Perils in Employment

- Inducements and Reference Letters

McMillan Binch Mendelsohn
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by Stephane Thiffeault and Dave J. G. McKechnie

Introduction

Recruiting capable talent is a difficult task in today's economy. Labour shortages loom in many segments of our economy. Canada's unemployment rate is at its lowest in decades. Consequently, employers are being forced to compete against each other to fill their human resource needs.

As a result, employers are turning to more and more inventive recruitment strategies. Organizations are literally "thinking outside" the box. Gone are the days when employers simply mined their in-house resume databank for available talent. In today's environment, employers are being forced to active recruitment strategies. So-called "head hunters" are called in to identify possible candidates and pluck them away from their current employers. Employee incentive programs, such as recruitment and referral bonus policies, are more and more prevalent and serve those same goals.

Although a strong economy is nothing to lament, employers ought nonetheless be aware of the possible legal implications of their active recruitment strategies. In the event the new recruit does not work out for whatever reason, i.e. culture, finances, performance, etc… the fact that the employer went out of its way to recruit the employee could very well serve to increase the employer's severance obligations.

This first part of this paper, Part A, addresses the impact that inducing a candidate from secure employment can have on an employer's severance liabilities, should the relationship not work out. Part B addresses a collateral issue that often arises at the time of dismissal: whether employers are legally obliged to provide reference letters, and what the potential implications are for failing to provide a reasonable reference letter to an employee dismissed without cause.

However, before addressing each one of these issues, it is important to first understand the general legal analysis our courts undertake in assessing wrongful dismissal damages.

General Approach – Relevant Factors in Assessing Reasonable Notice

As a general rule, Canadian courts consider a myriad of factors in assessing what notice of termination or pay in lieu of notice a former employee is reasonably entitled to from his or her former employer at the time of dismissal. If the matter reaches a courtroom, it is likely because the employer failed to provide any notice or allegedly failed to provide adequate notice.

A court's objective in assessing an employee's notice or pay in lieu of notice entitlement is, in effect, to quantify the damages sustained for the loss of wages, benefits and perquisites (some exceptions do apply) that the employee would or should have earned and/or received during his or her common law notice entitlement. An employer's first obligation is to, after all, provide the employee dismissed for no fault of his or her own with advance notice of termination. The purpose of doing so is to allow the affected employee sufficient time to secure comparable employment.

Though Canadian courts generally rely on a myriad of factors in assessing reasonable notice or pay in lieu thereof awards, the exercise is not simply a mathematical one. There is no precise method or specific arithmetical equation that can be used to calculate the damages in lieu of notice applicable to a given situation. Justin Laskin explained the process this way in *Minott* v. *O'Shanter Development Company Ltd.*[1]:

> Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a catalogue of relevant factors. No two cases are identical; and, ordinarily, there is no one "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness.[2]

The "catalogue of relevant factors" referred to by Laskin J.A. in *Minott* and typically considered by Canadian courts when assessing these damages, was in fact set out some time ago in Justice McRuer's seminal 1963 judgment in *Bardal* v. *Globe and Mail Ltd.*[3]

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualification of the servant.[4]

This oft-cited paragraph, which has been subsequently cited with approval by the Supreme Court of Canada in *Wallace* v. *United Grain Growers Ltd.*[5] and *Machtinger* v. *HOJ Industries Ltd.*,[6] has long served as a guiding tenet in the calculation of proper notice periods awards in Canadian wrongful dismissal cases, and is still widely applied today. In fact, the criteria McRuer J. adopted in *Bardal* for the calculation of reasonable notice has been adopted and applied in all common law jurisdictions.[7] Hundreds of trial and appellate courts have quoted and relied on *Bardal*.[8]

However, as McRuer J. stated in *Bardal*, those factors are by no means exhaustive. They are merely the most important ones to be considered by courts evaluating the proper notice period or payment in lieu thereof applicable to a given factual situation. As the litany of cases on the issue have demonstrated, every case will be decided according to its merits and particular facts. In other words, once the relevant factors have been properly considered by the court, the matter of the length of notice ultimately becomes an issue of judgment.

Although inducement is not expressly listed as a factor in *Bardal*, our courts will certainly consider whether there was any form of inducement and, if so, what degree of inducement, in

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1 (1999), 42 O.R. (3d) 321 (C.A.) [hereinafter *Minott*].

