

Your Employer Can't Bully You! How Courts Are Recognizing Mistreatment Of Employees In Damages Awards



If you have been fired from your job, you may face difficulties in receiving the severance and termination pay you are entitled to. Some employers may pressure employees to accept much less than what they are owed. However, there are two significant trends that terminated employees should be aware of, as they may increase the amount of termination damages awarded in some cases. First, it has become easier for employees to prove exceptional circumstances to justify their entitlement beyond the usual 24-month limit. Also, courts are now awarding significant moral and punitive damages for employers' bad-faith behaviours, encouraging employees to stand up against unfair treatment.

Are courts extending the limits of termination pay?

When an employee is entitled to common law reasonable notice, their entitlement is calculated by taking into account various factors known as the "[Bardal Factors](#)." These factors help to [determine an employee's entitlement to common law notice and its length](#).

In Ontario, the maximum notice period for a terminated employee is usually 24 months, no matter how long an employee has been employed. This was reaffirmed by the Ontario Court of Appeal ("ONCA") in 2019 in [Dawe v. The Equitable Life Insurance Company of Canada](#) (2019). The employee in question was a senior vice president who had been working at Equitable Life for 37 years. At the time of his dismissal, he was 62 years old. At trial, the judge determined the reasonable notice period to be 30 months. However, the ONCA reduced the trial judge's initial decision to 24 months, holding that only "exceptional circumstances" could justify a reasonable notice period exceeding 24 months. No guidance was provided for what might constitute "exceptional circumstances."

In the years following, we started to see a trend toward recognizing "exceptional circumstances." In early 2023, the Ontario Superior Court of Justice ("ONSC") found "exceptional circumstances" in [Milwid v. IBM Canada Ltd. \(2023\)](#), and gave judgment to the employee based on a 26-month reasonable notice period. The exceptional circumstances included the employee's age, long service with the company, the

exclusivity of his employment, the specialized nature of his work and the overall character of his employment. Although the ONSC refused to consider COVID-19 as an exceptional circumstance, due to the timing of the employee's termination coinciding with the pandemic, the employee was granted an additional month of notice, for a total of 27 months. This decision was upheld by the ONCA.

Late last year, the ONCA also upheld another ONSC decision where the employee was granted 30 months' notice ([Lynch v. Avaya Canada Corporation \(2023\)](#)). In this case, the finding of "exceptional circumstances" was supported by the employee's highly specialized skill set, the employee's significant contributions, and the lack of comparable employment.

While these two cases do not explicitly define what qualifies as "exceptional circumstances," they suggest that such circumstances may not necessarily fall outside the established Bardal Factors. Including pandemic-related factors and an employee's contributions as supporting elements for "exceptional circumstances" implies a broader judicial interpretation. This trend appears to indicate growing flexibility among judges in exercising their discretion to identify and acknowledge unique situations that warrant a notice period exceeding the standard cap of 24 months.

This trend could signal a potentially more accessible pathway to establishing "exceptional circumstances" and securing extended notice periods for long-serving employees.

Are courts more and more generous when granting moral/punitive damages and costs?

Recently, judges appear to have less and less tolerance for employers who mistreat their employees.

Pre-termination Conduct

An employer's pre-termination conduct may result in moral and/or punitive damages. In the case of [Osmani v. Universal Structural Restorations Ltd.](#) (2022), an employee was harassed and assaulted by his supervisor over a prolonged period, resulting in severe injuries. Furthermore, the employer produced a misleading investigation report and interfered with the employee's ability to apply for WSIB. Upon the employee's return to work, the employer assigned tasks that exceeded his physical capacity and placed him with the same supervisor.

The ONSC opined the employer's abusive conduct was "malicious, oppressive and high-handed" and ordered the employer to pay moral damages of \$75,000 plus punitive damages of \$25,000, for a total of \$100,000. Additionally, the court awarded an additional \$50,000 for the employer's violation of the Ontario *Human Rights Code*, because the abusive conduct was related to the prohibited grounds. For a more detailed discussion, please see our article, [What Are the Standards that Employers Are Responsible for When It Comes to Harassment](#).

Bad-faith Termination

In [Teljeur v. Aurora Hotel Group](#) (2023), the ONSC granted moral damages for the employer's bad faith during the course of termination. The employer failed to provide written notice of termination or pay in lieu of notice and refused to reimburse the employee's out-of-pocket expenses, which are mandatory under the Ontario *Employment Standards Act, 2000*. Additionally, the employer induced the employee to resign and made a misrepresentation about the termination payment by assuring an 8-week severance, but in fact, only paid three weeks of salary. As a result, the ONSC

awarded the employee \$15,000 as moral damages.

In British Columbia, [Chu v China Southern Airlines Company Limited](#) (2023), the court granted the employee \$150,000 moral and punitive damages, resulting from the [employer's aggressive "hardball" tactics during the course of termination](#).

Similarly, in [Janmohamed v. Dr. M. Zia Medicine Professional Corporation](#) (2022), when terminating the employee, the employer failed to provide a severance package aligned with the employee's entitlement, resulting in the lawsuit. The employer was ordered to pay \$30,000 in legal costs, twice the amount the employer had previously agreed to pay as settlement. In its reasoning, the court states, "Employers should not be incentivized to low-ball and then force a plaintiff to sue to obtain what everyone knows is justly due. Costs and delay are horrible risks to a plaintiff who finds herself sitting at home having to spend thousands of dollars, while unemployed and vulnerable, to chase money that is obviously due from a well-funded employer."

Post-termination Conduct

An employer's bad-faith behaviour after the termination may also justify awarding significant legal costs to the employee during litigation. In [Giacomodonato v. PearTree Securities Inc. \(2023\)](#), the employee was fired from his position as President and Co-head of Banking after just over a year. The employee sued for wrongful dismissal. During the litigation, the employer counterclaimed for breach of non-compete, claiming \$1,599,000 in damages and \$1 million in punitive damages from the employee, but then abandoned the counterclaim. The employer also delayed the document disclosure and failed to pay the employee money that was admitted to being owed after termination. The parties went through a 10-day trial.

The court found that the employer's counterclaim was clearly meritless, and that it was a suitable case to award costs to discourage frivolous and strategic claims. Employers who owe money to employees should be discouraged from engaging in tactical litigation that is intended to discourage employees from pursuing their rights and entitlements. The court also found it was an appropriate case to award costs to sanction inappropriate behaviour by the employer in its conduct of delaying the proceeding.

As a result, the employee was awarded \$830,761.75 in legal costs, in addition to the award of wrongful dismissal damages of \$718,103.05.

Conclusion

The increasing willingness to extend reasonable notice limits and award moral/punitive damages signals a movement toward better employee protection. The lower threshold to establish "exceptional circumstances" for extended notice periods shows judges may be more willing to see the uniqueness in employee situations. There is also less tolerance for workplace abuse, such as bullying, harassment, and violence leading up to termination. Courts may also compensate employees for their employers' bad faith behaviour during or after termination by awarding moral/punitive damages or significant legal costs. These developments signify a changing legal environment that encourages employees to assert their rights confidently and seek justice without apprehension.

Originally published 12 March 2024

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Author: [Lai-King Hum](#)

Hum Law Firm