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SPRING 2025, VOLUME 23, No. 2



Sharlene Rollins
RPR
Manager,
Administration

Helping Your Employees Find Work-Life Balance

It actually starts with you

We all know the importance of finding balance in our personal lives. While employees certainly have a right to their personal privacy, there are several ways that we can help them find their own work-life balance. The benefit to that for us as managers is that we not only get happier and healthier employees, we also get more productive ones.

Making this a priority has become even more crucial in these post-pandemic times. Back before COVID, lockdowns and all that drama, most of us actually had better balance between our professional and personal lives. Studies show that our work habits, schedules and the boundaries between work and home have almost completely disappeared. While some workers may have saved some commuting time, we now operate on an almost 24 hour a day work cycle with availability being a prized quality by most managers.

There has been some legislation to regulate time away from work, but that will take more time to become a widespread trend - or make it popular among workers and their supervisors. So what can we do now? We can do lots. Let's start by shifting focus and offering flexibility.

The old-style work ethic demanded that people put in long shifts and got rewarded long hours. The first step to bringing balance is to change that to valuing and rewarding productivity versus how long someone is actually on the clock. That shift in focus will not only be welcomed by employees, it has also been proven to improve morale and employee engagement, not to mention productivity.

Offering flexible work schedules and hybrid working models based on individual employee needs gives workers more control over their work and work environment. That feeling of empowerment easily translates into a positive employee experience and can lead to even greater productivity by individual workers and their teams. Two other pieces have also been proven to assist employees with building a healthy work-life balance. They are to provide additional support to parents and workers with other family responsibilities and to model the behaviour that you would like your employees to emulate.

Offering additional support and help to parents of young children and those who may be looking after sick or elderly family members could provide a lifeline to those employees at a time when they really need it. In tangible terms, this could be help with childcare or after care costs, offering additional leave credits or time off to allow workers to attend appointments or meet their specific family needs.

Perhaps the most important thing you can do to encourage your employees to find their own healthy balance between work and the rest of their lives is to practice good habits yourself. Establish some personal boundaries around when you will work and when you are off. Your employees will see that you are walking the walk and not just talking the talk. If you don't work every evening or every weekend, your team members will realize they don't have to either.

Sharlene Rollins is Manager, Administration for IPM [Institute of Professional Management].

Perspective



"The staff hates you, The CEO hates you and I hate you. Your promotion to management has been a huge success."



Nathaly Pascal
RPR, CMP, RPT
President

President's Message

Managing in the 21st Century

What you need to succeed

Korn Ferry is an international consulting firm with many years of experience in hiring, training and developing managers. I found an article in which they explain their framework for managing in today's complex and ever-changing workplace. This framework includes five elements that can help any manager succeed in this climate.

Right Size

Korn Ferry believes that managers must have the right number of staff to allow them to reach their organizational and strategic goals. There should not be too many because that will cause not only overspending, but overlapping in duties and responsibilities that will hamper productivity. There should also not be too few. That will lead to burnout and employees not being able to reach their full potential.

Right Skills

We all inherit a cadre of employees who bring a certain skill set to their jobs and work teams. Good management involves accurately assessing your workforce and determining where there are gaps or where you need to improve skills and capacity. This will allow managers to allocate resources as required and to always have a backup in case a key employee becomes incapacitated or leaves the organization.

Right Shape

Organizational structures are another key element that management must get right to be effective in the new world of work. It is not just about having your design, production and marketing systems all lined up. Attention also must be paid to how people fit into the structure that you have created so that they will feel engaged, motivated and really part of the structure.

Right Site

Are your people in the right jobs that will allow them to grow, develop and fully contribute to your organization? This may be a bit like weeding your garden. Removing dead leaves and debris and ensuring that your star performers have what they need to shine. Put them in the right place and support them through good training and development programs, coaching and mentoring.

