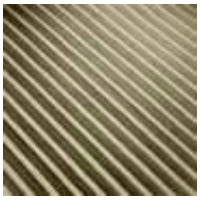

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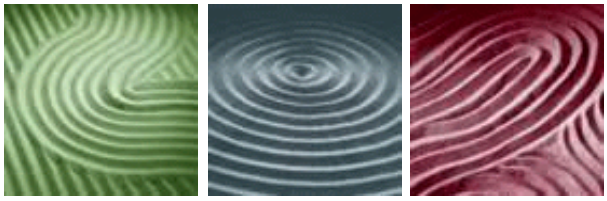

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Termination for Theft or Other Unethical Conduct

by John R. Sproat
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Termination for Theft or Other Unethical Conduct

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Introduction

Dealing with a potentially dishonest or unethical employee is a difficult and delicate task. Terminations for serious cause may stigmatize the employee and make it difficult, if not impossible, to find new employment. An employee guilty of theft or unethical conduct richly deserves termination and possibly criminal charges. An unjustified termination, however, exposes not only the employer but also involved managers to increased damage claims.

The law – theft and unethical behaviour constitute just cause for dismissal

General principle – onus

"Just cause" in law is conduct that constitutes a breach and repudiation of the contract of employment by the employee such that the employer has the right to terminate employment forthwith and without further obligation. Theft and unethical conduct are certainly examples of conduct which a Court will probably find constitutes just cause.

It is of vital importance, however, to bear in mind that the employer has the onus of proving just cause for dismissal. Further, while proof is only required to the civil standard of the "balance of probabilities" (ie.) what probably happened, as opposed to the criminal standard of proof beyond a reasonable doubt, as a practical matter Courts probably apply a standard approaching the criminal law

standard. Particularly in the case of long-service employees a Judge is unlikely to find just cause, thereby labelling the employee as dishonest or unethical, if there is any reasonable doubt in that regard.

In *McKinley v. BC Tel* (2001), 9 C.C.E.L. (3d) 167 (S.C.C.) the Court reviewed the law as to whether dishonesty constitutes just cause for dismissal. The Court has two conflicting lines of authority. The first line held that any act of dishonesty is a repudiation of the employment contract and constitutes just cause for dismissal. The conflicting line held that the act of dishonesty must be considered in the overall context of the employment to determine if it constitutes just cause for dismissal.

The Supreme Court of Canada adopted the latter line of authority stating as follows:

[. . .]

whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.

[49] In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if

so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.

[50] While ample case law supports this position, as discussed above, a second line of jurisprudence seems to run counter to it, suggesting that dishonest conduct *always*, irrespective of its surrounding circumstances, amounts to cause for dismissal. However, a closer inspection of these cases reveals that they actually support a contextual approach. As noted, these judgments involved dishonesty that was symptomatic of an overarching, and very serious misconduct. In most cases, the courts were faced with allegations to the effect that an employee had intentionally devised to extract some financial gain or profit to which he or she was not entitled, at his or her employer's expense. Such conduct was frequently tantamount to a serious form of fraud, and explicitly characterized by the courts as such.

[51] This being the case, I conclude that a contextual approach to assessing whether an employee's dishonesty provides just cause for dismissal emerges from the case law on point. In certain contexts, applying this approach might lead to a strict outcome. Where theft, misappropriation or serious fraud is found, the decisions considered here establish that cause for termination exists. This is consistent with this Court's reasoning in *Lake Ontario Portland Cement Co. v. Groner,* [1961] S.C.R. 553 (S.C.C.), where this Court found that cause for dismissal on the basis of dishonesty exists where an employee acts *fraudulently* with respect to his employer. This principle necessarily rests on an examination of the nature and circumstances of the misconduct. Absent such an analysis, it would be impossible for a court to conclude that the dishonesty was severely fraudulent in nature and thus, that it sufficed to justify dismissal without notice.

[52] This is not to say that there cannot be lesser sanctions for less serious types of misconduct. For example, an employer may be justified in docking an employee's pay for any loss incurred by

a minor misuse of company property. This is one of several disciplinary measures an employer may take in these circumstances.

