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

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DAMAGES FOR MANNER OF TERMINATION ALIVE AND WELL

Owen Shime, in a labour arbitration decision released April 26, 2010, awarded a dismissed employee \$500,000 in damages. The damage award included past and future income loss representing 8 years of earnings, \$50,000 in damages for mental suffering and an additional \$50,000 in punitive damages.

The employee had a 23 year unblemished service record with the employer. She was injured, outside of the workplace, had surgery and was advised by her doctor to take 4-6 weeks off work. While she was off, her employer videotaped her walking and driving and concluded that she and her doctor were colluding and lying about her medical limitations. The employer did not call the employee in for modified duties, nor did it confront her with the accusations of malingering. Instead, she was terminated for cause.

The employee had a history of abuse and had previously suffered from post-traumatic stress disorder, both unrelated to her employment, but known to the employer. The sudden and unexpected manner of termination and nature of the accusations brought about feelings of a sense of betrayal and caused the post-traumatic stress disorder to recur.

The evidence was that the employee did not have money for both the physiotherapy required to recover from the surgery and the psychotherapy required to treat the post-traumatic stress disorder and had to choose psychotherapy which resulted in longer recovery from surgery.

Of importance to the labour community was the finding by Shime that the Collective Agreement included an implied term of administering it in good faith and that employee had the right to the psychological benefit from that contract which was violated by the employer.

Of importance to all is how damages for bad faith in termination can go far beyond a few months' additional notice (formerly the Wallace bump) and could be years of salary, as well as damages for mental distress and punitive damages, both of which were also additional significant awards here.

Greater Toronto Airports Authority v. Public Service Alliance of Canada Local 0004 - April 26, 2010 decision of Owen Shime – Arbitrator

SCANDALOUS AND VEXATIOUS PLEADINGS LEAD TO COST AWARD AGAINST PLAINTIFF EMPLOYEE

The Ontario Superior Court has recently issued a decision in *Taylor et al. v. Design Plaster Mouldings Inc.* which shows what can happen to plaintiff employees if they make scandalous and vexatious allegations in their statement of claim in a wrongful dismissal suit that are found to be unrelated to the dismissal.

Thomas Taylor was terminated from his employment with employer Design Plaster Mouldings Inc. Shortly after being terminated, Taylor commenced a law suit for wrongful dismissal. In his pleadings, Taylor alleged that the principal of his employer had engaged in misconduct which Taylor alleged gave rise to Wallace damages. In response, the employer took the position that the allegations had nothing to do with Taylor's wrongful dismissal claim and brought a motion to strike the allegations from the statement of claim.

In issuing its reasons, the court refused to reproduce the allegations but did note that the allegations, if true, were serious enough to spark cause for concern amongst the shareholders of the employer and the employer's clients. The court also found that the allegations had no basis in law to justify a claim for Wallace damages, were unrelated to the plaintiff's claim for wrongful dismissal and were plead solely to cause the employer's principal embarrassment. For this reason, the court struck the allegations from the plaintiff's statement of claim. In deciding the motion in favour of the employer, the court also awarded the employer costs of \$3,000.

Thomas Taylor et al. v. Design Plaster Mouldings Ltd. 2010 ONSC 237 (CanLII)

PENSION PAYMENTS ARE NOT DEDUCTIBLE FROM A DAMAGE AWARD FOR WRONGFUL DISMISSAL

Waterman v. IBM Canada Limited considered the measure of damages for a 40 year employee terminated without cause. In particular, the court considered whether Richard Waterman's pension payments should be deducted from his salary payments in lieu of notice.

Waterman worked as an Advisory Software Services Specialist, a non-managerial position without supervisory responsibilities. He was terminated at age 65 as a result of company restructuring. Waterman looked for other work, and successfully replaced part of his lost income, but also opted to commence receipt of his pension under IBM's defined-benefit pension plan (the "Plan") The Plan is funded solely by employer contributions. Under the terms of the Plan, a member is not allowed to receive a pension and employment income unless he or she has reached the age of 71.

IBM asserted that Waterman's pension payments should be deducted from his damages award, or else he would experience "double recovery."

The court considered itself bound by the prior decision in *Girling v. Crown Cork & Seal Canada Inc.* which held that pension benefits are collateral to the employment contract and should not be considered income which would otherwise be deducted from pay in lieu of notice. Accordingly, the court held that Waterman's pension payments received over the notice period were not to be deducted from his damages award.

Waterman v. IBM Canada Limited 2010 BCSC 376

ONTARIO'S NEW SUMMARY JUDGMENT RULES STILL NOT A SUBSTITUTE FOR TRIAL

When Ontario Government instituted new *Rules of Civil Procedure*, effective January 1, 2010, which seemingly significantly increased the court's powers to deal with disputes in a summary manner, many in the employment bar expected many without cause wrongful dismissal cases to be resolved by way of summary judgment. Following *Cockshutt v Computer Facility Services Inc.*, that expectation may be unwarranted.

In *Cockshutt*, the plaintiff brought a partial summary judgment motion with respect to damages in lieu of notice. Other issues including aggravated damages, damages for mental distress and entitlement to bonuses were agreed to proceed to trial regardless of the outcome of the motion. Despite suggesting that summary judgment is often a suitable route for determining wrongful dismissal damages, the court refused to determine the issues in the summary procedure, instead referring them to trial.

The court found that there was a dispute about the plaintiff's role and responsibilities which the court could not resolve based on the evidence filed. The court also held that the determination of the issue of entitlement to a monthly expense allowance over the notice period was not one that was appropriately decided by summary judgment.

Interestingly, the court found that the issue of whether the employee mitigated his damages, which is normally the issue which makes summary judgment inappropriate in wrongful dismissal cases, was one which the court could determine if it were the only issue to be determined. The court also held that it could have decided the issue of the enforceability of a 24 year old employment agreement and the specific amount of damages in lieu of benefits, if those were the only issues. In the end, the court dismissed the plaintiff's motion and directed all of the issues to trial.

It is not clear whether the court in this case refused to interpret the newly increased summary judgment powers in a manner which would permit it to determine wrongful dismissal cases in the summary procedure, whether the evidence put forward was insufficient to permit the court to make summary determinations, or whether the fact that a trial was to take place in any event with respect to other issues influenced its decision.

Look for further wrongful dismissal cases to interpret the new powers provided to courts in summary judgment motions. It is likely that summary judgment motions will significantly reduce the expense of litigating without cause wrongful dismissal actions.

Cockshutt v. Computer Facility Services Inc., [2010] O.J. No. 1205

REMINDER TO ALL EMPLOYERS

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