



## “Blockbuster” 42-month notice award trimmed back by B.C. Court of Appeal

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Canadian courts have shown an increased willingness to make large damage awards to employees wrongfully dismissed in a manner that causes mental distress or difficulty in securing new employment. The Supreme Court of Canada’s 1997 decision in *Wallace v. United Grain Growers Ltd.* (see “Fairly, reasonably and decently”: Employers obliged to deal in good faith with dismissed employees, Supreme Court rules”) only confirmed the growing tendency of courts to deal firmly with employers found to have acted in bad faith towards wrongfully dismissed employees.

Possibly the high-water mark in what has come to be known as *Wallace* damages was the award of 42 months’ notice by the British Columbia Supreme Court in *Clendenning v. Lowndes Lambert (B.C.) Ltd.* The award was especially noteworthy given that the employee had been employed for only some four and one half years at the time of her termination. Now, however, the province’s Court of Appeal, in a 2-1 decision issued on November 27, 2000, has reduced the award to 12 months. In so doing, the Court’s majority may have lent some comfort to employers who unsuccessfully maintain a just cause defence at trial.

### **TRIAL JUDGE: EMPLOYER’S CONDUCT “UNTRUTHFUL, MISLEADING AND UNDULY INSENSITIVE”**

Clendenning was employed by an insurance firm as office manager and Nominee, the person responsible for ensuring the regulatory compliance of an insurance brokerage. Her termination came about after the employer became dissatisfied with her productivity, her use of the office cellular phone for personal reasons, and what it saw as her erratic personal life. This latter ground referred to her relationship with a man in prison and rumours that she suffered from a chemical dependency.

At trial, however, the main ground asserted by the employer was one that came to its attention after Clendenning’s termination. The employer alleged that Clendenning had submitted false employment information with the forged signature of her superior as part of a mortgage application.

Clendenning conceded that the false information had been sent, and admitted that she had signed a blank mortgage application and a blank offer to purchase. However, she denied responsibility for the misrepresentation, stating that her real estate agent had acted without her knowledge.

In support of her position, Clendenning produced the decision of the Hearing Committee of the Real Estate Council of British Columbia, which had found that the real estate agent had submitted false



employment information in support of four other mortgage applications. Relying on these findings (which were in relation to other mortgage applicants, not Clendenning), and noting that the employer had failed to call the real estate agent as a witness, the trial judge held that the employer had not proven that Clendenning was a party to deception.

Having found that none of the employer's allegations against Clendenning were proven, the judge turned to the question of damages. He found that all of the employer's allegations were made known to potential employers, making it impossible for Clendenning to obtain new employment in the insurance field. Citing the "untruthful, misleading and unduly insensitive activities" of the employer, the judge awarded Clendenning 42 months' notice, being the time between her dismissal and the date of judgment.

### **COURT OF APPEAL: EVIDENCE OF BAD FAITH LACKING**

In reducing the award of damages to 12 months, the Court of Appeal took issue with the judge's conclusion that the employer had communicated false allegations about Clendenning to prospective employers. Rather, the Court stated, there was no evidence to support this conclusion, and the two prospective employers called by Clendenning did not testify that the employer had conveyed its allegations to them.

The employer's behaviour, the Court observed, did not have the "wholesale defamatory character" suggested by the trial judge. Nor did the record suggest that the employer did not seriously believe its allegations against Clendenning:

"[T]he most serious allegation, that relating to forgery and fraudulent mortgage application, was pursued at trial and before this Court as establishing cause for dismissal. While that claim did not succeed, one cannot say the plea was frivolous. The employer's behaviour on this aspect indicates an honest belief in the validity of the plea."

This was concurred in by the other judge writing for the majority, who stated that the allegation of fraud against Clendenning "had a solid foundation in evidence". However, despite taking issue both with the trial judge's finding that the employer had acted in bad faith and communicated its allegations to others, the Court held that some notice for mental distress caused to Clendenning was warranted:

"In all the circumstances, acknowledging the trial judge's strong condemnation of the employer's behaviour, and recognizing that Ms. Clendenning did suffer from depression for several months after dismissal, I would award 12 months damages in lieu of notice."

### **In Our View**

Observers have noted that the Court of Appeal decision signals to employers that, if they have an



honest belief that the employee gave cause for dismissal, and if there is some credible evidence for that belief, they will not be penalized under *Wallace* principles for maintaining a just cause defence at trial, where the defence is ultimately unsuccessful. This appears to be one message coming out of the majority decision. However, it should also be borne in mind that the majority found that the trial judge had no evidence on which to base his conclusion that the employer had relayed its allegations against Clendenning to other employers. Clearly, when discharging an employee for cause, employers should use care to minimize actions which could be seen as causing mental distress to the employee, and they should also be cautious when communicating with other employers with whom the dismissed employee may seek employment.

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