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NOTICE EXTENSION FOR BAD FAITH DISMISSAL: "A REMEDY DIVORED FROM THE WRONG"

Introduction

The effect of the decision of the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.*[1] is irrefutably significant in the development of the law of wrongful dismissal in Canada. In *Wallace*, the Supreme Court reviewed the law of wrongful dismissal in the context of the manner of dismissal by the employer and chose to recognize both bad faith and unfair treatment on the part of the employer at the time of the termination of employment as factors additional to those traditionally considered in determining and otherwise extending reasonable notice in wrongful dismissal cases. However, the question the Supreme Court of Canada did not address in the *Wallace* decision because the facts did not warrant it, but one that will be of interest to many plaintiffs and plaintiffs' counsel, is whether bad faith dismissal damages are subject to an employee's obligation to mitigate damages in wrongful dismissal cases. More specifically, if a wrongfully dismissed employee, who otherwise qualifies for bad faith dismissal damages within the meaning of the *Wallace* decision, secures alternative employment immediately, or within a very brief period thereafter, or fails to take reasonable steps to obtain equivalent employment elsewhere, will such employee's bad faith dismissal damage claim be limited, curtailed, compromised or perhaps even extinguished? As a preamble to this discussion, it is perhaps instructive to discuss more fully the Supreme Court's decision in *Wallace*, as well as the nature and scope of an employee's duty generally to mitigate in wrongful dismissal cases.

The Supreme Court's decision in Wallace

In *Wallace*, the plaintiff, Jack Wallace, had been a long-term employee of United Grain Growers Ltd., who was dismissed from his employment at age 59, purportedly for cause, notwithstanding that a few days before his dismissal his employer's sales manager, as well as their general manager, had complimented him on his work. The employer maintained its unjustified allegations of cause for over two years, only withdrawing them shortly before the trial commenced. This allegation of cause caused Mr. Wallace to seek psychiatric help and made his search for alternate employment difficult.

Iacobucci, J., in writing for the majority of the Supreme Court, while confirming the principle that any award of damages beyond compensation for breach of contract for failure to give reasonable notice must be founded on a separately actionable course of conduct, as articulated in *Vorvis v. Insurance Corporation of British Columbia*[2], and agreeing with the Manitoba Court of Appeal that there was insufficient evidence to support a finding that the actions of the employer constituted a separately actionable wrong in tort or contract, stated:

> I note, however, that in circumstances where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, the employee is not without recourse. Rather, the trial judge has discretion in these circumstances to extend the period of reasonable notice to which an employee is entitled. Thus, although

> recovery for mental distress might not be available under a separate head of damages, the possibility of recovery still remains. I will be returning to this point in my discussion of reasonable notice below.[3]

Iacobucci, J. then reviewed the traditional factors in determining reasonable notice articulated in *Bardal v. Globe & Mail Ltd.*[4] (subsequently adopted by the Supreme Court in *Machtinger v. HOJ Industries Ltd*[5]) - the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant (noting that these factors were not exhaustive):

> The appellant urged this Court to recognize the ability of a dismissed employee to sue in contract or alternatively in tort for "bad faith discharge". Although I have rejected both as avenues for recovery, by no means do I condone the behaviour of employers who subject employees to callous and insensitive treatment in their dismissal, showing no regard for their welfare. Rather, I believe that such bad faith conduct in the manner of dismissal is another factor that is properly compensated for by an addition to the notice period.[6]

Iacobucci, J., in supporting and including in the mix of considerations to determine reasonable notice, the behaviour of the employer towards the employee at the time the latter is dismissed, relied on the unique characteristics of employment contracts and the special relationship that arises. In particular, Iacobucci J., after reviewing previous decisions of the Supreme Court and academic writings on the subject noted that employment relationships are characterized by unequal bargaining power, which places employees in a vulnerable position relative to their employers, and that such vulnerability remains in place and becomes more pronounced at the time of dismissal:

> *... I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.*[7]

His Lordship then described the obligation of good faith:

> *The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.*[8]

Having briefly reviewed the *Wallace* decision and the genesis of bad faith dismissal damages, as previously indicated, the question the Supreme Court of Canada did not address in its reasons for judgment is whether bad faith dismissal damages are subject to an employee's obligation to mitigate damages. As at the time of the writing this article, the Supreme Court's decision in *Wallace* has been cited in more than 700 cases, at all court levels, in all provinces across Canada but there

continues to be uncertainty on the issue as to whether bad faith dismissal damages are subject to an employee's obligation to mitigate damages. Less than a handful of cases at the lower court levels have directly encountered this question or commented on it. Before examining these few rare cases, it is helpful, in my view, to first examine the nature and scope of the duty to mitigate in wrongful dismissal cases.

