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THIS IS A SUMMARY OF EMPLOYMENT MATTERS OF INTEREST TO THE  
BUSINESS COMMUNITY, FROM A LITIGATOR'S POINT OF VIEW

SUMMER 2008

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***Recent decisions of both the Ontario Court of Appeal and Supreme Court of Canada suggest that we are entering a new and more conservative era in how the Courts approach wrongful dismissal damages. This employer friendly approach is a welcome change for employers and definite cause for concern for terminated employees seeking redress from their former employers.***

**Ontario Court of Appeal revisits *Wallace* Damages and sets the threshold high in *Mulvihill v. City of Ottawa* ...**

In a decision released March 25, 2008, the Ontario Court of Appeal commented on the proper application of the *Wallace* Doctrine in *Mulvihill v. City of Ottawa*. The *Wallace* Doctrine is an employment law doctrine that speaks to a dismissed employee's right to additional damages in a wrongful dismissal context. This doctrine was originally established by the Supreme Court of Canada in the 1990's in its decision in *Wallace v. United Grain Growers*. In that decision, the Supreme Court stated that when the employer engages in conduct during the course of dismissal which is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive", a trial judge is entitled to extend the dismissed employee's entitlement to reasonable notice damages as a means to compensate the dismissed employee for such conduct. In *Mulvihill v. City of Ottawa*, the Ontario Court of Appeal revisits the *Wallace* Doctrine and states clearly that neither the act of alleging "cause" for termination, which is later retracted, nor the mere fact of a termination while the employee is on medical leave will, in and of itself, give rise to the award of *Wallace* damages in the absence of actual evidence that the termination was carried out in bad faith or there was unfair dealing.

The decision involved the termination of Mulvihill, an employee of the City of Ottawa who had filed a harassment complaint. The harassment complaint was investigated and was dismissed. Mulvihill did not seek review of the decision in accordance with the City's policy, but instead, wrote a letter refusing to return to work unless she was provided with another position. In that letter she also complained

about her supervisors' competency. Sometime thereafter, the City terminated Mulvihill's employment for alleged insubordination. In response, Mulvihill commenced an action for wrongful dismissal. The City's allegation of cause was withdrawn at the outset of trial therefore leaving the amount of Mulvihill's notice entitlement as the only remaining issue in dispute between the parties. The Trial Judge determined that Mulvihill was entitled to 5.5 months of *Wallace* damages, in addition to 4.5 months compensation in lieu of notice in accordance with her employment contract. The award of *Wallace* damages was justified by the Trial Judge first as the dismissal was "not warranted" and second, because it occurred while she was on sick leave.

On an appeal filed by the City, the Ontario Court of Appeal held that even though cause for termination was alleged and not ultimately pursued, and Mulvihill was dismissed while on leave, neither fact warranted an award of *Wallace* damages in this case.

The Honourable Madam Justice Gillese on behalf of the Court wrote:

"...baseless, unfounded or fabricated allegations of misconduct sufficient to constitute cause are, by definition, untruthful, misleading and insensitive – the very description of bad faith or unfair conduct given in *Wallace*... ."

There are numerous reasons why an employer might resile from the position that dismissal was for cause, including a willingness to compromise and to resolve disputes without the necessity of a trial. Employers must be free to abandon a position based on cause without fear that abandonment will automatically lead to liability for *Wallace* damages."

Similarly, the Court of Appeal found that termination while someone is on sick leave, while possibly a mistake, does not warrant the award of *Wallace* damages absent other evidence of bad faith, unfair dealing or "playing hardball", such as cancellation of accommodation for an employee's illness as a reprisal for the employee having made a human rights claim.

Although the Ontario Court of Appeal's decision in *Mulvihill v. Ottawa* was released prior to the decision of the Supreme Court of Canada in *Keays v. Honda*, which also deals with the *Wallace* Doctrine and discussed more thoroughly below, the Ontario Court of Appeal's decision is a strong indication that Ontario's highest court is prepared to join the Supreme Court of Canada in taking a more conservative and employer friendly approach to employment law disputes.

