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WELCOME TO TODAY'S HR/EMPLOYMENT WEBINAR

SEPTEMBER 21, 2021

This program has been approved for continuing professional development (CPD) hours under Section A of the Continuing Professional Development (CPD) Log of Human Resources Professionals Association (HRPA).

This program has been approved and qualifies for 1 hour and 30 minutes of substantive CPD hours with the Law Society of Ontario.

TOPICS

- I. COVID-19 Vaccination Policies in the Workplace – Updates, Tips and Considerations for Employers
- II. Impact of COVID-19 on the Reasonable Notice Period – Case Law Update
- III. Employer's Duty to Deal with Employees in Good Faith and Moral Damages – Case Law Update

9:00 a.m.	Opening Remarks
9:05 a.m.	I. COVID-19 Vaccination Policies in the Workplace – Updates, Tips and Considerations for Employers
9:25 a.m.	II. Impact of COVID-19 on the Reasonable Notice Period – Case Law Update
9:45 a.m.	III. Employer’s Duty to Deal with Employees in Good Faith and Moral Damages – Case Law Update
10:05 a.m.	Break
10:15 a.m.	Q&A Period
10:30 a.m.	Concluding Remarks

I. COVID-19 Vaccination Policies in the Workplace

Tips and Considerations for Employers

I. COVID-19 Vaccination Policies in the Workplace

Agenda

- The Basics
- Protecting Your Employees
- Legal Risks
- Enforceability
- Exemptions
- Certain Specific Considerations for Unionized Workplaces
- Conclusion

The Basics

- Vaccines help build up and strengthen the immune system, providing protection against disease.
- The COVID-19 vaccines that are authorized for use in Canada are proven to be **safe and effective**.
 - Vaccination is one of the most effective ways to protect against COVID-19.
 - Vaccines are rigorously tested during their development and constantly monitored during their deployment.
 - They are available free of charge to everyone in Canada.
 - Pfizer (Cominarty) and Moderna (Spikevax) have received full approval under Canada's Food and Drug Regulations
 - Astrazeneca (Vaxzevria) – interim authorization expired September 16, 2021 – no full approval – under review – vaccine is still available for Canadians

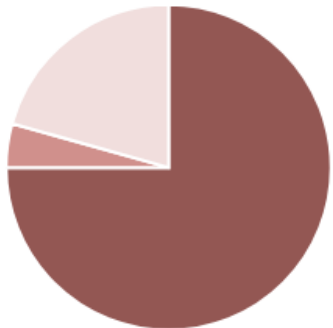
The Basics

- Natural immunity is not better than vaccine immunity.
- If you already had COVID-19, you should still get vaccinated.
- COVID-19 vaccines cannot infect you with COVID-19.
- The side effects of the vaccines are usually mild.
- Serious or other long-term side effects from the vaccine are rare.
- There is no evidence that COVID-19 vaccines compromise fertility or cause problems with pregnancy.
- The ingredients in the COVID-19 vaccines are not harmful in the amounts at which they are administered.

The Basics

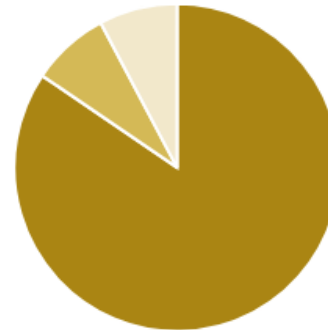
- The vast majority of hospitalizations due to COVID-19 are the unvaccinated:

Hospitalized but not in Intensive Care Unit (ICU)



Unvaccinated	138
Partially vaccinated	8
Fully vaccinated	38

Hospitalized in the Intensive Care Unit



Unvaccinated	98
Partially vaccinated	9
Fully vaccinated	9

Protecting Your Employees

- Employers have a statutory duty to **protect the health and safety** of their employees.
 - Employers must take reasonable steps to maintain a safe work environment and protect workers from illness and injury under the *Occupational Health and Safety Act*
Where an employer fails in this duty, employees may justifiably refuse to work.
 - Taking measures to protect its employees from contracting COVID-19 is a reasonable and required step to protect employees
 - Will requiring all employees to be vaccinated be considered a reasonable step to prevent a COVID-19 outbreak in the workplace? Depends on many factors, such as type of workplace and position held by employee.
 - Mandatory vaccination policy as defence to potential litigation from employee who contracted COVID-19 in the workplace?

Protecting Your Employees

- Vaccination is already mandatory in other parts of public life.
 - In Ontario, primary and secondary schools require proof-of-immunization from students—children and adolescents—for a list of designated diseases.
 - e.g., Polio, Measles, Mumps, Rubella, *et cetera*.
 - Failure to complete the program of immunization can result in fines and penalties.
 - Exemptions for medical reasons, conscience and religion – see *Immunization of School Pupils Act*
 - As of **September 22nd, 2021**, proof-of-vaccination will be required for all businesses and organizations which have indoor spaces which are open to the public where masks cannot be worn at all times.
 - ex. restaurants, meeting and event spaces, sports facilities, concerts, movie theatres
 - Failure to comply can result in fines and penalties for businesses, organizations, and individuals under *Reopening Ontario Act*

