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The Evolution of the Wallace Duty of Good Faith and Fair Dealing

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TABLE OF CONTENTS

1. Introduction………………………………………………………………………………… 1

2. The Wallace Decision………………………………………………………………… 2

3. The Broadening of Cases where Wallace Damages were Awarded………………… 4

4. Traditional Awards of Wallace Damages – Character of the Evidence……………... 7

5. Recent cases where Wallace claims have been successful………………………… 11

6. Emerging areas where Wallace Damages have been awarded…………………… 15
   (a) Wallace damages and the Duty to Accommodate………………………………… 15
   (b) Wallace damages in Constructive Dismissal Cases……………………………... 20

7. Conclusion………………………………………………………………………………… 25
1. Introduction

When the Supreme Court of Canada issued its decision in *Wallace v. United Grain Growers*¹ in 1997, it was heralded by some as a significant breakthrough for employees who are wrongfully dismissed by their employer. It gave these aggrieved workers an opportunity to obtain additional damages from their former employer in the form of an extension to the reasonable notice period if there was evidence that the employer did not act in good faith in dismissing the employee. Nearly a decade after this landmark judgment, there have been hundreds of wrongful dismissal awards which have considered the principles enunciated by Justice Iacobucci in *Wallace*. While Jack Wallace died in 2005, the impact of his fight against his former employer continues to resonate.

Today, in nearly all cases of alleged wrongful dismissal, the dismissed employee will make a claim for additional damages as a result of the employer’s bad faith and unfair dealing in the course of dismissal. As the number of claims for “*Wallace* damages” have increased, there has been movement by the judiciary away from the principles laid down by the majority in *Wallace*. In their analysis, judges have considered not only the manner in which the employee was dismissed, but also their actions before and after the termination. Other judges have closely adhered to Justice Iacobucci’s reasoning, and have only awarded damages where the employer’s actions in the manner of dismissal clearly demonstrated bad faith. However, in some of these decisions, the judge has lessened the evidentiary burden required to show that an employee suffered mentally or emotionally due to the employer’s actions in their dismissal. Perhaps as a response to this evolution,

¹ [1997] 3 S.C.R. 701 [*Wallace*].
several judges have refused to award *Wallace* damages, and have indicated a desire to narrow the types of cases where the notice period will be extended. Nonetheless, *Wallace* damages continue to be awarded in a variety of cases including those where employers have dismissed employees rather than accommodating their disability, and where employees were constructively dismissed.

2. The *Wallace* Decision

Jack Wallace ("Wallace") had worked for the United Grain Growers (the “defendant”) as a print manager for fourteen years, and had worked in the printing industry for nearly forty years when he was dismissed by the defendant, allegedly for just cause. Wallace had been induced by the defendant to leave his previous job, where he had worked for twenty-five years, with a promise that if he performed as expected, he would be employed by the defendant until his retirement. While he was employed by the defendant, Wallace was very successful and was the defendant’s top salesperson for a number of years. Notwithstanding, he was summarily dismissed without being given any reasons for his termination, only days after receiving a positive performance review. After his termination, the plaintiff had great difficulty finding similar employment, was diagnosed with depression, and declared bankruptcy.

At trial, Wallace sought damages for reasonable notice and aggravated damages for bad faith. He was successful at trial on both claims, but on appeal, the notice period was reduced, and the award of aggravated damages was overturned. Wallace appealed that decision, and the Supreme Court of Canada heard his case.
Justice Iacobucci wrote the decision for the majority. He awarded Wallace damages equivalent to twenty-four months’ notice. The Court dismissed Wallace’s claim for aggravated damages, based on a tort of bad faith. Instead, the majority recognized that Wallace could be compensated for the employer’s bad faith in the manner of dismissal, by increasing the period of reasonable notice. Justice Iacobucci also held that employers had a general obligation of good faith and fair dealing with their employees, and that if this obligation was not met, an additional notice period could be awarded. However, he was careful to clarify that a Wallace damages award is not a separate head of damages and thus is conceptually distinct from aggravated or punitive damages.2

The basis for an award of Wallace damages could be established by the dismissed employee proving that, because of the employer’s bad faith in the course of dismissal he or she suffered “injuries such as humiliation, embarrassment and damage to one’s sense of self-worth and self-esteem. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer”.3

The majority also recognized that another factor in determining the period of reasonable notice is whether the dismissed employee was induced to leave previous secure employment, as Wallace had been.4 While making it clear that whether Wallace damages would be awarded in a particular case would depend on the circumstances of the employee’s dismissal, Iacobucci cautioned that the Wallace decision was not intended “to

