

BAD FAITH DAMAGES IN WRONGFUL DISMISSAL CASES: POST-WALLACE JURIPRUDENCE

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Introduction

Prior to the Supreme Court of Canada's landmark decision in *Wallace v. United Grain Growers Ltd.*,¹ in a case of wrongful dismissal, damages were limited to the earnings lost during the period of reasonable notice to which the employee was entitled and did not include damages for the manner of dismissal, for injured feelings, or for loss sustained from the fact that the dismissal made it more difficult for the employee to obtain other employment. However, in the *Wallace* decision, the Supreme Court chose to recognize the relevance of the manner of an employee's dismissal in the determination of the appropriate period of reasonable notice stating that employers have an obligation of good faith and fair dealing in the manner of dismissal and where such obligation is breached the employee should be compensated for by an extension of the employee's notice period.

Since the Supreme Court's decision in *Wallace* eight years ago, trial and appellate courts in Canada have followed, distinguished, explained, mentioned and cited the decision in over 650 cases. The purpose of this article is to examine the jurisprudential development, post-*Wallace*, in the law governing the obligation of employers to treat their employees in good faith in the manner of dismissal. Accordingly, in the first part of the article, by way of background, a brief review will be undertaken of the judicial history of the *Wallace* case at the trial and appellate court levels, including the Supreme Court of Canada. In the second part, a summary review will be undertaken of the subsequent trial and appellate court decisions interpreting the scope of the employer's obligation of good faith and fair dealing in the manner of dismissal. In the third and final part, an examination will be undertaken of a recent trial court decision condemning employees who advance unmeritorious claims for bad faith dismissal damages and waste the court's valuable time.

1. Judicial history of the Wallace case

In 1972, at age 45, Jack Wallace, a very successful salesman for a national printing company, left his employment of 25 years to work in a similar capacity for a wholly owned subsidiary of a competitor, United Grain Growers ("UGG"). Prior to joining UGG, in a job interview with the subsidiary's director of marketing, Mr. Wallace indicated that he did not want to jeopardize his secure employment with his then employer and that at his age he was looking for employment where he would be treated fairly and afforded a guarantee of job security until retirement at age 65 or longer. As UGG wanted an experienced successful employee like Mr. Wallace, UGG offered Mr. Wallace employment with the assurances that UGG would treat him fairly and he could work at UGG until retirement, if he performed as expected and gave UGG no reason to terminate his employment. Mr. Wallace started working for UGG in June 1972.

Mr. Wallace excelled in sales at UGG was the top salesman from the date he joined UGG until he left, 14 years later, in 1986. In 1985, the year before Mr. Wallace left UGG, the General Manager of UGG sent him a letter congratulating him on a record year of sales. Further, a day or two before the termination of his employment, Mr. Wallace received accolades

from the General Manager of UGG for his performance. However, a few months before and once again a few days before the termination of his employment, Mr. Wallace raised some concerns regarding his compensation terms and questioned some of the language in his compensation plan with his sales manager. Further, on the date of the termination of his employment, August 22, 1986, Mr. Wallace had an altercation with his Sales Manager pertaining to a storage charge of \$300 he had removed from a price quotation he submitted to a client, which he subsequently offered to pay when questioned by the Sales Manager. It was shortly after this altercation that the Sales Manager told Mr. Wallace that his employment was terminated and asked him to leave the building, without advising him of the reason why his employment was terminated.

A few days after the termination of his employment, Mr. Wallace received a letter from the Sales Manager advising that his employment was terminated due to his inability to perform satisfactorily the duties of his position. However, at trial, the Sales Manager testified that he did not believe that there was any cause to dismiss Mr. Wallace. He stated that he was only following the orders of the General Manager of the subsidiary who had directed him to fire Mr. Wallace on the spot and to search Mr. Wallace's files at the office with a view to finding anything "of a derogatory nature to Mr. Wallace whether be it in his actions or his carrying on his duties or anything else related to his performance".

In October 1986, approximately two months after the termination of his employment, Mr. Wallace commenced a wrongful dismissal action against UGG for, *inter alia*, loss of income, including salary and commissions he would have earned during the unexpired term of a fixed-term contract, or alternatively, under a period of reasonable notice. He also claimed damages for mental distress, aggravated damages, punitive or exemplary damages and special damages. UGG, in its Statement of defence, challenged Mr. Wallace's capacity to maintain an action in his personal capacity, as he was an undischarged bankrupt at the time he commenced his action against UGG. UGG also maintained that Mr. Wallace's employment was terminated for reasonable and just cause but withdrew that defence on the first day of the trial.

(i) The Manitoba Court of Queens Bench

The Manitoba Court of Queens Bench, the Trial Court, struck out Mr. Wallace's claim for damages for breach of contract of employment stating that the relief claimed was vested in Mr. Wallace's trustee in bankruptcy as Mr. Wallace was an undischarged bankrupt at the time he commenced an action against UGG. Mr. Wallace appealed the Trial Court's ruling to the Manitoba Court of Appeal and the latter stayed the ruling pending completion of the trial.

With respect to Mr. Wallace's argument that there was a fixed-term contract of employment until he reached the retirement age, the Trial Court rejected this argument reasoning that it is unlikely that either party would commit to such a term at hiring, particularly since Mr. Wallace, at the time of hiring, had twenty years to go before reaching the retirement age.