Legal Risks

- Failing to take reasonable steps to prevent a COVID-19 outbreak at the workplace may expose the employer to legal liability.
 - Mandatory vaccination policy as strong defence to negligence action
 - See also *Supporting Ontario's Recovery Act* – no liability for employer if follow public health guidance and all laws related to COVID-19, as long as any act or omission does not constitute “gross negligence” – has not yet been judicially considered
- Other legal concerns include:
 - **Human rights legislation:** Employers have a duty to accommodate those who are unable to get vaccinated based on religion, disability (medical) or other protected grounds up to the point of undue hardship – health and safety is a relevant consideration in determining whether an accommodation would amount to undue hardship
 - **Privacy:** Employees might refuse to disclose vaccination status on the basis that it constitutes personal health information; however employer is likely entitled to the information as long as it has a policy in place which addresses confidentiality issues
 - policy should set out why the information is being collected, how confidentiality will be protected, who will have access to the information, how it will be used, where it will be stored and for how long it will be kept by the employer

Legal Risks

- Employees may commence a human rights complaint for failure to accommodate based on protected grounds (ex. religion and disability)
 - **Accommodate** the unvaccinated who are entitled to a *Human Rights Code* exemption with non-punitive alternatives while balancing safety with individual rights.
 - ex. permit them to continue working remotely, require screening, regular (or daily) testing, require strict social distancing, require masks.
- Incentivize employees who are merely unwilling or hesitant.
 - ex., provide paid time off for employees to attend vaccination appointments, or host a vaccination clinic at the workplace, gift card or other monetary incentive if provide proof of vaccination

Enforceability

- Still uncertainty as to whether an employer's vaccination policy will be enforceable
 - There is no case law which specifically addresses the issue of enforceability of mandatory COVID-19 vaccination policies at the workplace.
 - Ultimately, it will likely depend on the type of workplace and the job duties of the employees in question.
 - As more information about the spread of COVID-19 (and its variants) and more information about COVID-19 vaccines becomes known, the enforceability of mandatory vaccination policies may change.
 - does placing an employee on an unpaid leave for refusing to get vaccinated in contravention of an employer's policy constitute constructive dismissal?
 - From a constructive dismissal lens: is introducing a vaccination policy a reasonable change, which the employee must accept? Or a change in a fundamental term unilaterally imposed by the employer?
 - Can an employer terminate an employee for wilful misconduct and/or just cause for refusing to get vaccinated, in contravention of an employer's policy?

Enforceability

- A balancing exercise:
 - Risk level of workplace – will employees be exposed to COVID-19 patients or to high risk individuals?
 - Can the employee be accommodated while maintaining a safe workplace?
 - Is the employee's objection for refusing to get vaccinated covered by a protected ground under the *Human Rights Code*, such as disability or religion?
 - Personal belief or general concern about the vaccine? "Vaccine hesitancy"? Not protected by *Human Rights Code*.

Enforceability

- It may be possible for employers to...
 - Refuse to hire the unvaccinated, subject to the *Human Rights Code*
 - Impose requirements upon unvaccinated employees (ex. daily rapid testing)
 - Terminate unvaccinated employees.
 - **Obtain legal advice first.** Just cause and wilful misconduct? Or without cause?
 - In certain situations, depending on the policy and level of risk in the workplace, employers may be able to make termination a consequence.
 - It will likely depend on the particular workplace and position held by the employee.

Enforceability

“Requiring proof of vaccination to ensure fitness to safely perform work, or protect people receiving services or living in congregate housing, may be permissible under the [Human Rights] Code if the requirement is made in good faith and is reasonably necessary for reasons related to safety.”

- Ena Chadha

Chief Commissioner, Ontario Human Rights Commission

Exceptions

- **Medical exemptions** – ex. allergic to one or more ingredients contained in vaccines, severe side-effect from first dose (ex. myocarditis or blood clot) – there may be others, but medical exemptions will likely be difficult to obtain
- **Religious exemptions** – sincere and honest religious belief which calls for a particular line of conduct, connection to the spiritual or divine, harm must be non-trivial and balanced against the rights of others; see *Syndicat Northcrest v. Amselem*, 2004 SCC 47
 - Subject to undue hardship under Ontario *Human Rights Code* – ex. need to balance any infringement on religion with health and safety concerns
 - Although not the test as per *Amselem*, there appear to be few religions which advocate against vaccinations for religious reasons

Specific Considerations for Unionized Workplaces

- In the unionized context, it can be more difficult to implement and enforce a mandatory vaccination policy at the workplace
- However, appears so far that many Unions do not intend to challenge mandatory vaccination policies, but say they will be open to submitting grievances if an employee is disciplined (or terminated) pursuant to a vaccination policy
- Employer may be able to implement policy under the “Management Rights” clause contained in most Collective Agreements, which permits employers to introduce policies, among other things
- A rule or policy introduced by the employer without the union’s consent, which could result in discipline if not followed, must meet the following criteria:

Specific Considerations for Unionized Workplaces

- Consistent with collective agreement (i.e. is it a reasonable exercise of management rights?)
- Reasonable
- Clear and Unequivocal
- Brought to the attention of employees before employer attempts to act on it
- Where the rule is relied upon to justify termination, the employee was advised that a breach could result in termination
- The employer has enforced the rule consistently since its introduction

(see *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 as cited in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII), [2013] 2 SCR 458)

Specific Considerations for Unionized Workplaces

- Management retains the right to make and implement decisions, policies, and conditions, so long as this right is exercised reasonably and in a manner consistent with the collective agreement.

“Determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.”

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 (CanLII), [2013] 2 S.C.R. 458

Specific Considerations for Federal Government Employers

- The Government of Canada is the largest employer in the country.
- Vaccination will be required for the entire federal public workplace as of the end of September.
- The *Charter of Rights and Freedoms* applies to government employers, specifically section 7 which guarantees the **right to life, liberty, and security of the person**.
 - vaccine mandates as violation of section 7? The issue has not been addressed by the courts, but...
 - Vaccine mandates are not “forced vaccination.”
 - Even if a claimant were to establish a violation of Section 7, the violation could be upheld as a reasonable limit under Section 1.
- “All of the good jurisprudence points to the conclusion that a Section 7 claim would not be actionable.” - Samuel E. Trosow, associate professor in the faculty of law and faculty of information and media studies at Western University

News Release from Toronto Medical Officer of Health – August 20, 2021

- Dr. de Villa and Toronto Public Health strongly recommend that workplace vaccination policies require at minimum:
 - Workers to provide proof of their vaccination series approved by Health Canada or the World Health Organization
 - Unvaccinated employees to provide written proof of a medical reason from a physician or nurse practitioner that includes whether the reason is permanent or time-limited
 - Unvaccinated workers to complete a vaccination education course on the risks of being unvaccinated in the workplace

News Release from Toronto Medical Officer of Health – August 20, 2021

- Employers should also identify how workers' vaccination status information will be collected and protected in accordance with privacy legislation and explain the level of risk posed by COVID-19 in each unique workplace setting.
- Additional workplace precautions recommended to help reduce virus spread include:
 - COVID-19 testing
 - Strict adherence to physical distancing and other public health measures
 - Wearing personal protective equipment
 - Ensuring that appropriate ventilation is in place
- See <https://www.toronto.ca/news/toronto-medical-officer-of-health-strongly-recommending-toronto-employers-institute-covid-19-vaccination-policy-and-support-workplace-vaccination/>

Conclusion: Introduce a Vaccination Policy

- Many Fortune 100 and 500 companies have stated that they intend to introduce a mandatory vaccination policy
- Many smaller workplaces are also in favour of vaccine mandates. In a recent poll by KPMG Canada, 62 per cent of Canadian small and medium-sized businesses said they plan to make vaccinations mandatory for employees; mandatory vaccination for teachers, firefighters and police (Toronto)
- Employers should take steps to introduce a vaccination policy, **after consultation with a lawyer**
- Nature of policy should depend on the nature of the workplace, workplace culture, percentage of employees who are already fully vaccinated and the company's views about mandatory vaccination
- Policy examples, from least to most strict (mandatory or optional educational session can be included with each type of policy):
 - 1) Employees are encouraged to get vaccinated, and are encouraged (but not required) to disclose their status to their employer
 - 2) Employees must either be fully vaccinated or be regularly tested for COVID-19
 - 3) Employees must be fully vaccinated, with the only exceptions being disability, religion or any other grounds under human rights legislation; employees who do not comply by the specified deadlines to be disciplined (ex. unpaid leave) or terminated (**careful if alleging termination for just cause and wilful misconduct**)

II. Impact of COVID-19 on the Reasonable Notice Period

Case Law Update

Bardal Factors: *Bardal v Globe and Mail Ltd.* 1960 CanLII 294

1. Character of the Employment
 2. Length of Service
 3. Age
 4. Availability of similar employment having regard to the employee's experience, training and qualifications
- *relevant to determining an employee's entitlement to reasonable notice at common law*

Restrictions on Application of the *Bardal* Factors

Bardal factors are not applicable in the following scenarios:

- Where the employment is for a fixed term
- Where the employment contract contains an enforceable termination clause
- An employee is dismissed for just cause at common law
- Discriminatory termination in contravention of the Human Rights Code, and the employee has commenced a complaint at the Human Rights Tribunal of Ontario (HRTO)

Impact of Employer's Financial Situation on Reasonable Notice Period

- In *Michela v. St. Thomas of Villanova Catholic School*, 2015 ONCA 801(Court of Appeal for Ontario), 3 teachers were dismissed by their employer.
- The Ontario Court of Appeal held that the dire financial situation of the school did not justify a reduction of the notice period: “[an employer’s financial circumstances] justify neither a reduction in the notice period in bad times nor an increase when times are good.” (para. 17)

Yee v Hudson's Bay Company - 2021 ONSC 387 (Superior Court of Justice)

- Employee was terminated on **August 28, 2019** (well before the pandemic); 11.65 years of service; 62 years old; Director, Product Design and Development, Private Brands
- 16 months of common law notice awarded
- The Court concluded:

“It seems clear terminations which occurred before the COVID pandemic and its effect on employment opportunities should not attract the same consideration as termination after the beginning of the COVID pandemic and its negative effect on finding comparable employment.” (para. 22)

Kraft v. Firepower Financial Corp., 2021 ONSC 4962 (CanLII)