2 Ibid. at 343-344.

3 (1960), 24 D.L.R. (2d) 140 (Ont. H.C.).

4 *Ibid.* at 145.

5 [1997] 3 S.C.R. 701, per Iacobucci J [hereinafter *Wallace*].

6 [1992] 1 S.C.R. 986, per Iacobucci J.

7 See Stacey R. Ball, *Canadian Employment Law* (Aurora: Canada Law Book, 1996+) at 9-2 [hereinafter *Ball*].

8 *Ball*, *supra* note 7 at 9-4.

assessing reasonable notice entitlements. In other words, inducement is a relevant factor that, depending on the actual degree of inducement involved, will influence a court's assessment of the reasonable notice period that the employee would otherwise be entitled to.

Part A: Inducements and The Impact on Notice (or pay in lieu thereof) Entitlements

1. Supreme Court of Canada Pronouncement

In *Wallace*, Iacobucci J. confirmed that Canadian courts are entitled to consider additional factors not expressly listed in *Bardal*, including whether or not the dismissed employee had been induced into believing he or she had security of employment at the time of hire, in assessing reasonable notice periods. With respect to inducement as a factor, the Supreme Court of Canada noted:

> One such factor that has often been considered is whether the dismissed employee has been induced to leave previous secure employment… According to one authority, many courts have sought to compensate the reliance and expectation interests of terminated employees by increasing the period of reasonable notice where the employer has induced the employee to "quit a secure, well paying job… on the strength of promises of career advancement and greater responsibility, security and compensation with the new organization."[9]

> In my opinion, such inducements are properly included among the considerations, which tend to lengthen the amount of notice required. … there is a need to safeguard the employee's reliance and expectation interests in inducement situations. I note, however, that not all inducements carry equal weight when determining the appropriate period of notice. The significance of the inducement in question will vary with the circumstances of the particular case and its effect, if any, on the notice period is a matter best left to the discretion of the trial judge.[10]

Thus, absent an employment agreement dictating each parties' rights and obligations in the event of a dismissal without cause, our courts will in appropriate cases consider inducement as a factor in assessing and awarding reasonable notice of termination awards.

Employers who wish to secure the services of a desired candidate will – and should - naturally put their "best foot forward" to do so and attempt to quell any concerns the candidate may have.

Employers ought not necessarily refrain from doing so. Rather, they ought be aware and fully cognizant that the degree to which they "induce" a candidate into accepting employment, and thus into leaving their current employer, will have a direct bearing on that individual's severance

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9 *Wallace,* at par. 83.

10 *Wallace,* at par. 85.

entitlement should the employment relationship cease soon after it began. Whether or not "inducement" will serve to increase an employee's severance entitlement will depend on how far the employer went in painting the employment opportunity and, particularly, what assurances of employment security the employer communicated in an effort to secure the candidate's services.

2. Classic Inducement Cases

Inducement will generally only be relevant if the plaintiff can demonstrate that he or she resigned from a secure job on the strength of promises of career advancement, greater responsibility, security or better compensation made by the defendant. By definition, inducement would only be relevant if the employee was indeed enticed into leaving his or her former employer to join the new employer. Thus, in other words, inducement may not be a proper factor if the employee was already thinking of leaving his or her former employer or was proactively seeking employment with the organization.

The extent to which reasonable notice will be extended as a result of inducement is unclear and, based on decisions in this area, imprecise. The author of the text *Employment Law Manual*[11] argues that it may be appropriate for a court to look at the amount of time the employee spent with his or her former employer in calculating reasonable notice of termination.

> In considering [inducement], however, it may be helpful to consider the period of reasonable notice to which the employee would have been entitled to at his previous employment.[12]

However, to date it does not appear that a court has officially sanctioned that method of assessment. Rather, Ontario courts appear to have adopted the practice of simply adding a number of months to the employee's entitlement.

The 2002 decision of the Ontario Superior Court of Justice in *Buchanan* v. *Geotel Communications Corp.*[13] is on point. In that case, Ferguson J. extended the notice period by two (2) months on account of the employer's inducement. The employee had been induced away from secure employment only to be dismissed without cause 18 months after commencing employment with the defendant.

