

The Wallace Factor

An Analysis of the Effect of the Bad Faith Dismissal Doctrine on Reasonable Notice Periods in Wrongful Dismissal Actions

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Introduction:

Since Wallace v United Grain Growers Ltd. [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 (S.C.C.) there have been quite a number of interesting cases which have applied the principal of extending the notice period where the manner of the dismissal has been carried out in bad faith.

It is not the purpose of this paper to explain in detail the actual Supreme Court of Canada's decision in Wallace, as my colleague, Stacey Ball has expertly done this in his paper.

The effect of Wallace has been very well summed up in a recent case of the British Columbia Court of Appeal entitled Cassady v Wyeth-Ayerst Canada Inc. (Lawyers Weekly 1820-015). At page 23 of the decision Mr. Justice Easson said as follows:

The reasonable period of notice is no longer to be limited to providing enough time to find new employment. There is now to be an element of deterrence to employers by discouraging them from bad faith conduct on dismissal. To that extent, the extended notice period covers one of the purposes previously confined to punitive damages. As Cory J. said in Hill v Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at 1208 (para. 196)

'They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this matter.'

I thought it would be interesting to examine a number of post Wallace cases to see if we could determine answers to the following questions:

1. What are sort of bad faith factors that the Courts are applying in determining whether or not to increase the notice period?
2. By how much are the Courts actually increasing the notice periods, in relation both to number of months and as a percentage of the base reasonable notice period?

Review of Cases:

1. The first case of interest is **Cassady v Wyeth-Ayerst Canada Inc.** (Lawyers Weekly 1820-015). This was an appeal in the British Columbia Court of Appeal from a jury verdict in a wrongful dismissal action in which the plaintiff was awarded damages in lieu of notice equal to 8.3 months, damages for negligent infliction of mental suffering in the sum of \$10,000 (the equivalent of about 3 months' notice) and \$62,000 in punitive damages (the equivalent of about 16.23 months). This case involved a young sales representative with a total of 3 months' service.

The jury verdict was pre Wallace but the appeal was heard post Wallace. The first intriguing thing is that Court found that the plaintiff was not entitled in law to damages for infliction of mental suffering but they allowed the plaintiff to recast his argument and claim Wallace damages as an extension of the notice period. The Court went on to find that \$10,000 was a fair expression of the Wallace damages.

Thus we can see that the Court added 3 months to a base notice period of 8.3 months. This accounts for a Wallace Factor increase of 36%. In other words, the standard or base notice period was increased by 36% on account of the Wallace Factor.

What were the factors that influenced the Court to increase the notice period by 36%?

First of all the Court found that the mere fact that the employer alleged just cause all the way during the case was not grounds in itself for extending the notice period because the employer had a honest belief that there was just cause. Senior management had relied on the information received by the plaintiff's supervisor, which indicated that the plaintiff had verbally attacked her supervisor, challenged his authority and refused to take instructions while they were on a joint sales call.

However, the Court did find that there were facts upon which the jury could have found that the Employer treated her to "callous and insensitive treatment in her dismissal without regard for her welfare, whether the employer engaged in bad faith conduct or unfair dealing in the course of dismissal and whether it inflicted injuries such as humiliation, embarrassment and damage to the plaintiff's sense of self worth and self esteem".

It is difficult to ascertain exactly what this conduct consisted of, in part because this is a Court of Appeal reviewing a jury verdict rather than a trial judge writing his or her reasons for judgement. At best, it appears that the Court and the jury did not look kindly upon the employers' actions after the dismissal as well as the manner of the actual dismissal. In relation to the manner of dismissal the Court noted as follows:

"He (the plaintiff's supervisor) escorted her from the building, stood by her while she removed her possessions from the company car and then called for a taxi to take her home."

In relation to the post termination actions of the employer, said as follows:

“The plaintiff at trial led considerable evidence regarding events following the termination which tended to establish that the explanation by the defendant’s officers to employees and to others in the pharmaceutical companies was inaccurate and derogatory of Ms Cassady. For instance, it was said by Mr. Ames that she had been “fired” by Lederle and by others that she “did not know her stuff”.