[53] Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313 (S.C.C.), where Dickson C.J. (writing in dissent) stated at p. 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

This passage was subsequently cited with approval by this Court in *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986 (S.C.C.), at p. 1002, and in *Wallace*, *supra*, at para. 95. In *Wallace*, the majority added to this notion by stating that not only is work itself fundamental to an individual's identity, but "the manner in which employment can be terminated is equally important."

[54] Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.

[55] In light of these considerations, I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.

[56] Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.

[57] Based on the foregoing considerations, I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

Conduct alleged to constitute just cause will also be considered in the light of any extenuating or mitigating circumstances. For example, in *Blackburn v. Victory Credit Union Ltd.* (1997), 32 C.C.E.L. (2d) 39 (N.S.S.C.) the plaintiff had been employed by the credit union for over thirty years when he engaged in what Mr.

Justice Hall characterized as "bizarre and outlandish behaviour" which included taking $100 from petty cash for a fictitious purpose and altering a receipt to increase it by approximately $95. While viewed in isolation this would ordinarily constitute just cause, Mr. Justice Hall found that the plaintiff had been wrongfully dismissed stating:

43 Having found that Blackburn committed three improper financial dealings, does this conduct on his part constitute just cause for the summary termination of his employment, particularly in view of the higher standard demanded of persons in a position of trust?

44 In the circumstances that existed here, I find that it does not. It must be remembered that Blackburn was a loyal and productive employee of Victory for thirty-two years. While he was its general manager, its assets grew from $1,000,000.00 to $12,000,000.00. There was no suggestion of any improper conduct on his part except for the incidents that occurred during the last two months of his employment, other than his use of the petty cash fund. I have already found that during this period Blackburn was suffering from a clinical depression that affected his judgment, caused mental confusion and loss of memory and which resulted in irrational and inappropriate behaviour on his part. It is significant, in my opinion, that after doing a thorough search of Victory's files and current financial records, the Credit Watch officials were satisfied that no other financial irregularities had been perpetrated by Blackburn.

45 I should add that in rejecting Blackburn=s explanations with respect to some of these transactions, I do not mean to imply that I think that he was being dishonest and deliberately trying to mislead the Court and others. I am merely saying that I am not satisfied that they are the correct explanation. Indeed, I suspect Blackburn may believe them to be correct and they may be the product of his attempts to reconstruct what happened.

46 It seems to me that in terminating Blackburn's employment as they did, Victory's officials showed a callous disregard for the life long service that he had given Victory. In my opinion, Victory treated Blackburn in a very heavy handed and insensitive manner, particularly in view of the fact that Blackburn was seriously ill at the time. Victory's officials may say that they were not aware of his illness, however, it is clear that they made no inquiry as to the state of his health, and one member even went so far as to suggest that Blackburn was "faking" when he indicated that he was seeing a doctor, that he couldn't focus, and so forth. No effort was made by Victory to try to get at the root cause of this bizarre and outlandish behaviour, of recent origin, on the part of their long time employee. Victory's officials demonstrated a very hard nosed and rigid approach in their dealings with Blackburn in this respect.

While somewhat arbitrary, it is helpful to categorize the case law according to when and where the conduct alleged to constitute just cause took place - before or during the period of employment and in or outside of the course of employment.

Conduct prior to employment

Dishonesty on the part of the employee prior to the actual commencement of employment can justify dismissal. In *Pliniussen* v. *University of Western Ont.* (1983), 2 C.C.E.L. 1, 83 C.L.L.C. 14,068 (Ont. Co. Ct.), the plaintiff was hired as part-time lecturer in the defendant's School of Business Administration. His employment was to commence the following September. Prior to the opening of school, however, the university's administration discovered that the plaintiff had been charged in connection with certain fraudulent insurance claims. The plaintiff confessed his guilt to a university official and his contract was terminated. The Court found that there was potential for damage to the reputation of the school if

the fraudulent conduct of the plaintiff became public knowledge. The Court held that the dean of the school had acted very properly in removing a source of damage to, or potential damage to the reputation of the school for which he had charge. In the Court's view, he had no other alternative than to dismiss the plaintiff (at p. 6).

In *Pliniussen*, the potential effect of the plaintiff's conduct on the reputation of the school and on its students was an important factor in the Court's finding that there was just cause. These considerations would probably be of less importance in a case involving a lower profile of less influential employee.

