



## Are Wallace Damages Really Dead?

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In 1997 the Supreme Court of Canada significantly changed the scope of damages that could be awarded in wrongful dismissal actions.

In the case of *Wallace v. United Grain Growers*, the court held that employers “ought to be held to an obligation of good faith and fair dealing” in the manner of dismissal. It further held that if this obligation was breached by an employer, an employee could obtain compensation from the employer by way of an extension to the reasonable notice period. After that case was decided, it became fairly routine for employees to claim an additional award of *Wallace* damages in their wrongful dismissal actions.

Last year the Supreme Court of Canada reversed itself on the question of “*Wallace*” damages. It decided that it was time to revisit the issue of *Wallace* damages, and it held that damages attributable to an employer’s conduct and the manner of dismissal could only be awarded if they “fairly and reasonably” arise from the wrongful dismissal, or were reasonably within the contemplation of both parties at the time the contract was made. In such cases the damages that would be awarded would be the actual damages suffered by the employee, and not damages by way of an extension of the notice period.

With this decision, most people fairly assumed that the concept of *Wallace* damages was dead. This has not been the case.

Since that decision, the lower courts have continued to award *Wallace* damages. In some of these cases, the circumstances giving rise to the award of *Wallace* damages do not even meet the criteria of the original award of *Wallace* damages.

Here are some examples of cases where *Wallace* damages have been awarded:

1. A company reduced an employee’s commission rate from 30% to 18%, and then from 18% to 9% in a 12 month period. The employer advised the employee that this reduction was because the employee was making too much money in comparison to others in the business. The court found this amounted to constructive dismissal. The Ontario Court of Appeal upheld the trial judge’s award of 3 months’ *Wallace* damages on the basis that the employee was suffering from depression at the time of the reduction in pay, and that the employer had demonstrated “palpable” insensitivity in the manner in which it dealt with the employee and subjected him to undue pressure at a time when he was in poor health.
2. In an Alberta decision, the court found that an employee had signed a valid employment contract that limited her right on termination to employment standards notice only. Nevertheless, the

court awarded an additional month's pay as *Wallace* damages because the employer upon termination, advised the employee that she was being terminated as she was an "unsuitable fit" but gave no explanation as to how she was "unsuitable".

3. In British Columbia, the court awarded an employee *Wallace* damages of \$5,000.00 because the employee became embroiled in a conflict with a co-worker. She was summoned to a meeting to discuss the conflict. She became upset during the meeting and asked to leave. She indicated later that she was quitting, but the following day called and asked if she still had a job and was told that she had been replaced. The court found this was not a voluntary resignation as it was made in the heat of the moment. The court awarded her *Wallace* damages of \$5,000.00 because the company did not communicate with her in any meaningful way about her true intentions with respect to her resignation, nor did it enquire about her emotional state or consider her financial and emotional vulnerability when she called to get her job back.
4. The Ontario Government was ordered to pay *Wallace* damages of 4 months' pay to an employee when it terminated an employee rather than reviewing her performance deficiencies with her, and following a progressive discipline approach.
5. In another case, an employee was awarded *Wallace* damages of \$20,000.00 when the employee was summarily dismissed, asked to leave the premises immediately, and had great difficulty obtaining the return of his personal effects.
6. Finally, most recently the Ontario Court of Appeal upheld a trial judge's award of 2 months' *Wallace* damages where the employer sent a public pager message advising that the employee had been terminated for failure to adequately perform her duties even though this was not accurate.

Some of these decisions are remarkable in that impugned conduct does not really even meet the initial test for *Wallace* damages. They serve to show that employers should still be mindful of the factors set out in the *Wallace* case and in particular, the obligations of good faith and fair dealing. ■