The effect of this on the plaintiff was profound. Her psychiatrist testified at trial that in her opinion the plaintiff suffered after dismissal from a “mood disorder with mixed anxiety and depressed mood”, marked by symptoms of insomnia, flashbacks, nightmares, withdrawal and thoughts of suicide. The psychiatrist testified that these problems flowed primarily from the dismissal and the manner of dismissal.

2. In **Nagy v Metropolitan Toronto Convention Centre** (35 C.C.E.L. (2d) 209), Mr. Justice Dilks was faced with the situation of 61 year old Banquet Manager with just under 12 years' service. He was fired for submitting false time records, which he did not deny. His defense was that his immediate supervisor had authorized the payments. The trial judge found that in fact the supervisor did not authorize such records, but that the plaintiff had honestly believed that they were so authorized. He had suffered symptoms of severe insomnia, headaches, impaired concentration, reduced appetite, apathy and feelings of hopelessness. The plaintiff testified that he suffered this mental distress because his employer had accused him of fraud.

The judge found that the claim for “aggravated damages for mental distress” could not be upheld as an “independently actionable claim”, However he quoted Mr. Justice Iacobucci in Wallace at page 73:

An employment contract is not one in which peace of mind is the very matter contracted for, and so, absent an independent actionable wrong, the foreseeability of mental distress is of no consequence...I note, however that where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, the employee is not without recourse. Rather, the trial judge has discretion in these circumstances to extend the period of reasonable notice to which the employee is entitled.

The judge went on to find that find that the reasonable notice was 15 months but, with the addition of the mental distress factor, he upped it by one month to 16 months.

In other words, this judge upped the notice period by approximately 7% because of the employee's reaction to the allegation of theft. This is despite the judge's finding that the employer, although mistaken in their belief that the plaintiff did not have an honest belief that he had his supervisor’s permission to submit false time claims, did act in a reasonable manner throughout.

3. In **Stolle v Daishinpan (Canada) Inc** (98 CLLC 210-028) the British Columbia Supreme Court was faced with the situation of an assistant spa manager with 6 years' service returning from maternity leave. There was a dispute over what position she would return to and ultimately she was terminated. She was initially told by her employer that they would not pay her minimum

termination pay under the *Employment Standards Act* unless she signed a release of her claims under the *Human Rights Act*. She refused and retained a lawyer instead. After her lawyer sent a letter, the employer paid the *Employment Standards Act* minimums. Her lawyer then sued for wrongful dismissal.

The judge awarded 5 months' notice plus 3 more months for initially withholding statutory termination pay unless she signed a release under the *Human Rights Act*. The Court felt that this was high-handed conduct.

In this case the Wallace Factor resulted in an increase in the notice period of 60%.

4. In **Hamer-Jackson v McCall Pontiac Buick Limited**, (Lawyers Weekly 1818-002) Mr. Justice Burnyeat of the British Columbia Supreme Court awarded an additional 6 months' notice to 37 year old Sales Manager with 13 years' service. The notice was increased because the employer falsely accused the plaintiff of dishonest conduct and then broadcast those allegations to other GM dealers. As the total notice award was 19 months, this judge increased the notice period by 46% because of the Wallace Factor.

5. In **Boule v Ericatel**, (12 D.E.L.D. 110) Mr. Justice Henderson of the British Columbia Supreme Court awarded 18 months in total to a 43 year old Branch Manager with just over 13 years of service. This included a Wallace Factor increase of 4 months due to the employer falsely alleging fraud. This works out to an increase in the notice period of 29% due to the Wallace Factor.

6. In the case of **Whiting v Winnipeg River Brokenhead Community Futures Development Corp**, (Lawyers Weekly 1809-012) the Manitoba Court of Appeal, (which is the same Court that was overruled by the Supreme Court of Canada in Wallace) was asked to determine the appropriate notice for a constructive dismissal involving a 40 year old manager with a total of 6 years service. Absent the Wallace Factor, Mr. Justice Kroft would have awarded her 5 or 6 months. However because of the manner of the termination, which the Court characterized as "callous, improper and totally without sensitivity", he increased the notice period to 12 months. He noted that because of the mental distress suffered by the plaintiff following her dismissal, the plaintiff was virtually unemployable for 14 to 24 months. However he was at pains to point out that the Court was not suggesting that Wallace stood for the proposition that a plaintiff is disabled by stress which interferes with re-employment automatically entitles the plaintiff to extra notice for the period of disability.