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2 Jalan, infra at para. 84.
3 Wallace, supra. at para. 103.
4 Ibid. at para. 85.
advocate anything akin to an automatic claim of damages under this heading in every case of dismissal. In each case, the trial judge must examine the nature of the bad faith conduct and its impact in the circumstances.\(^5\)

3. The Broadening of Cases where Wallace Damages were Awarded

Since the decision in Wallace, the courts have clarified that the availability of Wallace damages is not limited to circumstances where the employer’s bad faith conduct had an adverse impact on the employee’s search for new work, and that the scope of the term “manner of dismissal” is much broader than the employer’s actions during the actual termination process itself. This expansive growth of the various aspects of Wallace damages is consistent with the judicial recognition that employees are inherently vulnerable, and particularly so at the time of termination.\(^6\) Therefore, if an employer attempts to capitalize on this vulnerability, the consequences will be an extension of the reasonable notice period.

The shift away from the fairly narrow and restrictive judgment in Wallace to a broader analysis of the employment relationship to determine whether a bump up in the notice period is appropriate was exemplified by a decision of the Ontario Court of Appeal in Gismondi v. The Corporation of the City of Toronto\(^7\). In that decision, the Court stated that “Wallace damages are not limited to acts of the employer at the very moment of dismissal and can in appropriate circumstances include the employer’s conduct pre- and

\(^5\) Ibid. at para. 101.
\(^6\) Ibid. at para. 95.
\(^7\) [2003] O.J. No. 1490 (C.A.) [Gismondi].
post-termination, and the conduct of the employer in its aftermath..."\(^8\) However, the Court resisted a complete push toward a more generalized duty of good faith by adding that any employer conduct that will warrant \textit{Wallace} damages must be “a component of the manner of dismissal”\(^9\)

A case which highlights how some judges have broadly interpreted the majority’s decision in \textit{Wallace} to award an extension of the notice period for a dismissed employee is \textit{McCulloch v. Iplatform Inc.}\(^{10}\). The plaintiff had been enticed by the defendant to leave his previous job at a packaging company where he had worked for ten years to work for the defendant in a similar position. The plaintiff had only worked for the defendant for 105 days when the company terminated him, as it was experiencing financial difficulties. The plaintiff’s dismissal letter stated that his position was being eliminated as a result of corporate restructuring, and he was offered one month’s salary and benefits continuance in exchange for a release. The defendant did not assert just cause until it filed its statement of defence, where it alleged that his job performance had been substandard\(^11\). The plaintiff sued for wrongful dismissal, claiming he had been induced to leave his former employer and then dismissed without cause.

Justice Echlin of the Ontario Superior Court of Justice determined that the plaintiff had been wrongfully dismissed, but any inducement had been minimal, as he had not received any assurance of long-term employment. Justice Echlin awarded the plaintiff three

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\(^8\) \textit{Ibid.} at paras. 23-24.  
\(^9\) \textit{Ibid.} at para. 23.  
\(^{10}\) [2004] O.J. No. 5237 (Sup. Ct).  
\(^{11}\) \textit{Ibid.} at para. 34.
months’ notice with an additional three months’ in Wallace damages, due to the defendants having played “hardball” in the manner in which they had terminated the plaintiff.12 This statement was made in light of the evidence adduced at trial that the defendants had maintained just cause allegations throughout the trial based on undocumented performance-related complaints, had failed to provide a letter of reference or disability insurance claim forms, and delayed paying the plaintiff his statutory entitlements.

In characterizing the defendant’s behaviour as “playing hardball” with the plaintiff, Justice Echlin used the same terminology as Justice Iacobucci did in Wallace. However, there are a number of key differences between the two cases. In Wallace, the employer had maintained unfounded allegations of cause until the day the trial began, and these allegations had led to rumours in the printing industry that Wallace, who had worked in the industry for thirty-nine years when he was summarily dismissed, had been involved in some wrongdoing. In McCulloch’s case, he had worked in the packaging industry for ten years, and there was no allegation by the plaintiff that any of the performance-related complaints had affected his chances at finding other employment in the field. As well, the plaintiff did not present any evidence of mental distress or emotional upset as a result of his dismissal, whereas Wallace had suffered from depression, which was directly related to his termination. Based on these differences, an extension of the notice period by three months, when the plaintiff had only worked for the defendant for just over three months seems generous.

