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Wallace damages still kicking around

Ontario Court of Appeal upholds notice extension based on bad-faith conduct

| BY RONALD MINKEN |

IT HAS BEEN more than a year since the Supreme Court of Canada ruled on the appeal in *Keays v. Honda Canada Inc.* This decision was one of the most highly anticipated decisions in employment law, providing insight and guidance for lower courts in awarding both damages for bad faith in the conduct of dismissal (formerly known as *Wallace* damages) and punitive damages. More specifically, the ruling essentially removed the ability of courts to award what has commonly been referred to as *Wallace* damages.

Wallace damages first appeared in the Supreme Court's decision in *Wallace v. United Grain Growers Ltd* in 1997. It stemmed from the power imbalance in the relationship between the employer and the employee. In recognition of this dynamic, the court determined employers should be held to an obligation of good faith and fair dealing in the course and manner of dismissing employees.

"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 in bad faith by being, for example, untruthful, misleading or unduly insensitive," the court said.

Until recently, the penalty for

breaching this good faith obligation was an increase in the length of the notice period the employer is required to give the dismissed employee. This changed, however, with the ruling in *Keays*.

Top court sets new employment law principle

Making its mark in legal history, the Supreme Court, now referring to *Wallace* damages as "damages for conduct in dismissal," said in *Keays*: "There is

WRONGFUL DISMISSAL

no reason to retain the distinction between 'true aggravated damages' resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle (where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover damages). Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove the manner of

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Fired manager gets pay in lieu of notice to fill gap to new job

A NEW BRUNSWICK man is entitled to double the pay in lieu of notice he received after being dismissed because he was in an important managerial position, even if only for slightly more than three years, according to the New Brunswick Court of Queen's Bench.

Glenn Ladd, 56, was the general manager of consumer electronics for Fredericton, N.B.-based Cox Radio and TV. He managed 39 employees spread over different locations and was in charge of the purchasing and pricing of consumer electronics for the business. He was employed with Cox Radio for a little more than three years but had 30 years of experience in similar jobs with other companies. During that time, he had also worked for a financial planning organization.

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Employer's conduct warranted *Wallace* extension: Court

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dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages.”

As a result, *Keays* removed the courts' ability to increase the notice period by an award of *Wallace* damages. Instead, the courts may only award damages attributable to bad faith conduct in the manner of dismissal under the *Hadley* principle as is done for aggravated damages.

Despite this ruling by the highest court in Canada, it appears some lower courts prefer to continue awarding an extension of the notice period with *Wallace* damages, thereby not applying the legal principle from *Keays*.

Ontario Court of Appeal keeps *Wallace* alive

In the recent case *Slepenkova v. Ivanov*, the employee worked as a buyer's agent for an employer contracted by Re/Max. From 2003 to 2006, the employee signed three agreements to work for the employer, each of which specified the employee was an "independent contractor." In addition to the agreements the employee entered into with the employer, she also signed an agreement with Re/Max, which contradicted the agreements signed with the employer.

In 2006, the employer wished to restructure the signed agreement with the employee, which would remove all bonuses. When asked to sign the new agreement, the employee refused. In response, the employer terminated her by way of letter and sent out a pager message to all other agents working for the employer stating, "We are sorry to inform you (the employee) has been terminated from our team for non-production and refusal to accept the new contract terms."

The employer provided two weeks' notice. The employee brought an

action against the employer for wrongful dismissal seeking reasonable notice and *Wallace* damages.

Rendering a decision prior to the release of the *Keays* decision, the trial court awarded the employee four months' reasonable notice and a further two months for *Wallace* damages due to the employer's unfair and bad faith conduct exhibited in sending the message to all other employees regarding the termination. The trial court found the employer's communication to the other agents amounted to conduct that was unfair and in bad faith, since the allegation she failed to adequately perform her duties was unfounded and damaging to her reputation.

"(The employer) used the termination of (the employee) as a tool to ensure that the other agents signed the amended agreements," the trial court said. "This tactic was unfair."

The employer appealed to the Ontario Court of Appeal.

The Court of Appeal upheld the reasonable notice and, more importantly and perhaps astonishingly, it also upheld the trial court's finding of two additional months' notice for *Wallace* damages.

"In our view, this finding of fact was sufficient to sustain the *Wallace* award, even in light of the Supreme Court of Canada's decision in *Keays vs. Honda Canada Inc.*, which was rendered after the trial judge's decision in this case," the appeal court said.

The Ontario Court of Appeal's decision in *Slepenkova* has caused confusion and uncertainty for employers, employees, employment lawyers and other courts. With the result being in stark contrast with the Supreme Court of Canada's legal principle of not simply extending the notice period as compensation for an employer's unfair or bad faith actions, the Court of Appeal's decision has led some to question whether *Wallace* damages can still be awarded as they were in the pre-*Keays* era. If this is the case, then how do we proceed with these conflicting deci-

sions?

Perhaps the most appropriate way of interpreting the Ontario Court of Appeal's ruling is to view it as a transitional case decided in the midst of a landmark decision that has since changed the way damages are awarded in employment law cases. Nevertheless, at the end of the day we still have two sound legal principles stemming from these contradictory decisions. Such vagueness may only be remedied either through the course of more judgments on *Wallace* damages, or in an appeal in *Slepenkova* to the Supreme Court of Canada, where consistency may restrain it from upholding the Ontario Court of Appeal's decision. ■

For more information see:

- *Slepenkova v. Ivanov*, 2009 CarswellOnt 3749 (Ont. C.A.).
- *Keays v. Honda Canada Inc.*, 2008 CarswellOnt 3743 (S.C.C.).
- *Wallace v. United Grain Growers Ltd.*, 1997 CarswellMan 455 (S.C.C.).



ABOUT THE AUTHOR

Ronald S. Minken

Ronald S. Minken is a senior lawyer with Minken and Associates P.C., an employment law boutique in Markham, Ont. He can be reached at (905) 477-7011 or www.EmploymentLawIssues.ca.

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