
Dismissal of an employee on sick leave – Ontario Court of Appeal rules *Wallace* damages are not automatic

Employers are well aware of the Supreme Court of Canada's landmark decision in *Wallace v. United Grain Growers Ltd.* (1997). It holds that employers are obliged to act in good faith when they dismiss employees. An employer's failure to live up to this obligation may be compensated by extending the notice period owing to the dismissed employee. The *Wallace* decision recognized the inherent vulnerability of employees when their contracts are terminated. Is this vulnerability exacerbated when the employee is terminated while he or she is on sick leave, with the result that *Wallace* damages are automatically warranted? The Ontario Court of Appeal recently considered this question in *Mulvihill v. Ottawa (City)* (March 25, 2008).

In *Mulvihill*, the employee began working for the Corporation of the City of Ottawa in 2001. She was employed for three years. Over time the employment relationship became more and more strained. Co-workers and supervisors said they had difficulty working with the employee and that they found her to be difficult and aggressive. There were also complaints regarding the quality and accuracy of her work. This strained relationship reached its climax in the middle of 2004 when the employee filed a harassment complaint against both a co-worker and her supervisor. She did not go to work and produced a note from her doctor stating that her absence was required for medical reasons.

The City launched an investigation of her harassment complaint and found that the events that gave rise to the complaint did not constitute harassment. The City requested that the employee return to work. She refused. The employee, not satisfied with the results of the City's investigation, sent an e-mail to two senior city officials and the mayor. She again alleged harassment and attacked the credibility and competence of her supervisors. The City then terminated her employment on the basis of insubordination and her failure to return to work. The employee sued for wrongful dismissal. In the early stages of the trial the City amended its defense by removing its argument that the termination was for cause. It paid its ex-employee three month's salary in lieu of notice.

The trial judge found that the employment contract required a severance of four-and-a-half months' salary and benefits. He awarded an additional five-and-a-half months in *Wallace* damages on the basis that the dismissal was "not warranted" and because the employee was terminated while on sick leave. The employer appealed, arguing that *Wallace* damages were not justified.

THE COURT OF APPEAL

The issue at the Court of Appeal was whether the City's conduct in firing Mulvihill warranted *Wallace* damages. The Court set out the standard for employers as provided in *Wallace*:

"...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."

In applying this standard, the Court of Appeal considered whether the employer acted in bad faith by dismissing the employee without just cause:

“The fact that in the present case the City abandoned the just cause defense at the outset of the trial cannot be taken as evidence of bad faith or unfair dealing at the time of dismissal....Employers must be free to abandon a position based on cause without fear that abandonment will automatically lead to liability for *Wallace* damages.”

The Court then concluded that, in the circumstances, the employer had been “candid, honest and forthright” about why it was dismissing the employee. The employer had communicated the basis of the termination (insubordination). It had also communicated the specific conduct that gave rise to the employer’s view that she had been insubordinate (the e-mail to the mayor and her failure to return to work). The Court found that the employer’s position was not unreasonable and was different from circumstances where employers fabricate reasons to establish cause.

The Court then considered whether the fact that the employee was on sick leave at the time of dismissal warranted *Wallace* damages. The Court stated,

“The mere fact that Ms. Mulvihill was on sick leave at the time of termination does not necessarily mean the dismissal was conducted in an unfair or bad faith manner.”

The Court noted that for the purposes of *Wallace* damages, it is the *manner* of the dismissal, taking into consideration the full context of the employment relationship that must be examined to determine whether there was bad faith conduct on the part of the employer. The Court noted that there was no evidence at trial that could support a finding that the City was untruthful, misleading or unduly insensitive in the way it dismissed Mulvihill. As a result, the Court of Appeal overturned the trial judge’s decision to award *Wallace* damages. The employee’s compensation was limited to four-and-a-half months’ salary and benefits.

In Our View

Although the Court of Appeal’s decision in *Mulvihill* pre-dates the Supreme Court of Canada’s landmark decision in *Honda v. Keays*, the two decisions nevertheless remain consistent. Readers of Focus will recall that in *Honda v. Keays* the Supreme Court of Canada required *Wallace* damages to be based on actual damages, as opposed to an arbitrary lengthening of the notice period (see “Supreme Court of Canada overturns \$100,000 punitive damages award in wrongful dismissal and restates law of damages in employment cases” on our Publications page). In spite of this change, the employer’s duty to act in good faith in the manner of dismissal, and the bad-faith conduct that will give rise to compensatory damages, remain the same. In this respect, both the *Mulvihill* and the *Honda* decisions relied heavily on the decision in *Wallace* and make it clear that *Wallace* damages do not arise automatically where the employee is sick at the time of termination. *Mulvihill* also indicates that *Wallace* damages will not be automatic where an employer dismisses an employee for cause but then later changes that position. Such a change can be based on numerous factors including a willingness to resolve the dispute without litigation. The Court indicated that even in circumstances where an employer terminates for cause and is found to be wrong, *Wallace* damages will not automatically flow as long as the employer had a reasonable basis for believing that there was cause. Such situations are distinguishable from dismissals in which an employer has no plausible basis for cause but attempts to fabricate allegations of misconduct in order to establish one. Such fabricated allegations are untruthful, misleading and insensitive and are the descriptions of the unfair conduct that gives rise to compensatory damages discussed in *Wallace*.

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