12 Ibid. at para. 44.
4. Traditional Awards of *Wallace* Damages – Character of the Evidence

Despite the broadening of circumstances where judges have awarded *Wallace* damages, in certain cases, judges have very carefully awarded unjustly dismissed employees an extension of the reasonable notice period based on the principles enunciated in Justice Iacobucci’s decision.

One of the more egregious examples of bad faith and unfair dealing by the employer in the manner of dismissal of an employee was described in *Bouma v. Flex-N-Gate Canada Co.*[^13^] In this case, the plaintiff was forty-four years old and had been employed by the defendant for twenty-two years. At the time of his dismissal, he held a management position and was the third ranking employee in the plant. The dismissal took place after an investigation revealed that the plaintiff had used company materials for his personal use. Apparently this was a common practice at the company. When confronted, the plaintiff immediately admitted that he had used the tools to construct something for his own personal use. Prior to this incident, the plaintiff had a clean employment record and was clearly a valued employee. The plaintiff’s dismissal came on the heels of his refusal to transfer to the employer’s plant in Mexico, for family reasons. After the plaintiff was terminated, he was not given a chance to obtain his own personal tools, which were valuable. He was told they would be kept safely, but they were in fact stolen. The employer had promised to replace them, but the plaintiff was not reimbursed for three and a half years. The plaintiff sought damages for wrongful dismissal, *Wallace* damages, and punitive and aggravated damages.

The court found that the employer had no cause to terminate the plaintiff, and held that he was entitled to twenty months notice, which included an additional four months for Wallace damages as a result of the employer’s post-termination conduct. Justice Gates of the Ontario Superior Court of Justice found the treatment of the plaintiff by the employer to be “high handed, callous, and offensive in the extreme”. The employer’s behaviour was found to be sufficiently egregious to also warrant an award of $15,000 for punitive and aggravated damages. It was determined that the real reason for the plaintiff’s dismissal was not because he used the company’s tools for his personal use, but rather, as a reprisal for the plaintiff’s refusal to move to Mexico. According to Justice Gates, this reprisal, combined with the refusal to give the plaintiff back his own tools, lying to the plaintiff about doing a proper investigation of the theft of the tools, and subsequently not reimbursing him for them for several years justified the imposition of *Wallace* damages equivalent to four months’ salary.

Another case, with some striking similarities to *Wallace* is *Geluch v. Rosedale Golf Assn. Ltd.* The plaintiff had worked as the General Manager and Secretary/Treasury of the defendant golf club (the “club”) for twelve years, and had spent his adult life employed by various golf clubs. After a member of the club’s Board of Directors heard from a former employee that the plaintiff had been abusive towards her, the Board immediately voted to dismiss him. The next day he was called out of a staff recruitment party and summarily dismissed in front of several employees without any explanation. The

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employer gave him two months salary in lieu of notice. Four months after his dismissal, the plaintiff was informed that there had been sexual harassment and abuse allegations made against him by his subordinates, which the employer alleged constituted cause for dismissal.

The trial judge allowed the plaintiff’s claim for unjust dismissal, and deemed seventeen months to be the appropriate notice period in the circumstances. This amount included an additional notice period of two months for Wallace damages. There were several reasons why Wallace damages were awarded in this case. First of all, the small size of the private golf club industry made it very difficult to secure new employment as many golf clubs had become aware of his summary termination and the alleged reasons for it. As well, the Board’s very public method of termination showed bad faith and a particular insensitivity for Geluch’s feelings. Furthermore, the Board had sent a letter to all its members, in the wake of Geluch’s termination, stating that they had concerns about “former senior management”, clearly referring to the plaintiff.

The reasons for the award of Wallace damages were all directly related to the manner of the plaintiff’s dismissal, and, like Wallace, focused on how the manner of dismissal affected the plaintiff’s future employment opportunities.

