

HOW TO AVOID BAD FAITH DAMAGE AWARDS

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COURTS HAVE consistently held that a dismissed employee is not entitled to compensation for ordinary distress and hurt feelings experienced following loss of employment. However, if an employee suffers mental distress because the employer breached its duty of good faith and fair dealing in the manner of dismissal, the employee may be entitled to aggravated damages. If the employer's actions are egregious, the employee may also be entitled to punitive damages.

Previously, bad faith damages were awarded to an employee only if the employer had been unduly insensitive or cruel in the termination. More recently, Canadian courts have lowered the threshold for what constitutes "bad faith" conduct. This article reviews recent case law and provides guidance to employers on how to minimize the risk of such a claim.

Bad faith conduct during employment

An employer's pattern of behaviour during employment up to dismissal can warrant an award for aggravated damages. In *Chu v. China Southern Airlines*,¹ a 68-year-old employee was subjected to unfair and humiliating treatment during employment. He was demoted, had his pay cut (to encourage him to resign), and was forced to sign disciplinary letters with which he did not agree. Ultimately, he was dismissed under the pretence of "time theft." The court was satisfied the employer's conduct caused the employee mental distress during his employment and after he was dismissed. He was awarded \$50,000 in aggravated damages for breach of the duty of good faith and fair dealing in the manner of dismissal.

Unduly insensitive behaviour at the time of termination

In *Pohl v. Hudson's Bay Company*,² a long-service employee was dismissed after his position was eliminated due to a restructuring. He was "walked out" of the workplace, which the court found to be "unduly insensitive" in the circumstances. He was also offered alternative employment that would have required him to relinquish his prior service and accept lower pay, which the court found was designed to extinguish his existing legal rights. All of this breached the duty of good faith and fair dealing, for which the court awarded moral (aggravated) damages of \$45,000.

Non-compliance with statutory requirements post-termination

An employer's failure to comply with its statutory obligations may also result in sanction by the court. In *Pohl*, in addition to the misconduct noted above, the employer paid the employee's termination pay and severance pay in installments instead of as a lump sum (within seven days) as required by employment standards legislation. These amounts were paid out in a lump sum only after repeated requests from the employee's counsel. The employer also failed to issue a Record of Employment (ROE) in a timely manner and, once issued, the ROE contained errors. The court was satisfied the employer's failure to comply with employment-related legislation warranted a further \$10,000 in punitive damages.

An employer may also be liable for bad faith damages if it fails to inform the employee of their right to immediate payment of statutory pay on termination. In *Russell*

v. The Brick Warehouse LP,³ the employer failed to expressly advise the employee that he would be given his minimum statutory entitlements under employment standards legislation even if he did not accept the termination package offered. The termination letter also failed to reference the employee's statutory benefit continuation. When the statutory amounts were ultimately paid, the employer inadvertently delayed paying out the correct amount to the employee's RRSP. The court found this conduct amounted to bad faith, and the employee was awarded \$25,000 in aggravated damages.

Inadvertent mistake is no excuse

In *Moffat v. Prospera Credit Union*,⁴ a dismissed employee was awarded the equivalent of an additional 2.5 months' salary as punitive damages because of an error on the part of the employer. The termination letter incorrectly stated the employee was entitled to two weeks of notice, which was less than her contractual or common law entitlement. The letter also required the employee to sign a release and agree to a 12-month non-solicitation clause as a condition of payment, both of which were included inadvertently. Despite the fact the employer corrected the errors, the court awarded punitive damages to deter other employers from making similar mistakes.

Reputational harm and "hardball" litigation tactics

If an employer's post-termination conduct negatively impacts an employee's reputation or is designed to frustrate an employee's attempt to litigate their wrongful dismissal claim, this can result in an aggravated or punitive damage award. In *Chu*, in addition to falsely asserting the employee was terminated for cause, the employer made damaging allegations about the employee in a public forum, compromising his ability to obtain alternate employment. The employer also engaged in a pattern of litigation conduct designed to "stall and frustrate" the employee's claim, such as refusing to pay a cost award and to comply with a court order. The court was satisfied the employer's conduct must be "denounced and deterred" and awarded \$100,000 in punitive damages.

Lessons learned and best practices

Employers can minimize the risk of a claim for bad faith damages by following these best practices:

- **Do not assert just cause without good reason.** A court is unlikely to award bad faith damages against an employer if, in good faith, the employer alleges there was cause for termination. However, an employer that “manufactures” cause to discourage an employee from claiming their termination entitlements or to gain leverage in settlement discussions may be sanctioned.
- **Treat the employee with respect.** Review the organization’s termination protocols to assess whether they are unnecessarily embarrassing for the dismissed employee.

- **Comply with all statutory termination requirements, in a timely manner.** This includes paying all outstanding wages, termination pay, and severance pay within seven days of termination.
- **Take care when drafting termination letters and documentation.** At a minimum, an employee must receive what they are owed under any contract and employment standards legislation. Also, ensure the employee is clearly informed of their statutory rights.
- **Do not publicly comment about the dismissed employee,** including the reasons for termination.
- **Be strategic.** While there is a time and place for aggressive litigation strategy, courts will generally look dimly on “hardball” tactics. 

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¹ 2023 BCSC 21 (C *Chu*).
² 2022 ONSC 5230 (C *Pohl*).

³ 2021 ONSC 4822.
⁴ 2021 BCSC 2463.

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