In *McIntosh v. CTF Supply Ltd.*,[14] the plaintiff was awarded seven and a half months' reasonable notice after only three weeks employment. Again, the employee had been induced to leave secure employment.

In *Marshall v. Watson Wyatt & Co.*,[15] the plaintiff was awarded nine-month reasonable notice period, despite the fact the Plaintiff had only worked for the employer for one year. The employer had induced the employee away from secure employment.

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11 John R. Sproat, *Employment Law Manual* (Toronto: Carswell, 1990+).

12 *Ibid.* at p. 6-11.

13 [2002] O.J. No. 2083 (Ont. Sup. Ct.).

14 [2001] O.J. No. 5062 (Ont. Sup. Ct.)

15 (2002), 57 O.R. (3d) 813 (Ont. C.A.).

Inducement was front and central in the 2004 Superior Court of Justice decision in *Antidormi* v. *Blue Pumpkin Software Inc.*[16] In that case, the plaintiff, Antidormi, was awarded 10 months plus an additional 2 months for bad faith conduct, for a total of 12 months notice, after only 6 months of service.

Although the evidence led at trial showed that the plaintiff had in the past changed employment quite frequently, the court nonetheless took into account the fact that the defendant had induced the plaintiff away from secure, stable employment in awarding her 10 months "basic", pre-Wallace (i.e. bad faith) notice of termination. Specifically, the defendant employer had spent approximately 13 months recruiting the Plaintiff before it finally secured her services.

The defendant's recruitment activities began with a "cold call" to the plaintiff. A meeting was subsequently set up between the parties during which the defendant sold itself as a "wonderful" place to be with plans to grow. The plaintiff was sceptical at first, and communicated that to the defendant. She let the defendant know that she was in fact quite content with her current employer. She thus rebuffed the defendant's attempts at first.

However, the defendant pursued, selling its business as "secure" and "committed" to growth. It even went as far as telling the plaintiff that the "sky was the limit" for her and promising her secure, stable employment so long as her performance remained acceptable. The defendant literally "wined and dined" the plaintiff until she eventually accepted its offer of employment.

Unfortunately, within 6 months of commencing her employment, the plaintiff was dismissed. The defendant cited financial reasons. In the end, the defendant spent more time recruiting the plaintiff than it did actually employing her.

Although the Court accepted the fact that the plaintiff had frequently changed jobs in the past, the Court nonetheless accepted her evidence that she would not have left her previous employer (which whom she only had been employed for approximately one and a half years) but for the defendant's inducement and representations. In the end, the plaintiff was awarded $320,000.00.

Blue Pumpkin serves a clear example of the perils of aggressive recruiting strategies. However, as the case discussed below demonstrates, it's not only active and/or aggressive recruitment efforts that could trigger further severance liability on account of inducement.

3. Ontario Court of Appeal Expands the Concept of "Inducement"

Recently, Ontario's Court of Appeal had reason to opine on the type of conduct that could amount to "inducement".

In *Egan v. Alcatel*,[17] the Court of Appeal upheld a trial court's damage award of nine months compensation to an employee who had been employed with the defendant for approximately only 20 months. In doing so, the Court defined what it viewed as behaviour amounting to "inducement."

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16 [2004] O.J. No. 3888 (Ont. Sup. Ct.).

17 unreported

The plaintiff, Ms. Egan, was previously employed with Bell Canada for almost 20 years when two of her former colleagues at Bell, who were now employed with Alcatel, encouraged her to leave Bell and hire on at Alcatel. To encourage her to consider leaving Bell for Alcatel, the plaintiff's former colleagues forwarded her resume to Alcatel without permission. This led to discussions between the plaintiff and Alcatel, which eventually led to the plaintiff accepting employment with Alcatel at a much higher annual salary than what she had been earning at Bell. Within less than 21 months of commencing her employment with Alcatel, the plaintiff was dismissed without cause.

Although the only evidence led at trial of possible inducement was the encouragement that the plaintiff had received from her former colleagues to apply for employment at Alcatel, who unbeknownst to the plaintiff stood to gain $8,000.00 for her successful referral, the Court agreed, citing the Supreme Court of Canada's decision in *Wallace*, that "encouragement" alone is a form of "inducement" that, in the Court's view, was, in this case, "a level beyond that inherent in every hiring process because the persuasion came from two former colleagues of Ms. Egan at Bell Canada who were long-time friends and who, unknown to Ms. Egan, knew that if they succeeded in getting her to leave Bell Canada, they would receive a substantial bonus."

