

Bad Faith Damages

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Bad Faith Damages

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Creation of duty of good Faith

The Supreme Court of Canada, in the 1997 decision of *Wallace v United Grain Growers LTD.*,¹ recognized an obligation of good faith and fair dealing in the manner of dismissal as follows:

The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employees 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.²

Since then, courts have expanded the duty of good faith and fair dealing by finding other pre-and post termination conduct to form a "component" of the manner of dismissal.³ The "Wallace bump" has been claimed where employer's acted in bad faith in connection with the termination of the employee's employment in some respect such as to justify an increased notice period. Circumstances giving rise to what had come to be referred to "Wallace damages" have included, an employer embarking on a lengthy campaign to procure the voluntary resignation of an employee and failing to discuss severance options with an employee.⁴ By 2004 such damages had become a routine plea leading the late Honourable Randal Echin to chastise the profession and offer a stern warning against continuing this practise.⁵

¹ Stacey Reginald Ball, *Canada Law Book, Employment Law*, Release No. 2 (Thomas Reuters, 2015) ("Ball") at s. 24:60; *Wallace v United Grain Growers*, [1997] 3 SCR 701, at p. 36 ("Wallace").

² *Wallace* at para. 98. This was further confirmed in *Keays v Honda Canada Inc.* (2008), 294 DLR (4th) 577 at para 57-58 ("*Honda*").

³ Ball at ss. 24:60; *Gismondi v Toronto (City)* 2003 CarswellONT 1498, at para. 23.

⁴ *Lowndes v Summit Ford Sales Ltd.*, (2006), 47 CCEL (3D) 198 at para. 18.

⁵ *Yanez v. Canac Kitchens*. 2004 CanLII 48186 (ON SC).

Moral Damages

In the 2008, Supreme Court of Canada decision, *Keays v. Honda*, the court used the term “moral damages” to refer to Wallace damages⁶ and further clarified what had been intended in Wallace. It held that moral damages were justified where it is reasonably foreseeable that the employer's breach of the duty of good faith and fair dealing in the manner of dismissal caused the employee to suffer mental distress.⁷ The former Wallace bump on the period of reasonable notice was removed by the court in favour of a more conservative approach where the court held a bump would only be awarded where there was a connection between the period of notice and the wrongful conduct (i.e. it took the employee longer to get a job as a result). Notwithstanding, we have seen few such awards where such direct relationship is cited in the reasons for the decision.

The result of *Honda* was that the duty of good faith and fair dealing by an employer in the context of discharge was left significantly without teeth. The award of moral damages as they are now termed, requires a loss before damages were to be awarded.

The court in *Honda* made it clear that moral damages required more than the usual mental distress cause by hurt feelings which are anticipated and expected to result from the fact of termination of employment⁸. Where the manner of dismissal caused mental distress, moral damages could be awarded. The Supreme Court of Canada cautioned the need to avoid duplicative damage awards, as punitive damages and Wallace damages had both been awarded in a fair number of cases by that time, and had been the case in the lower court decisions in *Honda*.

The court in *Honda* did not add any requirement to provide medical evidence of the mental distress suffered by or the impact on the employee. The damages still stem primarily from the conduct of the employer. Notwithstanding, we have seen many decisions in which medical evidence was relied upon as supporting the award. There have still been many cases awarding damages without such documentary support though.⁹ The evidence of mental distress is often the employee's own

⁶ *Honda* at para. 59.

⁷ *Honda* at para. 114.

⁸ *Honda* at para. 56.

⁹ See *Teljeur v Aurora Hotel Group*, 2023 ONSC 1234 at para 58; where although no medical evidence was produced by employee to illustrate the stressed suffered by the plaintiff, the judge accepted the plaintiff's evidence that

testimony. Severity may dictate the need for something more substantive. However, from reviewing the case law summary prepared by Mark Fletcher in a paper entitled "*What is Required to Prove Moral or Bad Faith Damages: A Practical Perspective*"¹⁰, which analyzed the evidence presented and the quantum of moral damages awarded, there has been no correlation between submitting medical evidence and the quantum of a damage award.

Similarly, the Ontario Court of Appeal, in *Jones v Tsige*¹¹ commented that where the plaintiff has suffered no provable pecuniary loss, the damages call into the category of "symbolic" or "moral" damages awarded to vindicate rights or symbolize recognition of their infringement emphasizing that medical evidence may not be required.

