

# A vote of sanity in employee claims of bad faith

June 2, 2008

*A recent unanimous Ontario Court of Appeal decision puts limits on what qualifies as “bad faith” in the manner of termination.*

Wrongful dismissal isn't what it used to be. Dismissed employees now look far beyond notice entitlements and severance to routinely include a claim for additional damages based on allegations of an employer's bad faith or unfair dealings during the dismissal process.

These claims known as “Wallace” damage claims after the leading Supreme Court of Canada decision on the issue have become commonplace, and few plaintiffs fail to assert them in conjunction with their principal claims in wrongful dismissal actions.

The Ontario Court of Appeal has now raised the bar significantly for Wallace damage claims, in the case of *Mulvihill v. Ottawa (City)* released on March 25, 2008. In that case, the Court overturned an award of Wallace damages and set some key parameters for these claims in the future.

## **Employee dismissed for cause**

The plaintiff was an employee of the City of Ottawa. In the fall of 2004, based on conflicts she was having with her supervisors, she made a complaint of harassment. She also went on sick leave at this time. The City made a thorough investigation of the complaint and dismissed it. The plaintiff wasn't satisfied with the result and refused to return to work unless she was reassigned to another department.

In addition, rather than have the harassment decision reviewed through proper channels, she sent an email message of complaint about her supervisors to both the City Manager and the Mayor. As a result, the plaintiff was dismissed for insubordination. She sued for damages alleging wrongful dismissal.

The City of Ottawa pled a just cause defence, but amended the defence after the pre-trial discovery examinations and agreed to pay the severance amount specified in the employment contract. There was still a dispute over costs however, and the case went to trial.

The trial judge awarded severance under the contract plus an additional five and a half months as Wallace damages, finding bad faith for two reasons:

1. The dismissal for cause was “not warranted”
2. The dismissal took place while the employee was on sick leave.

The City of Ottawa appealed the decision.

## **Wallace damages overturned**

The Court of Appeal overturned the Wallace damages award and disagreed with each of the two reasons for granting the award.

- **Just cause.** The Court of Appeal stated that the mere fact that just cause is alleged but not proven does not automatically mean that Wallace damages are to be awarded. So long as the employer has a reasonable basis to dismiss an employee for cause, it has a right to take that position without fear that it will be found to have acted in bad faith. In addition, abandoning a claim of just cause is not evidence of bad faith, as there are many reasons, including a willingness to compromise and reach a settlement, which could justify this action. The Court of Appeal found there was ample reason for the City of Ottawa to have concluded that a dismissal for cause was justified.
- **Dismissal while on sick leave.** The Court of Appeal found that the mere fact that the plaintiff was on sick leave at the time of termination does not necessarily mean that the dismissal was conducted unfairly or in bad faith. There must be other evidence of that type of conduct for a finding of bad faith. Even if the Court agreed with the trial judge's finding that the City made a "mistake" in dismissing the employee while on sick leave, a mistake alone is not conduct that is unfair or evidence of bad faith.

The plaintiff in this case was described by both courts as a "difficult" employee, and if anything, this case shows that it is possible to be mistaken so long as one is also dealing fairly with such an employee during the termination process without fear that an award of Wallace damages is inevitable. The City followed proper procedures, made many accommodations, and had a reasonable basis for concluding it could terminate for cause.

The case will be referred to often in future actions in which Wallace damages are claimed.

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