

## CASE IN POINT: WRONGFUL DISMISSAL

# Dismissed employee gets retrial of malicious prosecution claim

*Employee awarded more than \$100,000 for bad treatment in dismissal but employer also had him falsely charged with theft*

## BACKGROUND

### Going from bad faith to worse

**WRONGFUL DISMISSALS** are something employer should try to avoid, both in principle and for practical reasons. Employees are entitled to a notice period, or pay in lieu of, commensurate with their service time and position, as well as other factors such as their age and difficulty of finding similar employment. If an employer fails to provide reasonable notice according to those factors, a court often will.

Additional damages on top of reasonable notice can be awarded if the employer acts in a particularly mean-spirited and bad-faith way in dismissing the employee. Aggravated, punitive and bad-faith damages — such as in the landmark Wallace and Keays decisions — can add a lot of cash on top of an employee's notice entitlement. And perhaps one of the worst things an employer can do in terminating someone's employment is to accuse the employee of an offence — such as theft — without real proof.

| BY RONALD MINKEN |

**THE ONTARIO** Court of Appeal has found that an award of more than \$100,000 for an employer's bad-faith misconduct in firing an employee was not enough because it didn't hold the employer liable for malicious prosecution for an unfounded theft accusation.

In *Pate v. Galway-Cavendish & Harvey (Township)*, the appeal court reviewed the trial judge's decision of the dismissal of an employee's claim of malicious prosecution and the award of punitive damages arising from the termination of his employment.

John Pate had worked as a chief building official for the Township of Galway-Cavendish, Ont., for nine years and then as a building inspector for three months, when he was dismissed without notice. The dismissal was as a result of alleged discrepancies regarding permit fees that were paid to him and not remitted to the township. The township didn't provide any details of

the allegations to Pate, nor was he given the opportunity to respond to them. Rather, he was told that the matter would not be reported to the police if he immediately resigned. Pate didn't resign and the township went to the police with allegations of theft. Pate was charged by police and later acquitted of all charges.

#### Aggravated, punitive damages for employer's conduct

At trial, the parties agreed on a 12-month notice period for wrongful dismissal. The claim for malicious prosecution was dismissed and the trial judge added a four-month bump-up of Wallace damages for the township's bad-faith conduct in the dismissal. In addition, the township was ordered to pay Pate \$75,000 for general damages, aggravated damages for intentional infliction of mental distress, social and economic damages, as well as \$7,500 for special damages and \$25,000 for punitive damages.

The trial judge's decision was based, in part, on findings that the actions of the township were a "contributing factor to the end of (Pate's) marriage and perhaps even to the business he operated with his spouse," suffering "humiliation in the eyes of the public. ... To have been wrongfully dismissed and then to have been accused of criminal activity for which one is then exonerated, has left (Pate) with a feeling of the stigma of accusation. His career as a municipal official has never recovered."

In support of aggravated damages, the trial judge found that the "township decided to terminate (Pate) without advising him as to reasons; without providing him an opportunity to answer allegations made against him; terminated him and then mounted an investigation in order to build a case to justify the termination."

The trial judge ordered punitive damages on the basis that the township's withholding of evidence that could have helped clear Pate of the charges amounted to "reprehensible conduct" which was "a departure to a marked degree from ordinary standards of decent behaviour."

#### Fired employee sought liability for malicious prosecution

Pate appealed the lack of damages for malicious prosecution, and the appeal court ordered a new trial. The court found that the trial judge set too high a standard for proving malicious prosecution against a private individual. In addition, the court found that the trial judge made findings about malice when addressing damages for

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## Full days in office were less than half of workdays

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wrongful dismissal that were inconsistent with his findings about malice with respect to the test for malicious prosecution — a plaintiff must prove that the prosecution was initiated by the defendant. A new trial regarding the award of punitive damages was based on these damages being reconsidered in the event malicious prosecution is determined at trial. Given the evidence of significant misconduct by the employer that lasted over a lengthy period with a devastating impact on the

employee, there was no explanation by the trial judge why a high award of punitive damages would offend the “principles of proportionality.”


**The trial judge set too high a standard for proving malicious prosecution against a private individual.**

**Impact on employers**

Employers should ensure that proper investigations of misconduct

are performed and that the results are put to the employee for explanation. The objective should be full disclosure of all information in the investigation process, rather than building a case to justify the termination. Reporting allegations to the police can be considered egregious conduct by an employer and should only be done in exceptional circumstances.

**Impact on employees**

Employees should be aware that employers are required to perform thorough investigations and allegations of misconduct should be put to them prior to any termination. Police involvement initiated by employers is fraught with issues and is done at great risk to employers. If the employer reports allegations of misconduct to police and the employee is charged criminally and then acquitted, the employer may have to pay substantial damages for intentional infliction of mental distress as well as punitive damages. Employees should consult with experienced counsel to review the circumstances surrounding the termination, including a thorough review of the investigation process. 

**For more information see:**

■ *Pate v. Galway-Cavendish & Harvey (Township)*, 2011 CarswellOnt 7802 (Ont. C.A.).

## A difference of opinion

**THE TRIAL** judge in *Pate v. Galway-Cavendish & Harvey (Township)* didn't think the employer's accusations of theft to police constituted malicious prosecution, but the Court of Appeal felt a closer examination was needed.

**Trial judge:** “In this case, there is no evidence upon which I can find that the (township) exercised such an improper purpose and I cannot simply infer malice in these circumstances. Indeed, there may have been incompetence, honest mistake, negligence or even gross negligence in the way in which the (township) put in motion the pursuit of charges against (Pate). However, that is not sufficient for a finding of malicious prosecution.”

**Court of Appeal:** “Particularly in the light of his findings that aggravated damages were justified, at least in part, because the township terminated Mr. Pate's services, offered him clemency if he would resign, subsequently mounted an investigation to justify its actions and failed to disclose exculpatory evidence to the police, the trial judge's finding that this case calls for aggravated damages appears to contradict his conclusion that there was no evidence based on which he could find an improper purpose. Moreover, considered in the light of these circumstances, the lack of reasonable and probable grounds on an objective standard could also support a finding of malice.”

**Trial judge:** “I find that the actions of the (township) in withholding exculpatory evidence in this matter to have been an arbitrary decision made by one of its officers and which amounted to reprehensible conduct. Had the disclosure been made, no criminal charges would have been levelled against (Pate) in this matter. Such conduct, to this court, is a departure to a marked degree from ordinary standards of decent behaviour.”

**Court of Appeal:** “The findings that (Pate's supervisor's) failure to disclose exculpatory evidence amounted to ‘reprehensible conduct’ and ‘a departure to a marked degree from ordinary standards of decent behaviour’ fly in the face of the trial judge's earlier conclusions that the township was no more than grossly negligent and that (the supervisor) did not knowingly withhold exculpatory evidence from the police.”



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