The Trial Court also found that Mr. Wallace was dismissed without legal cause and was entitled to reasonable notice of termination of his employment. In determining appropriate notice, the trial court considered Mr. Wallace's length of service, age, the nature of his employment, the history of his relationship with UGG, his qualifications, the availability of similar employment, his concerted efforts to mitigate his loss and his preemptory dismissal by UGG. The Trial Court also considered UGG's subsequent actions, namely, advancing allegations of cause for the termination of his employment,

which made it difficult for Mr. Wallace to secure alternative comparable employment. On the basis of the foregoing factors, the Trial Court awarded Mr. Wallace the maximum award of 24 months as the period of reasonable notice.

With respect to Mr. Wallace's claim for damages in contract for mental distress, the Trial Court found that there was a special relationship between Mr. Wallace and UGG. The latter wanted someone like Mr. Wallace who was highly skilled at what he did and therefore it was prepared to compensate him accordingly to get him. UGG also provided him a guarantee of security of employment, if he performed as expected and did not give UGG cause to dismiss him. Accordingly, the Trial Court reasoned that it was an implied term of Mr. Wallace's contract of employment with UGG that if Mr. Wallace, having been given a guarantee of security of employment, was unjustifiably dismissed without warning he would probably suffer mental distress. Since UGG breached this implied term when it peremptorily dismissed Mr. Wallace without cause, the Trial Court concluded that it was reasonably foreseeable to UGG that its conduct would cause Mr. Wallace mental distress. The Trial Court also found that UGG's said conduct constituted a separate or independent actionable wrong and, accordingly, Mr. Wallace had made out a case for damages for mental distress.

With respect to Mr. Wallace's claim for damages in tort, the Trial Court noted that Mr. Wallace was devastated and felt sick when UGG's subsidiary, after the termination of his employment, in a letter to his counsel, alleged cause for his dismissal without any basis. The Trial Court further noted that UGG continued with the allegation of cause for two years until the first day of trial when it abandoned this position. The Trial Court also noted the evidence of Mr. Wallace's Sales Manager that the General Manager of the subsidiary instructed him to play hardball with Mr. Wallace and to make certain that he collected all information that could be used against Mr. Wallace in the litigation. As a result of the conduct of UGG at the time of his dismissal and subsequently, Mr. Wallace became very irritable, lost self esteem, lacked confidence, felt worthless, became very depressed, had suicidal thoughts and saw a psychiatrist for treatment. In the circumstances, the Trial Court agreed with counsel for Mr. Wallace that the conduct of Public Press should lead to compensation for mental distress by way of aggravated damages and went on to award Mr. Wallace \$15,000 for damages for mental distress in both, contract and tort. As for Mr. Wallace's claim for punitive damages, the trial court surveyed the principles in *Vorvis*², *supra*, *Werner v Arsenault*³ and *Meyer v. Gordon*⁴ and concluded that an award of punitive damages is very rare in breach of contract cases and requires evidence of extreme conduct exhibiting high-handedness, maliciousness or vindictiveness meriting full condemnation and punishment. In the case of Mr. Wallace, the Trial Court did not find sufficient evidence to constitute an actionable wrong or evidence of extreme conduct as to warrant an award of punitive damages in contract or tort.

(ii) The Manitoba Court of Appeal

On appeal, the Manitoba Court of Appeal, on the issue of Mr. Wallace's capacity to bring an action against UGG, reversed the trial court ruling and held that Mr. Wallace could maintain the action for breach of employment contract in his personal name.

On the issue of fixed-term contract of employment, the Court of Appeal upheld the Trial Court's decision that there was insufficient evidence to support the Mr. Wallace's claim of a fixed-term contract of employment until retirement. The Court of Appeal also agreed with the Trial Court's conclusion that damages should be at the high end of the scale for a person in Mr. Wallace's position but felt that the award to 15 months.

With respect to the Trial Court's award of aggravated damages for mental distress, the Court of Appeal struck down this award stating that the Trial Court erred in applying the "reasonably foreseeable test". The Court of Appeal noted that no authority was cited nor was any available to support the proposition that there is a duty upon an employer to take care to discharge an employee in such a way so as to reduce or even eliminate any risk of mental suffering. Moreover, according to the Court of Appeal, there was no evidence to support any breach of duty of care owed to Mr. Wallace such as to constitute an independent cause of action.

The Court of Appeal also rejected the argument advanced by Mr. Wallace's counsel that there exists a separate independent cause of action in tort called "bad faith discharge" for breach of an express or implied fair dealing or good faith obligation during or after termination of an employee.

Similarly, the Court of Appeal rejected the argument of Mr. Wallace's counsel that the employer is liable for the intentional infliction of mental suffering stating that the Trial Court made no finding that the employer deliberately attempted to inflict mental suffering on Mr. Wallace.

Finally, on the subject of punitive damages, the Court of Appeal agreed with the Trial Court's ruling that the employer's conduct neither constituted an independent cause of action nor was it of such extreme nature as to warrant such an award.

(iii) The Supreme Court of Canada

On appeal to the Supreme Court of Canada, the Supreme Court concurred with the Court of Appeal that Mr. Wallace could maintain the wrongful dismissal action in his own name.