The Court of Appeal was clearly satisfied that even though the employer, Alcatel, had not made any overtures to the plaintiff with respect to security of employment or career advancement, Ms. Egan was, in the Court's view, nonetheless subject to a level of inducement that goes beyond the norm of salesmanship inherent in every recruitment effort.

Thus employers ought audit their recruitment practices, including specifically their "sales pitch" to candidates, to ascertain whether or not a candidate would have any grounds to allege that they were induced into leaving secure employment based on promises or statement that, in the end, did not materialize.

4. Not all Successful Recruits Are Induced

In this competitive environment, where labour shortages loom in many segments of Canada's economy, employers ought be aware of the potential ramifications of an aggressive recruitment strategy. Promises or overtures of security of employment or career advancement or other long-term commitments that induce candidates into accepting employment, will only serve to increase, absent an employment agreement dictating the employee's entitlement to reasonable notice, the employee's severance entitlements if his or her employment is terminated shortly after it began.

Employers ought not, however, entirely shy away from their recruitment practices and strategies in fear that their practices or strategies would trigger the inducement factor in the event the relationship does not work out. At least one court has recently recognized that, at the recruitment stage, there will always be a certain level of salesmanship that does not warrant additional severance obligations.

Echlin J. recognized the realities of the recruitment process in *McCulloch v. IPlatform Inc.*[18] The plaintiff left his former employer of 10 years to accept employment, at a greater salary, with the defendant. He also did so to follow his former mentor and friend who had also left his former

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[18] [2004] O.J. NO. 5237.

employer for the defendant. Unfortunately, the plaintiff's employment was terminated within 4 months of his start date as a result of a corporate reorganization.

At trial, the plaintiff argued that he ought be awarded greater damages given his previous service with his former employer on account of the defendant's improper inducement. The plaintiff specifically sought a notice period of 18 months (for 4 months service).

Echlin J. rejected the inducement claim. The court found that since there was no evidence tendered to suggest that the plaintiff was assured long tenure, job security or career advancement, additional notice was not warranted. Echlin J. found that the plaintiff had willingly accepted employment with the defendant for greater pay and so that he could continue working with his friend. For these reasons, Echlin J. found that the plaintiff was, to quote the Court, a "willing seducee" ready and willing to change employers for his own purposes and goals.

Clearly, then, what amounts to inducement deserving of a greater notice period will be assessed on the facts of each case.

5. Time Limits on Inducement Claims?

It is interesting to note that the case law to date suggests that inducement only becomes a factor if the employee was dismissed from his or her new employment within a relatively short period of time after commencing employment.

The argument was specifically considered in *Kennedy v. Gescan Ltd.*[19] In that case, prior to being approached by the defendant, the plaintiff was working for another employer and had been so for some 18 years. He had not considered or contemplated a change of employment before being approached by the defendant. His employment was terminated after almost four (4) years of service with the defendant.

At trial, the plaintiff argued that his notice period should be increased on account of the defendant's inducement and guarantees of security. Wong J. of the British Columbia Supreme Court characterized the relevance of inducement as follows:

> I think inducement is a subjective factor applicable only in cases where an employee is terminated relatively early in his new position, having been induced to leave his previously secure position, and is basically a compensating factor for the short period of new employment but ceases to be a factor as the length of service increases… It is also applicable only in situations where the inducement and subsequent termination behaviour of the employer results in unconscionable prejudice to the dismissed employee…[20]

Having so characterized the factor, Justice Wong then went on to reject the plaintiff's claim for a longer notice period, stating:

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19 [1991] B.C.J. No. 3612 (B.C.S.C.).

20 *Ibid* at p. 4 (QL).