In *Islip v.Coldmatic* the Court followed the McKinlay decision in the Supreme Court of Canada and found that dishonesty by a prospective employee consisting of lying about his salary, which included the employer to offer a matching salary, did not constitute just cause for dismissal.

Conduct outside of employment during period of employment

It is fairly rare that events other than in the course of employment will be relied on as providing just cause for termination and as such there are relatively few cases. Since the conduct is outside of the course of employment there is usually no direct impact on the employer. In such cases, however, the Court will often view the incident as revealing the true character of the employee. The significance of a revelation of character is indicated by the words of Mr. Justice Ritchie in

Lake Ont. Portland Cement Co. v. Groner, [1961] S.C.R. 553, 28 D.L.R. (2d) 589:

[I]n my view it is not so much the misconduct itself as the fact that the was capable of it which justifies the respondent's dismissal.

In *Cdn. Imperial Bank of Commerce* v. *Rifou*, 13 C.C.E.L. 293, [1986] 3 F.C. 486, 86 C.L.L.C. 14,046, 25 C.R.R. 164, 72 N.R. 12 (C.A.), the Court considered an application to quash the decision of an adjudicator, who had ordered the reinstatement of a loans officer who had been convicted of shoplifting. The employee had served the bank for approximately 17 years, and the adjudicator concluded that it was appropriate that the employee be reinstated. (It should be noted that the power to reinstate is a statutory power set out in the *Canada Labour Code* and that the courts have no comparable power of reinstatement.) In this regard the adjudicator stated:

I conclude that the theft was an aberration, for which there may not be an explanation known to the Complainant, and that, given the event of criminal conviction and suspension from employment, which may be much more reliable conditioners than an excuse which may be contrived or an expression of remorse that may be fabricated, the aberration is a much less plausible base for projecting future conduct than the Complainant's long and commendable work record. I note also that her job function is clerical, and does not involve handling money or like property. I note also that the theft was not work related and occurred off duty and off the employer's premises. I accept the Complainant's explanation for the incorrect cryptic statements in the Unemployment Insurance events. The explanations are credible and I believe them.

I conclude, therefore, that the facts do not establish a case for an uncompromising response from the Employer to the Complainant's culpable behaviour. That conclusion lets in the Complainant's case for mitigation, mainly her work record, the complex severity of the consequences of termination, and the distance between what she did and her duties and opportunities at work. (at pp. 298-299)

The Federal Court of Appeal, however, concluded that the adjudicator had erred in finding that the job function of the employee did not involve handling money or like property. In this regard, a performance review document specified that one of the duties of the employee included selling traveller's cheques, drafts and money orders.

In the result, the Court quashed the order of the adjudicator, and referred the matter back to the adjudicator for reconsideration. Upon reconsideration the adjudicator, however, came to the same conclusion that the employee should be reinstated (*Rifou* v. *Cdn. Imperial Bank of Commerce*, (1986), 15 C.C.E.L. 67 (Adjud. under the *Canada Labour Code*)).

Conduct in the course of employment

Dishonest conduct in the course of employment will, absent significant and mitigating circumstance such as in the *Blackburn* case above, provide just cause for dismissal. In cases such as theft from the employer, the act itself constitutes a clear breach and repudiation of the employment contract.

As will be seen, most of the reported cases do not involve any direct financial benefit to the employee or loss to the employer. The reason for this is that dishonesty resulting in financial benefit to an employee at the expense of the employer so clearly constitutes just cause for dismissal that such a case is unlikely to be litigated.