- **Facts** – employee began work in October 2014. His employment was terminated without cause during **the second week of March 2020** – days before the Ontario government declared a state of emergency.
- **Significance** – termination which occurs during the pandemic (or slightly before) can increase an employee’s common law reasonable notice period
- “It is noteworthy that the Plaintiff was dismissed right at the onset of the COVID-19 pandemic. He contends, and the length of his job search demonstrates, that this situation seriously impacted on his ability to find new employment.” (para. 15)
- *Yee* distinguished because employee was terminated in August 2019 (more than half a year before pandemic) – “at issue here is the job market and the impact of COVID on that market” (para. 17)
- “Especially during the first half-year of the shutdown in response to the pandemic, there was uncertainty in the economy and the job market and fewer employers were looking to fill positions. ... As a number of my colleagues have commented, “this degree of uncertainty, which existed on February 19, 2020, is one of many factors that I consider in assessing the reasonable period of notice applicable to the circumstances of this case” (from *Lamontagne v. J.L. Richards & Associates Limited*, 2021 ONSC 2133 at para. 64)

Kraft v. Firepower Financial Corp., 2021 ONSC 4962 (CanLII)

- Court determined that reasonable notice period based on *Bardal* factors was between 4 and 12 months, and that the average would be 9 months
- Court awarded a 10 month notice period, with the following reasoning:

“As indicated, there is evidence that the pandemic impacted on the Plaintiff’s ability to secure new employment. In light of that evidence, he deserves to receive at least somewhat above the average notice period. I would peg the figure at **10 months**, or one month more than the average for his circumstances during non-pandemic times.” (para. 22)

- Employee applied for over 70 jobs in 13 months
- Court increased the notice period due to COVID-19 – but not by very much
- See also *Skowron v. ABC Technologies Inc.*, 2021 ONSC 3734 (CanLII):

“In addition to the *Bardal* factors, it is relevant that we are in difficult economic times at present. I have no indication that the job market for sixty-plus year old project engineers is particularly buoyant in Toronto during the third wave of the pandemic.” (para. 30)

III. Employer's Duty to Deal with Employees in Good Faith and Moral Damages

Case Law Update

Employer's Duty to Deal with Employees in Good Faith & Moral Damages – Case Law Update

What Are Moral Damages?

Moral damages are damages that flow from the manner of dismissal – employee must prove that the manner of dismissal caused mental distress that was in the contemplation of the parties (see *Keays v. Honda Canada Inc.*, 2008 SCC 39 at para. 59)

- **The normal distress, disappointment, embarrassment and hurt feelings that result from a dismissal are not compensable**
- Damages for the manner of dismissal can be awarded only if the employer engages in conduct during the course of dismissal that is unfair or is in bad faith. (ex. being untruthful, misleading or unduly insensitive - see *Colistro v. Tbaytel*, 2019 ONCA 197 at para. 57)
- Moral damages are also referred to as aggravated damages and *Wallace* damages

Employer's Duty to Deal with Employees in Good Faith & Moral Damages – Case Law Update

The Distinction between Punitive Damages and Aggravated Damages

In the *Keays v. Honda* decision, the Court set out the distinction between punitive damages which are intended to punish versus aggravated damages which are intended to compensate.

(1) What are Moral Damages/Wallace Damages/Bad Faith Damages?

Historically – employees were able to obtain additional damages in a wrongful dismissal claim only where the employer's actions during the dismissal were so severe or outrageous that they gave rise to an “**independent actionable wrong**”.

- Ex. intentional infliction of mental distress
- Ex. defamation

(1) What are Moral Damages/Wallace Damages/Damages for Bad Faith?

Aggravated damages compensate employees for non-monetary losses, such as emotional pain or loss of self-esteem, that were caused by an employer's conduct during the dismissal

In addition, punitive damages can be awarded in rare cases when an employer's conduct offends the court's sense of decency

However – because awarding either aggravated or punitive damages required finding that the employer had committed an independent actionable wrong – a difficult threshold to meet – before 1997, special damages were rarely given out in wrongful dismissal lawsuits – and when they were awarded, the amounts were relatively small.

Wallace v. United Grain Growers [1997]

Significance: In this 1997 landmark decision, – the Supreme Court of Canada created a new avenue for awarding damages to dismissed employees.

It held that employers have a duty to act fairly and in good faith in the course of dismissal (by being candid, reasonable, honest and forthright) and employers that breach this duty will be made liable for an extended notice period.

This extension did NOT require the employee to prove that the employer had committed an independent actionable wrong, only that it had acted in bad faith. Nor did the employee have to show that the employer's dismissal-related misconduct affected their chances of obtaining new employment.

- Examples given of bad faith conduct included attaching the employee's reputation at the time of dismissal, misrepresenting the reason for the dismissal, or dismissing the employee to deprive the employee of a pension benefit or other right.

In *Wallace* – the Supreme Court made it clear that it did not intend for plaintiffs to automatically claim bad faith damages in every dismissal case – an element of intent, malice, or blatant disregard for the employee had to be involved, such as where the employer was untruthful, misleading or unduly insensitive in the manner in which the employee was terminated.

After *Wallace* – many employees in their statements of claim began adding a claim for bad-faith damages as a matter of course, and courts regularly tacked “Wallace extensions” of several months on to the reasonable notice period.