Aggravated Damages

Aggravated damages have merged conceptually with moral damages post-Honda. Aggravated damages are an award of compensation for mental distress taking into account damages suffered as well as intangible injuries¹². The court in Honda expressly removed the distinction:

“There is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages.”¹³

all of that the employers conduct added significant stress to the plaintiff's life on top of the stress he was experiencing as a result of being terminated.

¹⁰ OBA PD – September 23, 2013, Fundamental of Employment Law.

¹¹ Ball at ss. 24:71; *Jones v Tsige*, 2012 ONCA 32 at para. 75.

¹² *Fidler v Sun Life Assurance Co. of Canada* 2006 SCC 30 at para. 51.

¹³ *Honda* at para. 59.

While there is some confusion over these terms from time to time, the Ontario Court of Appeal used the terminology of aggravated damages as opposed to moral damages in the *Boucher v. Wal-Mart*¹⁴ case and again in *Strudwick v Applied Consumer & Clinical Evaluations Inc.*¹⁵

Examples of Moral Damages

Grounds for an award of moral damages are thought to include similar grounds to those awarded for Wallace damages which have included:

- allegations of just cause not proven and not reasonably held, or where allegations included fraud, theft, or serious misconduct in particular with respect to the later when humiliation was caused to the employee;
- misrepresentation as to the reason for a termination;
- timing of a termination with the intention to deprive the employee of a benefit which would imminently vest (pension, bonus, etc.);
- conduct by the employer which caused harm to the employee's reputation and therefore resulted in a longer period of unemployment;
- termination of an employee returning from medical leave;
- failing to conduct a proper workplace investigation; and
- failing to pay employment standards minimums¹⁶.

Moral damage awards have averaged in the \$25,000 range since *Honda*. More recently however, the jury in *Boucher v. Wal-Mart Canada Corp.*¹⁷ saw fit to award \$200,000, a sum which the Court of Appeal refused to overturn on appeal finding the jury to have been properly instructed and hence no error was made which would justify the court's interference.¹⁸

¹⁴ *Boucher v Wal-Mart Canada Corp.* 2014 ONCA 419 para. 67 ("*Wal-Mart*").

¹⁵ *Strudwick v Applied Consumer & Clinical Evaluations Inc.* at paras. 88—104.

¹⁶ MacDonald, Natalie C., *Extraordinary Damages in Canadian Employment Law*, Carswell 2010, pp. 72-150.

¹⁷ *Wal-Mart* at para. 110.

¹⁸ *Wal-Mart* at para. 74.

Specific examples of cases where moral damages were awarded are highlighted in the following chart:

Case Name	Unfair or bad faith conduct	Award
<i>Strudwick v Applied Consumer & Clinical Evaluations Inc.</i> , 2016 ONCA 520	<ul style="list-style-type: none"> • In lead up the employees dismissal, she was confronted in front of an estimated 13 other employees, yelled at and called a "goddamned fool"; • She was then provided with a document confirming her termination, a cheque for three months' pay, and a form of release. • When she did not sign the release, the Employer took the cheque back and at that point she was escorted to her desk to collect her belongings and marched out of the building in front of her co-workers; and • The Employer submitted a termination indicating that she was terminated for insubordination and wilful misconduct which delayed her ability to secure unemployment insurance payments.¹⁹ 	\$61,599.82 for aggravated damages
<i>Bovin v Over the Rainbow Packaging Services Inc.</i> 2017 ONSC 1143	<ul style="list-style-type: none"> • The employer engaged in a course of conduct designed to harass the employee to make her quit by: <ul style="list-style-type: none"> ○ telling her she was overpaid and would have to start at the bottom when the business closed, ○ the owner sat in her office and stared at her while she tried to work, ○ threatening that the business would take legal action against her if she did not take all legal action against employees not doing their job.²⁰ 	\$15,000 for moral damages
<i>McLean v Dynacast Ltd.</i> , 2019 ONSC 7146	<ul style="list-style-type: none"> • The Employer unilaterally modified the terms of the employment agreement in spite of the non-modification clause in the contract and insisted the Employee accept the change in position or be deemed to have quit; 	\$25,000 for aggravated damages

¹⁹ *Strudwick v Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras. 14-15.

²⁰ *Bovin v Over the Rainbow Packaging Services Inc.* 2017 ONSC 1143 at para. 5.