The actual misconduct which got the employer into trouble involved letting an outside person, who controlled all grants to the employer, influence the employer to put the employee on probation without any satisfactory explanation of the problem or what was expected. As a result of this, the plaintiff became ill and went on sick leave. While on sick leave the plaintiff continued to try to find out from her employer why she was put on probation, all to no avail. The Employer had the plaintiffs' co-workers testify in private to the Board of Directors, however the plaintiff was not given any details of the allegations or given a chance to respond. Then the employer unilaterally amended the sick leave plan and cut off her payments with only three days' notice.

This case involved an increase in the notice period because of the Wallace Factor in the neighborhood of between 100% and 140%.

By way of passing comment, Mr. Justice Twaddle, although he agreed with the 12 month result, indicated that he believed that the proper methodology was not to assess reasonable notice and then add the bad faith as an extra, but rather to assess all the factors together and assess “a single period of time fixed with regard to all the factors.

7. In **Kroll v 948486 Ltd o/a Texas Border Grill & Boot Bar** (34 C.C.E.L. (2d) 78, Mr. Justice Stach of the Ontario Court (General Division) gave 6 months' notice to a 34 year old Restaurant Manager with 6 years' service. Although the judge does not state by how much he was increasing the notice period because of the employers conduct, he found that the notice period should be increased because of the “bad faith dismissal”.

The activity complained of in this case included making the employee sign a release and a non competition agreement in exchange for a minimal severance payment without giving the employee a chance to think about it or obtain independent legal advice, alleging poor performance without any substantiating evidence or giving any prior warnings and firing him one month before he was scheduled to get married.

8. In **Chaddock v Great Lakes Truck Centre Ltd** (34 C.C.E.L. (2d) 195, Mr. Justice McGarry of the Ontario Court (General Division) gave 12 months' notice to a 55 year old Credit Manager with almost 16 years' service. He also does not say by how much he is increasing the notice period but states that he was taking it into account. The bad faith conduct in this case consisted of pleading in the Statement of Defence that the plaintiff had been dismissed for insubordination, rudeness and disruptive conduct. Three weeks prior to trial, the defendant dropped the allegation of just cause.

9. In **Troung v British Columbia** (32 C.C.E.L.291), Mr. Justice Smith of the British Columbia Supreme Court found that reasonable notice for a Court Interpreter with 3 years' service was entitled to 6 months' notice. He increased the notice to 8 months (33% Wallace Factor) because the employer had made allegations of improper conduct and a breach of the Code of Professional Conduct, but these allegations were unsubstantiated. In fact the employer dropped the just cause allegation prior to trial.

10. In **Antonacci v A&P** (35 C.C.E.L (2d) 1. Swinton J. of the Ontario Court (General Division) was dealing with a 38 year old Grocery Store Manager with 33 years' service. The trial judge found that absent the Wallace Factor, the proper notice period would be between 18 and 20 months. However, because of the conduct of the employer, she awarded 24 months, which she said was generally considered to be the maximum notice period available in wrongful dismissal cases.

The main reason for applying the Wallace Factor was because the employer alleged just cause when there was no basis for doing so. In fact the Vice President of Human Resources of the defendant testified at the trial that he knew that they did not have cause at the time of the

dismissal but they alleged it anyway both in their Statement of Defense and in correspondence with The Workers Compensation Board.

The Wallace Factor was therefore worth an increase on the notice period of between 20% and 33%.

11. In **Murrell v Burns International Security Services**, (33 C.C.E.L. (2d) 1), the Ontario Court of Appeal upheld a 8 month notice period for a Branch Manager with 2 years and 7 months' service. The court indicated that although 8 months' notice was generous in light of the abrupt termination and the existence of a 12 month non-competition agreement, the notice period was not unreasonable.

12. In **Frank v Federated Co-operatives**, (1998 A.J. No 12), Mr. Justice Shannon of the Alberta Queens Bench awarded 15 months to a Building Material Sales Coordinator with 22 years service. The employee was terminated because of what the Court found was a minor breach of corporate policy in regards to the purchasing of material from the employer. The employee was given no opportunity to respond to the allegations of dishonesty and at the time of termination was told that if he did not resign, he would be fired. He resigned.