The Supreme Court also sided with the Court of Appeal and refused to interfere with the Court of Appeal's decision to uphold the Trial Court's ruling that there was insufficient evidence to support Mr. Wallace's claim that he had a fixed term employment contract until retirement. The Supreme Court, however, rejected the Court of Appeal's decision to reduce the Trial Court's award of 24 months' salary in lieu of notice to 15 months and restored the Trial Court's award of 24 months on the basis of the consideration of the non-exhaustive principles articulated in *Bardal v. Globe & Mail Ltds* and adopted by the Supreme Court in *Machtinger v. HOJ Industries Ltds*.

In particular, as with the Trial Court, the Supreme Court, considered Mr. Wallace's advanced age, his 14-year tenure with UGG as the company's top salesman and his limited prospects for re-employment and concluded that an award at the top end of the notice scale, namely, 24 months, was justified in Mr. Wallace's case.

The Supreme Court also considered UGG's assurance or promise of job security to Mr. Wallace to entice him to join UGG and noted that such inducement is a factor that should be included in the consideration of notice awards and in Mr. Wallace's case justified an award of damages at the high end of the scale.

On the subject of punitive damages, the Supreme Court again agreed with the Trial Court and the Court of Appeal that there lacked the requisite foundation for punitive damages, since UGG did not engage in sufficiently “harsh, vindictive, reprehensible or malicious” conduct and there was not evidence of an independently actionable wrong.

The Supreme Court also concurred with the Trial Court and the Court of Appeal in rejecting Mr. Wallace’s argument that he could sue in either tort or contract for “bad faith discharge”. The Supreme Court pointed out that contract law recognizes the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary. The Supreme Court noted that the requirement of “good faith” reasons on the part of the employer for dismissal is inconsistent with the principles of employment law and that such requirement should be left to legislative enactment. Similarly, the Supreme Court pointed out that there is no tort for breach of a good faith and fair dealing obligation with regard to dismissals and that such requirement too should be left to legislative enactment.

On the issue of damages for mental distress, the Supreme Court supported the Court of Appeal’s conclusion that any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination must be founded on a separately actionable cause of conduct and upheld the Court of Appeal’s decision that UGG actions did not constitute a separate actionable wrong either in tort or contract. However, the Supreme Court was quick to point out that where the manner of dismissal causes mental distress to the employee but falls short of an independent actionable wrong, the employee is not without recourse. More specifically, the Supreme Court stated that where the employer’s behaviour towards its employee is callous and insensitive in the manner of dismissal and causes mental distress to the employee, but falls short of an independent actionable wrong, the bad faith conduct of the employer should properly be taken into account in extending the employee’s notice period. In arriving at this conclusion, the Supreme Court relied on the unique nature of the employment contract and the special relationships they govern:

95 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.

As to the scope of the employer’s obligation of good faith and fair dealing in the manner of dismissal, the Supreme Court stated:

98 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.

The Supreme Court then provided some few examples of cases where employer conduct constituted a breach of such obligation including the following:

- Where an employer wrongfully accused the employee of theft and communicated that accusation to other potential employers of the dismissed employee.

- Where the employer refused to provide a reference letter to the employee, after wrongfully accusing the employee of theft.

- Where the employee whose position was eliminated was being reassured that he would be transferred to a new job and only told of the termination of his employment after he sold his home.

- Where an employer decided to fire the employee when he was on disability leave, suffering from a major depression.

- Where the employer closed its operations for three months and laid off the employee who later discovered through a newspaper advertisement for his position that he had been terminated.

The Supreme Court was unequivocally clear that the examples above were not exhaustive of all possible types of bad faith or unfair dealing in the manner of dismissal. The Supreme Court also advocated a broader view of the injuries resulting from the breach of the employer's obligation of good faith and fair dealing in the manner of dismissal that should be compensable:

102 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, relying on Trask, supra, and Gillman v. Saan Stores Ltd. (1992), 45 C.C.E.L. 9 (Alta. Q.B.), the court found that this factor could only be considered "where it impacts on the future employment prospects of the dismissed employee" (p. 180). 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.

103 It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself: see e.g. Addis, supra. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. In these situations, compensation does not

flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

104 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.

The Supreme Court, in supporting the Trial Court's ruling and reinstating the award of 24 months salary in lieu of notice, concluded that in Mr. Wallace's case there were several examples of bad faith conduct on the part of UGG that justified an award at the top scale: the abrupt manner in which UGG dismissed him after complementing him on his work just days before his termination; "playing hardball" with him and advancing unfounded allegations of cause for his dismissal until the eve of the trial; damaging his reputation in the industry as word of his dismissal spread in the industry and it was rumored that he was involved in some wrongdoing; causing his depression by virtue of the aforementioned actions.