	<ul style="list-style-type: none"> • the Employer told the Employee that the reason for the change in job description was a decline in sales which was untrue and misleading; and • the Employer placed unreasonable pressure on the employee to accept the role or be deemed to have quit.²¹ 	
<i>Humphrey v Mene</i> , 2021 ONSC 2539	<ul style="list-style-type: none"> • The employer was untruthful about the reasons for dismissal and exaggerated those reasons; and • the employer communicated with other employees and clients about her termination, before she was notified of the termination²² 	\$50,000 for aggravated damages and \$25,000 for punitive damages
<i>Russell v. The Brick Warehouse LP</i> , 2021 ONSC 4822	<ul style="list-style-type: none"> • A lack of transparency and fair dealing by the Employer in the termination process by failing to advise the Plaintiff he would be provided with his full statutory (<i>ESA</i>) entitlements in the event he rejected the offer reflected in the termination letter; • a lack of transparency and fair dealing by failing to advise the Plaintiff that his benefits would be extended consistent with his statutory notice period irrespective of whether he accepted the Employer's offer; • the failure of the offer to meet all of the statutory entitlements, including vacation pay accrued over the course of the statutory notice period; and • mental distress the Plaintiff suffered beyond the usual hurt feelings and distress of being dismissed, and which was reasonably foreseeable to the employer arising from its lack of transparency and fair dealing in the manner of terminating his employment.²³ 	\$25,000 as aggravated/moral damages
<i>Osmani v. Universal Structural Restorations Ltd.</i> , 2022 ONSC 6979	<ul style="list-style-type: none"> • The Employer took little to no steps to end abusive conduct by another employee against the Plaintiff, which lasted over a 	\$75,000 for aggravated/moral

²¹ *McLean v Dynacast Ltd.*, 2019 ONSC 7146 at paras 94-95.

²² *Humphrey v Mene*, 2021 ONSC 2539 at para. 176.

²³ *Russell v. The Brick Warehouse LP*, 2021 ONSC 4822 at para 62.

	<p>year, and conducted an insufficient investigation culminating in an informal caution;</p> <ul style="list-style-type: none"> • the Employer failed to enforce workplace policies which were designed to protect employees; • following the Plaintiff’s workplace injury, the employer produced a misleading investigation report and then interfered with the Plaintiff’s application to the WSIB; • upon the Plaintiff’s return to work the employer failed to make efforts to ensure that he was only given tasks that were within his abilities; and • the Employer placed the plaintiff back under the supervision of the employee who had engaged in abusive conduct towards him. • The Court found that the employer’s pre- and post-termination actions made the workplace objectively intolerable and caused the plaintiff significant mental distress and loss of dignity.²⁴ 	<p>damages and \$25,000 for punitive damages</p>
<p><i>Pohl v Hudson's Bay Company</i> 2022 ONSC 5230</p>	<ul style="list-style-type: none"> • The employer deliberately violated the <i>ESA</i> by paying out the employee's termination and severance pay by way of instalment instead of in a lump sum; and • the ROE was filled out incorrectly and filed late.²⁵ 	<p>\$45,000 in moral damages</p>

Intangible Effects

In addition to the aforementioned non-exhaustive categories, “intangible” impacts in the nature of enhanced difficulty in obtaining new employment due to the manner of dismissal can be awarded in a wrongful dismissal action²⁶. While these damages are awarded under the same rubric as

²⁴ *Osmani v. Universal Structural Restorations Ltd.*, 2022 ONSC 6979 at paras 417-418.

²⁵ *Pohl v Hudson's Bay Company* 2022 ONSC 5230 at para.

²⁶ *Lau v Royal Bank of Canada*, 2017 BCCA 253 at para. 59 ("*Lau*").

damages for mental distress, mental distress is a not a prerequisite.²⁷ To support an award of aggravated damages for intangible effects, the evidence must demonstrate not only harm to the claimant but also a linkage between the manner of dismissal and the alleged harm.²⁸

Conclusion

The proliferation of cases where moral/aggravated damages have been awarded indicate that the obligation of good faith and fair dealing in the manner of dismissal but also pre- and post-termination is an area of law that will continue to develop likely to include further examples of conduct by employers.

²⁷ Ball at ss. 24:76; *Lau* at para. 59.

²⁸ Ball at ss. 24:76; *Lau* at para. 60.