> After 4 years of service with Gescan, absent unconscionable prejudicial behaviour by the employer – of which I find none, inducement is no longer a factor for consideration.[21]

Justice Wong's views were echoed in *Horton* v. *Rio Algom Ltd.*[22] In this case, the Ontario Court of Justice – General Division (as it then was) agreed that the effect of inducement declines over time but acknowledged that "an argument could be made that an employee in the two to four year range might have an inducement argument if they left a position of long-standing."[23]

Thus, it appears that courts are prepared to place a time limit on which an employee can argue inducement in an attempt to increase his or her damages for wrongful dismissal. Case law seems to suggest that inducement becomes much less important in cases where the employee was employed for at least two to four years with the defendant employer. The position is entirely tenable; otherwise employees would always argue inducement despite their years of service in an attempt to increase their damages.

6. Proactive Strategies

Employers wishing to avoid triggering further liabilities for their actions or comments during the recruitment process ought consider entering into an employment agreement with the employee.

To be effective, the agreement must be entered into before the employee commences employment and must address what the employee's entitlement in the event of his or her dismissal. It ought also contain a clause in which the employee acknowledges and agrees that the employment agreement encapsulates the entire agreement between the parties and that, therefore, the employee relies on no other representations not clearly spelled out in the agreement in entering into the employment relationship.

If an employment agreement is not an option for whatever reason or simply not palatable, employers ought consider the following pro-active steps:

1) avoid promises of security of employment. If such promises or overtures are to be made, they ought be made conditional on, for instance, the employee's performance being satisfactory, the economy remaining strong and other relevant factors;

2) avoid promises of career advancement or alternatively, avoid making unconditional promises of career advancement; and

3) train your recruiting staff. Alert them to the fact that what they say or promise during the recruitment could trigger additional severance liabilities in the event of the new recruit is dismissed without cause shortly after the commencement of the employment relationship.

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21 *Ibid.*

22 [1995], 9 C.C.E.L. (2d) 180 (Ont. Gen. Div.). See also *Lenarduzzi* v. *P.B.N. Publishing Ltd.* (1995), 9 C.C.E.L. 238 (Ont. Gen. Div.).

23 *Ibid.* at p. 207.

PART B: Reference Letters and Their Impact on the Period of Notice

1. The Traditional View

The traditional view at common law was that employers were not legally obliged to provide a dismissed employee with a letter of reference. Unless the employee and employer had contractually provided for the issuance a letter of reference, employees had no legal right to require an employer to provide one. However, recently courts have indicated that the failure to give a reference letter may increase the amount of reasonable notice an employee is entitled to following a termination of employment without cause.

From a policy perspective, there are arguments for and against providing a letter of reference. For employers, there may be circumstances that justify refusing to provide a favourable letter of reference to an employee, particularly where the employee had performance or behavioural issues that led to the dismissal. Should an employer be forced to favourably recommend an employee who has been terminated because of fraud or because the employee was insubordinate and refused to follow directions? Courts should not penalize employers for the failure to provide a letter of reference where the employer would be forced to mislead a future employer or betray its own opinions about the employee.

Alternatively, for the employee, a letter of reference could assist in finding new employment and thereby reduce the loss suffered as a result of the termination, and may even allow the employee to mitigate his or her damages and reduce the liability of the employer. The cost to the employer of providing a letter of reference is not significant compared to the ability of an employee to demonstrate that he or she left the previous employer on good terms and has shown to be a valuable employee.

Arguably, an employer's concerns about providing a letter of reference are minimal where the employee has been terminated because of a restructuring or the closure of a business. Not all terminations result in bad feelings on either side, and in such cases the employer may want to assist the employee in finding a new position and getting back on her feet. However, there are potential pitfalls for employers in doing so, particularly if the employee subsequently uses the letter against the employer in an action for wrongful dismissal. In short, the employer is in a catch-22: provide the employee with a letter of reference, even though it may not reflect the employer's true feelings about the employee and may be used against it in a later proceeding, or, refuse to provide a letter of reference and be penalized by the courts for bad faith behaviour.

2. Mixed Signals from the Courts

The case law in this area has been decidedly mixed. One of the most cited cases is *Shinn v. TBC Teletheatre B.C.*[24] In that case, the employee was terminated and was advised that a letter of reference would not be provided until a settlement was reached on the notice period. However, the employer eventually provided a letter that set out the employee's former position and his duties and responsibilities. While it was not a "glowing" letter of reference, there was nothing in the letter that would reflect negatively on the employee.