2. The scope of the employer's obligation of good faith and fair dealing in the manner of dismissal: a review of subsequent trial and appellate decisions

Since the Supreme Court's decision in *Wallace* establishing the principle that an employer has an obligation of good faith and fair dealing in the manner of dismissal of its employees, a large number of wrongful dismissal claims against former employers have included a claim for "bad faith damages" as a matter of course. As indicated in the introduction to this article, the trial and appellate courts in Canada have followed, distinguished, explained, mentioned and cited the Supreme Court's decision in *Wallace* in over 650 cases. While the Supreme Court unequivocally pointed out that the obligation of good faith and fair dealing in the manner of dismissal was not capable of precise or exhaustive definition, the decisions of subsequent trial and appellate courts illustrate by example the breadth of employer misconduct that is capable of coming within the definition of bad faith employer conduct. A representative sample of cases where courts have construed the employers' conduct as breaching the obligation of good faith and fair dealing in the manner of dismissal and awarded bad faith dismissal damages to employees include the following:

- Where the employer terminated the employee, without warning, despite the fact that the employer was aware that the employee was seriously ill. The employee received 2½ months of additional notice.⁷
- Where the employer dismissed the employee without cause, escorted the employee from the premises, banned the employee from the premises without an explanation and refused to give the employee a letter of reference. The employee received 3½ months of additional notice.⁸

- Where the employer dismissed the employee without cause in the presence of the building superintendent who was instructed to escort the employee from the premises. The employee received 1 month of additional notice.⁹
- Where the employer summarily dismissed the employee who suffered a workplace injury and was in the process of meeting with medical specialists. The employer was aware of the meeting with the medical specialists but never inquired as to recommendations being made. The employee received 1 month's additional notice.¹⁰
- Where the employer maintained just cause allegations throughout the trial on the basis of undocumented performance related complaints, failed to supply the employee with a letter of reference or insurance claim forms, delayed the payments of the employee's statutory entitlements and created hurdles relating to the determination of the employer's true corporate identity. The employee received 3 months of additional notice.¹¹
- Where the employer terminated the employee for alleged cause deliberately during working hours and in the working environment thereby ensuring other staff would be alerted and had the police escort the employee from the premises to ensure that there would be a spectacle and maintained allegations of wrongdoing and misconduct throughout the trial, which the court rejected. The notice period was extended by approximately 6 months.¹²
- Where the employer, after requiring the employee to relocate to another province for the assignment as a project superintendent, terminated the employee abruptly, without warning or indication, and informed the employee that the reason for his termination was that he was "not capable of doing his job" when the true reason was that the employer wanted to replace him on the project with another more senior employee. The notice period was extended by 1 month.¹³
- Where the employer failed to supply a reference letter to the employee, though one was requested and promised. The notice period was extended by 1 month.¹⁴
- Where the employer, unilaterally and without any advance notice, deactivated the employee's security pass, decreased the employee's duties, reassigned the employee's desk and office to another employee, and caused the employee mental distress as a result which led to the employee's nervous breakdown and impacted on his ability to seek alternative employment. The notice period was extended by 4 months.¹⁵
- Where the employer induced the employee to leave secure employment and then shortly thereafter terminated the employee and misrepresented to her the reasons for her dismissal and maintained unproven allegations of just cause against her for approximately three years up until the day of trial. The notice period was extended by 3 months.¹⁶

- Where the employer terminated the employee by leaving an abrupt, discourteous, rude, and profane telephone message on the employee's home answering machine that could have been accessed by the employee's wife and children. The employer then left a subsequent message in an attempt to convince the employee that he was in fact laid off and not terminated. The employer then alleged various forms of misconduct by the employee on the employee's Record of Employment, which initially disqualified the employee from receiving employment insurance benefits. These baseless allegations were again repeated in a letter from the employer's counsel to the employee's counsel, which upset the employee. The court extended the notice period without specifically delineating the extension period.¹⁷
- Where the employer, without warning and in contravention of its own policies, demoted and reassigned the employee to another country despite being aware that the employee had certain family obligations and could not leave the country. In addition, the employee's supervisor altered the minutes of supervisory meetings to make it appear that the demotion was deserved. Moreover, after the employee was terminated, and just before trial, the employer amended its defence to plead baseless allegations of cause such as fraud, misrepresentation, and bad faith and informed the employee's new employer about possible biases of the employee which led the new employer to investigate the employee causing him embarrassment and worry. The total notice period of 30 months awarded at trial was reduced to 24 months with no explanation at either the trial or appellate levels as to what portion of the notice was for bad faith conduct of the employer.¹⁸
- Where the employer induced the employee to leave a stable position; promised the employee job security so long as she was a key performer; misrepresented to the employee the opportunities available with the employer; reassured the employee about the employer's focus in the Canadian market but reversed its focus within seven months of hiring the employee; knew that its conduct had placed the employee in a difficult financial position; failed to provide the employee outstanding commissions or any related information in a timely fashion; failed to provide the employee her Record of Employment in a timely fashion; failed to attend a mandatory mediation meeting pre-trial; failed to respond to any of the employee's pleas for assistance, in supplying placement counselling or a reference letter despite requests. The notice period was extended by 2 months.¹⁹
- Where the employer, a public body, owed a duty of procedural fairness to the employee, a municipal officer; failed to provide him a copy of the report of his superior criticizing him; failed to provide the employee the reasons for his dismissal and an opportunity to change the employer's mind regarding his dismissal; failed to afford the employee a hearing before dismissing him. The notice period was extended by 4 months.²⁰
- Where the employer dismissed an employee because the employee raised an employment standards issue. In addition, the abrupt dismissal of the employee for insubordination without the employee ever being reprimanded or rebuked caused the employee to enter into a state of shock and depression. The notice period was extended by 2 months.²¹
- Where the employer informed the employee, while she was on disability leave, that unless she returned to work, despite her doctor's advice, she would be terminated. The employer also took consideration of irrelevant and extraneous factors in determining whether the employee was in fact disabled and applied a standard in determining

the level of the employee's S-TIP benefits that was different than that outlined in the employment agreement. In addition, the employer never spoke with the employee's doctor nor offered the employee information regarding appealing the S-TIP benefits decision.²²

