

Excerpts from Halsbury's Laws of Canada, Employment: Halsbury's Laws of Canada - Employment (2023 Reissue), Soma Ray-Ellis (Contributor)

HEM-218

V. Obligations and Duties of the Employer

5. Protection from Harassment and Intimidation

(1) Implied Duty under Contract

(b) Duty to Safeguard Against Personal Harassment and Intimidation

Implied obligation in employment contract.

Canadian courts regularly imply a term into the employment contract obliging the employer to safeguard its employees against physical and psychological harassment and intimidation,¹ despite the ruling in *Wallace*² that there is no independent implied duty of fairness in the employment contract. The courts draw a line between, on the one hand, the “rough music” that is part of the normal give and take of social interactions in the workplace and, on the other hand, intimidation of a serious and persistent nature that is likely to cause the reasonable employee, in the plaintiff’s circumstances, to suffer psychological distress from their work experience.

Includes protection from harassment by other employees. The employer’s implied obligation not only encompasses protecting employees against intimidation committed by members of management,³ but it also extends to harassment of one employee by another employee, which the employer fails to take steps to eliminate, as well as to harassment by visitors to the worksite. Although difficulties will clearly arise for employers in preventing employees from treating each other unfairly and in policing the conduct of visitors to the worksite, nonetheless it is submitted that making the employer responsible for preventing such mistreatment is justifiable because the employer has the disciplinary weapons to ensure that it ceases and the right to remove visitors from the worksite unless they behave themselves.⁴

Intentional infliction of mental suffering. An employee does not have a free-standing cause of action, in tort, for negligent infliction of mental suffering against their employer absent any allegations of breach of the contract of employment between the two.⁵ Where breach of contract is also claimed, the court may award damages for intentional infliction of mental suffering where an employer’s actions are flagrant, outrageous and calculated to cause harm to the employee.⁶

Footnote(s)

- ¹ *Smith v. Canada (Royal Canadian Mounted Police)*, [2007] N.B.J. No. 244, 2007 NBCA 58 (N.B.C.A.); *Saunders v. Chateau des Charmes Wines Ltd.*, [2002] O.J. No. 3990, 20 C.C.E.L. (3d) 220 at 248-50 (Ont. S.C.J.); *Stamos v. Annuity Research and Marketing Services Ltd.*, [2002] O.J. No. 1865, [2002] C.L.L.C. para. 210-036 at 141, 404 (Ont. S.C.J.); *Morgan v. Chukal Enterprises Ltd.*, [2000] B.C.J. No. 1563, [2000] C.L.L.C. para. 210-036 (B.C.S.C.).
- ² *Wallace v. United Grain Growers Ltd.*, [1997] S.C.J. No. 94, 97 C.L.L.C. para. 210-029 (S.C.C.).
- ³ *Boucher v. Wal-Mart Canada Corp.*, [2014] O.J. No. 2452, 2014 ONCA 419 (Ont. C.A.).
- ⁴ In Québec, s. 81.19 of the (QC) *Act respecting Labour Standards*, *CQLR, c. N-1.1*, is unique in prohibiting intimidation and harassment as follows: “Every employee has a right to a work environment free from psychological harassment. Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it.” Section 81.18 of the Act defines “psychological harassment” as “[A]ny vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee. A single serious incidence of such behaviour that has a lasting harmful effect on an employee may also constitute psychological harassment”. See: *Gougeon v. Cheminées Sécurité International ltée*, 2010 QCCRT 120 (C.R.T.).

Occupational health and safety legislation in many Canadian jurisdictions imposes a duty on employers to protect employees from harassment in the workplace:

(CAN) *Canada Labour Code*, *R.S.C. 1985, c. L-2, s. 125*(1)(z.16)-(z.163); see also (CAN) *Work Place Harassment and Violence Prevention Regulations*, *SOR/2020-130*

(AB) *Occupational Health and Safety Act*, *S.A. 2020, c. O-2.2*, ss. 1(n), 3(1)(c), 4(a)(iii), 5(1)(d)

(MB) *Workplace Safety and Health Regulation*, *Man. Reg. 217/2006*, Part 10

(NB) *General Regulation*, *N.B. Reg. 91-191* under the (NB) *Occupational Health and Safety Act*, S.N.B. 1983, c. O-0.2, s. 374.2

(NL) *Occupational Health and Safety Regulations*, 2012, *N.L.R. 5/12, ss. 22.1-24.2*

(PE) *Occupational Health and Safety Act*, [R.S.P.E.I. 1988, c. O-1.01, s. 12\(3\)](#); (PE) Workplace Harassment Regulations, [P.E.I. Reg. EC710/19](#)
(SK) *Saskatchewan Employment Act*, [S.S. 2013, c. S-15.1, s. 3-21](#); (SK) Occupational Health and Safety Regulations, [R.R.S. c. S-15.1, Reg. 10, ss. 3-25, 3-26\(3\)](#)
(YT) Occupational Health and Safety Regulations, O.I.C. 2006/178, s. 19.01.
Employment standards legislation and/or human rights legislation in a number of jurisdictions also specifically protects an employee from harassment:

