

Wallace Clarified: The Ontario Court of Appeal Speaks About Wallace Damages
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In an important decision for human resources practitioners across Ontario, the Ontario Court of Appeal has ruled that an employee terminated for just cause will not necessarily be entitled to an increased damage award where the employer abandons or withdraws its just cause defence prior to trial.

In the 1997 case of *Wallace v. United Grain Growers Ltd.* (“*Wallace*”), the Supreme Court of Canada held that an employee may be entitled to an award of damages representing an extension to the notice period where the employer engages in unfair or bad faith conduct during the employee’s dismissal. The Court in *Wallace* stated:

At a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

Since the *Wallace* decision, virtually every statement of claim alleging wrongful dismissal has contained a claim for *Wallace* damages. Such a claim was asserted by the Plaintiff in *Mulvihill v. Ottawa (City)*.

Facts

Ms. Mulvihill was a City employee who absented herself from work on the basis of “stress” after alleging that she was harassed in the workplace by a co-worker. Despite failing to properly file her harassment claim, the City investigated Ms. Mulvihill’s complaints. Ultimately, a third party investigator found the complaints to be without merit.

Unsatisfied, Ms. Mulvihill refused to return to work unless she was reassigned to a different department; called into question the ability of her supervisors to perform their jobs; complained about her supervisors in an e-mail message addressed to each of the Chief Corporate Services Officer of the City, the City Manager and the Mayor; and called into question the integrity of the investigator. Notably, none of Ms. Mulvihill’s actions comprised a request to have the decision of the investigator reviewed nor did her actions comply with the City’s policy on decision reviews.

As a result of her actions, Ms. Mulvihill was terminated for insubordination and for failing to return to work after being requested to do so. The City alleged that it had cause for Ms. Mulvihill’s termination.

The City withdrew its cause allegation at the beginning of trial and paid Ms. Mulvihill three months pay in *lieu* of notice.

Trial Decision

The trial court awarded Ms. Mulvihill ten months' salary and benefits. The award comprised four-and-one-half months' salary as damages in *lieu* of reasonable notice and five-and-one-half months' salary in respect of *Wallace* damages. *Wallace* damages were awarded because the trial judge found that the allegation of cause was not warranted and the decision to terminate Ms. Mulvihill's employment while she was on sick leave was insensitive.

The Court of Appeal

The Court of Appeal overturned the trial judge's ruling on *Wallace* damages on three principle basis.

First, the Court disagreed that Ms. Mulvihill was entitled to *Wallace* damages simply because the City withdrew its cause allegation prior to trial:

The mere fact that cause is alleged, but not ultimately proven, does not automatically mean that *Wallace* damages are to be awarded.

And further:

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.

According to the Court, the key to assessing whether *Wallace* damages should be awarded where an employer has wrongly alleged cause or withdrawn an allegation of cause is whether the employer *knowingly made a false allegation of cause*. In this case, the Court found that the City did not make an allegation of cause knowing it to be untrue, but rather on the basis of Ms. Mulvihill's perceived inappropriate behaviour.

The second basis for overturning the trial judge's ruling on *Wallace* damages was that the City was "candid, reasonable, honest and forthright" in the reasons that it had provided to Ms. Mulvihill for her termination. Ms. Mulvihill was told that her termination was based on her insubordinate behaviour and her refusal to return to work, which while disputed by Ms. Mulvihill, did comprise her reasons for termination. On this basis, the Court held that the City had met its obligation to treat Ms. Mulvihill fairly and in good faith during the termination of her employment.

The third basis for overturning the *Wallace* award was that the Court disagreed that the City exhibited bad faith by terminating Ms. Mulvihill while she was absent from work while on stress leave. Acknowledging that the decision to terminate while she was on stress leave was "a mistake" on the part of the City, the Court reaffirmed what the Ontario Superior Court of Justice stated in *Yanez v. Canac Kitchens* in December, 2004:

...the legal standard against which conduct is to be measured for the purposes of *Wallace* damages is not whether an employer made a mistake but, rather, whether the employer engaged in unfair or bad faith conduct. A mistake is not conduct that can be said to be unfair or bad faith.

Finally, and significantly, the Court held that the termination of an employee who is on sick leave is not, in and of itself, bad faith. What is required is “other evidence of bad faith, unfair dealing or playing hardball”.

Professional Pointer

Mulvihill v. City of Ottawa confirms that an employer will not be exposed to a successful claim for *Wallace* damages simply because an employer abandons or withdraws an allegation of cause before trial.

The case also reminds employers that the manner in which an employee is terminated is the critical factor in assessing whether an employer will be liable for *Wallace* damages. It is not sufficient that an employee be upset that they have been terminated. Similarly, an employer is not required to act perfectly during the course of a termination. What is required is that the employer act honestly and in good faith during the course of the termination, that it ensure ‘with cause’ terminations are carried out reasonably, that it provide the employee with an honest explanation of the reasons for termination, and that it treat the employee with respect.

Finally, the case provides employers with some reassurance that a termination can, in the right circumstance, be carried out even though an employee may be absent due to health reasons. Yet despite this reassurance, employers must be extremely careful when terminating an employees who is absent due to disability. In those circumstances courts and the Ontario Human Rights Commission (should a human rights complaint be filed) will carefully scrutinize an employer’s behaviour and underlying motivation.



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