

Fulcrum Search Science Inc.

Wrongful Dismissal Update: The Wallace Factor



In 1997, the Supreme Court of Canada introduced a new term into the lexicon of wrongful dismissal litigation - the "bad faith discharge" or as it is sometimes called, the Wallace Factor. Basically, the wrongful dismissal damages an employee is entitled to receive following a without cause termination can now be increased because of the manner in which the employee is terminated.

Employers now have an obligation of "good faith and fair dealing" in carrying out a dismissal. In particular, "[A]t 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 a conduct that is unfair or that is in bad faith by being, for example, untruthful, misleading or unduly insensitive."

Not surprisingly, terminated employees now often claim additional wrongful dismissal damages relying on the Wallace Factor.

Accordingly, in addition to the traditional factors that the courts consider in wrongful dismissal cases such as: the character of employment, length of service, age, the availability of similar employment, and whether the person was lured from secure employment, the court will now also ask, "Did the employer engage in bad faith conduct?"

Since trial judges have only been applying the Wallace Factor for a couple of years it is still difficult to predict whether the Wallace Factor will be applied, and if so, how much additional damages will be awarded to an employee because of a bad faith termination. As a result, it is even more difficult to predict reasonable notice awards in wrongful dismissal cases where a bad faith discharge is alleged, which means that pre-trial settlement is more difficult.

Some judges assess the traditional factors and then increase damages by a specific amount for a bad faith termination. For example, in the Vito Antonacci and Great A & P Co. case, the trial judge indicated that using the traditional factors Mr. Antonacci would be entitled to 18 to 20 months but increased the reasonable notice period to 24 months because of the bad faith termination. Other judges assess all of the factors together when determining the notice period such as in Noseworthy and Riverside Pontiac-Buick Ltd. case. Mr. Noseworthy, 60, was fired after four years service as an office manager at a car dealership. He was awarded ten months notice. Although Mr. Noseworthy's age would suggest a longer notice period than usual it appears that the court significantly increased the notice period as a result of a bad faith termination.

Over time trial judges will likely move toward a more uniform approach in bad faith discharge cases. In the meantime, however, make sure that all new employees sign an employment contract with a termination clause. This will minimize the uncertainty surrounding the cost of without cause terminations.

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