The Court awarded him an additional 5 months' notice due to the circumstances of the dismissal. This accounts for a 33% increase in the notice period due to the Wallace Factor.

13. In **Horvath v Nanaimo Credit Union**, (1998 B.C.J. No 1906) Mr. Justice Hutchinson of the British Columbia Supreme Court awarded a total of 16 months to a 49 year old Assistant Manager with 13 years' service. He indicated that absent the bad faith discharge he would have awarded 12 months, thereby increasing the notice period by 33% because of the Wallace Factor. However, as the employee "removed herself from the job market" by making plans to open a restaurant, the judge determined that the employee had therefore mitigated her loss after 12 months and thus only awarded her 12 months' pay.

The rationale behind the Wallace Factor was especially fascinating. The employee had been put on a 90 day performance plan which contained a provision which said that if she did not improve during that period, she would be dismissed. Management assigned another manager to closely supervise the plaintiff during this probationary period, however the plaintiff found this to be embarrassing and humiliating as some of the criticisms made by that manager were made publicly in front of the other staff. The employee was fired after only 40 days into the probationary period, a fact that seemed to further anger the trial judge.

14. In **Birch v Grinnell Fire Protection**, (1998 B.C.J. No 1602) Mr. Justice Hardinge of the British Columbia Supreme Court awarded 18 months' notice to a 51 year old Manager of Residential Services with 18.3 years' service. He then increased the notice period by 2 months because 7 months prior to the final termination the plaintiff's position was eliminated while he was on vacation. The employee was then offered a demotion to his former position as an Estimator or else he had to resign. The employee accepted the demotion. Seven months later the employee was terminated due to lack of work. However, once the lawsuit was started, the

employer alleged that he had been fired for cause, a position which they argued at the trial, but dropped in their closing argument.

This increase in the notice period amounted to an increase of 11% because of the Wallace Factor. The judge found that this conduct by the employer did not hamper the employee's ability to find another job, but that it did cause "very real" hurt to the employee, and thus was deserving of the modest increase in the notice period.

15. In **McFadden v Brookville Carriers** (1998 N.B.J. No 250) Mr. Justice McLellan of the New Brunswick Court of Queens Bench, awarded 15 months notice to an 46 year old CFO and Vice President of Finance who had only 3.5 years' service. Most of the increased notice was due to the fact that the plaintiff had been induced away from his former employment, where he had been for 5 years.

In addition to the inducement, the judge also seemed to increase the notice period because of the following reasons:

- The failure of the Employer to provide a reference letter
- The failure of the Employer to provide any assistance in finding another job
- The failure to provide interim continuation of his salary after the termination.
- Although the employer never alleged that there was cause for dismissal and in fact said that the plaintiffs termination was a result of a reorganization, the trial judge came to the conclusion that the real reason the employee was terminated was because he had refused to carry out a directive from his boss as it constituted a serious contravention of the *Income Tax Act* as well as the professional ethics of the Institute of Chartered Accountants. Although he does not articulate this as a ground for extending the notice period, as he dwells on this in his reasons, one is left with the distinct impression that it did affect his reasoning in the case, otherwise why mention it? This raises the interesting aspect of plaintiffs trying to uncover the real reason they were terminated where the employer is not even alleging cause. If the employer is not alleging cause but is simply relying on its supposed inherent right to terminate any employee upon reasonable notice, then one wonders why it is important to find out the "real reason" for the termination. It now seems that some judges feel that they have the right or obligation to determine whether or not the termination itself was justified (according to their own judicial standards) and to punish employers who do not have a proper reason for terminating someone's employment. Surely this is a serious deviation from the basic implied term of employment which says the an employer can terminate an employee's employment for any reason (other than a reason that would breach a statute like the *Human Rights Code*) if they provide reasonable notice or pay in lieu of notice. This tendency of increased judicial intervention would also greatly increase the time it takes to try these issues, as it is, in my humble opinion based on 19 years of experience in representing employers and employees in wrongful dismissal cases, very common for employees to strongly believe that the reasons given for the termination are false and it also very common for employers to let someone go for one reason (like an inability to get along with co-workers or the boss) but to call it a "reorganization" or a "layoff".

