EMOND HARNDEN
LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

"Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules

January 1, 1998

In the July 1997 issue of *FOCUS* we noted that, in three separate cases, Courts of Appeal across Canada had awarded hefty wrongful dismissal damages to employees whom the courts considered were poorly treated at the time of their termination (see "False allegations when dismissing employees lead to large damage awards" on our Publications page). Now the Supreme Court of Canada has weighed in with a decision that will give pause to employers who may be tempted to "play hardball" with dismissed employees. While the Court declined to create a new cause of action for unfair or bad faith dismissals, it added a new element to the list of factors for determining an appropriate notice period first enumerated in *Bardal v. Globe & Mail*.

The decision, *Wallace v. United Grain Growers Ltd.* (October 30, 1997), concerned an employee who, at the age of 59, was discharged without explanation after 14 years as the firm's top salesperson. When he was hired, Wallace had been told that, if he performed as expected, he could remain at his job until retirement.

When Wallace sued for wrongful dismissal, the company responded by claiming that he had been insubordinate and had failed to carry out his duties, a position it abandoned only when the trial commenced more than two years later. For Wallace, who was unable to find other similar employment, the ordeal of his sudden dismissal led him to become depressed and in need of psychiatric help.

THE COURTS BELOW

At trial, the judge awarded Wallace 24 months' salary as reasonable notice. In addition to considering the four factors set out in *Bardal* (the plaintiff's age, length of service, position in the company and prospects for alternate employment) for determining the appropriate notice period, the judge placed particular emphasis on the fact that the employer's sudden dismissal and subsequent treatment of Wallace had made alternate employment "virtually unavailable" to him.

Further, the judge awarded an additional $15,000. by way of aggravated damages for mental distress, concluding that the employer was liable for these damages both in contract and in tort. With respect to the contractual damages, the judge found that Wallace had been given a guarantee of job security which was an implied term of the employment contract and that both parties must have known that, if he were dismissed without cause or warning, he would probably suffer mental distress. Regarding the

tort claim, the judge pointed to the employer's decision to "play hardball" with Wallace by insisting for over two years that he had been dismissed for cause. Given that course of action, the judge ruled, it was reasonably foreseeable that Wallace would suffer mental distress, and this negligent infliction of harassment warranted compensation by way of damages.

The Manitoba Court of Appeal agreed that, based on the *Bardal* factors, Wallace was entitled to a lengthy notice period. However, because it believed that the judge had given too much weight to the additional factor of the manner of Wallace's dismissal, it trimmed the notice period down to 15 months.

The Court also overturned the award of damages for mental distress. In making this ruling, the Court relied on a 1989 decision by the Supreme Court of Canada in *Vorvis v. Insurance Corporation of British Columbia*, which held that damages for mental distress in a wrongful dismissal case must flow from an "independently actionable wrong", i.e., a wrong which by itself could give rise to a court action. Here, the Court noted, there was no evidence that the employer had committed any actionable wrong other than the failure to give reasonable notice.

SUPREME COURT: NO SEPARATE CAUSE OF ACTION FOR INSENSITIVE DISMISSAL …

The Supreme Court of Canada restored the award of 24 months' notice, but upheld the denial of separate damages for mental distress. In declining to award damages for mental distress, the Court stated that it agreed there was no evidence of an independently actionable wrong against Wallace, either in tort or in contract. The Court also declined to create a legal cause of action of "bad faith discharge". Requiring good faith reasons for dismissal would unduly inhibit employers' right to terminate employment contracts at any time with reasonable notice. Such a change in the law was best left to the legislature, the Court concluded.

… BUT BAD FAITH DISMISSAL MAY LENGTHEN THE NOTICE PERIOD

Turning to the length of the notice period, the Court noted that, since *Bardal* was decided, Canadian courts have added other factors, such as a "promise of job security" or an "inducement to leave previous employment", to the criteria for determining appropriate notice. It was now time to add "manner of dismissal" to the list.

The Court noted that earlier decisions which held that damages in wrongful dismissal cases could only flow from the failure to give reasonable notice failed to take into account the special nature of employment contracts. These were contracts in which the parties had unequal bargaining power; and the unequal balance of power in both the employment contract and the employment relationship made employees a vulnerable group in society. Moreover, because employees are most vulnerable at the time of dismissal, the law must serve to discourage insensitive conduct by employers during this period:

"The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, 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.... [W]hen termination is accompanied by acts of bad faith in the manner of discharge, the results can be especially devastating. In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated for by adding to the length of the notice period."

The Court provided examples from recent case law of breaches of the obligation of good faith. These included making wrongful allegations of theft against a dismissed employee, firing an employee suffering from depression while he was on disability leave, and secretly planning to terminate an employee who had been assured his position was secure and was selling his house in reliance on that assurance. Summing up the type of conduct it was seeking to encourage, the Court stated:

"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 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."

The Court specifically rejected the view that the manner of dismissal could be a factor in lengthening the notice period only where it harmed the plaintiff's prospects for future employment. While such conduct by employers may lead to more compensation than conduct which has no effect on employment prospects, the Court held that intangible injuries that result from bad faith conduct, such as mental distress, also merit compensation.

The Court concluded by denying that its ruling imposed an onerous obligation on employers: "I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law."

In Our View

The Supreme Court's decision is more a confirmation of recent trends in the law than a new direction. Other courts have taken the position that damages for mental distress can be awarded in cases of bad faith dismissal, even in the absence of an actionable wrong distinct from the dismissal itself.

Interesting aspects of the case, which may be a comfort to employers, are the Court's refusal to imply a "good faith discharge" term into the employment contract or to create a tort of "bad faith discharge", and its retention of the requirement of an independently actionable wrong for separate awards of mental distress damages. These appear to cast doubt on the recent decision of the Ontario Court of Appeal in *Ditchburn v. Landis & Gyr Powers Ltd.* (June 12, 1997) which upheld an award of

$15,000. damages for mental distress in addition to 22 months' reasonable notice. The court in that case supported the lower court's ruling that the employer had breached an implied contractual obligation to provide added support, such as counselling, to a long-term employee. The decision in *Wallace* suggests that this approach may now be problematic. (See also "Aggravated and punitive damages refused for employee denied disability benefits", "Terminating employees: a tough job, but someone's got to do it" and "Long-serving employee on serial short-term contracts wins record notice and punitive damages" on our Publications page.)

For more information on this subject, please contact Jacques A. Emond at (613) 563-7660, Extension 224.