A good summary of law is set out in *Beyea* v. *Irving Oil* (1985), 8 C.C.E.L. 128, 63 N.B.R. (2d) 243, 164 A.P.R. 243 (Q.B.), affirmed (1986), 14 C.C.E.L. 67, 70 N.B.R. (2d) 1, 179 A.P.R. 1 (C.A.). The plaintiff was a 47-year-old plant foreman who had been employed for 28 years. The plaintiff was dismissed for having arranged to deliver waste oil to a neighbour, rather than having it disposed of by an associated company. The oil was apparently used by the neighbour to keep down dust on a roadway, and approximately 24 drums of oil were diverted for that purpose. Upon being confronted with these facts the plaintiff first denied the story, and the admitted the facts but took the position that the oil was of no value, and that his disposal of it had been authorized by a superior. The Court found that there was no such approval and that the removal of oil was contrary to the express policy of the defendant. It would also appear that at least some of the drums contained oil that did have some value. In upholding the termination for just cause the Court provided a helpful discussion of the standard of proof required in a case where a criminal act is alleged, and as to the general principles of law applicable, stating:

The defendant has alleged dishonesty and alleges theft. I do not feel that had the plaintiff been charged criminally with theft with respect to this matter that there would have been a conviction. Nevertheless, I would characterize his behaviour, both with respect tot he manner in which he sent the product off the premises and his actions subsequent thereto, as being deceitful.

It is urged on behalf of the plaintiff that where criminality or a criminal act is alleged, such must be proved with more certainty than the ordinary balance of probabilities. The test remains the balance of probability, but in finding what is reasonably probable, due regard must be had to the gravity of the suggestion with respect to the acts which are alleged to have been committed: *Hanes* v. *Wawanesa Mut. Ins. Co.* [1963] S.C.R. 154, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718 (S.C.C.). On the evidence before me and having due regard to the seriousness of the allegations, although I do not hold that there was criminal intent, I do find that the evidence discloses circumstances as I have described, and that these amount to deceit on the part of the plaintiff.

The next questions is whether or not this is cause. In considering whether or not it constitutes cause for dismissal without notice, one must have regard to the position held by the plaintiff. He was the plant foreman and as such exercised authority over a substantial number of the employees. His actions would be noted by the employees who were under him and would tend to set the standard for their own behaviour. It would be important, from the defendant's point of view, that there be no question with respect to the honesty of his conduct.

It is not relevant that the defendant may not have suffered an actual financial loss, nor is the extent of the financial loss particularly relevant. In considering misconduct such as this, it is the capability of the employee to conduct himself in such manner that particularly justifies his dismissal. See *LeFurgey* V. *Royal Bank of Can.* (1984), 56 N.B.R. (2d) 286, 146 A.P.R. 286 (N.B.Q.B.), and the excerpts referred to therein at pp. 303-04:

It is not relevant that the bank may not have suffered an actual loss in this particular transaction nor is it relevant that the bank representatives may not have been aware for example of the Russell

matter before termination of employment, See *Lake Ontario Portland Cement Company Limited* v. *Groner*, [1961] S.C.R. 553, Ritchie J., at p. 563:

> "The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England (2nd Ed.), vol. 22, p. 155, where it is said:
>
> It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time."
>
> It may be, as Mr. Justice Morden says in the course of his judgment in the Court of Appeal, that the respondent's misconduct "was not incompatible with the proper discharge of the duties for which he was employed", but in my view it is not so much the misconduct itself as the fact that he was capable of it which justifies the respondent's dismissal . . . As was said by Lord Atkinson in *Federal Supply & Cold Storage Company of South Africa* V. *Angehrn and Piel* (1910), 103 L.T. 150, at 151, 80 L.J.P.C. 1) "it is the revelation of character which justifies the dismissal."

Deceitful conduct is incompatible with the plaintiff's proper discharge of his duties, particularly in his capacity of employment as plant foreman and, in my view, constitutes misconduct which justifies his dismissal without notice.

The *Wallace* factor – exposure to increased notice periods for bad faith discharge

The *Wallace* decision

In *Wallace v. United Grain Growers* (1997) 152 D.L.R. (4th) 1 (S.C.C.) Mr. Justice Iacobucci (Lamer C.J. and Sopinka, Gonthier, Cory and Major JJ.) introduced a new factor to be considered in determining reasonable notice being whether the employer acted in good faith in relation to the termination. Mr. Justice Iacobucci described the facts as follows:

In 1972, Public Press, a wholly owned subsidiary of the respondent, United Grain Growers Ltd. ("UGG"), decided to update its operations and seek a larger volume of commercial printing work. Don Logan was the marketing manager of the company's publishing and printing divisions at that time. For Logan, the key to achieving this increase in volume was to hire someone with an existing record of sales on a specialized piece of equipment known as a "Web" press.