Wallace Damages (1997-2008) – Wallace v. United Grain Growers [1997]

Facts: In Wallace v United Grain Growers the employee, aged 59, was a successful commissioned salesman who was dismissed after 14 years after being told that his job was secure. The employer indicated that the dismissal was for “good cause” although it would not explain the cause and later withdrew its allegation at trial.

Decision: The trial court found that the employer had alleged dismissal for cause as a part of its “hardball” negotiation strategy. The Supreme Court found this conduct, while short of constituting an independent actionable wrong, worthy of a damage award – which it decided to confer by extending the reasonable notice period. This extension came to be known as “Wallace” or “Bad Faith” damages.

Reasoning: In explaining its decision, the Supreme Court spoke about the inherent power imbalance between employers and employees, especially at the time of termination.

- It stated – the point at which the employment relationship ruptures is the time when the employee is most vulnerable, and hence the most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal...
- “The loss of one’s job is always a traumatic event...however when termination is accompanied by acts of bad faith in the manner of discharge the result can be especially devastating.” (Wallace at para. 95)

Wallace Damages (1997-2008) – Wallace v. United Grain Growers [1997]

Reasoning: The Court held that the employer's bad faith conduct in subjecting an employee to callous and insensitive treatment at the time of dismissal was a factor for which the employee may properly be compensated by an addition to the notice period

- *[98] The obligation of good faith and fair dealing is incapable of a precise definition. However, at a minimum...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*

Takeaway: As a result of Wallace – employers were put on notice that harshness or insensitivity in the manner of dismissal could result in an extension of the notice period.

(2) *Honda Canada Inc. v Keays (2008)*

Evolution of *Wallace* damages

Over time, growing concern about how frequently *Wallace* damages were being awarded.

- The *Wallace* decision spawned a flood of bad faith termination lawsuits.
- Soon courts were extending termination notice almost as a matter of routine.

Revisiting The Law of Wrongful Dismissal Changes

This resulted in the Supreme Court of Canada returning to the issue in 2008 when the Supreme Court issued another landmark decision in *Honda Canada Inc. v Keays* which revisited the law of wrongful dismissal damages.

The changes made by the Supreme Court in the decision are significant. They include reformulating when and how *Wallace*-type damages are awarded and clarifying the circumstances in which punitive damages are appropriate.

(2) Honda Canada Inc. v Keays (2008)

Facts: Keays worked for Honda for 14 years, first on the assembly line and later in data entry. He received positive work assessments but had a poor attendance record due to chronic fatigue syndrome which the employee suffered from. Keays was enrolled in Honda's disability program, which allowed employees to miss work if they provided doctor's notes confirming that their absences were disability related.

However, when Keays began missing more days of work than his doctor had predicted and his medical notes changed in tone, Honda began to question whether Keays' absences were independently evaluated by his doctor. Honda decided to cancel Keays' accommodation, stopped asking for doctors notes and instead asked Keays to meet with an independent physician hired by them to further evaluate.

After further absences, Keays was asked to meet with a specialist in order to determine how to accommodate his disability. When Keays refused to meet with the specialist unless he was informed of the purpose and methodology, Honda wrote the employee a letter saying that they expect him to come to work and meet the specialist and that if he failed to do so that his employment would be terminated.

Keays remained unwilling to meet the specialist, was terminated for cause on the ground of insubordination and sued his employer for wrongful dismissal damages for discrimination and harassment.

(2) Honda Canada Inc. v Keays (2008)

Trial Court Decision: The trial court found that Honda's actions were not only unwarranted, but in fact outrageous. The judge held that Keays had been wrongfully dismissed and awarded him:

- 15 months pay in lieu of reasonable notice
- A 9-month extension to the notice period (for a total of 24 months) for the employers bad faith conduct in his dismissal (Wallace Damages)
- Punitive damages of \$500,000

(2) Honda Canada Inc. v Keays (2008)

Court of Appeal Decision: On appeal, the ONCA reduced the punitive damages award to \$100,000 on the basis that it was disproportionately large and that there was no evidence to support the trial judge's finding of a "protracted corporate conspiracy."

Supreme Court Decision: The Supreme Court of Canada struck down all of the damages awarded except for the reasonable notice award of 15 months.

The Supreme Court Went On To Revisit When And How Wallace Damages Are Awarded

- If an employee can prove the manner of dismissal caused actual damages for mental distress, they should be compensated for it.
- The award should be based on the employee's actual losses rather than given as an extension of the wrongful dismissal notice period.
- The punitive damage award of \$100,000 was also struck down as the court stated the conduct of Honda did not demonstrate "egregious bad faith."
- That there was no no discriminatory conduct here, the employer's disability program was designed to accommodate particular types of disabilities and was not itself discriminatory.

(2) Honda Canada Inc. v Keays (2008)

Takeaway: Moral Damages (formerly Wallace Damages)

The Supreme Court decided that damages attributable to bad faith conduct in the manner of dismissal should be determined on the same basis as other compensatory damages.

- The test is – what damages were within the “reasonable expectation” of the parties as flowing from a breach of contract?
- Because *Wallace v United Grain Growers* established that an employer has a duty of good faith and fairness in the manner of dismissal, damages for breach of that obligation are foreseeable and the employee is entitled to compensation.
- The court held that Wallace damages should not be given through an arbitrary extension of the notice period.
- Instead, they should be given in the same manner as all compensatory damages – through a monetary award that reflects proven damages.