The decision in Geluch is also significant because it lowered the burden on plaintiffs to show emotional or mental distress, as a requirement for the court to award Wallace damages. A portion of the reasons devoted to the Wallace damages in the decision details

19 Ibid. at para. 188.
the emotional trauma suffered by Geluch, due to the cause allegations made against him. However, the plaintiff did not offer any medical evidence and this did not dissuade the judge from awarding him the additional notice period of two months. The decision noted that whether the affected employee sought medical attention will not be determinative of whether an unfounded cause allegation can result in the imposition of *Wallace* damages. Coincidentally, later in the decision, the plaintiff’s claim for mental distress damages was dismissed without discussion.²⁰

Further support for the lowering by the courts of the standard of proof for emotional distress resulting from the manner of dismissal is found in the decision of the Ontario Superior Court of Justice in *Smith v. Casino Rama Services Inc.*²¹ The plaintiff, a thirty-five-year-old woman with two years of service had just returned to work from a leave of absence for some serious health problems, which were all documented and known to the employer. On the first day of her return to work on a modified schedule, she was unable to complete her shift. She informed her supervisor that she was leaving early, but failed to inform the health benefits advisor, and did not provide a doctor’s note. The defendant terminated her for non-compliance with the employer’s sick leave procedure. Consistent with the terms of her employment contract, she was given two weeks pay in lieu of notice.

The trial judge held that the employee’s termination was not warranted, and she was entitled to *Wallace* damages due to the emotional distress and devastation caused by her

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hasty dismissal by the defendant. The decision made no reference to any medical
evidence of this “emotional distress”, and did not even indicate whether the employer’s
treatment had any impact on the plaintiff’s post-termination job search. Nonetheless, the
judge stated that Wallace damages were appropriate in this case and she was awarded an
additional two-and-a-half months notice beyond the two weeks given to her by the
employer.22

5. Recent Cases where Wallace Claims have been Unsuccessful
Perhaps sensing that some of their colleagues had failed to heed Justice Iacobucci’s
warning that there should not be an automatic claim for Wallace damages in every
wrongful dismissal case, there have been several recent decisions where judges have
declined to award Wallace damages. These decisions may be a signal that the courts are
now taking a more narrow view of the types of claims that merit an extension of the
reasonable notice period.

The most vocal criticism of the broadening of circumstances where dismissed employees
were awarded Wallace damages has come from Justice Echlin of the Ontario Superior
Court of Justice. In his decision in Yanex v. Canac Kitchens et al23, Justice Echlin
signalled a desire for the courts to “crack down” on dubious Wallace claims and adopt a
narrower view of the types of allegations that appropriately support an award of
additional damages beyond the notice period.

22 Ibid. at para. 24. The decision did not make it clear what portion of this extended notice period was for
Wallace damages.
23 [2004] O.J. No. 5238 (Sup. Ct.).
In this case, the plaintiff’s claim for *Wallace* damages centered on the fact that, after his dismissal, the employer had mistakenly offered him a severance amount below the statutory minimum under the ESA, which it subsequently corrected, and had asked for a release at the same time. Justice Echlin stated that Wallace damages were not merited in this instance, as the employer’s conduct may have been “sloppy”, but it was not trying to play the kind of “hardball” referred to in *Wallace*.24

Justice Echlin went on to offer his general disapproval of the routine assertions of “Wallace damage” claims which are not justified by the facts.25 He offered a general warning to plaintiff’s counsel and suggested that unmeritorious claims having little or no evidentiary foundation could face cost sanctions.26

While no judges have yet picked up on Justice Echlin’s suggestion, other judges have expressed similar concerns. An example of this can be found in Justice Kelleher’s decision in *Jalan v. Institute of Indigenous Government*.27 The plaintiff had been the Dean of Academic Affairs at the defendant Institute for three years, and had attained the rank of full professor. She was terminated after her relationship with the defendant’s new president deteriorated. The plaintiff sought damages for wrongful dismissal as well as an extension of the notice period for *Wallace* damages. The plaintiff relied on three common allegations to support her claim:

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26 *Ibid.* at para. 43. The British Columbia Provincial Court has actually deducted $500.00 from an award of damages for wrongful dismissal as a result of the plaintiff’s post-termination conduct, based on what looks to be a form of reverse-*Wallace* damages. See *Sun-Da v. APS Architectural Structures Ltd.*, [2004] B.C.J. (Prov. Ct.) at paras. 96-97.
(a) she was given no advance notice that she was going to be terminated;
(b) she was given no reasons for the dismissal in the termination letter;
(c) she was not given the opportunity to address the Board of Governors with respect to the decisions to terminate her employment.\(^{28}\)