In April 1972, the appellant, Jack Wallace, met Logan to discuss the possibility of employment. Wallace had the type of experience that Logan sought, having worked approximately 25 years for a competitor that used the "Web" press. Wallace had become concerned over the unfair manner in which he and others were being treated by their employer. However, he expressed some reservation about jeopardizing his secure position at the company. Wallace explained to Logan that as he was 45 years of age, if he were to leave his current employer he would require a guarantee of job security. He also sought several assurances from Logan regarding fair treatment and remuneration. He received such assurances and was told by Logan that if he performed as expected, he could continue to work for Public Press until retirement.

Wallace commenced employment with Public Press in June of 1972. He enjoyed great success at the company and was the top salesperson for each of the years he spent in its employ.

On August 22, 1986, Wallace was summarily discharged by Public Press's sales manager Leonard Domerecki. Domerecki offered no explanation for his actions. In the days before the dismissal both Domerecki and UGG's general manager had complimented Wallace on his work.

By letter of August 29, 1986, Domerecki advised Wallace that the main reason for his termination was his inability to perform his duties satisfactorily. Wallace's statement of claim alleging wrongful dismissal was issued on October 23, 1986. In its statement of defence, the respondent alleged that Wallace had been dismissed for cause. This allegation was maintained for over two years and was only withdrawn when the trial commenced on December 12, 1988.

At the time of his dismissal Wallace was almost 59 years old. He had been employed by Public Press for 14 years. The termination of his employment and the allegations of cause created emotional difficulties for Wallace and he was forced to seek psychiatric help. His attempts to find similar employment were largely unsuccessful.

At trial Wallace was awarded damages for wrongful dismissal based upon a 24-month notice period, however, this was reduced to 15 months on appeal. In restoring the trial judgment as to notice Mr. Justice Iacobucci stated:

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. In *Machtinger, supra*, it was noted that the manner in which employment can be terminated is equally important to an individual's identity as the work itself (at p. 1002). By way of expanding upon this statement, I note that the loss of one's job is always a traumatic event.

However, when 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 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. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.

In *Trask, supra*, an employer maintained a wrongful accusation of involvement in a theft and communicated this accusation to other potential employers of the dismissed employee. *Jivrag, supra*, involved similar unfounded accusations of theft combined with a refusal to provide a letter of reference after the termination. In *Dunning, supra*, bad faith conduct was clearly present. Although the plaintiff's position had been eliminated, he was told by several senior executives that another position would probably be found for him and that the new assignment would necessitate a transfer. However, at the same time that the plaintiff was being reassured about his future, a senior representative of the company was contemplating his termination. When a position could not be found, the decision was made to terminate the plaintiff. This decision was not communicated to the plaintiff for over a month despite the fact that his employers knew he was in the process of selling his home in anticipation of the transfer. News of his termination was communicated to the plaintiff abruptly following the sale of his home.

In *Corbin, supra*, the New Brunswick Court of Appeal expressed its displeasure over the conduct of an employer who made the decision to fire the employee when he was on disability leave, suffering from a major depression. The employee advised the manager as to when he would be returning to duty and informed him that he was taking a two-week vacation. He was fired immediately upon his return to work. The facts in *MacDonald, supra*, are also illustrative of bad faith conduct. In that case, the defendant employer closed its bar for three months and laid off the plaintiff bartender. While the bar was closed, the executive committee was replaced and the new officers decided to implement a different salary structure for bartenders when the bar reopened. The employer advertised for a bartender at a rate of almost half of the plaintiff's hourly rate. The plaintiff was unaware of any change in his status, and it was only when he saw the advertisement in the newspaper that he learned that he had been dismissed and was not to be offered reinstatement.

These examples by no means exhaust the list of possible types of bad faith or unfair dealing in the manner of dismissal. However, all are indicative of the type of conduct that ought to merit compensation by way of an addition to the notice period. I note that, depending upon the circumstances of the individual case, not all acts of bad faith or unfair dealing will be equally injurious and thus, the amount by which the notice period is extended will vary. Furthermore, I do not intend to advocate anything akin to an automatic claim for 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.

