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## Ontario Court Continues Trend of Large Punitive Damages Awards

**By: Frank Portman**

Since 2008, Courts have wrestled with wrongful dismissal claims in which employees make claims of entitlements to damages beyond reasonable notice. One of these categories is punitive damages. Punitive damage claims are usually found where there are allegations of bad faith or vindictive treatment. Traditionally, such awards were handed out rarely, in cases viewed by the Courts as among the worst. However, recently Courts have been more inclined to hand out these damages, and in increasing numbers. A recent decision from the Ontario Superior Court of Justice is a prime example of this trend.

The reasons in **Altus v Gordon** are somewhat sparse, making certain aspects of analysis difficult. However, the salient points of the case can be summarized succinctly.

The Plaintiff ran his own company. In November of 2008, that company sold its assets to the Defendant. At the same time, the Plaintiff, along with his wife, were hired by the Defendant. Under the agreement, there was the possibility for an adjustment in the sale price depending on the performance of the business after closing.

As the date for that adjustment approached, the Plaintiff indicated that he believed he was entitled to additional compensation in respect of the sale of business. Ultimately, this dispute was referred to arbitration under the terms of the sale.

However, at the same time, the Defendant began to allege various types of misconduct by the Plaintiff. Ultimately, the Defendant dismissed the Plaintiff, along with his wife. The Plaintiff's wife was paid notice pursuant to her contract of employment, and no litigation ensued.

However, the Plaintiff was dismissed allegedly for cause, and without notice as a result.

The employer ultimately advanced its case for cause on three grounds:

1. The Plaintiff was insubordinate and swore in the workplace;
2. The Plaintiff was involved in a conflict of interest with respect to some aspect of his business dealings;
3. The Plaintiff had hired an employee whose non-work related fraud conviction was said to have jeopardized the company's interests.

The reasons put forward by the judge on the validity of these claims for cause are not extensive. In fact, it is difficult to determine what evidence was weighed in determining those claims. However, what is clear is that all of them were rejected.

The judge instead found that the termination of the Plaintiff was motivated by the Plaintiff's demands for additional compensation from the earlier sale, and the Defendant's desire not to pay

out the significant notice period that was provided for in the contract of employment. The judge characterized the Defendant's case for cause as being an after-the-fact attempt at justifying its actions.

The compensation granted to the Plaintiff does not appear to have been controversial. The Plaintiff's contract provided a guaranteed notice period that far exceeded his entitlements under the Employment Standards Act.

### **The Punitive Damages Claim**

The Plaintiff also claimed for punitive damages. Punitive damages can be awarded where there is a "separate actionable wrong" apart from the simple fact of dismissal. However, the exact meaning of a "separate actionable wrong" is not well defined, and appears to be subject to a great deal of interpretation.

In this particular case, the "separate actionable wrong" appears to be related to the fact that the Plaintiff was dismissed while there was an ongoing dispute and upcoming arbitration related to the evaluation of the sale price of his company. However, the judge's reasons are vague. It is difficult to tell where the misconduct that was a "separate actionable wrong" occurred.

### **The Amount of Punitive Damages Awarded**

The judge ordered a strikingly large amount of punitive damages: \$100,000.

It is important to remember that those damages are **in addition** to the usual notice payments which were awarded as a result of this trial. The size of this award becomes apparent when contrasted to the sum awarded in lieu of notice, roughly \$168,000.

This is at the high end of punitive damages. While we have seen higher damages awards in cases where there is a significant and ongoing act of bad faith by the employer, such as where the employer has instigated a malicious criminal prosecution (see our update on such a previous decision [here](#).) this is near the high end of the range for bad faith terminations. In fact, a higher punitive award in a different case was found on Appeal to be not rationally required, and was reduced significantly (see our update on the Court of Appeal's decision [here](#).)

There are a number of concerns employers should have with this decision. First, the size of the award is very high, and is quite close to the amount of notice awarded. In a case like this, where the parties implemented a termination clause which was later upheld by the Court, an award such as this significantly increases the liability that an employer can face.

This leads to our second, and perhaps more pressing concern: there is very little judicial explanation upon which the Court's finding of the necessary separate actionable wrong rests. In effect, the Court suggested that the employee was dismissed because of his claims for additional compensation under the sale of business. However, while such a reason may not constitute just cause in law, absent more it does not appear to create an independent actionable wrong, nor justify an additional award of damages. As a result, there is a very real danger that this decision could be used by creative employee side counsel to suggest that the Courts should be more

receptive to employee claims for punitive damages, even in cases where the existence of a separate actionable wrong is less than clear.

### **What Employers Should Know**

Employers need to be aware of the increasing awareness of courts of punitive and aggravated damages in employment law claims. These awards go above and beyond common law notice, and are not assessed on the same factors that govern common law notice awards. While employers do not need any reminders to follow good practices of good faith and communication in the dismissal process, employers should ensure that they have documented the important parts of the decision to terminate and the dismissal itself, regardless of if they intend to rely on just cause for the dismissal. Such records can be invaluable in defending against employee claims for punitive and aggravated damages.

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