Justice Kelleher analyzed each of these allegations and determined that there was no basis to award bad faith damages. He stated that there was no obligation on the part of the employer to provide the plaintiff with any advance notice of termination. The employer’s only obligation was to provide either reasonable notice or pay in lieu of notice. As well, Justice Kelleher did not believe that the failure to provide reasons was grounds to award Wallace damages. The termination letter that the plaintiff received was not untruthful, misleading or unduly insensitive in its nature.\(^{29}\) On the third allegation, Kelleher found that the Board of Governors did not have any obligation to hear from the plaintiff before deciding to terminate her employment, and there was no inherent right for the plaintiff to appeal the Board’s decision. While Kelleher acknowledged that the plaintiff was upset as a result of her termination, this was not a sufficient reason to award Wallace damages.\(^{30}\)

Despite dismissing these allegations, Justice Kelleher did find that the defendant’s false allegation throughout the trial that the plaintiff had lobbied staff and students to rally against her termination fell short of the minimum standard of good faith and fair dealing.\(^{31}\) Also, the defendant had not reimbursed the plaintiff for a modest amount of

\(^{28}\) Ibid. at para. 108.
\(^{29}\) Ibid. at para. 114.
\(^{30}\) Ibid. at paras. 110-111.
\(^{31}\) Ibid. at para. 125 (Q.L.).
money she had spent on work-related travel expenses. For these two reasons, Justice Kelleher concluded that the plaintiff should be entitled to an additional two months’ notice as a Wallace extension. However, because, the plaintiff’s employment was governed by the Public Service Employment Act which has a statutory maximum notice period of 18 months, to which he had already concluded she was entitled, he held that he could not award her any additional notice.32

An unsuccessful attempt by employees to broaden the scope of the Wallace decision can be found in Babcock v. Canada (Attorney General)33. In this case, the lawyers in the Vancouver regional branch of the Federal Department of Justice (the “Department”) alleged that the employer had breached their employment contract due to the Treasury Board’s implementation and use of a differential pay scale, which resulted in the plaintiffs having lower salaries than their colleagues employed in the Department’s Ontario region. The plaintiffs claimed that their employment contracts included a term that imposed a duty of good faith and fair dealing for the duration of their employment, beyond conduct related to the manner of dismissal. They asserted that the employer had breached this duty by implementing and maintaining the differential salary structure between the regions.34

Justice Smith of the British Columbia Supreme Court disagreed with the plaintiffs and refused to award Wallace damages. The judgment affirmed that the obligation of good faith & fair dealing identified in Wallace is expressly limited to conduct in the manner of

32 Ibid. at para. 130.
34 Ibid. at para. 195.
dismissal and is not extended to conduct in an ongoing employment relationship.\textsuperscript{35} Consistent with the decision in \textit{Gismondi}\textsuperscript{36}, Justice Smith maintained that a determination of whether there was any bad faith in an employee’s termination could include a consideration of pre- and post- termination conduct.\textsuperscript{37} Justice Smith also stated that even if a duty of good faith and fair dealing did subsist throughout the employment relationship, in this case the employer had not breached this obligation. While the plaintiffs were upset and disappointed by the Treasury Board’s decision to pay their colleagues more to do essentially the same job, “disappointment in the outcome of a decision such as this does not amount to bad faith conduct”\textsuperscript{38}.

6. Emerging areas where Wallace Damages have been Awarded

\textbf{a) Wallace Damages and the Duty to Accommodate}

In several recent decisions, courts in Ontario have awarded Wallace damages when a disabled employee was terminated so that the employer could avoid its statutory duty to accommodate. The best-known case where this occurred was in \textit{Keays v. Honda Canada Inc.}\textsuperscript{39}. The plaintiff, Kevin Keays (“Keays”) had worked for the defendant for eleven years when he was diagnosed with chronic fatigue syndrome. His health situation deteriorated to the point that he was on disability leave for over two years. After originally having his claim denied, the plaintiff was approved for LTD benefits for nearly a year, until they were terminated following a Work Capacity Evaluation by the employer. Keays eventually returned to full-time work at Honda, but due to his disability,

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\item \textsuperscript{35} Ibibd. at para. 200.
\item \textsuperscript{36} Gismondi, supra note 7.
\item \textsuperscript{37} Ibibd. at para. 215.
\item \textsuperscript{38} Ibibd. at para. 216.
\item \textsuperscript{39} [2005] O.J. No. 1145.
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he could not meet the employer’s attendance expectations. When Keays sought accommodation of his illness, he was informed that any and all absences would have to be “validated” by doctors’ notes, and he would have to give an estimate how often he would be absent from work. When Keays began to be absent more frequently than his doctor had estimated, Honda demanded that he see a company physician. This physician threatened Keays by telling him that he would be forced to work on the production line if he could not improve his attendance record. The employer then asked him to see a second physician, and falsely claimed that both physicians believed that his absences were unjustified. Keays refused to see the second physician without being given more information about the parameters of the examination. The following day he was terminated for insubordination. Keays sued for Honda for wrongful dismissal, Wallace damages, and punitive damages.