*Mulvihill v. Ottawa (City)*, [2008] CarswellOnt 1511 (Ont.C.A.).

### **Supreme Court of Canada applies objective standard when assessing mitigation efforts in *Evans v. Teamsters* ...**

In a Supreme Court of Canada decision released on May 1, 2008, the Supreme Court takes a conservative approach when assessing an employee's efforts to mitigate his damages after launching wrongful dismissal litigation alleging constructive dismissal in *Evans v. Teamsters*.

Evans was employed as a business agent for Teamsters Local Union No. 31 in its Whitehorse, Yukon office for over 23 years. His employment was terminated after the newly elected union executive took office in January 2003. Following his notice of dismissal, Evans advised the Union that he was prepared to accept 24 months' notice of termination of his employment, offering to continue his

employment for 12 months followed by a payment of 12 months salary in lieu of notice. The Union rejected Evans' offer but did respond by requesting that Evans return to his employment to serve out the balance of his 24 month notice period. Evans refused to return to work and sued for wrongful dismissal seeking 22 months termination pay.

At trial, the Judge applied a purely subjective test when assessing the reasonableness of Evan's refusal to return to work for the Union for the remainder of his notice period which means that the Trial Judge only gave consideration to what Evans himself thought was reasonable in the circumstances. In doing so, the Trial Judge concluded that Evans had been wrongfully dismissed by the Union and that in the circumstance, he was entitled to refuse the Union's offer to attend work for the balance of his notice period. As a result, the Trial Judge awarded Evans 22 months salary in lieu of notice.

The Yukon Court of Appeal allowed the Union's appeal, finding that the Trial Judge had erred in law by applying a purely subjective test when assessing whether Evans refusal to return to work for the Union for the balance of his notice period was reasonable. The Court of Appeal held that an objective standard of reasonableness was the proper test to be applied to the facts of the case, meaning that the test was not what Evans would do in the circumstances, but rather what a "reasonable person in similar circumstances" would do. In doing so, the Court of Appeal set aside the Trial Judge's damages award in its entirety and held that Evans' refusal to return to work for the Union was unreasonable and constituted a failure to mitigate his damages.

On appeal filed by Evans, the Supreme Court of Canada held that Evans' appeal should be dismissed. In doing so, a majority of the Supreme Court concurred with the Yukon Court of Appeal's finding that the Trial Judge had erred when he applied a purely subjective test to assess the reasonableness of Evan's decision to refuse the Union's offer to attend work for the balance of his notice period. After a thorough review of the facts of the case, the majority of the Supreme Court also concluded that Evan's refusal to return to work for the balance of his notice period was not objectively reasonable.

Justice Abella was the lone dissenting Supreme Court Judge. In her dissenting reasons, Justice Abella held that an employee should not be expected or required to mitigate damages by remaining in the workplace from which he or she has been dismissed. To do so, according to Justice Abella, disregards the uniqueness of an employment contract as one of personal service. Justice Abella also found that objective and subjective factors ought to be taken into consideration when assessing the reasonableness of an employee's refusal to return to a workplace that he or she has been dismissed. Different employees will be differently affected by a dismissal and are entitled to consideration being given to the reality of their own experience and reaction. The fact that Evans had few alternative employment opportunities in Whitehorse, other than the Union's offer to return to the workplace, did not entitle the Union to direct Evans to mitigate his damages by working through the notice period in the workplace from which he had been wrongfully dismissed.

This decision is a clear indication that a more conservative and employer friendly approach to issues of mitigation, especially in the constructive dismissal context, is preferred by the Supreme Court.