(CAN) *Canadian Human Rights Act*, [R.S.C. 1985, c. H-6, s. 14\(2\)](#)

(MB) *Human Rights Code*, [C.C.S.M. c. H175, s. 19\(1\)](#)

(NB) *Human Rights Act*, [R.S.N.B. 2011, c. 171, s. 10](#) (sexual harassment only)

(NS) *Human Rights Act*, [R.S.N.S. 1989, c. 214, s. 5\(2\)-\(3\)](#)

(ON) *Human Rights Code*, [R.S.O. 1990, c. H.19, s. 5\(2\)](#)

(PE) *Employment Standards Act*, [R.S.P.E.I. 1988, c. E-6.2, ss. 25, 26](#)

(QC) *Charter of human rights and freedoms*, [CQLR, c. C-12, s. 10.1](#)

(NT) *Human Rights Act*, [S.N.W.T. 2002, c. 18, s. 14\(1\)](#)

(NU) *Human Rights Act*, S.Nu. 2003, c. 12, s. 7(6)(c)

(YT) *Human Rights Act*, [R.S.Y. 2002, c. 116, s. 14\(1\)\(c\)](#).

- [5](#) *Piresferreira v. Ayotte*, [2010] O.J. No. 2224, [263 O.A.C. 347](#) (Ont. CA.), leave to appeal refused [2010] [S.C.C.A. No. 283](#) (S.C.C.). See also: *Amaral (Litigation guardian of) v. Canadian Musical Reproduction Rights Agency Ltd.*, [2009] O.J. No. 1934, [2009 ONCA 399](#) (Ont. C.A.).
- [6](#) *Boucher v. Wal-Mart Canada Corp.*, [2014] O.J. No. 2452, [2014 ONCA 419](#) (Ont. C.A.).

HEM-369 Punishment and deterrence.

VII. Termination of the Employment Relationship

8. Common Law Remedies for Wrongful Dismissal

(4) Damages for Mental Distress and Punitive Damages

(b) Punitive Damages

(i) Purpose of Damages

Punishment and deterrence.

Unlike damages for mental distress, punitive damages are not compensatory in nature; rather they are aimed at punishing the wrongdoer and are focused on the wrongdoer's conduct¹ in order to deter them and other potential wrongdoers from acting in the same fashion.² Along with deterrence, the purpose of punitive damages is retribution and denunciation.³

When available. In the context of wrongful dismissal, punitive damages are only awarded in exceptional circumstances where the employer's conduct is "deserving of punishment because of its shockingly harsh, vindictive, reprehensible and malicious nature".⁴ One consideration is whether the court has awarded compensatory damages in relation to the dismissal, as compensatory damages already awarded carry an element of deterrence.⁵ Where an employee seeks punitive damages for breach of contract, the employee must show that the employer committed an actionable wrong independent of the underlying breach of contract claim.⁶ Breach of the contractual duty of good faith can qualify as an independent actionable wrong.⁷

Particular examples. Punitive damages can be awarded against an employer for pre-termination or post-termination conduct. Although it is impossible to itemize precisely what conduct will attract punitive damages, some or all of the following features, often in combination, are typically present:

- 1. The employer knowingly fabricates allegations of serious misconduct or incompetence against an employee to support the dismissal, especially if such allegations are maintained up to and during the trial;⁸
- 2. The employer summarily dismisses an employee for serious misconduct, such as theft, without conducting a reasonably comprehensive and unbiased investigation, especially if the employer goes ahead with the dismissal after it becomes obvious that the employee is innocent;⁹
- 3. The employer implements the dismissal in a manner designed to disparage the employee's capabilities and/or honesty in the eyes of their colleagues and potential employers;¹⁰
- 4. The employer threatens or intimidates the employee at the termination meeting by, for example, threatening to bring a counterclaim against the employee if the employee brings a claim for wrongful dismissal or cautions the employee that the process will be expensive if the employee were to consult with a lawyer;¹¹
- 5. The overall pre-termination conduct of the employer in its treatment of the employee is beyond unduly insensitive and can be characterized as being mean;¹²
- 6. The employer utilizes "hardball" tactics to intimidate the employee to withdrawing or settling their wrongful dismissal suit, such as withholding in bad faith moneys owing to the employee under the employment standards legislation¹³ or the contract of employment,¹⁴ making false reports to police about the employee and causing the employee's residence to be invaded,¹⁵ or bringing a counter-claim in which serious, but meritless, allegations are made against the dismissed employee;¹⁶
- 7. The employer breaches its duty of good faith by failing to provide the wrongfully dismissed employee with their record of employment on a timely basis;
- 8. The employer conducts a bad faith¹⁷ (or possibly even a seriously negligent)¹⁸ performance appraisal of the employee that diminishes their professional reputation;
- 9. The employer dismisses the employee in retaliation for complaints the employee makes about the employer's work environment rather than conducting a proper investigation into the complaints;¹⁹
- 10. The employer fraudulently misrepresents to the employee important facets of the employment relationship, such as job security,²⁰ in order to induce them to accept employment and subsequently dismisses them in disregard of those representations; and
- 11. The employer's mistreatment of the employee also amounts to a violation of their human rights at common law or under legislation.²¹

