Perspective patronale en droit de l'emploi et relations de travail
Labour and Employment Law for Employers
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Court mulls "appropriate deterrents" against employees who frivolously seek *Wallace* damages

FOCUS readers know that, after the Supreme Court of Canada's decision in Wallace v. United Grain Growers (see "Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules"), a dismissed employee's notice period can be lengthened when the employer displays bad faith or engages in callous or insensitive treatment in connection with the termination. Perhaps not surprisingly, this has led counsel for dismissed employees to attempt to portray the actions of employers as sufficiently heavy-handed and hard-hearted to justify an extension of the notice period. Now, an Ontario Superior Court judge has warned plaintiffs that they risk sanctions when such claims are made frivolously.

Yanez v. Canac Kitchens (December 16, 2004) involved a foreman who was terminated after more than 15 years of service due to a downturn in the employer's business. At trial, Yanez was awarded a notice period of 12 months, but his claim for a *Wallace* extension to the notice period – a claim that took up more than half of the total trial time – was rejected. Yanez argued that he was entitled to *Wallace* damages because the employer had originally offered him 13 weeks of severance, based on the mistaken belief that he had only 10 years of service. The dismissal letter stated that the offer exceeded the statutory minimum required under the *Employment Standards Act, 2000*, indicated that the payment was conditional upon Yanez signing the offer and release, and stated that the offer was "more than fair in the circumstances".

When the employer discovered its error, it immediately offered more funds, amounting to the statutory minimum plus four days. The trial judge specifically found that the employer had not tried to short-change Yanez and accordingly rejected the suggestion by Yanez that the first offer entitled him to *Wallace* damages.

The court then considered the adjusted offer and the letter requiring the release. It held that neither made the employer liable to pay *Wallace* damages. At most, the court stated, the employer's offer of the statutory minimum exposed it to an action for common law damages for wrongful dismissal, and the release could fail because it offered nothing of value to Yanez in return for his signature. However, the fact that the employer had been less than generous did not make its actions callous and in bad faith. This was not the kind of conduct the Supreme Court of Canada had had in mind when it issued its decision in *Wallace:*

> "Canac was not trying to play the kind of "hardball" that the Supreme Court of Canada warned against in the *Wallace* case. When this employer discovered its mistake and rectified it, it made the payment to the employee in a timely fashion. I find that Canac's conduct was neither malevolent or egregious but simply sloppy, as was determined by the Ontario Court of Appeal in *Gismondi v. Toronto*... ." (See "Appeal Court denies "Wallace" damages to unsuccessful candidate of "sloppy" hiring process")

DISAPPROVAL EXPRESSED

Having dismissed the claim for *Wallace* damages, the court expressed its irritation at having to adjudicate a claim that clearly had no merit. While the court imposed no sanctions against Yanez, it warned that, in future, frivolous claims for *Wallace* damages might be costly for plaintiffs:

> "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.
> [T]hought 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."

In Our View

The approach suggested by the court parallels that taken towards employer defendants who assert cause and then abandon the position when trial begins. The concern in both cases relates to the waste of scarce legal resources on claims that should never have been litigated. Employers who believe that they have not demonstrated any bad faith in the implementation of a termination, or who believe that a dismissed employee suffered no demonstrable harm or prejudice apart from the loss of employment, may wish to discuss with counsel whether there are grounds to argue for a reduction in an employee's notice due to a weak *Wallace* claim.

For further information, please contact André Champagne at (613) 940-2735.

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