Since Honda: Moral Damages (formerly Wallace Damages) are being claimed less frequently and where claimed, they are somewhat less likely to be awarded than in the past because courts are generally requiring proof of damages suffered.

(3) Boucher v. Wal-Mart Canada Corp., 2014 ONCA 419

Facts: Boucher, aged 43, was an assistant manager at Walmart. By all accounts, Boucher was a good employee and got along with her manager Pinnock – until May 2009 when Pinnock asked Boucher to falsify a temperature log and Boucher refused. After this, Pinnock started belittling and humiliating Boucher in front of co-workers in an attempt to get her to resign. Boucher availed herself of Walmart’s internal policies to meet with the district people manager to discuss the issue. In breach of that policy, Pinnock was advised of this meeting and thereafter his behaviour toward Boucher became even worse. Walmart claimed Boucher’s complaints were unsubstantiated; Pinnock kept demeaning her so Boucher ultimately tendered her resignation. Boucher sued Walmart and Pinnock for constructive dismissal and related damages.

Trial Decision: In a jury trial, Boucher was awarded a total of \$1.45 million in aggregated, punitive and tort damages.

- Against Walmart: Awarded \$1 million in punitive damages + \$200,000 in aggravated damages
- Against Pinnock: Awarded \$100,000 for the tort of intentional infliction of mental suffering + \$150,000 for punitive damages.

Issue: Whether the special damages awarded against Walmart & Pinnock should be set aside or reduced for being unnecessary or excessive?

(3) Boucher v. Wal-Mart Canada Corp., 2014 ONCA 419

ONCA Decision: Against Pinnock

The court found that Boucher had proven all three elements of the tort of intentional infliction of mental suffering

1. The defendant's conduct was flagrant and outrageous
 - Pinnock continuously and publicly demeaned Boucher over a period of nearly six months
2. The defendant's conduct was calculated to harm the plaintiff
 - Evidence showed that Pinnock was overjoyed at accomplishing his goal of getting Boucher to quit
3. The defendant's conduct caused the plaintiff to suffer a visible and provable illness
 - Boucher's family doctor confirmed symptoms – abdominal pain, weight loss, inability to eat or sleep which arose from work-related stress

The ONCA upheld the amount of \$100,000 for the tort of intentional infliction of mental suffering.

The court reduced the award for punitive damages to \$10,000.

(3) Boucher v. Wal-Mart Canada Corp., 2014 ONCA 419

ONCA Decision: Against Walmart

The ONCA upheld the \$200,000 award for aggravated damages against Walmart but reduced the punitive damages from \$1 million to \$100,000.

The court held that the \$200,000 aggravated damages was justified on several grounds:

- Walmart failed to take Boucher's complaints seriously
- It failed to discipline Pinnock or stop his ongoing mistreatment of her
- It failed to follow and enforce its own workplace policies
- It threatened Boucher with retaliation for making her complaints

These actions warranted a substantial award for aggravated damages, separate from Pinnock's tort of intentional infliction of mental suffering – for which Walmart was also vicariously liable

Takeaway: Although the Court of Appeal scaled back the historically high punitive damage awards against both Walmart & Pinnock, the total amount awarded (\$410,000) in special damages alone remains a significant sum.

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Significance: The Ontario Superior Court awarded \$750,000 in extraordinary damages (moral damages, including aggravated damages, damages for mental distress and punitive damages) against Wal-Mart for its pre-termination and post-termination conduct of the termination of one of its senior employees who was “set up to fail” and left in limbo for many months by the employer.

Facts: Galea began working at Wal-Mart in 2002 as a District Manager – in training. Over the course of her employment, Galea received numerous promotions, rising quickly through the ranks over the course of 7 years and was considered a valued employee. In 2008, Ms. Galea was promoted to Vice-President, General Merchandise.

In January of 2010, Ms. Galea was informed that the position of Vice-President, General Merchandise had been eliminated as part of restructuring. Despite that, Wal-Mart assured her she was still a valuable employee and would find her another position. Galea was eventually demoted and assigned to a position with no duties or management expectations.

After delaying for several months, Galea was informed in writing in November of 2010 that her employment had been terminated, effective immediately.

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Employer's Conduct After Dismissal

- Wal-Mart continued to pay Galea's salary for the next 11.5 months, but then stopped abruptly (in violation of Galea's employment agreement).
- Wal-Mart also cancelled all of her health and dental benefits without informing her

Galea then commenced an action against Walmart for damages arising out of her employment contract, including punitive and aggravated damages

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Decision: The court found that Galea was entitled to damages for breach of contract, aggravated damages, and punitive damages.

