



Who's Afraid of Punitive Damages?

by David Greenwood

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Punitive damage awards in the U.S. can make even those in Bill Gates' tax bracket lay awake at night: \$3 million for a spilled cup of McDonalds' coffee; \$5 billion for the Exxon Valdez oil spill and \$250 million for employment discrimination. But should employers in Canada worry about punitive damage claims in wrongful dismissal actions?

Punitive damage awards are a relatively new remedy in employment law. Historically, an employee was only entitled to damages arising from the employer's failure to provide proper notice of the termination of the employee's employment. This was cemented by the decision in *Addis v. Gramophone Co.*, [1909] A.C. 488 (H.L.) where the House of Lords held that no damages were available to an employee for the actual loss of his or her job and/or pain and distress that may have been suffered as a consequence of being terminated. This remained the law in Canada for over 70 years.

Starting in the early 1980's, courts in Canada began to recognize that other heads of damages may be appropriate in wrongful dismissal actions. Thus, the grounds for recovery began to expand: aggravated damages; damages for mental distress; punitive damages and consequential damages all became accepted forms of damages.

Punitive damages, however, are the form of damages employers fear the most, largely because of the media attention they receive. However, for the most part that fear is not warranted. Punitive damage awards remain very rare in Canadian employment cases. This was highlighted by a decision of the B.C. Court of Appeal in January of this year. In *Marchen v. Dams Ford Lincoln Sales Ltd.* (2010) B.C.C.A. 29 the B.C. Court of Appeal reversed the trial judge's \$100,000 award of punitive damages. In particular, the trial judge found that the employer had attempted to cover up the real reason for the termination of the employee's employment. The trial judge did not believe that the employee was let go because of "lack of work" as claimed by the employer. Instead, he found that the employer had misled the court and that the real reason for the termination was because the employer, without any justification, suspected the employee may be involved in criminal activity.

Although the B.C. Court of Appeal agreed that there had been a cover up, it found that the employer's conduct was not unfair, in bad faith, misleading or unduly insensitive at the time of termination. The B.C. Court of Appeal followed the existing case law which held that punitive damages are only appropriate to express approbation and to punish in circumstances where the award of damages is insufficient. In essence the B.C. Court of Appeal found that the employer's misguided and unsupported belief of impropriety was not sufficient to justify an award of punitive damages.¹

So, should employers worry about punitive damages in wrongful dismissal cases? Based on how rare punitive awards are, the answer is: not really. However, if an employer crosses the proverbial “line”, it can be held accountable for its conduct.

There are a number of ways that employers can minimize the risk of being on the wrong side of a punitive damage award. These include:

- Be fair and truthful when dealing with employees;
- Take reasonable measures to investigate allegations of misconduct;
- Be careful when communicating information relating to employees, such as the reason for termination;
- Consider each employee’s circumstances when making dismissal decisions. Be careful that an employee is not being selected for an unfair or unlawful reason or that a particular group is over-represented;
- Don’t do anything that will have an unfair impact on the employee’s future or ability to re-employ; and
- Consider whether there are special circumstances that may result in additional forms of damages being awarded to the employee.

These considerations may be most relevant when dismissal decisions are being made, but employers must be sure that regard is given to these factors any time an employee issue arises. Punitive damages can arise from workplace conduct as well as dismissals.

As with all aspects of the employer-employee relationship, employers should be vigilant and fair in their dealings with employees. If an employer is concerned that its conduct or the conduct of people for which it is responsible (such as other employees) may cross the line, it should contact its legal counsel. That call may be much less expensive than a trial or award of punitive damages. ■

¹ And despite the finding of the B.C. Court of Appeal in *Marchen*, there are cases in which punitive damages have been awarded in other cases where employers persisted with misguided and/or unsupported allegations of wrongdoing.