

## Avoiding Punitive Damages in Legal Disputes with Employees

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Your business, like any successful business, works because of the personal relationships you have built within it: relationships founded on trust, respect, and hard work. Your employees are part of a valued and dedicated team. In a perfect world, nothing would ever disrupt this happy arrangement.

But your employees are also people. People face challenges, get sick, or don't get along. At these times we all have an unfortunate tendency not to be the best we can be. So it is understandable that many legal disputes are touched-off by these challenges. But whether you are trying to work through an issue, dealing with a disciplinary matter, or considering something more permanent, remember that someone else is almost always looking over your shoulder. One day, a Court may be too.

Years ago, employee lawsuits were thought to be generally small and easily settled, essentially involving nothing more complicated than a question of how much termination pay was owed. Recent law suggests that all of this is changing. Trends in employment law point to an increasing use of bad faith employer conduct to found significant legal claims.

There are now more legal claims than ever before for punitive damages related to the disciplining and dismissal of employees. Such damages are intended not to compensate the employee, but rather to punish the employer. In the past few years, such claims have escalated not only in number but in size, with employers being stung by huge punitive damages awards from juries (*Higginson v. Babine Forest Products Ltd.*; *Boucher v. Walmart*). And it isn't only juries: judges are regularly persuaded to punish wrongdoing with six- or even seven-figure punitive damages awards. The overall trend of punitive damages in all areas of law is upwards: *Downham v. Lennox Addington (County)*, and *Branco v. American Home Assurance Co.* both available on CanLii.

In the *Downham* case, the employer, an Ontario County, alleged a "breach of trust" against Mr. Downham for attempting to assist a recently released convict to obtain subsidized housing. The County fired Mr. Downham for cause. The County also interfered with Mr. Downham's efforts to obtain new employment by providing extremely negative and unsolicited references. The Court awarded Mr. Downham \$100,000 in punitive damages and \$70,000 in aggravated damages, in addition to pay in lieu of notice of termination.

In the *Higginson* case, a sawmill in British Columbia fired a 30+ year employee alleging cause. At trial, a jury accepted that the "cause" was made up: it was just a sham to try to avoid paying a substantial amount of wages in lieu of notice. Not only was the employer ordered to pay the wages, it was also slapped with a \$573,000 award for punitive damages – thought at the time to be the largest such award in Canada to an employee.

Not to be outdone, in *Boucher* an Ontario jury found that a Walmart employee was subjected to abuse at the hands of her supervisors in an effort to make her quit. The conduct apparently included profanity and humiliation in front of other employees. Ms. Boucher was awarded \$1,150,000 in punitive damages, including \$150,000 from her manager, personally.

When the personal relationships in your workplace break down, and your team is left to their own devices in difficult situations, your business invites this sort of liability. Without guidance, your usually calm, trusted managers may react to such situations with "a marked departure from ordinary standards of decent behaviour," which is one way that the Supreme Court of Canada describes employer conduct supporting punitive damages. You may look past such conduct as excusable or even understandable in the circumstances. A Court will not.

There are many common mistakes that employers make when trying to deal with a difficult employee situation. Fabricated paper trails, sudden emphasis on “performance problems,” and allegations of minor misconduct, inevitably lead to legal trouble down the road. Sometimes there is an over-emphasis on justifying alleged cause for termination. There may be a scramble to enforce the strict letter of policies that have fallen into disuse or have been effectively changed by convention. There may be actions unwisely taken based on “usual practice,” or “industry standard.”

Seeking legal advice is always a good idea, and the earlier, the better. It is even more important as the stakes grow higher. In the legal world, a little good advice now is worth a lot more later, and no situation highlights this truth better than punitive damages. Even when employers are ultimately successful in defending against such claims, the expense, the negative publicity, and the burden of lost productivity and workplace disruption, can render a victory hollow.

The good news is that most conduct attracting punitive damages is fairly obvious to experienced counsel and can be avoided with timely advice and good planning. Empowering yourself and your team to seek legal counsel early when faced with difficult situations is one of the best investments you can make in your happy and successful workplace.

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