Right Spend

Money is always an important and often fought over resource within organizations. There are often competing demands with compelling arguments. Good managers know how to marshal and preserve valuable dollars so that they know when to invest and even more importantly, when to pull back. The ultimate test for managing in the 21st century is how well you manage your financial resources. Spend wisely to ensure your continuing success.

Nathaly Pascal is President of IPM [Institute of Professional Management].



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Tommy Leung
J.D.

Senior Associate,
Borden Ladner
Gervais LLP

Feature

Reducing Vacation for Absentee Employees

Keep accurate records to avoid unnecessary payouts

In Alberta, all employees are, at a minimum, entitled to vacation time and vacation pay calculated using formulas based on the employee's length of service. However, for some employees who are constantly absent from work, is it fair that they receive the same amount of vacation time and vacation pay as their colleagues with perfect attendance?

Section 44 of the Alberta *Employment Standards Code* is a mechanism for employers to balance the scales. Section 44 says, "When an employee is absent from work, an employer may reduce the employee's vacation and vacation pay in proportion to the number of days the employee was or would normally have been scheduled to work, but did not."

However, this provision is targeted at absences and not where the parties agreed to different types of work arrangements. One early arbitration decision, *Greater St. Albert Catholic Regional Division No. 29 v. C.E.P., Local 72-A*, 1998 CarswellAlta 1568, was about employees who only work 10 months per year versus 12 months. The union argued that the 10-month employees were not employees normally scheduled to work for 12 months and then chose not to work for 2 of those months. The arbitrator stated that, "I agree with the union that although article 44 speaks to prorating vacation or vacation pay based on an employee's absence from work, the clause only deals with circumstances where the employee was or would normally be scheduled to work, but did not."

In another early arbitration decision, *Federated Co-operatives Ltd. v. Miscellaneous Employees Teamsters, Local 987*, 2004 CarswellAlta 1139, the arbitrator implies that employees who are on statutory leaves may potentially be subject to such proration, by stating, "The Code's parental leave provisions addressing return to work, section 53(7), does not protect vacation accrual during the leave". Although there may be an argument based on this decision that an employee on leave would "normally" be scheduled to work but for their statutory leave, it may be

risky to take such an interpretation, because an employer would not be permitted to schedule an employee who is on statutory leave. There does not appear to be any clear guidance from Employment Standards or decisions that confirm whether employees on statutory leaves can have their vacation entitlements reduced in this manner. Considering the *Employment Standards Code* is a remedial legislation, it would unlikely be interpreted in a way that is detrimental to the employee.

In more recent decisions, they demonstrate the importance of the employer showing that the employee was normally scheduled. In the employment standards appeal decision, *Harcourt Personnel Inc. v. Nicholls*, 2011 CarswellAlta 2407, the umpire stated, "my reading of section 44 of the Code does not assist the employer. The words used in that section are 'the number of days the employee was or would normally have been scheduled to work, but did not'. There was no schedule to work and no fixed number of work days or number of days of vacation in this relationship... and also no number of days the employee was or would normally have been scheduled to work".

It would seem, perhaps, that this provision may be best used to claw back overpayment of vacation pay. In the employment standards appeal decision, *McMillan-McGee Corp. v. Borth*, 2008 CanLII 54689, the employee was not employed long enough to be entitled to time off, but he already took three weeks off with pay. The umpire found that section 44 of the Code allowed an employer to reduce an overpayment of salary or earnings from the earnings otherwise due on termination of employment.

Key Employer Takeaways:

Although section 44 of the Employment Standards Code offers a mechanism to prorate an employee's vacation entitlement if they were or would normally have been scheduled to work, but did not, this is likely only applicable to employees who were absent without authorization and is

continued next page...

Reducing Vacation for Absentee Employees *concluded from page 4*

likely without practical value. Because if the employee is absent without authorization, they are unlikely to be paid for their absence. Since vacation pay is calculated as a percentage of wages, if the employee was not paid, they would not receive any corresponding vacation pay in any event, so their vacation pay would effectively be prorated, unless this provision is to be interpreted to reduce additional vacation pay from the employee as a form of discipline, which appears unlikely.

