

Last week, we wrote about a recent decision by the Supreme Court of Canada (the “Court”) in *Matthews v Ocean Nutrition Canada Ltd*, 2020 SCC 26 [*Matthews*]. Although *Matthews* focused primarily on an employee’s entitlement to incentives and bonuses during the reasonable notice period, the employee also alleged that the employer had breached its duty to act in good faith in the manner of his dismissal.

This blog explores the principles that underpin the employer’s duty of good faith and possible consequences for a breach of this duty.

Principles of the Duty of Good Faith

Prior to *Matthews*, the Court recognized the obligation of employers to act in good faith in carrying out a dismissal in *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 [*Wallace*]. The Court described the loss of one’s job as a “traumatic event” that renders the employee vulnerable. To ensure the protection of such employees, the law requires that employers be held to a duty of good faith and fair dealing on dismissal. The Court observed that at a minimum, the duty required employers to be “candid, reasonable, honest and forthright with their employees” and to “refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive”.

The Court provided examples of possible breaches of the duty of good faith, including employers:

- spreading unfounded accusations of serious employee misconduct to others in the industry, which results in a longer period of unemployment;
- maintaining a wrongful accusation of serious employee misconduct in combination with a refusal to provide a letter of reference after dismissal;
- misrepresenting the availability of work to an employee who relies upon the employer’s assurances of job security, and delaying communication of a dismissal to an employee’s detriment (such as when an employer knows an employee is purchasing a home and doing so by relying on the job security improperly conveyed by the employer);
- dismissing an employee immediately upon a return from disability leave; and
- laying an employee off while advertising for the employee’s same position without communicating a termination decision directly to the employee.

In 2008, the Court clarified in *Honda Canada Inc v Keays*, 2008 SCC 39 [*Honda*] the assessment of damages relating to a breach of the duty of good faith in the manner of dismissal, referred to by the Court as “moral damages”. There had previously been a trend since *Wallace* for courts to considerably “bump up” or extend a common law notice period when there is a breach of the duty

of good faith. However, the Court in *Honda* clarified that where such damages are appropriate, they cannot be awarded through an extension of the notice period but rather the award should be based on actual damages related to mental distress suffered by the employee. To prove a breach of the duty of good faith, the onus rests upon the employee to prove that the manner of dismissal caused the mental distress, and the mental distress was foreseeable to the parties.

In 2014, the Court released its decision in *Bhasin v Hrynew*, 2014 SCC 71 [*Bhasin*] to build upon its principles from *Wallace* and *Honda*. The Court in *Bhasin* clarified that the “duty of honest performance” flows out of the principle of good faith and is applicable to all contractual dealings. This duty requires that parties must not “lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”.

Recently in *Matthews*, the Court considered the scope of the duty of good faith, where the employee was mistreated and lied to about his job security by the employer in the years leading up to his constructive dismissal. The Court confirmed that a breach of the duty does not need to be confined to the employer’s actions at the exact moment of dismissal. Rather, the breach may include a series of events—even over a period of years—that culminate in the dismissal.

The Court also noted the arguments of the employee and several intervenors that the duty to act in good faith should be expanded beyond “the manner of dismissal” to be applicable to the entire employment relationship. The Court declined to expand the duty of good faith, given the facts before it. For now, the duty to act in good faith remains limited to the manner of dismissal. However, the Court left open the possibility that the duty might one day bind both employers and employees based on a mutual obligation of loyalty throughout the entire employment agreement.

Recent Damage Awards for Bad Faith Conduct

The cases summarized below provide further examples of what courts have deemed to be bad faith conduct on an employer’s part, as well as the damages that may result. The courts routinely refer to such damages by various terms, including “moral damages”, “*Honda* damages”, and “bad faith damages”. Our summaries refer to them simply as “bad faith damages”.

- In *Lincoln v Sobeys Capital Incorporated*, 2019 CanLII 69718 (ON SCSM), a grocery store employee was dismissed for an alleged violation of food safety standards. She argued the employer misrepresented the reason for her dismissal, and that she was reprimanded as a result of a complaint she had made against her supervisor after he yelled at her while holding a knife. She claimed that there was an atmosphere of harassment and abuse within her department that was reinforced by the employer’s failure to enforce its harassment policy and carry out a proper investigation of her complaints. She sued in Small Claims Court exclusively for

damages arising out of the employer's bad faith conduct and was awarded the previous Small Claims Court threshold for damages of **\$25,000**.

- In *Colistro v Tbaytel*, 2019 ONCA 197, the employee had worked for the employer and its predecessor for nearly twenty years. She and others brought a complaint against a supervisor for sexual harassment, who was later dismissed for just cause. A decade after the substantiated sexual harassment complaint, the employer announced that it was rehiring the former supervisor as a Vice President. The employee swiftly objected to his rehiring and voiced her concerns to management, but the employer proceeded anyway. The employee went on stress leave and was later diagnosed with post-traumatic stress disorder and depression. She sued the employer for wrongful dismissal. The Ontario Court of Appeal agreed that the employer created an intolerable work environment by "re-victimizing" the employee and maintained her award of **\$100,000** in bad faith.
- In *Galea v Wal-Mart Canada Corp*, 2017 ONSC 245 [*Galea*], the employee had worked for the employer for eight years and had held the position of Vice President of General Merchandising. Due to alleged restructuring, she was demoted to a lower executive position but was not provided with any duties. She was misled about her career prospects, as she was repeatedly assured of her future with the company while internally being labelled "non-promotable". She was evicted from her office while away at a conference. The CEO then gave her an ultimatum to accept either a further demotion or a severance package but was soon dismissed. Halfway through the employee's contractual salary continuance period, the employer stopped making payments without explanation. The employee claimed termination entitlements, punitive damages, and damages for mental distress arising out of bad faith conduct in the manner of her dismissal. She succeeded on all claims and received a record-breaking **\$250,000** in bad faith damages plus **\$500,000** in punitive damages.

Takeaways

As can be gleaned from the summaries above, courts have awarded a wide range of damages in successful claims for employer bad faith conduct. Bad faith damages can be awarded in addition to or separate from wrongful dismissal damages related to pay in lieu of common law reasonable notice, or even other types of damages such as punitive damages, to significantly increase an employee's recovery. Recent decisions with large awards have signalled the willingness of courts to raise the stakes for employers where the factual circumstances warrant it.

To avoid the consequences of bad faith conduct and associated damages, employers should continue to exercise caution throughout the employment relationship and avoid engaging in any conduct that may be untruthful, misleading, or unduly insensitive, particularly at or leading up to a dismissal. We note that while employers do not have an obligation to advise employees of their particular reason for a dismissal when done on a without cause basis, if they lie or mislead an employee about the reason, they may be exposing themselves to additional claims. Employers

should therefore ensure that any actions taken with respect to employees are based on legitimate business considerations and are honestly and properly communicated to employees.

This blog is provided as an information service and summary of workplace legal issues.

This information is not intended as legal advice.