



Employment Update

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NEW CASES CHANGE THE RULES FOR DAMAGES IN WRONGFUL DISMISSAL CASES

Mark E. Geiger

A little over eight years ago, McIsaac J. released the judgment in the now famous *Keays v. Honda* case. After 29 days of trial the court was convinced Mr. Keays had been very badly treated by his employer, Honda. The court awarded *Wallace* damages extending the notice period from 15 months to 24 months because of the manner of dismissal. In addition, the court awarded \$500,000 as punitive damages, a costs premium, and costs. On appeal, the Ontario Court of Appeal reduced the costs premium and the punitive damages award to \$100,000.

The Supreme Court ultimately overruled and quashed the punitive damages award, the *Wallace* notice extension, and the costs premium. It also took the opportunity to ‘redefine some aspects of the law of damages in the context of employment.’ In summary, the Supreme Court found:

1. Extending the notice period (i.e. awarding *Wallace* damages) was not an appropriate way to compensate for the manner of dismissal. The court concluded that since the common law presumes the right to terminate a contract

by giving reasonable notice, normal distress and hurt feelings resulting from termination are not compensable.

Rather, in order to be recoverable, damages must have been in the reasonable contemplation of both parties. Therefore, damages resulting from the conduct of dismissal are only available where the employer has engaged in conduct during the dismissal process that is “...unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.”

2. Damages attributable to the manner of dismissal should be established by the court compensating for the ‘actual damages’ that occurred, and not by an arbitrary extension of the notice period.
3. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.

Following this decision, many employment lawyers came to the conclusion that both *Wallace* damages and punitive damages in wrongful dismissal cases were effectively no longer available. However, cases since *Honda* suggest that these damages are far from dead.

“The Federal Court of Appeal accepted that Mr. Tipple’s reputation was damaged by false accusations related to his termination and restored the \$250,000 award for loss of reputation.”



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Tipple v. Canada (Attorney General), 2012 FCA 158 (CanLII)

In *Tipple v. Canada*, a special advisor to Public Works and Government Services Canada (“PWGSC”) pursued a grievance under the *Public Service Labour Relations Act* arising from the termination of his employment and damage to his reputation in part arising from the suggestion that his employment was terminated due to misconduct.

The Adjudicator awarded Mr. Tipple damages in excess of \$1.3 million: approximately \$690,000 for lost wages, \$110,000 for lost performance bonus and \$110,000 for lost benefits, \$125,000 for ‘psychological injury’ and \$250,000 for loss of reputation. The Adjudicator found that the actions of the Government department had contributed to Mr. Tipple’s damages, and they had not taken steps to minimize the damage to his reputation that they should have taken. The Adjudicator also awarded legal costs incurred by Mr. Tipple as a result of the PWGSC’s decision to not disclose relevant documents in a timely fashion - to the tune of \$45,322.03.

The Attorney General sought judicial review.

At the Federal Court level, the court, relying on *Honda*, found that Mr. Tipple was entitled to moral damages, but found that the amount was too high and remitted the matter back to the adjudicator to be reassessed. The court also struck down the damages awarded in respect of legal costs.

The Federal Court of Appeal accepted that Mr. Tipple’s reputation was damaged by false accusations related to his termination and

restored the \$250,000 award for loss of reputation. The damages relating to the failure to disclose documents was also restored as being a lawful and reasonable exercise of the Adjudicator’s authority to control the adjudication process.

Where Have Trial Courts Gone Lately?

A number of more recent lower court decisions have also dealt with the issue of additional or punitive damages in wrongful dismissal actions.

Pate Estate v. Galway Cavendish and Harvey (Township), 2011 ONSC 6620

In *Pate Estate*, Mr. Pate was a building inspector with the Municipality dismissed without notice. His employer alleged that he kept permit fees. Mr. Pate was charged criminally and eventually acquitted.

Prior to trial, the parties agreed that a twelve month notice period was appropriate. The issues before the judge, therefore, included whether additional damages were warranted, including *Wallace* damages, aggravated and punitive damages and damages for malicious prosecution.

In December 2009, the court awarded *Wallace* damages equal to four months’ wages. The court found that the case for malicious prosecution had not been made out, but awarded special damages of \$7,500, the legal fees for the criminal defence, general and aggravated damages of \$75,000, and punitive damages of \$25,000. The court indicated that more would have awarded more but that it was bound by ‘principles of proportionality’.

The case was appealed to the Ontario Court of Appeal. The Court of Appeal referred the matter

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of the malicious prosecution claim back to the trial judge for a new trial on those issues and directed the court to reconsider the quantum of punitive damages.

In the end, the court awarded \$550,000 as punitive damages due in large part to the judge's finding that the Municipality withheld exculpatory evidence from police. The court concluded that had this evidence been provided to police, Mr. Pate would not have been charged. The court further considered the ten-year ordeal that effectively destroyed Mr. Pate's employability and significantly impacted his family. The Supreme Court refused leave to appeal.

Higginson v. Babine Forest Products, 2010 BCSC 614

In *Higginson*, a 34-year employee was terminated with cause. He had been an electrical supervisor in a mill where closure was imminent. The inference at trial was that the termination was motivated by a desire to avoid payment of significant notice damages. The allegations of cause failed and the employee was granted 24 months' notice, with some deduction for failure to mitigate. The award amounted to about \$240,000. However, the jury also awarded punitive damages of \$573,000.

The Company appealed the punitive award but the parties settled before the appeal was heard.

Kelly v. Norsemont Mining Inc., 2013 BCSC 147

In this case, a self-represented litigant successfully completed a trial in excess of 30 days' duration and achieved a significant punitive damage award of \$100,000.

It is clear from the judgment that the behaviour of the defendant, not only at the time of termination, but also after - by vigorously pursuing spurious reasons for termination - influenced the size of the punitive award.

Conclusions

It is difficult to find any unifying trends or principles from the cases I have reviewed. Apart from the fact that larger awards are becoming more common, the theories on which these awards are based are often very different, and sometimes appear to be contradictory. For this reason, it is essential to 'stay on top' of the trends in order to properly deal with the law in this rapidly changing area.

One thing is clear, however. Employers are expected to treat employees with candour and fairness during any termination process. Failure to do so can result in very significant damages in addition to the notice requirements, whatever the theory may be! ■

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