency

The frequency with which mental distress and punitive damages are being awarded may be worrying for employers and is leading to concerns that the threshold for conduct that qualifies for such conduct is being lowered. The recent decision in *Russell v. The Brick Warehouse LP* certainly suggests that.

Tom Russell was employed by The Brick for over 36 years when he was terminated at 57 years old as part of a broader restructuring. He claimed 30 months' notice but was awarded 24. In addition, he asked for "aggravated damages" on the basis that the Brick's termination letter was deficient in a number of ways. Specifically, it did not advise that he would receive his statutory entitlement to 34 weeks' termination and

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severance pay if he did not accept the full severance offer. The letter was also deficient in failing to advise that Russell's benefits would continue for the required statutory period or that he would be paid vacation pay over the statutory notice period (it said that he would receive vacation pay accrued to the date of termination).

The court was satisfied that Russell experienced mental distress as a result of The Brick's "lack of transparency," despite the absence of objective third-party medical evidence. As a result of what was acknowledged to be The Brick's "inadvertence," the court awarded Russell $25,000 in moral damages, in addition to the reasonable notice award.

Takeaways for employers

Litigation, and a trial, are sometimes unavoidable after an employment relationship ends. Moral and punitive damages in relation to an employment relationship will not, for most employers, cause serious financial hardship. It is, however, an embarrassing public record of a dim view taken of an employer's conduct at the time of termination. Given what appears to be an increasing willingness by judges to remedy and punish abuses of power in an employment relationship, employers are well advised to take steps to mitigate the risk of moral and punitive damages. At a minimum, employers should do the following:

- Be civil, respectful, courteous, and frank at the time of termination. As one lawyer I know frequently says, terminate as though you were dismissing your best friend.
- Do not take positions of just cause without an appropriate foundation. Positions of cause, taken for strategic purposes to obtain leverage or lengthen the litigation process, are likely to attract punitive damages.
- Avoid counterclaiming against an employee solely for strategic purposes.
- Ensure that statutory amounts are paid, even if just cause is alleged, unless there is clear evidence that the statutory exceptions for termination and severance pay are met.
- Take care in drafting termination letters to ensure that they reflect compliance with employment standards legislation. Ensure transparency in disclosing the employee's entitlements.

Above all, employers should be mindful of the vulnerability of employees at the time of termination, regardless of the breakdown of personal relationships and the objectionable behaviour of an employee. It seems trite to say, but taking the high road and acting with empathy are more important than ever.

For more information, see:

- *Acumen Law Corporation v. Ojanen*, 2019 BCSC 1352 (B.C. S.C.).
- *Fobert v. Medical Cannabis Resource Centre Inc.*, 2020 BCSC 2043 (B.C. S.C.).
- *Chen v. MagIndustries Corp.*, 2021 ONSCE 2377 (Ont. S.C.J.).
- *Ruston v. Keddco MFG. (2011) Ltd.*, 2019 ONCA 125 (Ont. C.A.).
- *Humphrey v. Mené*, 2021 ONSC 2539 (Ont. S.C.J.).
- *Russell v. The Brick Warehouse LP*, 2021 ONSC 4822 (Ont. S.C.J.).

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