Separate from vacation pay, section 44 may also be useful in prorating vacation time, but this is likely to have limited value for the employer dealing with an employee who only has 2 to 3 weeks of vacation time per year, unless the employee is absent for a long period of time.

The scenario where section 44 is likely the most useful, as discussed in the *McMillan-McGee Corp.* decision, is where vacation pay was already paid in advance, but the employee never ended up

earning it. However, since November 1, 2020, employers are now able to deduct a recovery of vacation pay paid to the employee in advance of the employee being entitled to it from their earnings without the need of the employee's consent, which effectively renders section 44 of no real use, other than being read in conjunction with section 12(1)(a.2) to establish that the employee did not earn the vacation pay in question, because they were absent.

Nonetheless, this is a reminder to employers to keep accurate records of an employee's work schedule, their absences, vacation time used and vacation pay paid. Otherwise, it will be difficult to establish any vacation pay overpayment and corresponding deduction.

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ASK THE EXPERT

Winning the Competition for Your Boss's Job

Dealing with the new reality

Q: You have competed against a teammate for your former boss's position and you won. What happens now?

When the boss leaves a position, it's not uncommon for direct reports to know they will compete against one another for the vacant spot. When the successful candidate is a former teammate, it can be challenging for the one who competed but did not get the role to adjust. The new boss can help make the transition a success for everyone concerned. Here are a few pointers to keep in mind.

Understand that this will be an emotional time for both parties.

Winning or coming in second in a competition sparks different emotions depending on the seat one occupies. For the successful candidate, it can bring excitement, curiosity, joy and a sense of achievement or accomplishment. For the candidate who needs to try again, the feeling might encompass disappointment, sadness, remorse, doubt, a sense of failure, embarrassment or resentment.

Acknowledge the situation.

Ideally, the new manager will reach out to the other to acknowledge the new reality. It will be hard to know precisely how the former teammate feels, so be prepared to approach the conversation following the notion of 'less is more.'

Acknowledge the shift in the relationship and indicate a willingness to figure out the new dynamic. How the relationship has changed and the communication required does not need to be all figured out in one conversation. Instead, just set the stage by being open and transparent.

Establish a time for a subsequent meeting after the employee has had time to think about what they need to feel supported in this new reality.

Understand the positional power that comes with the new role.

Positional power is a real thing. It is the type of power you have when you have a rank, title or position of authority in an organization. With positional power comes the responsibility to use that power in a mature and honouring way.

Moving to a place of authority from within a team naturally shifts the responsibility for how

one interacts with former teammates. Employees will be watching to see what behaviour is acceptable. Establish appropriate boundaries and ensure to be objective and impartial and not treat the one who competed for the role in a way that negatively distinguishes them from others.

Address the expression of any emotion that negatively affects your or the team's working relationships with the one who competed.

It takes social and emotional maturity to handle the disappointment of not getting a position you've competed for. Sometimes, candidates hold a grudge or behave in ways that compromise relationships, positivity and productivity. Sometimes, candidates have other stresses in their lives that coincide with the timing of the news that they did not get the job. While it is important not to jump to conclusions about the root cause of the emotion, it is wise to meet with the team member promptly to address your concerns. If the discontent is about the job competition, it will not likely go away.

Acknowledge the situation's complexity and the employee's feelings about the result while holding the expectation of adherence to the accepted behavioural norms and working effectively together. If the employee is unwilling to shift behaviour to embrace a constructive working relationship, then be prepared to address this as a performance issue.

Support the former competitor's desire to move to a management role.

Have a conversation with the competing colleague regarding their desire to move into management. Ask what they need to do to prepare for the next competition. Support professional development opportunities that align with available options and compare with what could be offered to other employees.

Allow for time to settle into the new normal.

As with any new role, it takes time to learn the ropes and establish 'new' relationships. And while the players are not new, this is new regarding shifting the reporting relationship. Be clear with everyone about what's expected

continued on next page

Winning the Competition for Your Boss's Job ...concluded from page 6

and the support they can expect from you to help them be successful in their role.