Justice McIsaac of the Ontario Superior Court of Justice determined that Keays had been unjustly dismissed and awarded him damages based on a twenty-four month notice period, including a nine-month extension for Wallace damages, due to Honda’s “egregious bad faith” in the manner of Keays’ termination. The judge concluded that his employment had been terminated to avoid having to accommodate his disability. As well, Honda’s request to see the company’s physicians was not made in good faith, but rather was a “clear implication…that his condition was bogus and that he was able to attend work without absences.” In determining the length of the extension of the notice period for Wallace damages, Justice McIsaac considered that Keays had been totally

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40 Ibid. at paras. 48-49.
41 Ibid. at para. 43.
disabled since his termination date, that he had developed an adjustment disorder with depressive symptoms, and that Honda had unilaterally cancelled the accommodation of his disability. Justice McIsaac also determined that Honda's conduct was sufficiently outrageous to justify punitive damages in the amount of $500,000. This is an unprecedented punitive damage award in Canadian employment law and one of the highest punitive damage awards assessed by a judge in Ontario legal history.42 Honda has appealed this decision to the Ontario Court of Appeal.

Another recent decision which awarded Wallace damages to an unjustly dismissed employee with a disability is Rinaldo v. Royal Ontario Museum43. David Rinaldo (“Rinaldo”) had worked for the Royal Ontario Museum (the “ROM”) since he had completed university, a period of more than fifteen years. After a re-organization at the ROM, Rinaldo was promoted to the position of Director of Public Programs. He alleged that once he began in his new position, certain senior managers made it clear that they disliked him and he had difficulties in his new job. Rinaldo felt that this harsh treatment was due to the fact that he was gay, a fact with which many of the senior managers were not comfortable.44 Due to perceived problems with his management style, Rinaldo was disciplined by the employer by being placed on a six-month probationary period, and was warned that he would be terminated if his performance did not improve. A short time later, he was diagnosed as suffering from severe stress, and requested immediate sick leave from the employer. The employer told Rinaldo that they would only grant him sick

44 Ibid. at para. 31.
leave if he provided further evidence of his medical condition. Rinaldo obtained a second letter from his psychiatrist which indicated he was ill and could not return to work. This letter did not satisfy the employer and they informed Rinaldo that unless he provided further evidence he would be deemed to have resigned his position. Rinaldo did give the employer a third letter, which outlined his illness in greater detail, but the employer still deemed him to have resigned. Eventually the employer conceded that he was entitled to three-months of short-term disability (“STD”) leave. Several months later, the employer paid him six months salary and informed Rinaldo that they considered him to no longer be an employee of the ROM. Rinaldo sued the ROM for wrongful dismissal and also sought Wallace damages.

Justice Garton agreed with the plaintiff that he had been unjustly dismissed. He was awarded sixteen months of salary in lieu of notice. As well, due to the aggregate effect of what Justice Garton termed the ROM’s “insensitivity” to Rinaldo’s medical condition, he was awarded three additional months for Wallace damages.\(^45\) Justice Garton determined that the ROM’s attitude was that Rinaldo’s sick leave was a “hoax”, an attitude which had a serious effect on the plaintiff’s well being.\(^46\) He also considered the fact that the plaintiff remained disabled and was unable to look for work. As well, the employer had caused Rinaldo additional emotional distress due to damage to some of his personal belongings when the contents of his office were packed up.

\(^{45}\) *Ibid.* at para. 143-144.

\(^{46}\) *Ibid.* at para. 139.
Courts have also awarded *Wallace* damages in a case where an employer failed to recognize that an employee’s behaviour was the result of psychological problems, and terminated him or her, rather than taking steps to assist and accommodate the employee. The case is also of interest as it is one of the only times that *Wallace* damages were awarded in a jury trial. In *Sommerard v. I.B.M. Canada*\(^{47}\), the plaintiff had worked for the employer for almost 4 years in a non-managerial technical support position. He had received STD benefits, which had ended, while he awaited a decision from the insurer as to whether he was eligible for long-term disability (“LTD”) benefits. His application and subsequent appeal for LTD benefits were denied. When he was informed by the employer’s nurse that his appeal had been denied, the plaintiff stated that he could not return to work as he might “thump somebody”\(^{48}\). The plaintiff clarified this statement, and maintained that he might injure someone at work. Based on this comment, the defendant concluded that the plaintiff presented too great a risk to the other employees, and dismissed him for cause “because of [his] threat to hurt someone if [he] returned to work”\(^{49}\).

