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

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SLOPPY TERMINATION DOES NOT JUSTIFY 'WALLACE' DAMAGES

Since the decision of *Wallace v. United Grain Gowers Ltd. (1997)*, 152 D.L.R. (4th) 1 (S.C.C.), plaintiffs have routinely been claiming 'Wallace' damages for increased notice associated with the manner of their termination. The Ontario Court of Appeal was recently called upon to clarify the types of circumstances giving rise to 'Wallace' damages.

The plaintiff, a professional engineer, was a former long-term employee of the City of Toronto who had fallen victim to the significant restructuring associated with the amalgamation of the City of Toronto. He was one of many managers required to complete an application form to compete for jobs in the new amalgamated City. Each applicant was interviewed by the hiring committee at which they were asked the same questions and scored on the results. The types of questions were both technical and managerial.

The plaintiff had participated in the application and interview process; however, he was not offered a position. The candidate who was ultimately hired did not score as highly as the plaintiff. In view of the fact that he was not offered a position in the amalgamated City, the plaintiff had been offered a package which included 80 weeks pay, benefits and an allowance for job counseling.

The Court of Appeal overturned the finding by the trial judge that the differential treatment by the employer in the hiring process amounted to bad faith, justifying increased compensation under 'Wallace'. While the Court did not disagree that 'Wallace' damages are not limited to acts of the employer at the very moment of dismissal but may include the employer's conduct pre and post-termination and the conduct of the employer in its aftermath, such consideration is a component of the manner of dismissal.

Rosenberg J.A., who wrote the unanimous judgment wrote:

"it seems to me that what is common in all of the examples provided in Wallace and the other cases I have mentioned above is the presence of something akin to intent, malice, or blatant disregard for the employee. It is conduct that could be characterized as 'callous and insensitive treatment' or as Laskin J.A. said in Marshall, 'playing hardball'...[The trial judge] described the manner in which the competition was conducted as 'sloppy'. This does not reach the kind of conduct worthy of compensation."

The Court therefore concluded that the failure of the employer to strictly follow its own procedure neither entitled the respondent to damages for a breach of contract nor to an extended notice period, absent bad faith conduct as described in Wallace, even though the respondent was dismissed as a result of competition. Further, it concluded that 80 weeks represented reasonable notice.

TERMINATION OF 50% SHAREHOLDER MAY NOT BE OPPRESSION

The plaintiff was a 50% shareholder, the president and a director of the corporation. He was also employed as marketing manager. The individual defendants were each 25% shareholders and directors. At a meeting of the board of directors the plaintiff was dismissed from his position as marketing manager. He unsuccessfully made an application to the Court under the oppression remedy section of the *Ontario Business Corporations Act*.

Notwithstanding the fact that the shareholdings were 50% plaintiff, 25% first individual defendant, 25% second individual defendant, the bylaws of the company provided that no one had outright control of the company and majority rule prevailed at the Board of Directors save and except some decisions which were stipulated to require unanimous consent.

At a meeting of the board of directors on September 23, 2000, the individual directors requested that the plaintiff take a six month paid leave of absence. When he refused, they voted to terminate him which vote was carried.

Following termination, the Plaintiff continued as a shareholder, director and president of the corporation. He attended board meetings, was paid directors fees, was provided with financial statements quarterly as they were prepared, and received a monthly information package in the same manner as the other directors. He was also kept apprised of negotiations for the sale of the company to the third party.

Killeen J. set out a helpful and concise summary of the leading principals and rules for consideration by the Court where relief under the oppression remedy is sought.

- 1) the reasonable expectations of the person seeking the relief according to the arrangements which existed between the principals;
- 2) the term "oppression" connotes an inequality of bargaining power while "unfairness" connotes an obligation to act equitably and impartially in the exercise of power and authority;
- 3) the terms "unfair prejudice to" and "unfair disregard for the interests of" require less rigorous tests than oppression. Where the conduct goes beyond mere inconvenience and lack of information, and the interests of the applicant have been unfairly disregarded, there will be entitlement to relief;
- 4) there is no requirement to show bad faith;
- 5) contractual terms will prevail over expectations, even where those expectations are wholly reasonable;

- 6) reasonable expectations are not necessarily static concepts; they may change and evolve over time;
- 7) the business judgment rule operates to shield decisions made by the board of directors made honestly, prudently, in good faith and on reasonable grounds;
- 8) actual or material loss is not a prerequisite to the granting of relief;
- 9) wrongful dismissal, standing alone, will not justify a finding of oppression. The dismissal must be intertwined with the interests as a shareholder and be part of a pattern of conduct to exclude the complainant from participation in the corporation.

The Court held that notwithstanding the fact that the plaintiff was the driving force behind the establishment of the corporation there had been no oppression. The Court's decision was largely based upon the fact that the individual defendants had acted in the best interests of the company. There had been no strife between the silent shareholder and the plaintiff which brought his judgment into question, and the feeling that the termination was justified was well supported by staff. Further, by not excluding the plaintiff from operations after the fact, there was no sufficient connection between the termination as marketing manager, and his interests as shareholder.

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