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### Double-decker Damages

#### Employer Liability for Aggravated Damages Arising from Workplace Harassment



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When it comes to terminating an employment relationship, the amount of pay in lieu of notice is something an employer can exercise a degree of control over through a written employment contract. What is often forgotten is the potential for enormous awards for aggravated and punitive damages if the actions of the employer are proved to have caused an employee mental distress. In the recent decision of *Boucher v Wal-Mart Canada Corp*, 2014 ONCA 419, the jury awarded the dismissed employee \$1,450,000. While the Court of Appeal slashed the portion of the award representing punitive damages, it upheld the other aspects, leaving the employer on the hook for a very large sum of money.

In the case, the Plaintiff was an employee of Wal-Mart for 10 years. While she initially had a strong working relationship with her store manager, the situation changed after the manager pressured her to falsify certain store records. After refusing to participate in the falsification, the employee became the subject of a prolonged campaign of abuse by the manager. The abuse included an “unrelenting and increasing torrent” of profane language and berating the Plaintiff in front of other employees. The stress caused by the abuse resulted in serious physical symptoms for the Plaintiff. She was ultimately forced to leave her job and bring an action for constructive dismissal.

At trial, a jury awarded the Plaintiff \$100,000 against the store manager for the tort of intentional infliction of mental suffering. The Court of Appeal agreed that the store manager’s behaviour was flagrant and was calculated to harm the Plaintiff, which it did in causing significant health problems to her. The Court of Appeal described the amount of the award as “very high” but upheld it, pointing out that the harm caused by the store manager’s conduct was severe. The Court reduced the punitive damages award against the manager from \$150,000 to \$10,000, noting that the tort damages award carried a strong punitive component and was effective in denouncing his conduct.

Turning next to the employer, in addition to the 20 weeks’ pay in lieu of notice provided for in the Plaintiff’s employment contract, the jury at trial awarded the Plaintiff \$200,000 in aggravated damages, together with \$1,000,000 in punitive damages.

Reviewing the jury’s award, the Court of Appeal had to consider the issue of double recovery. Specifically, the Court contemplated whether there was conduct on the part of the employer *independent* of the store manager’s abuse that justified a \$200,000 award for aggravated damages.

The Court felt that Wal-Mart’s conduct was reprehensible in the manner it dealt with the employee’s complaints about the manager’s abuse, finding that the employer failed to take the Plaintiff’s complaints seriously in breach of its own policies. Wal-Mart also threatened retaliation against the Plaintiff if her complaints were found to be unsubstantiated. On this basis, the majority of the Court of Appeal upheld the \$200,000 for aggravated damages.

In relation to the punitive damages award against the employer, the Court noted that the employer was vicariously liable for the damages award against the store manager, as well as pay in lieu of notice, and aggravated damages. The Court found that the exceptionally high tort award against the manager and aggravated damages award against Wal-Mart sent a clear denunciatory and punitive message. While Wal-Mart’s conduct was reprehensible, it fell short of the gravity and duration of the misconduct in other cases where major punitive damages awards were made. As a result, the Court of Appeal reduced the punitive damages award to \$100,000.

In her dissenting judgment, Associate Chief Justice Hoy objected to the aggravated damages award against Wal-Mart, viewing it as double recovery. Pointing to the Supreme Court's decision in *Honda Canada Inc v Keays*, 2008 SCC 39, she noted that the purpose of aggravated damages is to compensate the Plaintiff for the mental distress caused by the manner of her dismissal. Justice Hoy felt that, while Wal-Mart's failure to deal with the abuse may have contributed to the Plaintiff's distress, it could not amount to a \$200,000 award when the award for the abuse itself only amounted to \$100,000 for intentional infliction of emotional suffering.

While the dissenting opinion appears logical, it adds to the uncertainty surrounding the issue of aggravated damages, and the exact type of conduct that can lead to mental distress. The message employers should take from the case is that failing to address bullying and harassment in the workplace could, in certain circumstances, lead to a claim for constructive dismissal and may itself constitute conduct causing mental distress that can give rise to an award for aggravated damages.

The best way for an employer to minimize the risk of this type of aggravated damages award is to institute and enforce a clear policy on harassment in the workplace. Employers should be cautious in dismissing complaints of harassment without a proper investigation and assessment. Field Law's Labour and Employment Group can help you develop policies and strategies to prevent harassment in the workplace, and provide advice on how to deal with it should it ever arise.

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