Footnote(s)

- ¹ *Boucher v. Wal-Mart Canada Corp.*, [2014] O.J. No. 2452, 120 O.R. (3d) 481 (Ont. C.A.).
- ² *Gilbert v. TS Realty Inc.*, [1996] O.J. No. 3044, 23 C.C.E.L. (2d) 100 at 112 (Ont. Gen. Div.); *Elgert v. Home Hardware Stores Ltd.*, [2011] A.J. No. 560, 2011 ABCA 112 (Alta. C.A.), leave to appeal refused [2011] S.C.C.A. No. 294 (S.C.C.).

- [3](#) *Whiten v. Pilot Insurance Co.*, [\[2002\] S.C.J. No. 19](#), [2002 SCC 18](#), [\[2002\] 1 S.C.R. 595](#) (S.C.C.).
- [4](#) *Vorvis v. Insurance Corp. of British Columbia*, [\[1989\] S.C.J. No. 46](#), [58 D.L.R. \(4th\) 193](#) at 224 (S.C.C.); *Whiten v. Pilot Insurance Co.*, [\[2002\] S.C.J. No. 19](#), [2002 SCC 18](#), [\[2002\] 1 S.C.R. 595](#) (S.C.C.); *Honda Canada Inc. v. Keays*, [\[2008\] S.C.J. No. 40](#), [\[2008\] 2 S.C.R. 362](#) (S.C.C.); *Elgert v. Home Hardware Stores Ltd.*, [\[2011\] A.J. No. 560](#), [2011 ABCA 112](#) (Alta. C.A.), leave to appeal refused [\[2011\] S.C.C.A. No. 294](#) (S.C.C.). If courts decide to award punitive damages, commonly the employee is also awarded their solicitor-client costs: *Fedele v. Windsor Teachers Credit Union Ltd.*, [\[2000\] O.J. No. 3430](#), [10 C.C.E.L. \(3d\) 256](#) (Ont. S.C.J.).
- [5](#) *Honda Canada Inc. v. Keays*, [\[2008\] S.C.J. No. 40](#), [\[2008\] 2 S.C.R. 362](#) (S.C.C.); *Elgert v. Home Hardware Stores Ltd.*, [\[2011\] A.J. No. 560](#), [2011 ABCA 112](#) (Alta. C.A.), leave to appeal refused [\[2011\] S.C.C.A. No. 294](#) (S.C.C.).
- [6](#) *Boucher v. Wal-Mart Canada Corp.*, [\[2014\] O.J. No. 2452](#), [120 O.R. \(3d\) 481](#) (Ont. C.A.).
- [7](#) *Morison v. Ergo-Industrial Seating Systems Inc.*, [\[2016\] O.J. No. 5706](#), [38 C.C.E.L. \(4th\) 312](#) (Ont. S.C.J.); See also *Honda Canada Inc. v. Keays*, [\[2008\] S.C.J. No. 40](#), [\[2008\] 2 S.C.R. 362](#) (S.C.C.).
- [8](#) E.g., *Mastrogioseppe v. Bank of Nova Scotia*, [\[2005\] O.J. No. 5417](#), [\[2006\] C.L.L.C. para. 210-006](#) at [141](#), 055-141,056 (Ont. S.C.J.), vard [\[2007\] O.J. No. 4052](#), [61 C.C.E.L. \(3d\) 1](#) (Ont. C.A.); *Fedele v. Windsor Teachers Credit Union Ltd.*, [\[2001\] O.J. No. 2951](#), [10 C.C.E.L. \(3d\) 254](#) (Ont. C.A.); *Ben David v. Congregation B'Nai Israel*, [\[1999\] O.J. No. 1238](#), [99 C.L.L.C. para. 210-031](#) at [141](#), 218 (Ont. Gen. Div.).
- [9](#) *Bouma v. Flex-N-Gate Canada Co.*, [\[2004\] O.J. No. 5664](#), [\[2005\] C.L.L.C. para. 210-033](#) at [141](#), 299 (Ont. S.C.J.), supp. reasons [\[2005\] O.J. No. 1307](#), [40 C.C.E.L. \(3d\) 2](#) (Ont. S.C.J.); *Kaniewski v. Key Property Management (1986) Inc.*, [\[1992\] O.J. No. 1833](#), [44 C.C.E.L. 136](#) (Ont. Gen. Div.); *Francis v. Canadian Imperial Bank of Commerce*, [\[1992\] O.J. No. 153](#), [41 C.C.E.L. 37](#) (Ont. Gen. Div.), vard [\[1994\] O.J. No. 2657](#), [7 C.C.E.L. \(2d\) 1](#) (Ont. C.A.); *Nishina v. Azuma Foods (Canada) Co.*, [\[2010\] B.C.J. No. 663](#), [\[2010\] C.L.L.C. para. 210-027](#) (B.C.S.C.).