- Where the employer terminated the employee while the employee was on severe stress leave and posted an opening for the employee's job one month before the employee was informed that he had "resigned". In addition, the employer returned the employee's personal effects in a haphazard and careless manner. The notice period was extended by 3 months.²³

- Where the employer terminated the employee and had him escorted from the building while there was an employee party for a retiring employee taking place. In addition, the employer wrote a letter to the members of the golf club where the employee worked that contained statements that affected the employee's reputation in the small industry. The notice period was extended by 2 months.²⁴

- Where the employer confronted the employee with a false allegation of forgery and threatened to lay criminal charges if he did not sign a letter of resignation thereby causing the employee to suffer from traumatic stress disorder. The court extended the notice period without specifically delineating the extension period.²⁵

- Where employer made serious, but unfounded allegations against the employee of poor performance, harassment, intimidation, and threats thereby casting a shadow on him that would make it virtually impossible for him to find another position, especially given his advanced age and physical condition. The trial court awarded the maximum period of notice of 24 months without indicating specifically what portion of the notice comprised *Wallace* damages. This award was undisturbed on appeal by the employer.²⁶

- Where the employer knowingly terminated the employee just before the employee's wedding date and gave the employee an inadequate offer of severance pay, telling him that if he did not accept the offer he would be terminated for cause and would receive nothing. The settlement offer also contained a restrictive covenant that would have the effect of preventing the employee from working elsewhere. The court, while taking into consideration the bad faith conduct of the employer in deterring the appropriate notice period, did not specify what portion of the 6 months' notice period was for *Wallace* damages.²⁷

- Where a 17 ½-year employee at a geriatric centre was terminated while on disability leave and the employer made harassing calls to the employee inferring that she was malingering and wrote a letter to her falsely implying that her physician had said that she was fit to return to work. When the employee returned to work, the employer terminated her. The employee suffered emotional upset, increased blood pressure, weight gain and return of diabetes symptoms. The appellate court went on to uphold an award for infliction of mental suffering but commented 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 *Wallace* damages.²⁸

Having delineated a few examples where courts have awarded bad faith dismissal damages to employees for breach of the employer's obligation of good faith and fair dealing in the manner of dismissal, it is clear that the breadth of employer conduct that attracts bad faith dismissal damages is rather broad. In *Gismondi v. The Corporation of the City of Toronto*,²⁹ the Ontario Court of Appeal, while reversing the trial court's decision to award bad faith dismissal damages to the terminated employee as there was not sufficient evidence to justify an increased compensation under *Wallace*, unequivocally agreed with the trial judge's view that bad faith dismissal damages are not limited to employer misconduct at the time of the termination but can be based on pre and post termination misconduct so long as it is related to the manner of dismissal. At paragraph 23 of the judgment, the Court of Appeal stated:

I do not disagree with the trial judge's view that Wallace damages are not limited to acts of the employer at the very moment of dismissal and can in appropriate circumstances include "the employer's conduct pre- and post-termination ... and the conduct of the employer in its aftermath" but only, in my view, as a component of the manner of dismissal.

An examination of Post-Wallace jurisprudence indicates that the concept of bad faith dismissal is a broad concept that will continue to expand and develop as it continues to be invoked by terminated employees in wrongful dismissal cases. It is also arguable that because of the lower threshold for successfully invoking a claim for bad faith dismissal damages than claims for mental distress, aggravated or punitive damages, where one needs to prove an independently actionable wrong, bad faith dismissal damages are perhaps more readily and realistically available remedy to many terminated employees³⁰. Accordingly, it is submitted that while mental distress, aggravated and punitive damages were rare in wrongful dismissal cases before the *Wallace* decision, after the *Wallace* decision these heads of damages will be even less frequently awarded. In some recent cases,³¹ the availability of *Wallace* damages to some extent appears to have influenced the courts' decision not to consider awarding damages under other heads of damages such as mental distress, aggravated or punitive damages. In *Marshall v. Watson Wyatt & Co.*,³² for example, on appeal, the Ontario Court of Appeal struck down the jury award of punitive damages where the employee was also awarded 12 months' notice period consisting of 9 months' reasonable notice and a further 3 months for bad faith conduct on the part of the employer. The Court of Appeal stated at paragraph 50:

Even if the Commission's view satisfies the independent actionable wrong requirement, and I doubt whether it does, a punitive damages award in this case serves no rational purpose. Ms. Marshall was awarded generous compensation equal to nine months' notice. That nine months was increased by three months because of the jury's finding that the way Watson Wyatt dismissed Ms. Marshall was unfair or in bad faith. Undoubtedly the jury relied on much the same evidence for both extending the notice period by three months and awarding punitive damages. In my view, the overall compensatory award of 12 months' notice—which included a base salary of \$112,500 for the second six months and a maximum bonus of \$45,000 -- was more than adequate to express the jury's disapproval of Watson Wyatt's conduct and to deter similar conduct in the future. I would therefore set aside the award of \$75,000 in punitive damages.