*Evans v. Teamsters Local Union No. 31* [2008] S.C.J. No. 20

## **Supreme Court of Canada revisits the principles of employment law damages in Canada in *Keays v. Honda* ...**

On June 27, 2008, the Supreme Court of Canada released its long awaited decision in the *Keays v. Honda* case. In a surprising decision, the majority of the Supreme Court, with two of the Justices vigorously dissenting, departed from the decisions of both the Trial Judge and the Ontario Court of Appeal in respect to the proper allocation of damages in a wrongful dismissal case including significantly deflating the *Wallace* Doctrine.

The employee, Keays, was terminated in 1997 after 14 years of employment with Honda, 3 years after being diagnosed with chronic fatigue syndrome. Prior to his termination, Keays had received disability benefits for 1 year, until Honda's insurer discontinued benefits, and then he had returned to work to Honda's disability program. Honda became concerned about Keays' repeated absences from work and questioned his doctor's notes. Honda then requested that Keays attend an independent medical examination ("IME") in order to determine how his disability could be accommodated. On the advice of legal counsel, Keays refused to attend unless Honda explained the purpose, methodology and parameters of the examination. Honda terminated Keays' employment, after providing him with a written warning, for failing to attend the IME.

The Trial Judge found that Keays had been wrongfully dismissed and awarded Keays 15 months reasonable notice damages. He increased the notice period to 24 months by reason of the callous manner of Keays' dismissal, relying on the *Wallace* Doctrine. Further, after finding that Honda had engaged in discrimination, harassment and other misconduct in its dealings with Keays, amounting to an "independent actionable wrong", the Trial Judge also awarded Keays \$500,000 in punitive damages, together with costs on a substantial indemnity scale with a 25% premium.

In a majority decision, the Ontario Court of Appeal reduced the punitive damages award to \$100,000 and reduced the costs premium, but otherwise upheld the Trial decision.

The majority of the Supreme Court, with Justices LeBel and Fish dissenting in part, allowed Honda's appeal in part and dismissed Keays' cross-appeal seeking to reinstate the Trial Judge's punitive damage award.

The majority of the Supreme Court held that the Trial Judge's notice award of 15 months should be upheld but set aside both the *Wallace* damages and the punitive damages awards. The costs premium was also set aside and the costs award adjusted to the standard partial indemnity scale. Costs were awarded to Honda before the Supreme Court.

In setting aside the extended notice awarded by the Trial Judge based upon the manner of dismissal, the Supreme Court held that such damages will only be available if they are in the reasonable contemplation of the parties at the time of the contract. The Supreme Court explained that such damages will be available in the employment law context when an employer engages in conduct during the course of dismissal which is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive". The Supreme Court went on to clarify that such damages should only be compensated through an award that reflects actual damages, rather than by an arbitrary extension of the notice period.

The Supreme Court also held that the Trial Judge made overriding and palpable errors of fact when rendering his decision. In its review of the facts, the Supreme Court found no basis for an award of *Wallace* damages because in the Supreme Court's estimation, Honda had made attempts to

accommodate Keays and had not acted in a bad faith or malicious and outrageous manner deserving of punishment. The Supreme Court further held that punitive damages were restricted to “overt wrongful acts that are so malicious and outrageous that they are so deserving of punishment on their own” and are exceptional in nature. The Supreme Court found punitive damages to be unwarranted and further stated that the lower Courts’ damage awards were, in any event, considerable and an unnecessary duplication of the reasonable notice damages.

Finally, in respect to the discriminatory conduct, the Supreme Court held that the lower Courts erred in concluding that Honda’s conduct amounted to an “independent actionable wrong” for the purpose of awarding punitive damages. The Supreme Court held that the Ontario *Human Rights Code* (“the *Code*”) provided a comprehensive scheme to deal with claims of discrimination and that a breach of the *Code* cannot constitute an actionable wrong for the purposes of punitive damages. The Court found that there was no need to deal with Keays’ request to recognize a distinct tort of discrimination.

The Supreme Court decision *in Honda v. Keays* is yet another indication that the Courts are moving towards a more conservative and employer friendly era when dealing with issues of termination and accommodation.

*Honda Canada Inc. v. Keays* [2008] S.C.J. No. 40.

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