Support the employee's decision if they choose to leave the team.

Sometimes, the employee who competed for the role finds it too challenging to stay with the team and you as the new manager. If this is the case, acknowledge their contribution, and should they ask, provide a reference that speaks to their strengths.

Transitions can be difficult, especially if the change is unplanned. New managers may know their competitors at or near the time of accepting a new role. It's incumbent on the new manager to set the tone and demonstrate the social and emotional maturity to support individuals and

lead the team, knowing some members wanted the job. It's not always easy yet necessary work.

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Feature

Broader Considerations for Aggravated and Punitive Damages

Employers will always be under the microscope - be prepared

Introduction

The Ontario Superior Court provides new guidance on the timing of conduct which can draw aggravated and punitive damages in *Koshman v Controlex Corporation*, 2023 ONSC 7045 (“*Koshman*”). The Court ruled the Defendant employer’s actions during the eight-week period prior to the Plaintiff’s termination justified compensation for the common law notice period, aggravated damages and punitive damages.

Background

The Plaintiff, Mr. Koshman, was employed as Vice-President of Controlex Corporation, the Defendant. Mr. Koshman was dismissed at age 69 after 18.5 years in his role. His dismissal came eight weeks after the sudden death of the late Peter Dent, Controlex’s founder, in July 2020. Mr. Dent’s wife, Susan Dent, took over the business. On September 11, 2020, Mr. Koshman received a letter by courier advising of his immediate termination, with no explanation.

Upon termination, Mr. Koshman was provided his base salary for eight weeks and benefits continuation for the same period. His annual base salary was \$228,000, plus benefits and a \$300 monthly car allowance. The Defendant initially refused to pay Mr. Koshman’s accrued vacation entitlements, totalling \$151,506.89, but later paid these entitlements on May 21, 2021.

Mr. Koshman had been unaware that Ms. Dent intended to terminate his employment and did not have an opportunity to meet with her after Mr. Dent’s death. In the days after Mr. Dent’s death, Ms. Dent revoked Mr. Koshman’s signing authority and began to instruct his direct reports, without his knowledge or involvement. In the eight-week period after Mr. Dent’s death (and leading up to the termination of Mr. Koshman’s employment), Ms. Dent told clients Mr. Koshman was “a nobody,” was “no good,” and that he had been receiving improper payoffs from Controlex jobs. Clients were also directed to deal with Ms. Dent only. She also suggested her husband had

been murdered and Mr. Koshman may have been involved.

Mr. Koshman attempted to obtain similar employment after his termination but has remained unemployed for a period of three years following his dismissal. He has earned \$8,842 from part-time assignments.

The Decision

The Court addressed three issues related to Mr. Koshman’s termination: (1) the appropriate common law notice period, (2) aggravated damages, and (3) punitive damages.

(1) Common Law Notice

Applying the “Bardal factors,” identified in *Bardal v The Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (Ont. H.C.), the Court found several factors present which favoured a higher notice period in this case, including Mr. Koshman’s responsibilities as Vice-President, his age, his previous 18.5 years of responsible leadership and his contribution to the Defendant corporation’s growth. The Court also acknowledged Mr. Koshman’s opportunities to relocate were obstructed by Ms. Dent’s defamatory allegations and a baseless counterclaim alleging Mr. Koshman had breached his fiduciary duty to the corporation. The Court concluded Mr. Koshman was entitled to 24 months notice. This notice period totalled \$471,461.68 in damages.

(2) Aggravated Damages

The Court also considered whether the Defendant employer’s actions were unfair or in bad faith to justify aggravated damages. The Court found the Defendant exhibited bad faith towards Mr. Koshman after Mr. Dent’s death, leading up to his dismissal, and in the dismissal itself. Considering Ms. Dent’s actions, the Court concluded she intended to terminate Mr. Koshman, without taking the appropriate steps for termination, and set out to destroy his reputation. The Court awarded Mr. Koshman \$50,000 in aggravated damages.

continued next page...

