

Current Workplace Issues

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In the Fall, 1997, issue of *Workwise*, we described the Supreme Court of Canada's decision in Wallace v. United Grain Growers Ltd. and its potential impact on wrongful dismissal lawsuits. It will be recalled that, in Wallace, our highest court held that absence of good faith conduct and fair dealing during the termination of an employee can extend the notice period for which the employer must pay damages. We predicted that "wrongful dismissal litigation will now more strongly emphasize the employer's conduct and the personal, rather than simply economic, harm which bad faith termination inflicts on employees."

That prediction has come true in the approximately 75 decisions across Canada which have considered Wallace since that time. There are two major trends thus far:

1. Employer conduct and notice periods. Rather than simply assessing objective factors, such as age, character of employment, or length of service, in determining the appropriate notice period at the time of dismissal, the character of the employer's conduct at a time when the employee is particularly vulnerable is having a dramatic effect on notice periods. In most cases, the court sets the applicable notice period by reference to the traditional factors, then adjusts it upwards for employer conduct found to amount to bad faith or unfair dealing. The adjustment can reach dramatic proportions. For example:
 - (a) 6 months -> 42 months, for unsupported allegations of fraud, incompetence, disobedience, and alcohol and drug dependency in an industry where fidelity and honesty were paramount (Glendenning, BCSC)
 - (b) 15 months -> 20 months, for the employer's failure to deal fairly and in good faith with an employee whose breaches of company policy were technical and minor (Frank, Alta. Q.B.)
 - (c) 6 months -> 12 months, for placing an exemplary employee caught up in a company's reorganization politics on probation without warning and in effect constructively dismissing her (Whiting, Man. C.A.)
 - (d) 12 months -> 16 months, for abridging the time given the employee for performance improvement, public monitoring of her performance, and a barrage of written criticism (Horvath, BCSC)
 - (e) 5 months -> 8 months, for high handed conduct in withholding statutory severance pay in order to force the employee to sign a release (Stolle, BCSC)
 - (f) 3 3/4 months -> 5 3/4 months, for the insensitive firing of a manager in the public area of his restaurant (Robertson, BC Prov. Ct.)
 - (g) 18 months -> 20 months, for the unreasonable and insensitive treatment, including a wrongful accusation of insubordination, of an employee with long service (Birch, BCSC)
2. Reduced availability of other types of damages. Typically, a wrongful

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dismissal action involves the court in a determination of compensation in lieu of reasonable notice, based on objective factors such as age, length of service, etc. Prior to Wallace, an employee who also sought damages for the *manner* in which the employer treated him or her at the time of dismissal would do so by way of a claim for any or all of (1) aggravated damages (for unusually severe impact on the complainant) or (2) punitive damages (for significantly reprehensible conduct on the part of the defendant), or (3) damages for intentional infliction of mental distress. These other types of damages require proof of stand-alone wrongdoing separate and apart from the basic monetary claim in the wrongful dismissal action. This requirement continues to make them more difficult to prove than the type of employer misconduct which now, under the principles established in Wallace, results in higher awards for extended notice periods.

It appears that the courts, particularly at the appellate level, have welcomed the opportunity to adjust the notice period for bad faith employer conduct rather than, as before, focusing on bad conduct chiefly when considering the other types of damages often claimed by aggrieved employees in wrongful dismissal lawsuits.

Nevertheless, the option of extending the period of reasonable notice does not preclude awards in these other categories of damages. In one Ontario case the court found unwarranted allegations of poor performance in the case of an employee who had been injured on the job and extended the notice period to 24 months. The court went even further and awarded an additional \$15,000 in aggravated damages for loss of certain rights under workers compensation legislation. In B.C., a court increased the notice period by one-third but also awarded \$35,000 in punitive damages against the employer for slandering the employee and \$25,000 personally against the company president for false and exaggerated testimony during the trial.

It is clear then, that while the traditional factors will continue to determine the fundamental period of reasonable notice to which a terminated employee is entitled, the *manner* in which the termination is carried out is assuming major financial significance. In order to avoid larger damage awards, employers will need to place increasing emphasis on such actions as: (1) explaining the reasons for termination without reference to "fault" on the part of the employee; (2) conducting the conversations privately and in a dignified manner; (3) providing an appropriate letter of reference; (4) avoiding where possible a requirement that the employee

leave immediately; (5) considering an offer of working notice where possible or appropriate. These factors were singled out for praise by the BC Supreme Court in Cox v. Robertson. As a result, the employer was able successfully to resist the employee's application for an extension of the reasonable notice period and punitive damages.

With the courts' emphasis on the circumstances of dismissal, apart from the fact that an employee has been dismissed, employers can save themselves grief and increased damage awards by seeking advice on how to effect a termination in light of the principles derived from Wallace.

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