At trial, the jury found that the plaintiff had been unjustly dismissed, and awarded him a nine month notice period, and an additional four months in *Wallace* damages, as well as aggravated and punitive damages. The defendant appealed this decision.

On appeal, the Ontario Court of Appeal determined that there was no basis to interfere with the jury’s award of Wallace damages. While the Court felt that the four months

\[\footnotesize{\text{47} \ [2006] \ O.J. \ No. \ 1209 \ (C.A.). \hspace{1cm} 48 \ \text{Ibid.} \ \text{at para. 2.} \hspace{1cm} 49 \ \text{Ibid.}}\]
awarded was very generous, it determined that the jury was entitled to accept the plaintiff’s evidence that his “threat” was actually a cry for help as IBM knew of psychological illness and financial difficulties, and the manner of termination was unduly insensitive in light of his enhanced vulnerability. The Court noted that the plaintiff was aware that he had been previously warned that his aggressiveness could result in the termination of his employment, but this warning still did not justify the employer acting precipitously in dismissing the plaintiff.

b) Wallace Damages in Constructive Dismissal Cases

An increasing number of judges have awarded Wallace damages in constructive dismissal cases. In Miller v. ICO Canada Inc. the plaintiff had worked for the employer and its predecessor for thirty years. He had been a co-owner of the predecessor company, the shares of which had recently been sold to the defendant. As part of the transaction, the parties had agreed that the plaintiff would continue to hold the same managerial position and responsibilities as before the sale. However, after the sale, he was given progressively fewer responsibilities, until he was assigned no tasks at all. Eventually, even his desk was removed, and after he returned from a vacation, another worker occupied his office. The company never gave any explanation for any of these actions. The plaintiff suffered a nervous breakdown, and claimed that he had been constructively dismissed.

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50 Ibid. at para. 17.
51 Ibid. at para. 10.
The court determined that Miller had been constructively dismissed, and he was awarded twenty-months notice. In his determination of whether or not Miller was also entitled to an extension of the notice period for Wallace damages, Justice Binder of the Alberta Court of Queen’s Bench noted that Miller’s supervisor, for several years, had often raised his voice in dealing with him. As well, the plaintiff’s letter to the employer in which he complained that his responsibilities had been taken away from him had fallen on deaf ears, with the only response being “Read your contract”.\(^{53}\) While the employer had not misled or lied to the plaintiff about the changes to his position, the defendant had been insensitive in the circumstances, and should have known that by treating the plaintiff the way it did, the employer had created a serious risk of psychological injury, which inevitably did materialize.\(^{54}\) The manner of his dismissal also hindered his ability to seek other work, and after several months, the best he could do was to find an entry-level position in another industry. For all these reasons, Miller was awarded an additional four months of notice.\(^{55}\)

Another case where a constructively dismissed employee was awarded Wallace damages is Lavinskas v. Jaques Whitford & Associates Ltd.\(^{56}\) In this case the plaintiff had worked for the defendant company for approximately four years as the accounting manager for its Ottawa office. While his first performance appraisal had indicated he had several weaknesses, subsequent appraisals were much more positive. However, the Montreal head office of the employer held a negative impression of the plaintiff, which was shared

\(^{53}\) Ibid. at para. 68.
\(^{54}\) Ibid. at para. 71.
\(^{55}\) Ibid. at para. 72.
by the plaintiff’s supervisor. As time went on, he was excluded from management meetings, and the employer gave him a reprimand letter, which highlighted a number of perceived deficiencies in his work. During this period, the plaintiff was diagnosed with reactive depression, and went on medical leave. After the employer denied his claim for STD benefits, the plaintiff refused to return to work, and the employer concluded that he had resigned from his position. The plaintiff alleged that he had been constructively dismissed.