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[24] [2001] B.C.J. No. 223 (C.A.) [hereinafter *Shinn*]

The trial judge took into account the failure to provide what she termed a "satisfactory" reference letter in setting the period of notice. On appeal, Chief Justice McEachern of the B.C. Court of Appeal stated that there was no obligation upon the employer to provide a letter of reference. In finding that the lack of a favourable reference letter should not have increased the notice period, Chief Justice McEachern stated the following:

> There could be many reasons why an employer may not wish to give a letter of reference, or a favourable letter of reference. In many cases, including this case, it would seldom be known if the employer could honestly give a favourable letter. The risk of increased damages could become an inducement to employers to give misleading references.[25]

The Chief Justice identified that there may be some situations where a court should inquire into the reasons for not providing a letter of reference, such as where the employee was terminated for cause and where there were other circumstances that could support an argument for a bad-faith discharge under *Wallace*. Indeed, one of the complicating factors in this area of the law is that Justice Iacobucci in *Wallace* mentioned the failure to provide a letter of reference as the type of conduct that could be an indication of bad faith. However, absent those circumstances, the employer should not be penalized for not providing something that it was under no legal obligation to provide.

Despite the B.C. Court of Appeal's decision in *Shinn,* there have been cases in which the court has considered the issue in determining the notice period. For example, in *Ditchburn v. Landis & Gyr Powers, Ltd.*,[26] a long-service older employee was found to have been terminated without cause. The employee asked for a letter of reference and received a terse letter stating that he had worked for the company for twenty-seven years as a sales representative. The Court took a strong view of the treatment of this employee in the circumstances, and determined that there should be an extended notice period as it would be difficult to find alternative work without a recommendation from his employer of twenty-seven years. In this case, the court awarded two months as an extension.

However, the Ontario Court of Appeal overturned the two-month award.[27] The Court of Appeal stated that if the employee had demonstrated that the reference letter made it more difficult in finding alternative employment, there might be a basis for the award. As the employee had not done so, the record could not support the judge's award.

Requiring that the employee show that the lack of the letter impacted his or her job prospects and caused the employee to lose a position or benefit makes sense if there is to be an award of damages for the failure to provide a letter of reference. This accords with the traditional purpose of damages: the plaintiff must demonstrate that the defendant's actions caused him or her a loss that should be compensated. Clearly, if the employee was able to show that the employer sabotaged future efforts at re-employment there would be an entitlement to damages. Similarly, if the employee showed that he or she alerted the employer of a need for a letter of reference in order

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[25] *Ibid.* at para. 11.

[26] [1995] O.J. No 2882 (Gen. Div.)

[27] [1997] O.J. No. 2401 (C.A.)

to get a specific position, and lost the position because no reference was available, there could be a factual finding that supported the damage award.

However, other courts have refused to place the onus on the employee. In *Barakett v. Levesque Beaubien Geoffrion Inc.*,[28] the Nova Scotia Court of Appeal placed the onus on the employer to demonstrate why the employee was not entitled to a letter of reference. The employee had been terminated following a restructuring, and had refused a severance offer from the employer. The employer had withheld the letter of reference as a result, despite promising the employee that he would receive one. As a result, the Court of Appeal agreed with the trial judge that the failure to provide the letter of reference was a factor to consider in determining an entitlement to damages under *Wallace*. The Court of Appeal did not set out any guidelines about how long the notice period should be increased, but considered the issue in the context of other actions on the part of the employer.

In *Lim v. Delrina (Canada) Corp.,*[29] the Court also placed the onus on the employer to demonstrate why a letter of reference was not provided. Justice LaForme stated that "if a given situation dictates that a letter of reference ought to have reasonably been given, then subject to any satisfactory explanation for the failure to provide one, the notice period can be increased."[30] Justice LaForme went on to state that even if there was no explanation, any increase in the notice period should be minimal.

While the decision in *Lim* places the onus on the employer to show why no letter was provided, it at least indicates that: (a) the circumstances surrounding the failure to provide the letter should be examined, and (b) any increase in the notice period should be minimal. If there is no evidence that the lack of a letter of reference hurt the employee's chances of reemployment then any increase should be minimal. In addition, examining the circumstances surrounding the failure to provide the letter is consistent with the Court's fact-finding mandate under *Wallace* to determine if there was evidence of bad faith in the manner of termination.

