$55,000 PUNITIVE AND MORAL DAMAGES AWARD UNDERSCORES IMPORTANCE OF PROPER TERMINATION PRACTICES

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The Ontario Superior Court issued a stern warning to employers on the consequences of failing to treat employees fairly when terminating employment. In *Pohl v Hudson's Bay Company*, 2022 ONSC 5230, Hudson's Bay Company ("HBC") dismissed a sales manager with 28 years of service. In addition to a 24-month reasonable notice period, HBC was also ordered to pay $55,000 in moral and punitive damages on account of its conduct in terminating the employee, as well as its post-termination conduct.

The Facts

HBC dismissed the employee without cause as part of a nation-wide restructuring. HBC immediately exited the employee upon providing him with his termination letter and offered the employee a separation package of 40 weeks, inclusive of his entitlements under the *Employment Standards Act, 2000* (the "ESA"). When the employee declined this offer, HBC provided him with only his ESA entitlements, but made him an offer of "continuing employment", in which the employee would return to a lower position. The employee declined this offer and instead commenced litigation.

Analysis

While the award of 24 months is not surprising given the employee's tenure and managerial position, employers should pay particular attention to the punitive and moral damage awards by the Court. The Court based its awards on the following four actions by HBC:

1. HBC's decision to immediately walk the employee out the door upon termination, which the court described as "unduly insensitive" given the employee's tenure and that he had committed no misconduct.
2. HBC failed to pay out the employee's wages, termination pay, and severance pay as a lump sum within the time period prescribed by the ESA and when instructed to do so by the employee's counsel. Instead, HBC paid out these entitlements as salary continuation, taking the position that it was entitled to pay

salary continuation unless otherwise directed by the employee. The Court strongly disagreed with this position, stating that "compliance with the ESA is not optional" and that it should not have taken nearly two months for HBC to make the payment after it was instructed to do so by the employee's counsel.

3. HBC failed to properly issue a record of employment ("ROE") within five days of the employee's interruption of earnings. Instead it issued two ROEs three months after termination, each of which incorrectly described the reason for issuing the ROE. While the Court did not accept the employee's argument that HBC did so in order to maximize its entitlements to the Canada Emergency Wage Subsidy, it did agree that HBC was placing its interests over the employee's, further contributing to his mental distress and sense of exploitation.
4. HBC's offer of alternative employment was found by the Court to be carefully designed to (a) extinguish the employee's significant common law termination entitlements, and (b) allow HBC to gut his contract (including by canceling his group-insured benefits and reducing his hours to between 28 and 40 per week, but with no guarantee of a minimum number of hours). The Court found that this was a deliberate attempt to take advantage of the employee when he was at his most vulnerable and accepted the employee's evidence that he "concluded that [HBC] was attempting to trick or induce me into giving up my rights", leading to feelings of humiliation, diminished self-work, and anxiety.

Takeaways for Employers

This decision forms part of a recent trend of courts to scrutinize employers for missteps that may not initially appear problematic (certainly, the items set out in 1 to 3 above are not unusual circumstances to arise in a termination). While prior decisions (such as the Supreme Court's ruling in *Honda v Keays*) had significantly limited the scope of such damages, recent case law is trending back toward an expansive view of wrongful dismissal damages, particularly where employees are able to prove mental distress as a result of an employer's post-termination conduct.

The moral and punitive damages awarded by the Court highlight the need for employers to both comply with the ESA at all times, and to treat employees fairly post-termination. While this need is present for all employees, employers must be particularly aware of how they conduct dismissals of long-serving employees where there is no allegation of misconduct.

This decision also emphasizes the need for employers to follow their statutory obligations post-termination. This includes paying out employees' statutory termination entitlements within the time period prescribed by the ESA and issuing an accurate ROE within the time period prescribed by the *Employment Insurance Regulations*. The Court's decision removes any doubt that salary continuation is not an acceptable substitute for paying out these entitlements as specifically prescribed by the ESA, unless the employee explicitly agrees to

a salary continuation arrangement.

Employers should ensure that managers, human resources and payroll are well-trained on the process of dismissing employees and best practices, particularly in cases where misconduct is not alleged. This should involve a review of company policies on how to handle terminations to ensure that the company is not unknowingly engaging in practices that would draw the ire of a court or tribunal.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.