What is the nature and scope of the duty to mitigate in wrongful dismissal cases?

The concept of mitigation is a fundamental principle of contract law, which dictates that if a party to a contract suffers a harm or loss by the other's breach of the contract and desires to obtain relief in the form of damages, then the injured party must take reasonable steps to curtail the loss. This principle equally applies in context of employment relationships, as employment relationships are also contractual. Accordingly, a wrongfully dismissed employee has a duty at law to mitigate or limit his damages and to take all reasonable steps to find alternative, comparable employment upon dismissal[9]. Laskin C.J.C., as he then was, concisely and succinctly delineated the principle of mitigation in employment relationship in *Red Deer College v. Michaels*[10]*:*

> *In short, a wronged plaintiff is entitled to recover damages for the losses he has suffered but the extent of those losses may depend on whether he has taken reasonable steps to avoid their unreasonable accumulation.*
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> ...
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> In the ordinary course of litigation respecting wrongful dismissal, a plaintiff, in offering proof of damages, would lead evidence respecting the loss he claims to have suffered by reason of the dismissal. He may have obtained other employment at a lesser or greater remuneration than before and this fact would have a bearing on his damages. He may not have obtained other employment, and the question whether he has stood idly or unreasonably by, or has tried without success to obtain other employment would be part of the case on damages. If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, subject to the defendant *being content to allow the matter to be disposed of on the trial judge's assessment of the plaintiff's evidence on avoidable consequences.*

The duty of an employee to mitigate is not a duty owed to the employer but to the employee himself as a reasonable person to protect his own interests of maintaining his income and position in his trade or profession as indicated by Taylor J.A. in *Forshaw v Aluminex*[11]*:*

> *That "duty" - to take reasonable steps to obtain equivalent employment elsewhere and to accept such employment if available - is not an obligation owed by the dismissed employee to the former employer to act in the employer's interests. It would indeed be strange that such a duty would arise where an employer has breached his contractual obligation to his employee, having in mind that no duty to seek other employment lies on an employee who receives proper notice*
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> .

> *The duty to "act reasonably", in seeking and accepting alternate employment, cannot be a duty to take such steps as will reduce the claim against the defaulting former employer, but must be a duty to take such steps as a reasonable person in the dismissed employee's position would take in his own interests – to maintain his income and his position in his industry, trade or profession. The question whether or not the employee has acted reasonably must be judged in relation to his own position, and not in relation to that of the employer who has wrongfully dismissed him. The former employer cannot have any right to expect that the former employee will accept lower paying alternate employment with doubtful prospects, and then sue for the difference between what he makes in that work and what he would have made had he received the notice to which he was entitled.*

If the wrongfully dismissed employee is successful in either wholly or partly mitigating his loss upon dismissal or fails to take reasonable steps expected of him at law to limit his loss then his claim for damages will be reduced to the extent of either his successful mitigation or his failure to properly mitigate. In *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*[12] *Viscount* Haldane explained how the principle of mitigation modifies an award of compensation for breach of contract:

> The fundamental basis is ... compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in Dunkirk Colliery Co. v. Lever (2) at p. 25: "The person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business."[13]

Having reviewed the scope of the employees' duty to mitigate upon dismissal, does this duty apply to modify an award of bad faith dismissal damages?

Duty to mitigate and bad faith dismissal damages

In *Wallace*, the Supreme Court was critical of the Manitoba Court of Appeal's decision to recognize as relevant the manner of dismissal in determining the appropriate notice award only where it impacts or affects the dismissed employee's employment prospects.

Iacobucci J. stated:

> *The Court of Appeal in the instant case recognized the relevance of manner of dismissal in the determination of the appropriate period of reasonable notice. However … the court found that this factor could only be considered "where it impacts on the future employment prospects of the dismissed employee"…. With respect, I believe that this is an overly restrictive view. In my opinion, the law must recognize a more expansive list of injuries which may flow from unfair treatment or bad faith in the manner of dismissal.*
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> …

> *Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. However, in my view the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable.*[14] *[Emphasis added]*