- Court found a 2-year fixed term existed, therefore no mitigation obligation.
- \$915,897.46 for lost wages, benefits, and bonus entitlements
- **\$250,000.00 in aggravated damages**
- \$500,000.00 in punitive damages

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Aggravated Damages

Hadley test for aggravated damages is:

- Whether the damages were reasonably foreseeable on the breach of the contract
- The conduct of the employer is such that it causes the employee mental distress beyond the understandable distress and hurt feelings that normally accompany termination
- These damages are compensable, and are meant to compensate the employee for hurt feelings, and their loss of dignity and respect

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Moral Damages

Courts have long recognized an employer's duty to act in good faith and fair dealing when dismissing an employee; employers must be candid, reasonable, honest, and forthright with employees

- Wallace v. UGG 1997 SCC – extended the notice period
- Keays v. Honda 2008 SCC– moral damages are simply aggravated damages which are to be awarded under the Hadley principles:
 - Ex: if it is reasonably contemplated that the actions (manner of dismissal) would cause mental distress – it is compensable.
 - Ex: Attacking an employee's reputation, or misrepresentation regarding the reason for termination

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Moral Damages: Due to the factual background, the Court was highly critical of the conduct of Wal-Mart both during the final months of Galea's employment and in how the company elected to conduct itself during the course of litigation. The Court stated:

- *...Wal-Mart's conduct was misleading at best, and dishonest at worst, in the way the company treated Ms. Galea. Only Wal-Mart knew that Ms. Galea's career was over long before she was actually terminated. To keep her in suspended animation was unduly insensitive conduct. The 10 months she was left to seek a new foothold qualifies as a manner of dismissal that caused Ms. Galea mental distress and qualifies her for aggravated damages.*
- *I am also awarding moral damages to Ms. Galea for Wal-Mart's post-termination conduct. I consider Wal-Mart's decision to stop the continued payment of her base salary...to be unduly insensitive...I consider Wal-Mart's delay in answering its undertakings until the eve of trial, and the torrent of productions made in the course of trial...capable of causing Ms. Galea prolonged anguish about the case.*

(paras. 277 and 279)

The Court awarded Galea \$200,000 in moral damages for pre-termination conduct of Wal-Mart and a further \$50,000 for its litigation conduct.

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Punitive Damages

- Punitive damages are awarded ‘against’ a defendant rather than ‘for’ a plaintiff
- They are meant to punish, and to demonstrate the court’s disapproval of the defendant’s actions
- They are only awarded in the exceptional cases where the defendant’s conduct is “malicious, oppressive and high-handed” such that it ‘offends the court’s sense of decency’

Punitive Damages

- The award also has to be ‘proportional’ – in this sense, means that the amount awarded scales with the blameworthiness of the defendant
- It also means that the amount awarded must be appropriate to effectively denounce and deter the behaviour

(4) *Galea v Wal-Mart Canada Corp, 2017 ONSC 245*

Punitive Damages In addition to moral damages, the court also awarded punitive damages of \$500,00.00. In particular, the Court concluded:

- *“...Wal-Mart would make representations to Ms. Galea about her career prospects while making decisions that detracted from, or even defeated that purpose. It is not that Wal-Mart set Ms. Galea up to fail; it is that Wal-Mart built her up, only to let her down that much more. That corporate behaviour was not just unduly insensitive, it was mean.” (para 290)*

Punitive Damages

- The court found that Wal-Mart’s behaviour was particularly heinous
- In order to effectively deter the behaviour of Wal-Mart, the award needed to be larger
- The court reasoned that the conduct of Wal-Mart was worse than the conduct of the employer in a previous case (McNeil v Brewers Retain Inc.) where the court there awarded \$450,000.00 in punitive damages
- The court referred to the Boucher v. Wal-Mart (2014) decision where a punitive damages award was reduced from \$1 million to \$100,000.
- Based on that, the court awarded \$500,000.00

(4) Galea v Wal-Mart Canada Corp, 2017 ONSC 245

Takeaway: Aggravated and punitive damages are alive and well (and becoming more common) in employment law

As an employer – understand the company's duty of good faith to employees, both throughout the employment relationship and the termination process

- Comply with employment contract. In this case, the employer, Wal-Mart, had no excuse for cutting off Galea's post-employment salary and benefits to which she was entitled

(5) Russell v. The Brick Warehouse LP, 2021 ONSC 4822

The court awarded \$25,000 in moral/aggravated damages because the employer breached the duty of good faith and fair dealing at the time of and following the employee's dismissal.

Facts: An employee was awarded \$25,000 in moral damages because the termination letter did not expressly state that the employee would be entitled to minimum ESA entitlements if they did not sign a release. When the employee refused his severance package offered by the employer, the employer paid the required minimum standards, continued the employee's benefits throughout the statutory notice period (**with the exception of LTD and vacation pay**), however failed to inform the employee that he would be entitled to his minimum ESA entitlements if he did not sign the release. Further, the employer did not communicate the benefit continuation to Russell until 7 months after the termination.

(5) Russell v. The Brick Warehouse LP, 2021 ONSC 4822

Analysis:

In *Honda Canada Inc. v. Keays*, 2008 SCC 39, the Supreme Court ruled that employees may be entitled to moral or aggravated damages when an employer engages in conduct that is unfair or in bad faith (untruthful, misleading or unduly insensitive) in the manner of dismissal. Effectively, an employee should be compensated if they suffer mental distress beyond the normal distress and hurt feelings that come with being dismissed.