Justice Aitken of Ontario Superior Court of Justice determined that the plaintiff had been constructively dismissed. The appropriate notice period was fixed at six months, which included an unspecified extension for Wallace damages. Justice Aitken determined that the employer should have informed the plaintiff that his skill set was not a good fit for the company, and should have been given reasonable notice, so he could seek out other employment opportunities. Rather then doing this, the employer marginalized the plaintiff, and collected “ammunition” to terminate him for cause.\(^{57}\) Because he was not informed by the employer of their concerns with his performance, his mental health was adversely affected, which it made more difficult for him to seek out other employment opportunities.\(^{58}\) In the judge’s opinion, this was sufficient to lengthen the appropriate notice period.

The analysis of the awarding of Wallace damages by the judges in these two cases highlights a key problem with regard to employer bad faith in constructive dismissal.

\(^{57}\) Ibid. at para. 106 (Q.L.).
\(^{58}\) Ibid.
cases, namely how to determine what is included in “the manner of dismissal”. In *Miller,* *supra,* in awarding *Wallace* damages, Justice Binder considered the way the plaintiff had been treated by his supervisor for a number of years.59 This would seem to go beyond the ambit of the manner of dismissal contemplated by the majority in *Wallace.* On the other hand, in *Lavinskas, supra,* Justice Aitken takes a more traditional approach to the analysis of *Wallace* damages by focusing on the employer’s lack of candour and honesty about its concerns with his job performance, and looking at how the manner of dismissal affected the search for future employment.

In general, courts seem to have taken an inconsistent approach in their determination of which constructive dismissal cases warrant an extension of the notice period for employer bad faith. This is evidenced by the decision not to award *Wallace* damages in *Murdock v. 497123 Ontario Ltd. (c.o.b. Van Horne Day Care Centre).* The plaintiff (“Murdock”) had worked for the defendant (the “Day Care”) for twenty years, as a teacher, and eventually as an assistant supervisor. When the Day Care was sold, the new owner appointed Murdock as supervisor. A short time later, the employer informed Murdock that a new supervisor would be hired and demoted her back to a teacher position. The decision to demote Murdock was announced by the owner of the Day Care to all the other staff in a hallway, at the end of the school day, and this conversation was overheard by a number of parents who were picking up their children. This caused Murdock a great deal of humiliation and embarrassment. Murdock did not accept the demotion to the teacher position and alleged that she had been constructively dismissed. Other then a short-term contract position, she remained unemployed for nine and one half months.

59 *Miller, supra* note 50. at para. 68.
Justice Stinson of the Ontario Superior Court of Justice agreed that Murdock had been constructively dismissed when she was demoted, and fixed the notice period at fifteen months. However, Stinson did not award her any Wallace damages. In the judge’s opinion, the employer had acted in good faith when it decided to hire a new supervisor, and had treated Murdock fairly. While Stinson acknowledged that the way in which the demotion was announced to the other staff was humiliating and embarrassing to Murdock, this did not warrant an awarding of Wallace damages. Rather, it was considered in the determination that she did not fail to mitigate her damages when she chose not to accept the teacher position offered by the employer.

The refusal of Justice Stinson to award the plaintiff Wallace damages is not consistent with many other cases in which plaintiffs have been successful. Clearly, the rather public announcement by the Day Care owner of Murdock’s demotion was an aspect of the circumstances surrounding her dismissal, and this event obviously caused the plaintiff substantial humiliation and degradation, which likely affected her abilities to secure future employment. Based on the evidence, it is logical to conclude that the actions of the employer in this case fell within the parameters of bad faith in the course of dismissal, which according to Justice Iacobucci include injuries such as “humiliation, embarrassment and damage to one’s sense of self-worth and self-esteem”, all of which may be worthy for compensation. This case serves as a textbook example of the

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60 Ibid. at para. 54.
61 Ibid. at para. 69.
62 Wallace, supra, at para. 103.
difficulties that some judges have had in determining in what cases *Wallace* damages are appropriate.

### 7. Conclusion

A consideration of recent cases that have reviewed *Wallace* claims reveals several different trends. Certain judges have issued decisions which have broadened the circumstances that can be included in the consideration of the manner of the employee’s dismissal to include a variety of pre- and post-termination events. Other judges have maintained that the awarding of *Wallace* damages has gone too far, and have sought to narrow the types of employee allegations that will support an award for bad faith damages. As well, in a number of other decisions, judges have not hesitated to award an extension of the reasonable notice period in situations where the employer has failed to accommodate a disabled employee or where the employee was constructively dismissed. It remains to be seen if a more consistent approach to the awarding of *Wallace* damages will be adopted in future cases. If not, there is little doubt that employees’ counsel will continue to seek *Wallace* damages for their clients in most wrongful dismissal cases.