This contextual approach was applied in *Beatty v. Canadian Mill Services Assn.*[31] In that case, the Court looked at the circumstances surrounding the termination to determine whether a letter of reference should be provided and whether there were any factors that would entitle the employee to a *Wallace* award. The Court concluded that there were no factors demonstrating any bad faith, and found that there was also no obligation to provide a letter of reference.

One issue that can cause problems for employers is when the employer promises the employee that a letter of reference will be provided, but then fails to provide it. In *Ashby v. EPI Environmental Products Inc.*,[32] the employer indicated that it would provide a letter of reference to the employee following his dismissal without cause if the employee accepted the company's settlement offer. At the same time, the employee refused to accept the proposed letter of reference and argued for a more complimentary letter. After referring to the decision in *Shinn*, the judge found that the

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[28] [2001] N.S.J. No. 426 (C.A.)

[29] [1995] O.J. No. 171 (Gen. Div.)

[30] *Ibid.* at para. 28. (hereinafter *Lim*).

[31] [2003] B.C.J. No. 1617 (S.C.)

[32] [2005] B.C.J. No 1833 (S.C.)

failure to provide the letter was not an element of bad faith as both sides were attempting to use the letter as a bargaining chip, a practice the judge termed "inappropriate".

However, employers could find themselves in danger at court if a promise to provide a letter of reference is made and then revoked, particularly if there were no circumstances that justified the refusal to provide a letter. The employer may not be able to rely on the post-termination behaviour of the employee in challenging the dismissal as a basis for refusing to provide the letter of reference. If the Court employs a contextual approach, it should consider all of the circumstances of both the termination and the employee's employment to determine whether an employer was justified in not providing a letter of reference.

3. Negligent Misrepresentation and Reference Letters

Aside from the failure to provide a letter of reference, there is a related issue of providing a misleading letter of reference to an employee for use with a future employer. There is a possibility that an employer who has terminated an employee for cause, but has provided the employee with a letter of reference in order to settle a claim for notice, could be liable to the employee's subsequent employer if the employee engages in similar conduct at the new workplace.

A similar situation arose in the recent decision of the Ontario Superior Court in *The Treaty Group Inc. v. Drake International Inc.*[33] The Treaty Group retained Drake International Inc. ("Drake"), a global personnel and training firm, to assist in filling its human resources needs. Drake was retained to find the best possible candidate and provide the "highest calibre of professional screening, evaluation and reference-checking."

Drake referred an employee to the Treaty Group, which eventually hired her to assist with bookkeeping tasks. The employee was responsible for bookkeeping generally, doing bank reconciliation, managing petty cash, processing and issuing cheques and paying accounts. Unfortunately, the employee defrauded The Treaty Group of $263,324.20. It also turns out that she had been twice criminally convicted of defrauding former employers prior to joining her new employer

The Treaty Group sued Drake for breach of contract, negligent misrepresentation and negligence to recover monies stolen and other damages. In addition to finding that Drake was liable for breach of contract, the Court also found Drake liable for negligent misrepresentation and negligence as it had not conduct the necessary references to provide an unqualified reference to The Treaty Group. While not involving a letter of reference, the decision should warn employers of their exposure to potential liabilities for misrepresenting former employees to employers during reference checks. If the future employer relies on the letter of reference in making its decision to hire the employee, the former employer could be liable if its comments in the letter of reference were not accurate.

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[33] [2006] O.J. No. 1529 (Sup. Ct.)

4. Issues to Consider: To Provide or Not to Provide

Where does this leave employers? Given the uncertainty in the case law, employers must carefully consider the risks and benefits in providing a letter of reference. Employers should consider the following:

- Can the employer give a positive letter of reference based on its experience with this employee, or are there valid reasons for not providing the letter?

- Should the employer institute a policy that stipulates that employees will only receive letters confirming employment at the time of termination?

- Should the employer promise to provide a letter of reference at the time of termination, or adopt a "wait and see" approach to determine if the employee will challenge the termination?

Employers must be cautious in situations where the termination has been unexpected or acrimonious, as the employee may seek to hold the employer hostage by refusing to accept a severance offer in the hopes of receiving a letter that will later be used against the employer. An employer may not wish to provide a letter of reference unless an agreement is reached with the employee (or his or her counsel) that the letter of reference not be used in any potential litigation.

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