

Ten Topics That Frequently Arise at Wrongful Dismissal Mediations

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Barry B. Fisher is a mediator and arbitrator who specializes in employment law. This article is based on a speech delivered by Mr. Fisher at an Ontario Bar Association conference in 2003. It is not legal advice and no member of our firm is responsible for its content but is intended solely as information about issues in mediation of employment law disputes. Legal advice is provided only on the basis of specific facts following consultation with a lawyer.

INTRODUCTION:

My ADR practice consists largely of mediating wrongful dismissal lawsuits, both voluntary and mandatory (under the terms of the Ontario Mandatory Mediation Program). In the course of my practice I work with a diverse cross-section of the workforce, from the CEO to the billing clerk, from the Fortune 100 Company to the owner operated restaurant. I also see a wide variety of lawyers, senior and junior, big firm and small firm and plenty of in-house counsel, both Canadian and American.

However no matter who the players are, the same types of issues arise again and again in mediation. The purpose of this paper is to go over some of these issues and to give some insight as to why they come up so often in lawsuits, how they can be discussed at meditation and most importantly, how these issues can be incorporated into a settlement.

1. WALLACE DAMAGES and OTHER DAMAGE CLAIMS

Wallace damages is the term applied to a claim for an extended notice period because of the bad faith actions of the Employer prior, or after the termination. There also are many other types of damages claims which seek to expand the monetary value of a wrongful dismissal claim. These include claims for mental distress, punitive damages, aggravated damages, intentional interference with economic relations, intentional infliction of mental suffering, defamation, violation of human rights statutes, and anything else that appeared in the last six months of *The Lawyers Weekly*.

It would appear that the days of the straight forward wrongful dismissal action are almost dead. Virtually every Statement of Claim that I see contains one or more of these extra claims. Many a tree has lost its life so that issues of Wallace type damages can be pleaded and defended. Experienced plaintiff's counsel seek to set up through pre-litigation correspondence the factual underpinnings of a bad faith claim by requesting reference letters, making claims for disability, and requesting outplacement counselling prior to reaching an overall settlement.

Many employers seem to be blissfully unaware of these damage claims and thus commit many tactical errors in the termination. These include terminating people when they are on disability, terminating people when they just returned from disability, humiliating termination procedures, terminating people by mail or email, providing no reason for termination, providing false reasons for termination, providing no reference letter or a useless one, alleging just cause in response to a claim and continuing to allege just cause throughout the litigation when it was dubious to do so.

The way in which these issues are discussed at mediation depends on why they are being presented. Often these claims are the legal background for the plaintiff's desire to "tell his story" and talk about how awful and humiliating the termination process was. Other times the Wallace damages claims are simply put forward by counsel to try to maximize the reasonable notice period.

Wallace damages can be a useful offset to an allegation of just cause. In other words the mediator might suggest, "Let us park the issues of Wallace damage and just cause and focus on reasonable notice".

Wallace damages can also be a way of getting the Employer to pay the top end of reasonable notice, rather than the low end or middle range. This is especially helpful when the person at the company who caused the Wallace type event to occur in the first place is no longer with the company and the HR representative at the mediation is there to clean up the mess.

Rarely do claims for Wallace type damages result in a higher settlement at mediation than would be provided by a generous approach to reasonable notice. Plaintiffs who are deadly serious about obtaining substantial damages for Wallace type claims usually end up going to trial.

2. MITIGATION

Before an employer decides whether or not they should pay out on a wrongful dismissal action, they often want to know two aspects of the plaintiff's mitigation activities; has he or she earned any money since termination and what efforts have they made in looking for alternative employment.

More often than one would expect, the plaintiff has earned some money by the time of the mediation. Plaintiffs will sometimes volunteer this information but often they will wait until they are asked. Defence counsel should ask all the usual questions about earned income, offers accepted, work performed but not yet compensated for and the like. If the defendant is suspicious of the plaintiff's plea that he has not earned any income since termination, then the inclusion of such a statement in the Minutes of Settlement and a warranty to the effect that the defendant is relying on the truth of such statement in agreeing to this settlement, is usually enough to overcome this hurdle of mistrust.