The motive of the employer to lie about this reason to the employee and to the public is because they have no desire to unduly hinder the employee's chance to get another job so they come with a reason for termination that will be generally accepted by a potential new employer. For the same reason, employers who are firing an employee for cause will often allow the employee to "resign" instead so that any potential employer in effect will not be told the real truth. These are the little white lies that go on every day, however the intent and effect is to help the dismissed employee get a new job, not hinder it.

16. In **Martin v International Maple Leaf Springs Water Corp.** (1998 B.C.J. No 1663) Madam Justice Saunders awarded 6 months base notice plus 3 months Wallace factor additional notice to a 46 year old Senior Operating and Management employee who had only 9 months notice. The increased notice was due to the fact that the President of the Company had falsely accused the plaintiff of dishonesty and of having a drinking problem. The Employee also received punitive damages of \$35,000 and damages as against the President personally of \$25,000 for inducing breach of contract. It is of some interest that the factual basis for the extra 3 months notice, the punitive damages and the inducing breach of contract was exactly the same. All told the false statements made by the President cost he and his company approximately an extra \$93,750 over and above the base notice period.

The Wallace Factor in this case was worth 50%.

CONCLUSIONS:

What are sort of bad faith factors that the Courts are applying in determining whether or not to increase the notice period?

Clearly the primary factor which the Courts consider in deciding whether or not to extend the notice period is where the employer alleges just cause and fails to prove it. It seems to matter not if you drop the allegation prior to trial. In fact, if you drop the allegation prior or during the trial, the employer runs the risk that their action will be taken as admission that just cause was alleged in bad faith in the first place. Similarly, if you pursue the allegation all the way to trial and it is dismissed, you run the risk that the judge will apply the Wallace Factor. We have also seen in **Nagy v Metropolitan Toronto Convention Centre** that the employer did nothing wrong other than allege just cause but fail to adequately prove it, and still the Court has awarded Wallace damages because the employee suffered distress as a result of the allegation of cause. This obviously ups the ante any time an employer alleges cause and fails to prove it, even where the employer acted reasonably in alleging cause. The lesson to be learnt by employers is not to allege just cause unless you have a very good case and only if you have conducted a proper investigation of the facts before termination in which the employee was given a full opportunity to give his or her side of the story. As a litigation tactic, employer counsel may wish seek an agreement from plaintiff's counsel that the employer will drop cause if the employee agrees not

to rely on this action in later seeking Wallace damages arising from the dropping of the just cause claim.

Another lesson to be learned from these cases is that the Wallace Factor is most likely to be invoked where the plaintiff has suffered mental distress after the dismissal. It would seem logical to assume that part of that reason is that an employee suffering mental distress is not likely to be able to look for another job, thus they need more notice (i.e. money) in order to first get their health back and then to start looking for a job. However, there also seems to be a healthy dose of the concept of general damages or damages for pain and suffering at work here. This is in keeping with Wallace in which it is clear that the remedy of extending of the notice period need not be tied to a finding that the bad faith manner of the dismissal actually lengthened the employees' period of unemployment.

The Wallace Factor will have a great effect, I believe, in putting the whole termination process under close judicial scrutiny. As we can see from **Horvath v Nanaimo Credit Union**, the Court will even punish the employer for the manner in which they review an employee performance, especially where that review causes stress to the employee. This begs the question as to whether an employer can ever conduct an effective Performance Review Program without causing stress to an employee. Employers will also have to be even more scrupulous in the way they handle dismissals. This should provide for more business for outplacement counselors who can assist employers in handling these difficult situations. Third, employers can only get into big trouble if they publicize to third parties the reasons for the dismissal. It is much better for employers to say nothing about why a certain person was terminated.