*Broader Considerations for Aggravated and Punitive Damages
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(3) Punitive Damages

The Court also found Ms. Dent embarked on a malicious campaign to undermine Mr. Koshman's ability to perform his job and ruin his reputation with clients, without any justification. Once this proceeding began, Ms. Dent also pursued a baseless counterclaim, caused Controlex to default on a court order to appoint new counsel and abandon defending this proceeding, and chose not to attend the trial. The Court awarded \$50,000 in punitive damages.

Takeaways for Employers

Koshman reiterates the high thresholds for aggravated and punitive damages. However, it also demonstrates that the courts will look at conduct more broadly. Prior to *Koshman*, the courts generally assessed aggravated and punitive damages as they related to conduct in the course

of termination. In *Koshman*, the court not only considered the employer's conduct at termination, but also Ms. Dent's conduct in the eight weeks prior, as well as her conduct after dismissal (including during the legal proceedings) in its assessment.

This decision serves as an important reminder that employers are increasingly under the microscope in wrongful dismissal cases, and that careful consideration should be given not only to the circumstances in which a termination of employment arises, but also to events prior to, and even following, such a termination.

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AI Surveillance in the Workplace - *Big brother is watching*



Members
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As organizations start to implement AI and algorithmic tools to monitor employee behaviour and performance, there are signs that employees are not only resisting these approaches, but some are in active rebellion. A study by Cornell University has found that these tools may be decreasing productivity and leading to more people quitting their jobs. This AI monitoring which often tracks things such as keystroke movement and time spent online to gauge worker activity is facing real pushback from employees.

One of the lead researchers in the Cornell study said that they found evidence across the board that algorithmic surveillance was leading participants “to perceive they had less autonomy and to engage in more resistant behaviours, such as complaining more, performing worse and intending to quit.” Most likely the only positive sign in their research was that when participants were told that an AI tool would be used to provide developmental feedback, they resisted less.

In Canada, similar concerns are being raised by a number of groups ranging from labour unions to privacy experts. It may not be that surprising. Who wants technology in their workplace that constantly tracks your every movement, including time spent in the washroom? Other programs take unsuspecting screen shots of your computer without telling you and there are even some monitoring systems that detect your mood during your shift.

Even some legal experts are wading into this debate with a warning that Canada’s laws regarding the use of AI technology aren’t keeping up. They note that while electronic monitoring is a reality for most workers, there are few protections about abuse or invasion of privacy. That raises the ire of the Canadian Labour Congress which claims to represent more than 3 million workers across Canada. They are pushing the federal government for legislative action to protect employees and are encouraging their affiliated unions to make it a bargaining demand during the next round of negotiations.

We don’t even know how widespread the practice is since there is little data documenting AI employee surveillance in Canada. However, at first glance, it seems like a lot. In 2022, Abacus Data surveyed 1,500 employees and 500 supervisors who work remotely for the Future Skills Centre. The Future Skills Centre is an independent body dedicated to helping Canadians gain the skills they need to thrive in a changing labour market.

What this research found was that seventy percent of respondents reported that some or all aspects of

their work were being digitally monitored. About a third of employees said they experienced at least one instance of location tracking, webcam or video recording, keystroke monitoring, screen grabs or employer use of biometric information. The report went on to say that this was happening without any real framework to govern or monitor these practices. “There is a patchwork of laws governing workplace privacy which currently provides considerable leeway for employers to monitor employees.”

On the positive side, many AI experts and organizations endorse the move to AI monitoring in the workplace. They note that AI tools can help individuals navigate workplaces that are being dramatically changed by new technology. The benefits include helping people find jobs and opportunities more quickly, get career advice and access online training programs. It also speeds up the hiring process and gives applicants instant feedback about how to improve their applications and resumes.