The Court of Appeal in the instant case recognized the relevance of manner of dismissal in the determination of the appropriate period of reasonable notice. However, relying on *Trask, supra,* and *Gillman v. Saan Stores Ltd.* (1992), 45 C.C.E.L. 9 (Alta. Q.B.), the court found that this factor could only be considered "where it impacts on the future employment prospects of the dismissed employee" (p. 180). With respect, I believe that this is an overly restrictive view. In my opinion,

the law must recognize a more expansive list of injuries which may flow from unfair treatment or bad faith in the manner of dismissal.

It has long been accepted that a dismissed employee is not entitled to compensation for injuries flowing from the fact of the dismissal itself; see e.g. *Addis, supra*. Thus, although the loss of a job is very often the cause of injured feelings and emotional upset, the law does not recognize these as compensable losses. However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the case. 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.

Often the intangible injuries caused by bad faith conduct or unfair dealing on dismissal will lead to difficulties in finding alternative employment, a tangible loss which the Court of Appeal rightly recognized as warranting an addition to the notice period. It is likely that the more unfair or in bad faith the manner of dismissal is the more this will have an effect on the ability of the dismissed employee to find new employment. However, in my view the intangible injuries are sufficient to merit compensation in and of themselves. I recognize that bad faith conduct which affects employment prospects may be worthy of considerably more compensation than that which does not, but in both cases damage has resulted that should be compensable.

[. . .]

The law should be mindful of the acute vulnerability of terminated employees and ensure their protection by encouraging proper conduct and preventing all injurious losses which might flow from acts of bad faith or unfair dealing on dismissal, both tangible and intangible. I note that there may be those who would say that this approach imposes 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 the case before this Court, the trial judge documented several examples of bad faith conduct on the part of UGG. He noted the abrupt manner in which Wallace was dismissed despite having received compliments on his work from his superiors only days before. He found that UGG made a conscious decision to "play hardball" with Wallace and maintained unfounded allegations of cause until the day the trial began. Further, as a result of UGG's persistence in maintaining these allegations, "[w]ord got around, and it was rumoured in the trade that he had been involved in some wrongdoing" (p. 173). Finally, he found that the dismissal and subsequent events were largely responsible for causing Wallace's depression. Having considered the *Bardal* list of factors, he stated at p. 170:

> Taking [these] factors into account, and particularly the fact that the peremptory dismissal and the subsequent actions of the defendant made other employment in his field virtually unavailable, I conclude that an award at the top of the scale in such cases is warranted.

I agree with the trial judge's conclusion that the actions of UGG seriously diminished Wallace's prospects of finding similar employment. In light of this fact, and the other circumstances of this case, I am not persuaded that the trial judge erred in awarding the equivalent of 24 months' salary in lieu of notice. It may be that such an award is at the high end of the scale; however, taking into account all of the relevant factors, this award is not unreasonable and accordingly, I can see no reason to interfere. Therefore, for the reasons above, I would restore the order of the trial judge with respect to the appropriate period of reasonable notice and allow the appeal on this ground.

Post-*Wallace* decisions

Following *Wallace*, in *Noseworthy v. Riverside Pontiac-Buick Ltd.* (1998), 39 C.C.E.L. (2d) 37, 168 D.L.R. (4th) 629 (O.C.A.) the Court endorsed the view that bad faith is not an add-on to the notice period but is to be weighed with all of the other *Bardal* factors.

25 *Wallace* represents a significant new step in the evolution of the way in which reasonable notice is determined. Speaking for a majority of the Supreme Court of Canada, Iacobucci J. began his discussion of reasonable notice by making clear that the principles set out in *Bardal, supra,* remain centrally relevant to this task. He reviewed the subsequent common law to demonstrate that Canadian courts have not treated this list as closed but have built several additional factors onto this foundation. Principal among them is a consideration of whether the dismissed employee had been induced to leave previously secure employment.

26 He then turned to an analysis of the relevance of bad faith conduct by the employee in effecting the dismissal. He concluded that, given the special characteristics of the employment relationship and the type of contract governing it, the law must recognize such conduct as a consideration in determining the length of notice required. Particularly in light of the power imbalance that typically exists in the employment relationship, the fundamental importance of work in a person's life, and the special vulnerability of an employee when termination occurs, the employer must act fairly and in good faith in carrying out the dismissal. He puts his conclusion this way at p. 742:

> 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 . . . 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.