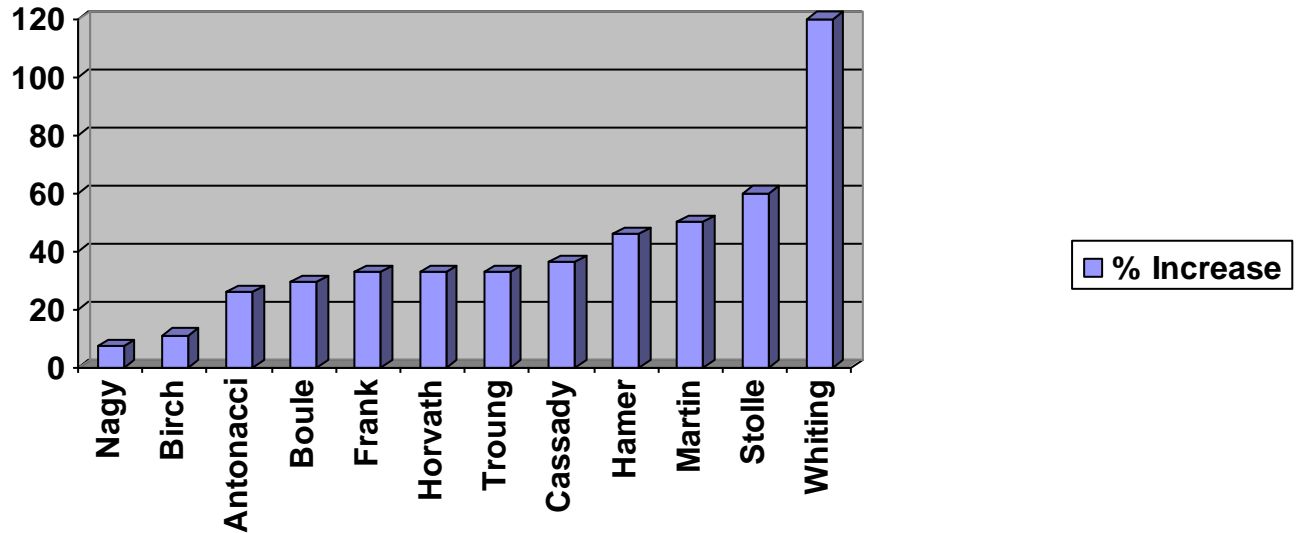
However, even when the employer chooses not to go down the just cause route and instead terminates the employee without claiming cause, some Courts are prepared to go behind the employers reasons to see if there was really an underlying sinister motive behind the termination. If there was, the Court may enforce the Wallace Factor. So if an employer is honest and says to an employee that we are letting you go because we feel that you cannot get along with your co-workers and besides you have terrible breath, they may be critiqued and punished by the Court for dealing with the employee in a insensitive manner. However if they lie to the employee and tell him that that his position has become redundant, they run the risk of being punished by the imposition of the Wallace Factor because they were not honest with the employee.

It seems clear that applying the Wallace Factor is becoming a much easier way in which plaintiffs can increase their monetary recovery than the more traditional route of trying to prove mental distress, aggravated damages, punitive damages or intentional infliction of mental suffering. It avoids the whole problem of trying to figure out if there exists an "independent cause of action", which seems to be the prerequisite that the Courts have imposed on these heads of damages. The truth is that no one could figure out what an "independent cause of action" was any ways, so judges were compelled to find other ways to compensate abused employees. Many judges in pre-Wallace cases either consciously or unconsciously extended the notice period when they were faced with an abusive termination but where they felt constrained about awarding tort damages because of the legal restrictions on those remedies. Now at least the Courts can award

extra damages more openly and plainly without going through so many legal contortions as before.

By how much are the Courts actually increasing the notice periods, in relation both to number of months and as a percentage of the base reasonable notice period?

I have prepared the following graph, which illustrates the amount of extended notice that the Courts have awarded in the cases referred to in this paper. The graph shows the extended notice as a percentage of the base notice period, that is the notice period based on the traditional Bardal factors.



As can be seen, the most common percentage increase in notice where a Wallace Factor comes into play is approximately 33%. **In other words, where the Court determines that the manner of dismissal was done in bad faith, they are most likely to increase the notice period by a factor of one-third.**

As someone who has studied and worked with judicial determinations of reasonable notice for almost 20 years, my hope is that judges continue to explain in their reasons for judgment not only the factors they considered in determining whether or not the Wallace Factor applies but also how much they are actually increasing the notice period because of the Wallace Factor. If this methodology is followed, then lawyers and other professional advisors will have some better idea on how to advise their clients as to the appropriateness of notice periods. This enhanced degree of predictability can only benefit employers and employees.