- [10](#) *Mastrogioseppe v. Bank of Nova Scotia*, [\[2005\] O.J. No. 5417](#), [\[2006\] C.L.L.C. para. 210-006](#) at [141](#), 055-141,056 (Ont. S.C.J.), vard [\[2007\] O.J. No. 4052](#), 61 C.C.E.L. (3d) 1 (Ont. C.A.); *Martin v. International Maple Leaf Springs Water Corp.*, [\[1998\] B.C.J. No. 1663](#), [38 C.C.E.L. \(2d\) 128](#) at 139 (B.C.S.C.); *Ribeiro v. Canadian Imperial Bank of Commerce*, [\[1989\] O.J. No. 183](#), [89 C.L.L.C. para. 14.033](#) (Ont. H.C.J.), vard [\[1992\] O.J. No. 2471](#), [44 C.C.E.L. 165](#) (Ont. C.A.), leave to appeal refused [\[1993\] S.C.C.A. No. 5](#) (S.C.C.).
- [11](#) *Ruston v. Keddco Mfg. (2011) Ltd.*, [\[2018\] O.J. No. 2636](#), [2018 ONSC 2919](#), 49 C.C.E.L. (4th) 113 (Ont. S.C.J.), affd [\[2019\] O.J. No. 825](#), [2019 ONCA 125](#) (Ont. C.A.).
- [12](#) *Galea v. Wal-Mart Canada Corp.*, [\[2017\] O.J. No. 6444](#) 2017 ONSC 245, [44 C.C.E.L. \(4th\) 251](#) (Ont. S.C.J.).
- [13](#) *Linkson v. UTDC Inc.*, [\[1991\] O.J. No. 2567](#), [40 C.C.E.L. 305](#) at 308 (Ont. Gen. Div.); *Mustaji v. Tjin*, [\[1996\] B.C.J. No. 1376](#), [96 C.L.L.C. para. 210-051](#) (B.C.C.A.).
- [14](#) *Strangis v. Hub International Ltd.*, [\[2005\] O.J. No. 939](#), [39 C.C.E.L. \(3d\) 303](#) at 319-20 (Ont. S.C.J.), where the employer wrongfully withheld the plaintiff's accrued commissions, resulting in the court awarding \$10,900 in punitive damages.
- [15](#) *Park v. 101143482 Saskatchewan Ltd.*, [\[2017\] S.J. No. 224](#), [2017 SKQB 156](#) (Sask. Q.B.).
- [16](#) *Ruston v. Keddco Mfg. (2011) Ltd.*, [\[2018\] O.J. No. 2636](#), [2018 ONSC 2919](#), [49 C.C.E.L. \(4th\) 113](#) (Ont. S.C.J.), affd [\[2019\] O.J. No. 825](#), [2019 ONCA 125](#) (Ont. C.A.).
- [17](#) *Marlowe v. Ashland Canada Inc.*, [\[2001\] B.C.J. No. 1338](#), [\[2002\] C.L.L.C. para. 210-004](#) at [141](#), 052 (B.C.S.C.).
- [18](#) *Hawley v. Webb*, [\[2002\] B.C.J. No. 305](#), [16 C.C.E.L. \(3d\) 248](#) (B.C.S.C.).
- [19](#) *Horner v. 897469 Ontario Inc.*, [\[2018\] O.J. No. 178](#), [2018 ONSC 121](#), 45 C.C.E.L. (4th) 136 (Ont. S.C.J.), order set aside on other grounds [\[2018\] O.J. No. 6971](#), [2018 ONSC 7529](#).
- [20](#) *Lukowski v. Hatch Associates Ltd.*, [\[1998\] O.J. No. 5345](#), [39 C.C.E.L. \(2d\) 177](#) (Ont. C.A.).
- [21](#) *Moffatt v. Canso Pharmacy Ltd.*, [\[1990\] N.S.J. No. 145](#), [96 N.S.R. \(2d\) 399](#) at 404 (N.S.T.D.).