27 He made clear that this factor is relevant even where the employee suffers mental distress as a result but cannot show that the manner of dismissal affected his future job prospects although if the latter occurs as well, the resulting extension of the notice period would likely be considerably greater.

28 In *Wallace* the employer's bad faith conduct had both these consequences. Together with the other relevant factors, this led Iacobucci J. to uphold an award equivalent to twenty-four months' notice which he acknowledged may be at the high end of the range. This ultimate conclusion makes clear that the compensation for bad faith employer conduct comes by way of a lengthened notice period fixed within a generally accepted range.

29 Put another way, it seems to me that Iacobucci J. does not contemplate that the dismissed employee should recover damages for all the harm caused by the bad faith conduct. To do so would be to treat "bad faith discharge" as a stand-alone cause of action either in contract or in tort, something he clearly rejects.

30 Fixing the notice period within a range depends on all the relevant circumstances of the particular case. The upper end of the range is not an absolute ceiling but is elastic enough to increase for particularly deserving cases. Within this range, the consequence of *Wallace* is that where bad faith employer conduct exists, there will be a longer notice period than there would be in the same case if there were no such conduct.

31 As Iacobucci J. said in *Wallace* at p. 745 the trial judge in weighing the importance of this factor must examine both the nature of the bad faith conduct and its impact in the circumstances. This is best done as part of a consideration of all the relevant factors in the case rather than as a

separate exercise of determining the discrete addition to be made to the notice period because of the employer's conduct. Given the various factors to be considered and the endless variety of factual contexts, reasonable notice cannot be determined as if it were simply the product of an arithmetical formula.

32 In part, this is a consequence of the fact that the various factors to be considered do not appear to yield a single organizing principle. Rather, they reflect various important aspects of the employment relationship that deserve recognition by the law in determining the notice required to terminate an employee. The factors set out in *Bardal*, supra reflect the employee's interest in some degree of job security and his or her need to be cushioned against its loss. The consideration of whether the dismissed employee has been induced away from secure employment reflects his or her reliance and expectation interests. The factor first laid out in *Wallace*, supra reflects the employee's interest in being dealt with fairly and in good faith at the point of dismissal.

33 Where an employee is terminated without cause and without notice the task of the trial judge is to examine the circumstances of the particular case in light of these factors to determine the quantum of damages in lieu of notice that reflects the relative wrongfulness of the termination. The degree to which the termination was done without respecting these important aspects of the employment relationship will dictate where, within the range, the required notice falls.

"Tip of the iceberg" scenario – determining the true loss and preventing future losses

I had a case one time in which a relatively large and sophisticated corporation discovered a fraud, investigated and determined that a fraud in the tens of thousands of dollars had been perpetrated by an employee. A civil action was commenced and the matter was also reported to the police. The accused -

defendant decided to plead guilty and, to everyone's surprise, offered to make restitution in the hundreds of thousands of dollars.

The simple fact is that most financial - business people are not equipped by education or experience to investigate a fraud. They don't know the questions to ask, they don't know the typical tricks of the fraudster and may only see the tip of the iceberg.

In all but the most straightforward cases I advise clients that they should consider retaining a forensic accounting - investigative firm. This is helpful not only in terms of determining the full extent of the loss but obtaining preventative advice as to procedures which can be implemented to reduce the likelihood of loss in the future.

How and when to interview the target of the investigation

When a loss, or possible loss, is discovered there is a natural human tendency to immediately confront the suspect. In virtually all cases, however, this is counter-productive.

By definition, there is only one initial interview of a suspect at which you have the advantage of surprise and at which the untruthful suspect will have little opportunity to fabricate a story which will fit the evidence and provide a defence. Further, very often there is only one opportunity to interview the suspect. The exigencies of the situation may require that the suspect be terminated immediately

or the suspect, fearing the prospect of criminal charges, may refuse to submit to a further interview.

To the greatest extent possible, therefore, you want to conduct an investigation so that you have at hand the relevant documentation and can ask the suspect all of the pertinent questions. There should certainly be two individuals involved in interviewing the suspect so that one person can focus on asking questions and the other can focus on recording answers.

In some cases, a suspect, who is guilty of lesser forms of dishonesty, has a split second decision to make (ie.) am I better to admit what I have done wrong and throw myself on the mercy of the employer or try to concoct a story which may make matters worse. An example of this situation might be a case in which an employee has contravened policies relating to expense accounts or accepting gifts from suppliers.

In virtually all cases, employers should insist upon the employee answering questions as and when asked. It sometimes happens that an employee will ask to have a lawyer present which, as a practical matter, having regard to the lawyer's schedule generally results in the interview being delayed by days or even weeks.

In most cases, the position I take is that the employee does not have any right to have a lawyer present. The purpose of the meeting is to obtain a factual description from the employee of events which have occurred in the course of or

relating to employment. The employee is free to obtain whatever advice he or she wishes after the interview.

Whether and when to call the police involves both philosophical and practical considerations. Some employers believe that it is only right and proper that criminal conduct always be reported to the police and that this is a paramount consideration. In my experience a greater number of employers are first concerned to be rid of the employee without wrongful dismissal liability and to make any financial recovery available from the employee, an insurer or other deep pocket.

Further, the police have very limited resources to investigate fraudulent conduct. A fairly simple and typical fraud case might involve an employee who purchases goods from a dummy corporation which the employee has set up. It is a relatively simply matter of linking the dummy corporation to the employee and then reviewing the invoices from the dummy corporation against other invoices for the same product, or market prices for the product in question, to prove the fraud and the extent of the loss.

With few exceptions, the police simply will not conduct this type of investigation or it will become such a low priority it will never see the light of day. In saying this I am sympathetic to the position of the police. With limited resources, the police have to focus on the cases which pose the greatest threat to the public and a fraud on a corporation by an employee is not high on that list.

Practical considerations in alleging and proving just cause for dismissal

Practical consideration which may affect your tactics include the following:

(a) **Are your witnesses ready, willing and available to testify** – Consider who has direct knowledge of the facts constituting just cause. If the witnesses reside outside Canada, are favourably disposed to the employee or unfavourably disposed to the employer for unrelated reasons it may be hazardous to rely on their evidence.

(b) **Do business considerations prevent using certain witnesses** – Such considerations arise most often when the theft or unethical conduct relates to customers. Many employers would prefer to forgo a just cause defence or laying criminal charges if this would require a customer to give evidence.

(c) **Will you disturb skeletons in the closet** – Just cause is not a precise, objective standard. Fast and loose conduct that might constitute just cause for one employer with clear employment policies may not for another employer who condones questionable conduct.

When the employer pleads just cause it, in effect, contends that the conduct complained of is at odds with the corporate policies and culture. The employee who is terminated for a particular breach may attempt to defend by citing analogous breaches by others. An employee terminated for falsifying expense

accounts may allege that the boss has accepted improper benefits or that the corporation has sent questionable invoices to customers.

Before you allege just cause make sure that the employer does not have skeletons in the closet.

(d) **Will your case attract unwelcome media attention** – In some cases "winning" with publicity is not worth it. For example, an institution reliant on public donations may not want to publicize lax management or procedures which permitted a fraud and a professional services may not want to publicize that its clients were overcharged by a fraudster.

Strategies to minimize collateral claims (ie.) defamation, intentional infliction of mental suffering, malicious prosecution

These types of claims are often added to a wrongful dismissal claim by a terminated employee. The twin strategies are as follows:

(a) Due diligence – Investigate with professional advice to ensure to the greatest extent possible that you can prove your allegations; and

(b) Control and limit information – Information concerning the investigation and as to the reasons for employment termination should only be distributed on a "need to know basis". Employees in the know should be told to keep confidential what they have learned. Employees not in the know should in most cases simply

be instructed to not make any comment on the departure of the individual from the company.

There are obviously exceptions to every rule. In certain cases the exposure to collateral claims is minimal given that the terminated employee has confessed or pleaded guilty. Employers should, however, adopt a cautious approach because the cost, in legal fees and management time, of successfully defending a claim may be substantial.

(The author acknowledges with thanks the permission of Carswell to include excerpts from his book the *Employment Law Manual* in this paper)