Similarly in *McCulloch v. Iplatform*,³³ the Ontario Superior Court of Justice having awarded an extra 3 months notice for *Wallace* damages refused to consider an award of punitive damages. At paragraph 47, the Court stated:

Having regard for the award of Wallace damages, I make no separate award of damages for mental distress, punitive, or aggravated damages.

In *Iacobucci v. WIC Radio Ltd.*,³⁴ the British Columbia Supreme Court found the employee's plea for aggravated damages inappropriate in light of the *Wallace* decision. At paragraph 54, the Court stated:

In relation to paragraph 28, I find that the words "aggravated damages" are inappropriate given the direction lately received from the Supreme Court of Canada in Wallace. The appropriate remedy for bad faith conduct on dismissal is to extend the notice period, rather than to order a separate damage award. To this extent, then, I agree with the defendants. I note, however, that the alteration required to make these pleadings conform with the plaintiff's submission based on Wallace is relatively minor, and that the plaintiff can amend them prior to the trial of this action.

It is arguable that in some wrongful dismissal cases, the courts are opting for a more expedient solution of awarding *Wallace* damages than going through the exercise of determining whether there is actually a basis for mental distress, aggravated or punitive damages. It would seem that because the concept of bad faith dismissal is more flexible and expansive in scope than the remedies of mental distress, aggravated and punitive damages and because of the much lower threshold for claiming *Wallace* damages, the courts are more inclined to award the *Wallace* damages and summarily dismiss claims for mental distress, aggravated and punitive damages. Moreover, once the courts award *Wallace* damages they appear to be content in not awarding other damages such as mental distress, aggravated or punitive damages. Since in most cases the same evidence is proffered by employees to advance claims for mental distress, aggravated and punitive damages and the theory of the courts is that awarding under any one of the latter heads of damages amounts to double recovery.

3. Reverse Wallace?

As a result of the *Wallace* decision, terminated employees routinely assert claims of bad faith dismissal damages in wrongful dismissal cases in the hopes of obtaining an increase to their awards of reasonable notice periods. This is evidenced in the disproportionately high number of wrongful dismissal cases referring to the Supreme Court's decision in *Wallace* in such short period. In their article³⁵, authors J. Howard and K. Krenn assert that successful claims for wrongful dismissal damages, on the average, increase the employee's notice award by three months. However, a recent decision in the Superior Court of Ontario in *Yanez v. Canac Kitchen*³⁶ may represent an ominous warning to those wishing to advance claims for bad faith dismissal damages when there is no factual or evidentiary justification for advancing such claim.

In *Yanez*, due to a downturn in business, an employee of approximately 15½ years was "permanently laid off". In both the employer's letter of dismissal and the subsequent 'exit interview', the employee was told that the severance payment he was receiving exceeded his entitlement under the Ontario Employment Standards Act ("OESA"). In fact, due to an error on the part of the employer, the severance payment was lower than what the employee would have been entitled to under

the OESA. Once the employer discovered its mistake, the employer immediately rectified the error by paying the employee the difference. The employer also provided the employee a reference letter describing the employee as a diligent and effective employee.

The employee subsequently commenced a wrongful dismissal action against the employer claiming, among other things, ‘Wallace damages’ because the amount offered by the employer was lower than required under OESA and because the employer, when making the original offer, represented that he was receiving more than his entitlement under the OESA. More than half the total trial time was focussed on this issue. The trial judge ultimately found that the error made by the employer in miscalculating the severance payment under the OESA was not intentional, particularly due to actions of the employer once the error was discovered. In his decision, the trial judge expressed the court’s distaste for routine assertions of Wallace claims that have little or no support in the evidence stating:

[para16] Some plaintiffs and their counsel appear not to have appreciated or wilfully ignore the fact that "the Wallace bump up" does not occur automatically in every dismissal.

[para35] Much of this trial was concerned with the plaintiff asserting and the defendant denying an entitlement to “Wallace damages”. “Wallace damages” ought not to be asserted in every case. Only in the appropriate case. This lawsuit involved an employer who, while being less than generous, did attempt to do it right. It failed because it did not ensure that the right service figures were included in the calculations. However, when it was notified that it had made a mistake, rather than to stonewall, it immediately remedied the situation, without requiring a release.

The trial judge then went on to state:

[para40] The time has now come to express this Court’s disapproval of routine assertions of “Wallace damage” claims which are not justified by the facts.

[para41] Such claims seriously impede the potential consensual resolution of disputes which could otherwise be settled well short of trial. Additionally, the assertion and defence of specious “Wallace claims” can consume large amounts of valuable court time; can increase the costs to all concerned; and can generally drive the parties apart.

[para42] While these comments are not, in any way, intended to discourage meritorious “Wallace damage claims”, thought must be given in future cases to appropriate deterrents against plaintiffs who assert “Wallace claims” which are clearly without merit and should not have been advanced. Sanctions could include a diminution of either the costs award or the amount awarded for such dismissal claims. Unmeritorious “Wallace claims” for bad faith firings ought not to be an apparently automatic inclusion in every plaintiff’s prayer for relief.