While recognizing that intangible injuries of a dismissed employee resulting from bad faith conduct of the employer are "sufficient to merit compensation in and of themselves" irrespective of the dismissed employee's employment prospects, the majority in the Supreme Court rejected an implied term in the employment contract of good faith conduct in the termination of employment and likewise rejected a tort for breach of a good faith and fair dealing obligation with regard to dismissals indicating that such law "should be left to legislative enactment rather than judicial pronouncement". However, in recognition of the general vulnerability of an employee at the time of the termination of employment and the need to protect an employee at that point particularly from bad faith conduct on the part of the employer that could have a devastating result upon the employee, the Supreme Court finds the obligation of good faith and fair dealing on the part of the employer in the manner of dismissal, the breach of which is compensable by an extension of the notice period. Iacobucci states:

> *The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal. In Machtinger, supra, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event. However, when termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period.*[15]

However, since the obligation of good faith and fair dealing in the manner of dismissal is not a free standing duty grounded in the employment contract or tort law, the remedy available to employees in case of the breach of such obligation, namely, an addition to the length of the notice period, is consequently not free-standing either. For example, if the dismissed employee finds alternative employment at comparable wages immediately or very shortly after his dismissal then the extension of the notice for the bad faith manner of his dismissal is of no or very little economic value or benefit to him, unlike an award for an independently actionable tort such as defamation[16]. This view is aptly articulated in the decision of the Ontario Supreme Court in *Y.S. v. H.R. Property Management Ltd*.[17] where the employee found alternative employment within 9 weeks of her dismissal earning more than what she had earned with her former employer. The Court, while rejecting the employee's claim for bad faith dismissal damages, stated in *obiter:*

By virtue of the fact that the plaintiff found new employment by October 1987 the possible recovery by the plaintiff is quite limited so long as this case is regarded as a simple case of wrongful dismissal. The plaintiff's new job, as stated, paid her more than did her job with the defendant. She is required to mitigate her damages.

I digress somewhat at this point to record my opinion that under the Supreme Court of Canada decision in Wallace and United Grain Growers Ltd. (1997), 152 D.L.R. (4th) 1 (S.C.C.), a breach by the employer of his obligations of good faith when terminating an employment is compensable by increasing the notice period but is not compensable by way of aggravated damages except where an independent, freestanding actionable wrong has been established.

In my opinion that means that any additional amount in lieu of notice that might be mandated in those circumstances under the doctrine of Wallace would itself be subjected to capping by way of mitigation when a terminated employee obtains a new job at higher pay. The decision in Wallace would thus be of no assistance to the plaintiff in avoiding the mitigation effect of her subsequent long term employment.

...

In order to be eligible in law for more than a modest recovery the plaintiff must establish a right to recovery for an independent tort.[18]

Unlike in *Y.S. v. H.R. Property Management Ltd., in Musgrave v. Levesque Securities Inc.*19 the employee presented sufficient evidence to properly found a claim against his employer for damages for the bad faith manner in which he was dismissed and the court, the Nova Scotia Supreme Court, had the occasion to determine whether the award for damages for bad faith dismissal would be subject the employee's duty to mitigate. By way of background, in *Musgrave*, the employer, an investment firm, hired Cecil Musgrave as an investment dealer. At the time of hiring, the employer viewed Mr. Musgrave as a talented individual with much potential to advance in the securities business. Approximately four years later, when the employer amalgamated with another securities firm, the employer dismissed Mr. Musgrave without notice or severance pay alleging poor performance as the basis of dismissal, although the employer had not told Mr. Musgrave that his performance was of concern. Further, at the time of the dismissal, the employer required the Mr. Musgrave to remove his personal effects from his office under supervision and prevented him from taking his personal documents. The employer also did not pay outstanding commissions owed to Mr. Musgrave. Mr. Musgrave's personal investments remained with the employer and, unknown to the Mr. Musgrave; an execution order was issued against him for a tax assessment that was under appeal. The sheriff served the employer with the execution order and neither the sheriff nor the employer advised Mr. Musgrave of the execution proceedings. The employer, although aware that the sheriff did not have any authority to authorize the sale of Mr. Musgrave's investments with the firm, offered to and did liquidate the investments at a significant loss to him. Moreover, after Mr. Musgrave's dismissal, his immediate supervisor made several defamatory statements to several of his former clients and prospective employers intimating that Mr. Musgrave may have done something wrongful.

While Mr. Musgrave secured employment shortly after his dismissal with another securities firm, he was unable to establish a practice and he was fired a few months later. His expenses at the second securities firm exceeded his income. A month after his dismissal from the second firm Mr. Musgrave interviewed with another securities firm and was offered employment on the spot but the offer was retracted shortly thereafter. Convinced that his reputation as an investment

dealer was destroyed and he could not reestablish himself as an investment dealer again, Mr. Musgrave subsequently started his own business, an informational website for investors. He was quite successful in the latter business, at some point started earning more than the commissions he was earning during his employment with Levesque.

The Court allowed Mr. Musgrave's action and held that the employer did not have cause to dismiss him. The Court awarded Mr. Musgrave 8 months severance pay in lieu of notice and, because of the employer's "extreme" bad faith at and following termination, extended the award by a further 8 months. The Court also awarded Mr. Musgrave 10 damages for defamation, which were reduced as a result of the overlap between compensation for the defamation and bad faith since the facts grounding liability in defamation were same as those relied upon to extend the notice period for the bad faith manner of dismissal. Instructive in the Court's decision on this subject are its thorough analysis of the different approaches articulated in the majority and minority decisions of the Supreme Court in the *Wallace* decision and its treatment of Mr. Musgrave's mitigating efforts in calculating compensation for the bad faith manner of his dismissal. The Court stated:

> *...I have concluded that Levesque engaged in acts of extreme bad faith. Having reached that conclusion by taking into account, among other things, the defamatory statements, I am concerned to find a method of compensation that does not compensate twice for the same injury or loss, and, as I see it, this is complicated by the radically different principles for setting compensation for defamation and compensation for bad faith in the mode of dismissal.*

> *[In Wallace,] ... Iacobucci, J., with whom five members of the court concurred, compensation for bad faith dismissal is not based on any term of the employment contract other than the obligation to give notice before termination (p. 28). Accordingly, the compensation is by way of an addition to the notice period (p. 31). McLachlin, J., as she then was, wrote in dissent, with La Forest, J., and L'Heureux-Dubé, J., concurring. For McLachlin, bad faith conduct in dismissal is relevant to the assessment of a notice period only where the conduct affected the employee's ability to obtain new employment (p. 43). She would have based compensation upon the breach of an independent implied term. For her, the employment contract contains an implied promise to act in good faith in the manner of dismissal if the employer should dismiss the employee (p. 44). The difference between the two opinions would be most striking in the case an employee who suffered greatly on account of extreme bad faith in dismissal, but quickly secured new employment at the same salary. Under the McLaughlin approach, the injury would be compensated. Under the Iacobucci approach, there would be no compensation. I have commented at length upon differences between the majority opinion and the minority opinion in Wallace, because recognizing those differences enlightens the path I must follow in assessing damages. I believe the minority opinion would have permitted me to compensate for breach of good faith and for defamation, all in one. So closely bound up are the acts of bad faith and the defamatory statements, that it will be difficult, and a little artificial, to assess them separately. The minority opinion would also have permitted me to establish compensation based upon my assessment of the intangible injuries inflected by the bad faith conduct as well as the tangible injury to Mr. Musgrave's ability to reestablish employment, without a cap established by Mr. Musgrave's mitigation of his loss of employment, which did not mitigate the intangible losses occasioned by the bad faith. And so, my comparison of the two opinions instructs me as to what I must do, since I am, of course, bound by the majority opinion. I cannot assess damages for the defamations together with compensation for the bad faith dismissal. And, I must determine compensation for the bad faith according only to period of notice.*[20] *[Emphasis added]*

The Court was compelled to follow the majority opinion in *Wallace* and determine compensation for the bad faith manner of Musgrave's dismissal by adding to the notice award. Since Musgrave was able to earn some income during the notice extension period, the Court stated:

> Subject to my assessment of damages for defamation, I would double the notice period to sixteen months. I found the annual income to be $39,509 a year, $3292 a month. Fourteen months would take us to June 28th, 1996, near the end of the second quarter when Mr. Musgrave earned $2000 from his new business. So, the dollar award to that point would be fourteen months at $3292 less $2000, $44,088. He earned much more than $3292 a month after that time, so, although the extended notice period is for sixteen months, there is no recovery after the sixteenth.[21]

The Court further stated:

...

> The extended notice has a value of $26,336, but, because of mitigation, which had nothing to do with the injury caused by the defamations and the intangible harm caused by the breach of duty, that is reduced to $17,752. So, I would calculate the adjustment for the overlap at $4587 [$17,752 - 26,336 / 2], and leave it to Mr. Musgrave's election to 12 deduct this sum from either the wrongful dismissal award or the defamation award when a final order is taken out.[22]

Under the minority approach in the *Wallace* decision in the Supreme Court, it would not have mattered whether Mr. Musgrave found replacement employment immediately after his dismissal or earned any income during the notice period as the claim for bad faith dismissal would be a free-standing claim arising as a result of the breach of an implied obligation of good faith in the contract of employment. However, the Court's adoption of the majority approach in *Wallace* had the effect of reducing the employer's financial exposure in *Musgrave* by $4,587. Quaere why the employer should benefit at all from Mr. Musgrave's efforts to mitigate?

The employee's obligation at law to mitigate his lost income stream in wrongful dismissal cases by searching for alternative comparable employment, as discussed earlier, is well settled. It is also well settled that "the reason for awards of damages for wrongful dismissal being calculated on the basis of the period of reasonable notice [is] that the employee should be given the notice that could reasonably be considered sufficient for him to seek out and find new employment."[23] In *Ansari v. B.C. Hydro*[24] the British Columbia Supreme Court further added:

> The underlining principle which arises out of the law of master and servant (as they were called at common law), is that, absent contractual provisions, the master who terminates the employment of a servant must give reasonable notice, and upon doing so he is not required to compensate the servant in any way. If the master does not give reasonable notice then the law requires him to compensate the servant by an award of damages that is intended to put the servant in the position he would be in if he had received proper notice.[25]

Accordingly, it is a sensible requirement in employment law that any income the employee earns from alternative employment during notice period should be taken into account in calculating his losses or damages, since the award of damages is to put the employee in the position he would have been in had he received proper notice from his employer and

not in a better position. For example, if the dismissed employee is entitled to 5 months notice of the termination of his employment but receives no notice and finds alternative employment in the second month earning $3000 per month ($2,000 less than what he was paid by his former employer) then his compensable loss is $5,000 for the first month and $2,000 for each of months 2 to 5 inclusive for a total of $15,000. Thus, awarding the employee in the scenario posed $15,000 would make the employee whole as it would put him financially in the position he would have been in if he had received proper notice from his employer. However, if the employee is compensated the full $5,000 per month for the 5-month period without regard to the income earned by the employee from alternative employment during the same period then the employee will be doubly compensated for that portion of the income stream replaced during the 5-month notice period. The latter result would place the employee in a better position than he would have been in had his employer provided him proper notice and such result is inconsistent with the fundamental principle governing damage awards articulated in *Ansari* and other cases.

However, to extend the obligation to mitigate to awards of notice extension based on the employer's bad faith manner of dismissal such as in the *Musgrave* case shows a clear failure on the part of the Court to recognize the lack of parity between the claims for reasonable notice and bad faith manner of dismissal. The Manitoba Law Reform Commission in its report entitled *Good Faith and the Individual Contract of Employment* succinctly articulates this point:

> …[T]he function of the obligation to give reasonable notice is to provide a period within which the employee may find alternative employment. An award of damages for bad faith dismissal, however, does not depend on whether or not the conduct makes it more difficult to find another job. In Wallace, the Court used the breach of a contractual obligation to give notice to protect an interest that it was not designed to protect. "Wrongs should give rise to a remedy. The problem with Wallace is that the remedy is divorced from the wrong."[26]

Further, it should be noted that while the employee may be able to mitigate his lost income stream arising from his wrongful dismissal by finding alternative employment, the employee could not similarly mitigate his intangible injuries from the bad faith dismissal. The intangible injuries such as hurt or injured feelings, humiliation, embarrassment and damage to one's self-worth caused by bad faith conduct of the employer at dismissal do not simply vanish when the employee finds alternative employment. The intangible injuries may linger on long after the employee finds alternative employment.

Therefore, while the sentiments of the majority in the Supreme Court in *Wallace* as expressed by Iacobucci J. that the "intangible injuries are sufficient to merit compensation in and of themselves" are laudable, the remedy for the intangible injuries is imperfect because it is tied to the notice period and therefore "divorced from the wrong". The remedy clearly does injustice to employees who are able to mitigate their income loss by finding alternative employment immediately or shortly after the termination of their employment. Such employees may not receive any or appropriate compensation for the ill treatment they suffered at the hands of their former employer at the time of the termination of their employment. This point is also adverted to in Ontario Court of Appeal's decision in Prinzo v. Baycrest Centre for Geriatric Care.[27]

In Prinzo, the employer terminated the employment of the employee, a beauty shop manager for 17 ½ years in a geriatric centre, while she was on a disability leave. During the employee's disability leave, the employer, despite the contrary

instructions of the employee's lawyer, made harassing calls to the employee urging her to return to work and accusing her of malingering. The employer's supervisor, at one point, also falsely implied that the employee's doctor had agreed that she was fit for work. When the employee returned to work, the employer immediately arranged a meeting with her, and terminated her employment. During the termination meeting, the employer suggested that the employee in someway was harming the residents of the geriatric centre, which was most hurtful and upsetting to the employee. At trial, medical evidence from the employee's doctor was adduced indicating that the manner in which the employee's dismissal was handled caused the employee emotional upset, increased blood pressure, weight gain and increased symptoms of diabetes. The trial court awarded the employee 18 months pay in lieu of notice for the termination of her employment without cause and added that while the employer's bad faith conduct allowed it to extend the notice award, there was sufficient evidence of extreme and insensitive acts of harassment on the part of the employer that constituted a reckless and wanton disregard for the health of the employee and, thus, provided a basis for a separate cause of action. Accordingly, the trial court awarded the employee, *inter alia*, aggravated damages for the employer's intentional infliction of mental suffering. On appeal, the employer challenged the trial court's award of damages for mental distress and the employee argued in the alternative that the notice period should be extended due to the manner of dismissal. The Ontario Court of Appeal, while upholding the trial court's award against the employer for intentional infliction of mental suffering, stated in *obiter* that if the employee was not entitled to damages for intentional infliction of mental suffering, she would have been entitled to an extension of notice period based on the *Wallace* decision. The court further opined on the issue of mitigation and *Wallace* damages:

> The issue of mitigation of damages did not arise in Wallace. Ordinary damages for wrongful dismissal are subject to a duty to [page497] mitigate on the part of the employee. The amounts earned in mitigation are deducted from the amount of damages awarded to an employee in lieu of notice. Prinzo fulfilled her duty to mitigate by finding alternative employment. Her new employment paid somewhat less than her previous employment. Baycrest only has to make up the difference between her salary level at Baycrest and what she was earning at Allstate during the ordinary notice period. If this deduction of earned income were also made from the damages awarded in relation to a "Wallace extension", Prinzo would not effectively be compensated for the injury done to her. This result would appear incongruent with the Supreme Court's view in Wallace that the injuries resulting from bad faith conduct on the part of the employer are "sufficient to merit compensation in and of themselves" irrespective of whether the bad faith conduct affects employment prospects. On the basis that intangible injuries cannot normally and completely be mitigated by finding other employment, it has been suggested that the extended notice period be treated as akin to a severance payment which is not subject to mitigation…. This issue was not, however, argued before us, and having regard to my earlier conclusion upholding the trial judge, I need not resolve it.[28] [Emphasis added]

But for the Court of Appeal upholding the trial court's decision that a separate actionable wrong existed because the elements of the tort of intentional infliction of mental suffering were present, the facts in *Prinzo* were ideal for awarding the *Wallace* notice extension and determining whether the notice extension should be subject to mitigation since the employee found alternative employment during the reasonable notice period and the Court of Appeal was alive to the argument of the employee's counsel that the employee would not be properly compensated for the intangible injuries if the notice extension award were subject to deduction for mitigation.

In a more recent decision of the Nova Scotia Court of Appeal in *Schimp v. RCR Catering Ltd.*,[29] the Court of Appeal reconceptualized the aggravated damages award on *Wallace* principles and, whether intentionally or not, effectively avoided the question of whether the award should be subject to mitigation. By way of background, in *Schimp*, the employee, a bartender, was summarily terminated from his employment after he was accused of theft of alcohol at work. The employer escorted the employee from the premises in front of other staff and banned the employee from the premises for 6 months without an explanation. The employee's reputation was damaged causing him difficulty to find work in the hospitality industry. As a result, the employee took employment in the family business approximately one month after the termination of his employment and almost fully replaced his income. At trial, the court concluded that theft was not proven by the employer and accordingly, the employee was dismissed without cause. The trial court awarded the employee, *inter alia*, 4 ½ months salary in lieu of reasonable notice; an amount of $10,000.00 for aggravated damages for loss of reputation and mental and physical distress suffered by the employee due to the unsubstantiated accusation of theft; and an additional 6 months' salary characterized as an award of exemplary and punitive damages but based on the *Wallace* factor, namely, the employer's failure to use good faith and fair dealing in the manner of dismissal.

On appeal, the Nova Scotia Court of Appeal, as a result of the employee's successful mitigation efforts, reduced the severance award of 4 ½ months salary to 1 month's salary; set aside the award of punitive and exemplary damages as without any foundation; and reduced the aggravated damages award to the equivalent of 3 ½ months salary (i.e. $6,664.88). Of particular interest in the Court of Appeal's decision is its reconceptualization of the employee's entitlement to aggravated damages based on the *Wallace* principles[30]:

> In this case the trial judge has awarded the sum of $10,000.00 for loss of reputation and mental and physical distress suffered by the respondent as a result of being summarily terminated. The appellants, he said, should have foreseen that such a breach of contract involving an unsubstantiated accusation of theft would cause mental and physical distress to the plaintiff. In awarding aggravated damages in this matter the trial judge made no analysis with respect to the so-called Wallace factors to which I have referred, and did not, in dealing with aggravated damages, refer to Wallace. He did refer to it when he addressed the issue of punitive damages.
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> The trial judge did not make an analysis based on Wallace. In my opinion, the award should have been calculated on such a basis. We are in a position to do this having regard to the findings of the trial judge respecting the manner in which the respondent was dismissed. The selection by the trial judge of the lump sum award of $10,000.00 is roughly equivalent to an increase in the notice period of just over five months.
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> Here, the trial judge has made findings that the dismissal was done callously, involving as it did an unsubstantiated accusation of theft, a removal from the premises in view of other employees, an absence of a letter of recommendation and a six month ban from the premises. He found that as a consequence the respondent suffered loss of reputation and mental and physical distress. This finding embraces "injuries such as humiliation, embarrassment, damage to one's sense of self worth and self esteem" as referred to by Iacobucci, J.
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> In my opinion, an award of $10,000.00, the equivalent of an increase in the notice period in excess of five months is so inordinately high as to be a wholly erroneous estimate of the damages. The notice period should in my view

be increased only by an additional 3 ½ months, resulting in a total additional award for aggravated damages of $6,664.88 ($1904.25 x 3.5).[31]

While the Court of Appeal reduced the trial award of $10,000 (5 months' salary) for aggravated damages to 3 ½ months' salary and based the award on the *Wallace* principles, the Court of Appeal did not reduce any part of the award for the employee's successful mitigation 1 month after the termination of his employment as the award was characterized as aggravated damages. Quaere whether the same analysis of the Court of Appeal based on the *Wallace* principles, but without characterization of the award as aggravated damages, would have resulted in a similar outcome?

Whether or not the Court of Appeal in Schimp intentionally characterized Wallace damages under the head of aggravated damages to avoid the negative effect on Mr. Schimp of successfully mitigating so soon after the termination of his employment, Mr. Schimp, as with his low income earning counterparts in cases where courts award notice extensions on the basis of *Wallace* principles, is subject to unfair economic discrimination that is inherently built into the remedy of notice extension. More specifically, while the Supreme Court in *Wallace* asserts that the more unfair or bad faith the manner of dismissal the greater the compensation for the injured employee, the Supreme Court fails to consider that the remedy of notice extension inherently discriminates on the basis of the employees' income level. That is, claimants who are higher income earning employees stand to economically benefit more than lower income earning employees. For example, everything else being equal, if both dismissed employees receive 3 months extension to their notice award to compensate them for their intangible injuries resulting from the bad faith manner of their dismissal by their employers, the employee earning $5,000 per month will benefit more than the employee earning $3,000 per month. There is absolutely no justification for such result. The magnitude of the suffering does not depend on one's income level but more likely on the severity or harshness of the treatment afforded to the employees by their employers and the sensitivity individual employees.

Conclusion

From the perspective of employees, the Supreme Court's decision in Wallace is laudable for recognizing that**:**

(i) employment contracts are unique, and the relationships they govern are special and very different relative to commercial contracts;

(ii) work is one of the most fundamental aspects in an individual's life and a significant component of his identity, self-worth and emotional well- being;

(iii) there is an inequality or power imbalance between the parties to an employment contract which is evidenced in not only the contract itself but in "virtually all facets of the employment relationship";

(iii) employees are the vulnerable party in the employment contract and relationship and that they are most in need of protection;

(iv) employees are especially vulnerable at the time of the termination of their employment, most in need of protection and the law ought to encourage conduct that minimizes the personal and economic damage and dislocation an employee is subject to as a consequence of the termination of their employment.

(v) "the manner in which employment can be terminated is equally important to an individual's identity as the work itself";

(vi) "the termination of employment accompanied by acts of bad faith (on the part of the employer) in the manner of discharge" may have devastating consequences for the employee;

(vii) employers should be held to an obligation of good faith and fair dealing in the manner of dismissal which at a minimum requires that employers be candid, reasonable, honest and forthright with their employees" not unfair, "untruthful, misleading or unduly insensitive".

However, the Supreme Court's decision in *Wallace* is also problematic in that the remedy it sets out for the breach of the employer's obligation of good faith in the manner of dismissal-an extension of the notice award- has the potential of doing much injustice to employees who are low-income earners and those who secure alternative employment immediately or shortly after the termination of their employment and thus mitigate their income stream or a large portion thereof. Accordingly, the remedy of notice extension, as indicated previously, is "divorced from the wrong"; it does not really compensate the injured employee for his intangible injuries and it is therefore incongruent with the Supreme Court's express assertion that intangible injuries resulting from bad faith conduct or unfair dealing on dismissal are sufficient to merit compensation in and of themselves. It is only where the employee does not find alternative employment during the notice period that he may stand to economically benefit from an award of damages for bad faith dismissal or alternatively, where the conduct of the employer meets the elements of an independently actionable wrong to qualify the employee for an award of aggravated or punitive damages.

However, even where the employee is unable to mitigate the loss of his income stream by finding alternative employment, such employee, if he is a low-income earning employee, stands to receive a lesser damage award for bad faith dismissal because damages are based notice extension which is usually calculated on the basis of the employee's monthly salary. In the case of *Schimp, supra*, where the Nova Scotia Court of Appeal reconceptualized aggravated damages basing them on *Wallace* principles, the Court of Appeal awarded aggravated damages equal to 3 ½ months' salary based on the bartending employee's monthly salary of $1,904.25. Everything else being equal, if the employee was a bar manager with a monthly income of $5,000, he would receive more than double the amount of damages, whether characterized as *Wallace* damages or aggravated damages. The inherent unfairness in making compensatory awards to employees for the bad faith conduct of the employers in the manner of dismissal on the basis of notice extension is evident.

If the wrong-the bad faith in the manner of dismissal-and the consequent remedy for the wrong are to be married, the minority decision of McLachlin J. in *Wallace* needs to be revisited and implemented into law. In her dissenting reasons for judgment, McLachlin J. in *Wallace* espoused the view that the employment contract contains an implied term that the employer act in good faith in dismissing employees. This creates a distinct and free standing or independent cause of action for breach of contract and the consequent remedy would also be free standing or independent, rather than connected to the

notice award. This approach effectively remedies the current problems associated with the notice extension remedy identified in this paper. In the approach of McLachlin J. it would matter not when the employee secures alternative employment after the termination of his employment or whether the employee is low-income earning employee; compensation would be determined strictly on the basis of the egregious conduct of the employer in the manner of dismissal and its consequent impact on the employee.

End Notes

1 (1997), 152 D.L.R. (4th) 1
2 [1989] 1 S.C.R. 1085
3 *Supra*, note 1, at par. 74.
4 (1960), 24 D.L.R. (2d) 140 (Ont. H.C.)
5 [1992] 1 S.C.R. 986, at p. 998.
6 *Supra*, note 1, at par. 88.
7 *Supra*, note 1, at par. 95.
8 *Supra*, note 1, at par. 98.
9 Knight J.G., Goodfellow L.S. and Overholt C.J. *Employment Litigation Manual.* Ontario, Canada: Lexis Nexis Canada Inc., 2006
10 [1976] 2 S.C.R. 324 at p331.
11 B.C.L.R. (2d) 140 (C.A.), at pp. 143-44.
12 [1912] A.C. 673 (P.C.).
13 *Ibid.*, at p. 689.
14 *Supra*, note 1, at pars. 102 to 104.
15 *Ibid.*, at par. 95.
16 Janice B. Payne and Ted Murphy, "Recent Developments relating to the awarding of damages within an employment law context: A unifying theory", p.31
17 [1999] O.J. No. 5588
18 *Ibid*, at pars. 19 to 24
19 [2000] N.S.J. No. 109
20 *Ibid*, at pars. 75 to 76.
21 *Ibid*, at par. 79.
22 *Ibid*, at par. 81.
23 Dunlop v. B.C. Hydro [1988] B.C.J. No. 1963 (B.C.C.A.) at p. 7.
24 [1986] B.C.J. No. 3005, at p. 7
25 *Ibid.*, at p. 7.
26 Manitoba Law Reform Commission, *Good Faith and the Individual Contract of Employment, Report #107, December 2001, at p. 12.*
27 [2002] O.J. No. 2712
28 *Ibid*, at pars. 71 and 72
29 [2004] N.S.J. No. 57
30 *Supra*, Note 16 at pp. 38-39.
31 Supra, Note 29, at paras. 55-57, 59