Employer's often question the adequacy of the plaintiff's mitigation efforts. However the Courts do not expect much from a dismissed employee, so unless the defendant can show a complete lack of effort, this issue usually does little to help an employer. This is especially so where the defendant has done nothing to help out the employee. In other words, where the employee was given no outplacement counselling, no reference letter and only the statutory minimums under the Employment Standards Act, do not expect the Court to come down hard on a plaintiff with a less than perfect job search.

However, many plaintiffs deeply resent the idea that any income that they earn in the notice period reduces their damages by an equal amount and therefore seem reluctant to even look for another job or do so in a cursory fashion. A close review of their job search efforts often reveals a flurry of activity in a limited time frame and then long periods of no activity.

Often plaintiffs with inadequate job searches are often the ones with the most unrealistic settlement expectations. Emphasizing the fact that their inadequate job search efforts is the prime reason that their case is now not worth the fortune they thought it was, often has a salutary effect on their expectations. It also can be a useful excuse for plaintiff's counsel to revisit his advice to his difficult client as to how much the case is worth.

3. BONUS

Many compensation plans have a bonus or a variable incentive component. In some industries, notably the financial services sector, the overwhelming bulk of one's income derives from such plans.

In wrongful dismissal actions, the following issues usually arise:

- Determination of the quantum for bonuses for a period ending prior to the date of dismissal for which the employer has made some payment. This often arises where the employee is terminated at the same time at which the amount of past bonuses is being determined where the severance offer deals both with bonus issues and severance issues.
- Liability and quantum determination for the bonus for the historical period, being the period of time up to the date of actual dismissal from the date of the last bonus period. For instance, if the bonus is calculated and paid on a calendar basis and the employee is terminated on May 31, the historical bonus period would be from January 1 to May 31.
- Liability and quantum determination for the bonus for the notice period, being from the actual date of termination to the end of the reasonable notice period. If, in the above example, reasonable notice was seven months then the period in question would be from June 1 to December 31.

The issues arising as to whether or not the employer is required to pay a bonus in a wrongful dismissal action are both complex and highly emotional.

Employers seem to deeply resent paying a bonus to an ex-employee who was not there to contribute to the success of the company, even when you remind them the only reason the employee was not present was because they terminated him without notice. Furthermore, even though sophisticated employers do not allege just cause unless they have a legally defensible position, the real reason employees are terminated often is directly related to their performance, and again the employer has a difficult time being told that they are being asked to pay a bonus to an employee who they judged to be incompetent or at least not deserving of a bonus.

Employees also are deeply emotional over their bonuses. The size of the bonus represents the quantification of how your employer judges you. Therefore to be dismissed is one thing, to then being told that your past performance was deficient or borderline incompetent, is very difficult to deal with. Moreover, since bonuses often come out a fixed pool, in which the persons determining the plaintiff's share of that pool also draw their bonus, most plaintiff's question the integrity of the boss who both determined to terminate him in the first place and then deny him a fair bonus in the second place, when those actions at the same time increase the amount of money available to the boss and his or her co-workers for their own bonuses.

Generally speaking the law has developed over the last ten years in this area to favour employees. Even where a bonus is said to be discretionary, that discretion must be exercised in a fair and non-arbitrary manner. Procedural rules that purport to require the employee to be in the employ of the company as of a certain date (end of fiscal period or on date of payment) are typically read to mean that the relevant date is not the actual date of dismissal but rather the end of the reasonable notice period, on the basis that the rule cannot allow a party to take advantage of its own breach of contract.

The real fight therefore is not typically over whether the plaintiff is entitled to a bonus, but rather the amount of that bonus.

There are essentially two ways at looking at the issue of determining the quantum of the bonus.

The most common method is to look at the past history of the bonus as a way of predicting future bonuses. Courts have generally looked at a two or three year backward average. This is especially helpful where there have not been any significant swings in the bonus and the economic outlook of the company for the notice period is not much different than the history immediately prior to the termination

However there is another method of determining bonuses based on what actually happened after the termination. This is based on the theory that a plaintiff in a wrongful dismissal action is to be put in the same economic position that he or she would have been if they had been given reasonable working notice. If the employee had been permitted, or in fact required, to work out the notice period then his or her bonus would have been considered in light of the current economic condition of the company, not the past.

This new methodology has arisen largely out of the recent stock market fiasco following the collapse of the dot com market. Prior to the collapse many employees in the high tech and financial sector had huge bonuses, way out of proportion to anything else in the recent past. Then after the collapse of the market, many of these former high flyers were let go. The plaintiffs naturally wanted their bonuses for the notice period calculated on a pre crash scenario, while employers were obviously balking at paying huge bonuses to former employees and small or no bonuses to existing employees. In order to have the data to determine what a dismissed employee would have received as a bonus had he or she been permitted to work out the notice period, the parties need access to reliable information regarding what comparable employees received in the same period. This can often be difficult to agree on, as the parties often disagree over who is comparable to the plaintiff. Furthermore, there is a privacy concern about disclosing bonus information of other employees; however this concern is often alleviated by not providing the plaintiff with the actual bonus figures, but either group averages or percentage rate of increase or decrease from the previous bonus year.

From a mediation point of view, my goal is to try to get the parties to agree on a single number representing one month of bonus. If I cannot get them to agree to a single number, then at least I can help them understand that the monthly amount of bonus is another variable that the Court would have to decide. This increases the unpredictability of the Court result, which hopefully will increase the willingness of the parties to avoid this uncertainty and settle the case. Often this matter is addressed by simply agreeing that by using the average of the parties different positions, then we have achieved an acceptable compromise on this issue.

4. COMMISSIONS

The issues facing commissions are similar to those referred to in the bonus issue. We first have the issue of discussing past commissions and future commissions. We then have to determine the proper amount of the commissions.

With respect to the issue of past commissions, it is important to not double count past and future commissions. First we determine how the company determines when a commission is earned and when it is paid. Often companies pay upon invoicing, others when the order is accepted and others only when the client pays for the product. Contracts involving long term commitments, renewals or variable pricing within the contract may involve complex and confusing commission rules. Whatever the rules are, it is helpful to determine what commissions, if any, were owed up to the date of actual termination. These should then be separated from other commissions on projects not yet completed and thus no commission is yet owing.

Future commissions are covered in the topic of determining the amount of commissions in each month of notice. Again there are two methods of calculation; the historical and the actual. With respect to the historical method, again a two or three year average is common. With respect to the actual method, this is only possible where there is a reliable method of tracking what likely would have happened had the employee been permitted to work out his or her notice period. Thus where the company closed down its business and no longer sold the product that the plaintiff sold, the actual method does not work. However where the employee was replaced by another salesperson, simply tracking the replacement's sales may be useful. Where the employee had a small number of significant and long term clients, tracking those client sales for the notice period may also serve to provide some data on what the commissions would be over the notice period.

Another issue which sometimes arises is the plaintiff's claim that he is entitled to commissions deriving from a sale regardless of whether or not this takes him beyond the notice period. Here we generally look at issues such as whether or not the Company has assigned another commissioned salesperson to the file as well as their past practice in similar situations to see if this argument has legs. One way to resolve these disputes where the parties do not know how much commission will be generated in the future is to come with an agreement whereby the plaintiff is paid on an on going basis into the future on an agreed basis.

5. LEGAL FEES

Legal fees are an issue that always comes up and often creates bad feelings all around. Plaintiffs do not understand why they should be responsible for any portion of their own legal fees because if the defendant had simply paid them what they were legally entitled to in the first place, then they would not have had to hire a lawyer at all. Defendants do not feel it is right that not only do they have to pay their own lawyer but they are also being asked to pay for the lawyer that talked the plaintiff into suing them in the first place. Plaintiffs' counsel feels that he should not have to justify his legal fees to his opponent and defence counsel often feel that the plaintiff's counsel spent too much time on non-productive matters.

Quite simply, legal fees are the grease that makes settlements possible. From the defence point of view, if you make it clear from the beginning that you are willing to pay reasonable legal fees to the plaintiff, then you set a positive tone for resolution. The plaintiff will think that all of his fees are being covered, so he or she will stop worrying about it. The plaintiff's lawyer will also relax because his fee is at least being partially covered. On the other hand, if the defendant takes a rigid position that under no circumstances will they contribute anything towards the plaintiff's legal fees, the plaintiff is encouraged to take a more difficult position on the balance of the settlement so that he can build up a fund to pay for his lawyer. Plaintiff's counsel also gets his or her back up, as the defendant's refusal to contribute anything to the legal fees means that he or she will now have a more difficult time getting fees out of his own client.

From a mediation point of view, I remind the parties that the usual rule is that the loser (the party paying money) generally contributes to, but does not indemnify, the winner's legal fees. I remind both parties, but especially the defendant, that legal fees are simply another monetary issue and should be viewed as part of an overall settlement. If the settlement number is acceptable, then why care about how it is constructed?

The amount that the defendant will contribute to the plaintiff's legal fees is therefore the important issue. Generally speaking, the disbursements in a wrongful dismissal case, especially one at the mandatory mediation stage (generally this is after the pleadings have been exchanged but no discoveries have been held) are fairly modest and should not be an issue. The big issue is the legal fees themselves.

Determining an appropriate amount is more of an art than a science, but it would be fair to say that the following factors are usually taken into account:

- The seniority of plaintiff's counsel
- How far along the lawsuit is
- The amount of the settlement
- The hours docketed by both counsel
- Whether the lawyer is on a contingency fee
- The actual amount a lawyer is going to charge his or her client

In terms of timing I usually canvass the issue of the plaintiff's legal fees later on in the mediation when it looks like a settlement is possible and within reach. If however, I believe that the plaintiff's legal fees may constitute a barrier to settlement, I will canvass them earlier on with the plaintiff only. If I believe that the plaintiff's legal fees are out of line, I may point out to the plaintiff that although he may well have incurred those fees, it is not realistic to think that the defendant's contribution to his fees will come anywhere close to covering his or hers actual legal fees. At the same time I may also give defence counsel a heads up that legal fees may well be more important than in this case than they normally are.

By preparing both parties for the general concept that the defendant is expected to contribute to but not indemnify the plaintiff's legal fees, but not discussing the actual numbers until later in the mediation, I am usually able to insure that a deal does not fail because of the legal fees issue.

6. INDUCEMENT

This is one of the most misunderstood concepts in employment law. It was originally developed to take care of the situation where an employee with short service was terminated. In those situations, applying general principles, short service usually led to short notice periods. However, where the short service employee had previously worked for a lengthy period of time for another employer and where it looked like the present employer sought out the employee, the Courts felt it was unfair to provide a short notice period to the employee.

For many years lawyers understood that for inducement to be relevant, the latter employment had to be short and the prior employment had to be long. Then in a series of decisions, including *Wallace v United Grain Growers*, the Courts seem to say that "inducement" was always an issue, no matter how long or short the two employment periods were. Later cases however commented that although inducement remains a factor even when the present service is not short, the effect on the notice period diminishes over time.

As a result of this change in the law, virtually every plaintiff who was employed at the time that they started to work at the defendant now claims inducement in the Statement of Claim. Even plaintiffs who were unemployed at the time they joined the defendant claim that they were induced to join the defendant because they were also considering another job offer at the time, which had they accepted, would have resulted in a secure job.

Some employers seem to think that "inducement" equates to coercion, so that if they can prove that the employee was not forced to join their company, then the inducement claim fails. Needless to say the test is not that high. Therefore, in the course of the mediation we often look at factors such as whether or not a recruiter was used, the length of time the hiring process took, if the plaintiff moved his residence, if there were any discussions of job security, was there a probationary term, and whether the plaintiff received a signing bonus.

If there is a credible case for inducement, then the real issue is how that affects the calculation of the reasonable notice period. In most cases the existence of inducement as a factor results in a notice period indicating more service than was with the defendant but less than if the two periods of service were combined. For instance, if the plaintiff was five years with Employer A and then two years with Employer B, and then is terminated from Employer B, the notice period is probably what an employee with more than 2 but less than 7 years service would receive.

7. INDEPENDENT CONTRACTOR

Many individuals arrange their affairs with the tax man in mind. In the employment world, this gives rise to a large number of people wishing to carry on business as “independent contractors”. This arrangement also appeals to many would be employers.

At termination time however, all plaintiffs wish to become employees in order to claim the protection of the law of wrongful dismissal.

The issue of whether a particular working relationship is that of employer and employee is a complex one requiring a lengthy analysis of many factors. Even so, one can be an employee for the purposes of the Employment Standards Act but on the same facts not an employee under the Income Tax Act. However for purposes of wrongful dismissal the question is not “Is the plaintiff an employee of the defendant?” but rather the correct question is

“Is the relationship between the plaintiff and the defendant of the type which requires reasonable notice to terminate?”

The law has long recognized that other types of relationships other than employment ones require reasonable notice in order to terminate. These other types of relationships have been given labels such a “dependant contractors” or “mercantile agent” . In essence the law will impose an obligation of reasonable notice to terminate where the relationship is one of economic dependence similar to that existing between and employee and an employer. Furthermore the Court is much more concerned with the substance rather than the form of the relationship.

For mediation purposes therefore, it does not matter whether the plaintiff is an employee of the defendant if the economic dependence of the relationship would still give rise in law to an obligation to only terminate the relationship (absent just cause of course) with reasonable notice.

Mind you, when discussing what constitutes reasonable notice, there are some different considerations when talking of reasonable notice for contractors. The applicable statutory termination provisions in the Employment Standards Act do not apply unless the plaintiff is an employee. Moreover the notice periods tend to somewhat less for contractors than employees and rarely do you find a notice period in excess of 12 months for a contractor.

8. CONSTRUCTIVE DISMISSAL

I have come to believe that no one resigns anymore; rather all plaintiffs believe that they have been constructively dismissed after enduring untold harassment from their employers. There has been what appears to a dramatic rise in the number of constructive dismissals in the last couple of years. This seems to flow from the Courts general tendency over the last decade or so to more closely regulate the actual working relationship between the parties. In the seminal case of *Shah v Xerox* , the Court recognized , for the first time, that having a “toxic boss” in and of itself could constitute grounds for a claim for constructive dismissal , even where there was no evidence of a demotion, change of duties or a decrease in compensation.

Therefore many cases come to mediation where the underlying situation is a seriously dysfunctional relationship between the employer and the employee. Again the mediation can provide for a relatively safe and inexpensive forum for both parties to vent and tell awful stories about how cruel and heartless the other party has been. At the end of the day however, the employer is usually thrilled to be rid of the employee and is agreeable to paying something approaching reasonable notice to settle the case. Often the plaintiff was in line to be a not for cause dismissal anyways, and the defendant comes see the mediation as an opportunity to complete a severance at a bargain basement price. The plaintiff, if he has been provided with proper legal advice before he walked out the door, is usually satisfied with something less than reasonable notice because they are painfully aware that losing a constructive dismissal case can be an economic nightmare.

9. JUST CAUSE

You would think that after all these years that employers would learn that terminating an employee and alleging just cause is usually a losing position. There are many procedural safeguards which the law builds in to intentionally make a just cause defence difficult. Furthermore the Supreme Court of Canada has recently reminded us that just cause must be seen in a “contextual context” (*McKinley v. BC Tel*; 2001 Carswell BC 1335;), which is fancy language for saying that simply proving that an employee was dishonest does not necessarily lead to the conclusion that a summary discharge is the only appropriate employer response, as less severe responses may be more appropriate.

When an employer alleges cause when it has no reasonable chance of success (for example, just cause for poor performance without an explicit warning in writing), a number of things happen. First of all, the employee is more likely to go to a lawyer because of the hurt feelings that arise from a dismissal where just cause is alleged. Secondly, the chances that the employee will find employment are greatly diminished because the employee now feels that he will get either no reference or a negative one and also because the employee has to try to explain to a prospective employer why he is now unemployed. Third, the chances of extraordinary claims for monetary damages of the Wallace type increases exponentially as the most common ground for extended Wallace damages is improper allegations of just cause.

How does one deal with allegations of just cause at mediation? First of all, you closely scrutinize the merits of the defense, and as importantly, what the defendant will have to do to prove just cause. If the defendant, in order to prove just cause, has to call its largest customer as a witness, it is highly unlikely they will jeopardize an important client relationship in order to save some money in a lawsuit. Therefore even though they could prove just cause, they will probably choose not to do so.

If the allegation has no merit, or will not be able to be proven for non-legal reasons, then the best thing you can do at mediation is to drop it, and the sooner the better. Advising the mediator and plaintiff’s counsel in the mediation brief or in your opening that you will not be relying on the just cause defense for purposes of the mediation is an effective way to park the issue and deflect the plaintiff’s claim for increased damages because of the unwarranted allegation.

If the defense has merit, then show the plaintiff that you have done your homework. If your case depends on the evidence of a key witness, show plaintiff’s counsel a signed witness statement. If your case is a document case, show the other side your documents immediately. If you anticipate an alibi defense (“that porno may have been downloaded onto my computer but I was not there when it happened”), then bring the documentary and technical proof to show the unlikelihood of the plaintiff’s story being true.

In the end, a serious allegation of just cause with the proof to back it up will scare the daylight out of most plaintiffs' counsel. If you can show plaintiffs' counsel that his or her own client has lied to him, most plaintiffs' counsel will be looking for a quick way to close the file and get paid. An offer at that point to cover the plaintiffs' legal fees and the fees of the mediator will often be enough to settle the file.

If the claim for just cause is not a slam dunk but is highly dependant on a Court's finding on credibility, then most reasonable counsel will recommend to their clients a settlement on the basis of around 50% of reasonable notice.

10. Jury Notice

Although still not common, there seems to be a small but notable increase in the number of cases where one of the parties, usually the plaintiff, has issued a jury notice. This trend has occurred, in part at least, because of two factors; one, as the Court expands the variety and depth of tort claims in this area, there is more room for the evaluation of non-wage loss claims, and secondly, lawyers who practice primarily in the area of personal injury (where juries are much more common) have increasingly seen employment law as an apparently lucrative field.

The effect of a jury notice in mediation has many interesting aspects. First of all it comes as a surprise to most counsel and their clients that in a jury trial the jury determines the reasonable notice period and neither the lawyers nor the judge can refer to prior case law as to what constitutes reasonable notice. Therefore all the legal professionals may know that a 45 year old sales manager with 10 years service usually receives about 12 months notice, but the jury does not know that. The jury alone, subject to some minimal judicial restrictions, sets the notice period and the quantum of non-wage loss damages (i.e. punitive damages) based on their own collective sense of justice. Although I have not read any study on this issue, I suspect that the determination of reasonable notice is "negotiated" between members of the jury, with the verdict being either a consensus or an average of the varying opinions of the jury members.

With a jury as part of the mix, the mediation focuses less on predicting judicial outcomes and more on the unpredictability of juries. As very few counsel have actually completed even a single jury trial in a wrongful dismissal action, there is rarely anyone in the room who can speak with any real confidence about what a jury might do in a given situation. People often seem to assume that the jury will be their own version of a dream jury and thus will either award oodles of money or banish the greedy and dishonest plaintiff to a dark corner. Of course the odds are that neither party will get the jury of their dreams and therefore their ability to predict the outcome is minimal.

At the end of the day, the unpredictability of juries usually promotes a desire for a settlement as this is the only effective way to reduce and eliminate the uncertainty. Defendants fear the outrageous jury awards that we all read about in the daily press, and plaintiffs sometimes get cold feet when they realize that their financial future is about to be put in the hands of six complete strangers, one or more of them who could be even stupider and meaner than their former boss.