While discouraging claims for Wallace damages which have little or no support on the evidence, the trial judge in Yanez did not reduce the amount awarded to the employee including the amount granted for costs but instead sent a warning to all

employees and plaintiffs counsel that in future cases unmeritorious claims for *Wallace* damages may result in sanctions against the employee. Sanctions may come in the form of partial or full costs awarded against the employee for wasting the court's valuable time or a reduction in the notice awarded to the employee—a reverse *Wallace* as it were.

The *Yanez* decision has yet to be followed or considered in a wrongful dismissal case but it is anticipated that employer's counsel will rely upon *Yanez* to defend unmeritorious claims by employees for *Wallace* damages and seek either a reduction in the ultimate notice awards made to employees or argue for costs against the employees or perhaps both.

It should also be noted that just before the *Yanez* decision, the British Columbia Provincial Court in *San-Da v. APS Architectural Precast Structures Ltd.*³⁷ articulated some similar sentiments to those of the *Yanez* court in condemning an employee who advanced unfounded allegations against the employer and further penalized the employee by reducing the damage award. In *San-Da*, the employee was employed as the head of the employer's quality control department. During his probationary period, the employee discovered certain irregularities in the procedures used in the creation of certain concrete products that he believed went against the Canadian Standards Association. The employee informed the employer of these irregularities and warned the employer of the associated hazards. Due to the employer's subsequent inaction combined with the employer's instruction to him to report henceforth to a newly hired Assistant Superintendent, the employee suffered upset and "profound stress" causing him to take a one-month leave. Upon his return, the employer dismissed the employee and paid him one week's pay in lieu of notice in compliance with the Employment Standards Act, the employee having worked for the employer for 5 months at the time of termination.

Following his dismissal, the employee made allegations against the employer to the Association of Professional Engineers and Geoscientists of British Columbia (the "Association") claiming that the employer, through one of its employees, was engaged in unlawful behaviour, namely, falsifying test results and violating the Association's Code of Ethics. The Association, after investigating the employee's allegations, dismissed them as lacking any merit. In the employee's subsequent wrongful dismissal action against the employer, the Court, while finding that the employee was wrongly dismissed and entitled to common law notice, reduced its award due to the employee's "likely false" allegations to the Association. The Court stated:

[para96] I turn now to a very troubling aspect of the claimant's behaviour following his dismissal. In my opinion, while he had every right to lodge a complaint with the Association, he did not have the right to allege that the defendant, through Lee, was engaged in unlawful and perhaps criminal behaviour. His allegations that the defendant was falsifying test-results and otherwise violating the Association's Code of Ethics were reprehensible. At no time during his employment did he suggest that the defendant was engaged in this kind of behaviour, and he was far from shy in drawing the defendant's attention to what he perceived as its shortcomings. He must be taken to have known how serious allegations of this nature

were and what effect they potentially had for both Lee's reputation and professional standing and the defendant's standing in the industry.

[para97] I have concluded that these allegations were likely false and that the claimant was not justified in making. If an employer had acted in such a manner towards an employee, a court would, in all likelihood, express

its disapproval by extending the notice period. In the present case, I am satisfied that I should express my strong disapproval of the actions of the claimant. Accordingly, I decline to award the claimant any of the other relief he has sought and deduct the sum of \$500.00 from the award of damages to which he would otherwise be entitled.

It should be noted that neither the *Yanez* nor the *San-Da* decisions were appealed to the respective provincial appellate courts. Whether the analysis and reasoning on the subject of frivolous claims for *Wallace* damages articulated by the courts in *Yanez* and *San-Da* would be completely sustained on appeal is doubtful in this writer's respectful submission. There is lacking the parallel required between the award of *Wallace* damages for employer misconduct and the reduction of an otherwise appropriate notice award where a frivolous claim for *Wallace* damages is advanced by the employee for the analysis of the *Yanez* and *San-Da* courts to be compelling. The purpose of *Wallace* damages is compensatory in nature and not punitive. That is, *Wallace* damages are awarded to an employee to compensate him for the employer's lack of good faith in dismissal and not to punish the employer³⁸, although effectively it may be punitive to the employer. Conversely, the effect of reducing the employee's notice award for advancing an unsupportable or frivolous claim for *Wallace* damages is punitive to such employee and not compensatory to the employer. Therefore, it is doubtful that the suggestion of the *Yanez* court and the reasoning of the *San-Da* court in reducing the employee's notice award for advancing frivolous claims for *Wallace* damages are really supportable in law. It is perhaps more appropriate for the courts to deter frivolous claims for *Wallace* damages by resort to imposition of special costs against or a reduction of the cost awarded to such claimants. Principally, the later course has precedence and is supportable in law as courts daily resort to costs to punish those claimants advancing frivolous claims and wasting courts' precious and limited time.