Moving forward, Canadian legislators are working hard to create new rules and regulations about AI tracking and monitoring. Bill C-27 is a landmark piece of legislation that underscores the importance of responsible AI and data use. By focusing on transparency, fairness and accountability, it sets a framework for ethical AI deployment while paving the way for further advancements in regulation. This includes tools and programs that impact recruitment and hiring as well as remuneration, promotions and training or apprenticeships. They worry that AI systems could perpetuate bias and discrimination in hiring and are trying to work with AI developers and users to ensure that this doesn’t happen.

Also on the legislative side, in 2022, the province of Ontario began requiring employers with 25 or more employees to have a written policy that describes any process of electronic monitoring and provides restrictions on how that information can be used. However, there is the feeling that neither the federal or Ontario legislation seem to go far enough according to those watching this situation unfold. They are calling for more protections for workers including being notified before they are subjected to AI monitoring at work.

This is an ongoing issue that we will all need to note and monitor going forward- another example of AI influencing our society and the way we work in today’s workplace, no matter where that actual place of work exists.

Members Quarterly Staff Writer

Feature

The Key to HR Audit - *Unlock your organizational success*



Carla Hurley
M.Ed., CPHR,
SHRM-SCP

Hurley HR

When we think of an audit, it often suggests the idea of intense scrutiny and criticism. However, in today's rapidly changing work environment, it's unrealistic for HR professionals to predict and incorporate every change as it occurs. Rather than seeing audits as mere critiques, it's more productive to shift our focus toward continuous improvement and use audits as tools to evolve HR practices and empower the organization. A HR audit serves as an iterative process, not only helping HR adapt to changes, but also proactively addressing risks and positioning the organization for future success. By adopting a mindset of advancing HR excellence, professionals can leverage audits to enhance organizational value and achieve desired outcomes.

A well-planned HR audit serves as a strategic pause, allowing us to evaluate and strategize for the ever-changing landscape of HR best practices. Whether it's a targeted review of a specific functional area or a comprehensive assessment of the entire employee lifecycle, a properly designed audit encompasses various crucial elements. This includes assessing legal and regulatory compliance risks, adapting policies and processes to evolving standards, and reviewing the strategic alignment of best practices for relevance, scale and efficacy.

In preparation for audits, whether conducted internally or externally, standardized checklists are often used to evaluate HR practices against predetermined criteria. These criteria can be developed using the employee lifecycle as a framework, with detailed best practice elements listed for each category. For instance, in the Recruitment and Selection function, categories might include Job Vacancies, Job Descriptions, Job Postings, Resume Screening, Interview Questions/Scoring, Checks, Offer Letters/Contracts, Communication and Record Retention. The documentation of a comprehensive audit tool to assess other HR functions would follow a similar process. Assessors then evaluate whether HR policies, processes and practices are present within each category and detailed sub-categories as well as the level of deficiency. One straightforward method to accomplish this is the 'traffic light' approach, where the audit criteria are evaluated in a table as follows: Green (no improvements required at present), Yellow (minor improvements needed), Orange (significant improvements necessary), and Red (urgent attention or new program development required). Please keep in mind that this review offers a

high-level assessment rather than a statistically significant one; it aims to inform direction and progress rather than perfection.

By evaluating the presence or absence of each criterion and assessing its scope, auditors can then rank the elements to develop an actionable plan. To aid in this process, an impact effort matrix can be utilized. This matrix features an X-axis for urgency and a Y-axis for impact or importance. It allows for the mapping of yellow, orange and red enhancements in the matrix to identify and prioritize risks and initiatives. The output is a visual representation of urgent and impactful priority areas for improvement. Hence, leveraging data infused with contextual cues can empower organizational decision-making concerning enhancements in HR practices.

To further optimize this process, HR professionals should involve select business leaders, fostering a collaborative dialogue and jointly crafting a prioritized action plan. Soliciting feedback and input from stakeholders highlights the systematic approach to the audit. As well, it fosters a sense of engagement, inclusivity and collaborative ownership in deciding what improvement efforts directly contribute to improving HR practices that impact the organization's bottom line.

Finally, transparent communication of audit results and implementation plans to both the HR team and the wider organization is paramount for fostering trust and accountability. HR leaders should ensure that the findings are conveyed in a clear, comprehensible manner, avoiding jargon and technical language. By openly discussing the outcomes, including strengths and areas for improvement, HR demonstrates a commitment to transparency and a willingness to address challenges head-on. Moreover, providing context around the audit process and explaining the rationale behind the identified issues helps HR employees understand the importance of the assessment and their role in driving positive change as business partners. Overall, transparent communication of audit results fosters a culture of openness and collaboration setting the stage for continuous improvement within the organization.

Carla Hurley is HR/PHS/Change Consultant with HURLEY HR and can be reached via email at carlahurley@eastlink.ca.

Feature

Bad Faith Termination - *Recent Trends in Aggravated Damages*



Megan Van Huizen
J.D.
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Feature

It is increasingly common, if not inevitable, that most claims for wrongful dismissal these days will be accompanied by significant claims for aggravated and/or punitive damages. Given claims have steadily increased in frequency and amount claimed, it is important to understand when employers are actually at risk of having such damages awarded against them and what steps can be taken to avoid liability.

First, it is helpful to note the distinction between aggravated and punitive damages, as these damages are often conflated with one another. Punitive damages are aimed at punishing the employer and will only be awarded “in exceptional cases for malicious and high-handed misconduct that offends a court’s sense of decency” [see: Elgert, 2011 ABCA 112]. As a result, punitive damages are less common than aggravated damages given the extremely high bar of misconduct required. Given the egregious type of conduct required for punitive damages is more obvious/apparent, our primary focus in this article will be the trends and conduct associated with aggravated damages. In order to receive aggravated damages, the employee must demonstrate they have suffered actual damages as a result of the unfair or bad faith conduct of the employer. In other words, they must prove they suffered mental distress which went beyond the normal hurt feelings that can result from dismissal.

More specifically, the mere fact of a termination alone will not give rise to aggravated damages, as termination itself is always a contemplated result of the employment contract. However, what is not contemplated is the manner in which termination is pursued by the employer, specifically in cases where the employer takes intentional steps to humiliate or acts unduly insensitive towards the employee. In reviewing such factors, it is relevant to note that Courts do not readily award aggravated damages, unless the conduct of the employer is “untruthful, misleading or unduly insensitive” [see: Elgert, para 75].

That said, when Courts do see fit to award aggravated damages, we have seen an increase in the dollar amount of these awards and therefore it is more important than ever for employers to be

cognizant of such damages and the conduct that can potentially lead to liability risks.

Specifically, the following conduct has attracted aggravated damages awards from the Courts in recent years:

- Termination of an employee during a medical or other protected leave of absence;
- Providing misleading or inaccurate reasons for termination;
- Failing to clearly communicate that the employee has been terminated;
- Insensitive or disparaging public remarks about the employee, which may function to unnecessarily damage their reputation;
- Maintaining unsubstantiated allegations of cause and/or misconduct against the employee;
- Publicly escorting/removing an employee from the workplace without reasonable basis for doing so;
- Conducting a biased and inadequate investigation into unfounded allegations of misconduct.

As a result, once an employer has made the decision to terminate, it should take steps to provide this message to the employee in a clear and respectful manner. By failing to clearly indicate to the employee that he/she is terminated or by making hurtful comments about that employee in front of other coworkers, the employer is risking exposure to a successful claim for aggravated damages. Overall, most terminations will likely not rise to the level where a claim for aggravated damages is warranted, however employers should always strive to carry out terminations in a respectful and good faith manner in order to limit their liability.

Notably, aggravated damages awards can range widely from \$2,000 - \$75,000, depending on each case’s specific circumstances. It is therefore important to seek legal advice prior to proceeding with a termination to ensure you have adequately mitigated your risk.

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