Relevant factors re: award of moral or aggravated damages include:

- The employer breached its duty to act in good faith when dismissing an employee
- The employer's conduct was untruthful, misleading, or unduly insensitive
- The employer was not candid, reasonable, honest, and forthright with the employee
- The mental distress experienced by the employee would have been reasonably contemplated by the employer
- The employee's mental distress was beyond what would be expected normally from termination
- Grounds for moral damages to be assessed on a case-by-case basis (para. 50, cited from *Galea v. Wal-Mart*)

(5) Russell v. The Brick Warehouse LP, 2021 ONSC 4822

The court took issue with the lack of transparency and clarity surrounding the termination letter. The employee was only given 3 days to accept the offer; the employer did not fully comply with the minimum employment standards under the *ESA* as it did not extend other benefits (Long-term disability, vacation pay) through the statutory notice period. The termination letter also failed to outline that if he declined the offer, that the employee would still be provided with his statutory benefits.

Even though he eventually received those benefits, it was wrong of the employer not to make this clear from the start. **This type of lack of transparency can induce a worker to sign a release because they are led to believe they will get nothing if they do not accept the terms of the offer.**

- The Court stated that “inadvertently” delaying payment of the correct amount of severance also caused the plaintiff stress beyond what is normally expected at termination. Russell’s spouse was forced to go back to work full time and he had to use his savings to make ends meet. He also received medical treatment and medication for stress related issues.
- There was no adequate reasoning for the employer in this case to not advise the plaintiff that he would still receive his statutory entitlements if he rejected the without prejudice severance offer.
- Even though the employer continued his benefits after termination, it treated him poorly by failing to inform him of that so that he could actually benefit from them.
- The Court concluded that no worker should be treated this way.

(5) Russell v. The Brick Warehouse LP, 2021 ONSC 4822

Decision: The Court awarded \$25,000 in moral damages for four reasons:

1. There was a lack of transparency and fair dealing in failing to advise the plaintiff that he would still get his *ESA* entitlements if he rejected the termination letter offer
2. There was a lack of transparency and fair dealing in not informing the plaintiff that his benefits would be extended throughout the statutory notice period even if he rejected the offer
3. The offer itself did not meet all the statutory requirements, including vacation pay accrual during the statutory notice period
4. The mental distress arising because of the above was reasonably foreseeable to the employer

(6) Avoiding Wrongful Dismissal Claims, Handle Terminations Professionally

Insensitive conduct during the termination process can increase an employer's liability in a number of ways. It can cause a court to award compensatory damages for damages the employee actually suffered because of the manner of the dismissal. It can also result in punitive damages.

Tips When Dismissing An Employee:

1. Hold termination meetings in private locations, such as the employee's office or in a meeting room. This way the employer controls the length of the meeting, while the employee can remain in a private place until they are ready to encounter other employees
2. Investigate an employee's personal circumstances before terminating them. (ex. avoid terminating an employee on their birthday or around a holiday) – lack of sensitivity may cause a court to increase the compensatory damages award
3. Keep the meeting focused on the termination and keep the meeting brief. If the employee is being dismissed for cause, the employer should briefly state the reasons for dismissal but avoid reciting a series of employee's shortcomings.
4. Make no unsubstantiated allegations – do not misrepresent the reasons for the dismissal

(6) Avoiding Wrongful Dismissal Claims, Handle Terminations Professionally

Tips When Dismissing An Employee:

6. Have two representatives present at the termination meeting.
7. Ensure that all representatives of management at the meeting make notes, date them and sign them
8. Confirm the termination of employment in writing (written notice is required under the ESA) The letter should include the effective date of termination, should briefly set out the reasons for the termination and confirm the reasonable notice provided or the just cause alleged. An employer can also use the letter to remind an employee of any post termination obligations, such as confidentiality.
9. Pay outstanding wages, commissions, expenses and vacation pay.
10. Provide employment standards termination and severance payments immediately if the dismissal is without cause. Withholding them as a tactic to pressure an employee into signing a release could result in additional damages for bad faith conduct if the matter proceeds to litigation.
11. Where a separation package is provided, the employee the name of a contact person who can answer any questions related to the separation package; contact person should be knowledgeable about the package and related legal requirements.
12. Ask the employee to return all company property in their possession; specify the items and a date by which they must be returned

(6) Avoiding Wrongful Dismissal Claims, Handle Terminations Professionally

General Guidelines For An Employer To Follow When Dismissing An Employee:

14. Do not offer a separation package if termination is for wilful misconduct
15. Explain all terms of any separation package; list the support being offered – financial compensation, outplacement services, benefit conversion options, letter of reference, etc.
16. Avoid humiliating the employee – any conduct that unnecessarily undermines an employee's dignity may result in additional damages
17. Prepare the employee's Record of Employment promptly; unjustifiably delaying an employee's receipt of employment insurance benefits could lead to additional damages
18. Have a lawyer draft or review the termination letter

(7) Conclusion & Takeaways

Reminder: Moral damages for bad faith dismissal are only available for mental distress suffered that was reasonably foreseeable as a result of the bad faith manner of dismissal. Moral damages are not available for normal stress and hurt feeling caused by the dismissal itself, even if the decision to dismiss the employee was unfair.

Takeaway for Employers:

Employers should always be respectful when terminating an employee. Regardless of the circumstances of the dismissal, employers should show regard for their employee's dignity, treat them fairly, in good faith and conduct themselves honestly.

Consult an employment lawyer!

Thank you.

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