4. Conclusion

Having reviewed the judicial history of *Wallace* as well as the jurisprudential developments post *Wallace*, the following principles can be extracted to govern claims for *Wallace* damages:

- ◆ Employers are held to an obligation of good faith and fair dealing in the manner of dismissal of an employee;
- ◆ Where an employee can establish that an employer breached this obligation by engaging in bad faith conduct or unfair dealing leading up to or in the course of dismissal, injuries to an employee such as humiliation, embarrassment and damage to one's self worth and self-esteem may be compensated by the Court by adding to the length of the notice period;
- ◆ In advancing a claim for *Wallace* damages, the employee must have "hard" evidence of the actions of the employer that constitute bad faith dismissal, "soft" evidence will not be enough to prove a case of *Wallace* damages.
- ◆ Conduct of the employer that may be characterized as clearly untruthful, misleading or unduly insensitive will qualify for *Wallace* damages.

◆ Common in all of the examples of bad faith conduct on the part of the employer provided by the Supreme Court in *Wallace* and subsequently evidenced in other decisions is the presence of something similar to “intent, malice, or blatant disregard for the employee”. It is the type of conduct that may be described as “callous and insensitive treatment” or “playing hardball”.

◆ Where an employee can establish in addition, that an employer, in breaching its obligation of good faith and fair dealing in the manner of dismissal or its actions thereafter, affected the employee’s employment prospects, the Court may award compensation to the employee greater than otherwise would be the case, in recognition of the additional damages suffered by the employee.

◆ Claims for Wallace damages that are clearly unmeritorious should not be advanced and if they are, courts may begin using deterrents in the form of costs or reductions in damages (although in this writer’s view, resort to costs is the preferred mode for deterring frivolous claims for *Wallace* damages).

End Notes

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1 [1997] 3 S.C.R. 701

2 [1989] 1 S.C.R. 1085

3 (1982), 53 N.S.R. (2d) 146 (N.S.S.C.A.D.)

4 (1981), 17 C.C.L.T. 1 (B.C.S.C.)

5 (1960), 24 D.L.R. (2d) 150 (Ont. H.C.)

6 [1992] 1 S.C.R. 986

7 *Smith v. Casino Rama Services*, 2004 CanLII 4340 (ON. S. C.).

8 *Terry Schimp v. R.C.R. Catering Ltd. and R.C.R. Pubs Ltd.*, 2004 NSCA 29.

9 *De Guzman v. Marine Drive Golf Club*, 2003 BCPC 284.

10 *Montague v. The Bank of Nova Scotia*, 2004 CanLII 27211.

11 *McCulloch v. Iplatform Inc.*, 2004 CanLII 48175 (ON. S. C.).

12 *Zadorozniak v. Community Futures Development Corp. et al.*, 2005 BCSC 26.

13 *Locke v. Chandos Construction*, 2004 ABPC 199.

14 *Schmidt v. AMEC Earth and Environment*, 2004 BCSC 1012 (CanLII).

15 *Miller v. ICO Canada Inc.*, 2005 ABQB 226.

16 *Crisall v. Western Pontiac Buick GMC (1999) Ltd.*, 2003 ABQB 255.

17 *Carter v. Packall Packaging Inc.*, 2004 CanLII 15496 (ON. S.C.).

18 *Silvester v. Lloyd’s Register North America*, 2004 NSCA 17.

19 *Antidormi v. Blue Pumpkin Software Inc.* 2004 CanLII 30885 (ON. S.C.).

20 *Reglin v. Creston (Town) et al.*, 2004 BCSC 790 (CanLII).

21 *Baumgartner v. Jamieson*, 2004 BCSC 1540.

22 *Zorn-Smith v. Bank of Montreal*, 2003 CanLII 28775.

23 *Rinaldo v. Royal Ontario Museum*, 2004 CanLII 4770.

24 *Geluch v. Rosedale Golf Assn.*, 2004 CanLII 14566 (ON. S.C.).

25 *Noseworthy v. Riverside Pontiac-Buick Ltd.* (1998), 168 D.L.R. (4th) 629 (Ont. C.A.)

26 *Antonacci v. Great Atlantic & Pacific Co. of Canada* (2000), 181 D.L.R. (4th) 577 (Ont. C.A.)

27 *Kroll v. 949486 Ontario Inc.* [1997] O.J. No. 4932 (QL) (Gen. Div.)

28 *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (C.A.)

29 [2003] O.J. No. 1490 (CA)

30 Janice B. Payne and Ted Murphy, "Recent Developments relating to the awarding of damages within an employment law context: A unifying theory", p.30.

31 *Iacobucci v. WIC Radio Ltd* [1997] B.C.J. No. 2874 (SC); *Geluch v. Rosedal Golf Association Supra*, note 24; *Nagy v. Metropolitan Toronto Convention Centre Corp.* [1998] O.J. No. 1017; *Marshall v. Watson Wyatt & Co.* [2002] O.J. No. 84; *McCulloch v. Iplatform Inc.* 2004 Can LII 4817S

32 *Ibid*, note 31.

33 *Supra*, note 31.

34 *Supra*, note 31.

35 "Wallace Update: Damages for Bad Faith Dismissal in Canadian Courts of Appeal" (2003), 61(3) *The Advocate* 389 at 401.

36 [2004] O.J. No. 5238

37 [2004] B.C.J. No. 2209

38 In *Clendenning v. Lowndes Lambert (B.C.) Ltd.* (2000), 82 B.C.L.R. (3d) 239 (C.A.) the British Columbia Court of Appeal stated at para. 84: