Torkin Manes
BULLETIN

Torkin Manes Cohen Arbus LLP
Barristers & Solicitors
151 Yonge Street, Suite 1500
Toronto, ON M5C 2W7
Tel: 416 863 1188
Fax: 416 863 0305
torkinmanes.com

APRIL 2008

FOCUS ON LABOUR RELATIONS AND EMPLOYMENT LAW

Good news for employers on two fronts

Thomas A. Stefanik

Two recent decisions — one an arbitration award under a collective agreement, the second, an Ontario Court of Appeal decision involving so-called *Wallace* damages — are good news for employers. The arbitration award dealt with a union's claim to the newly legislated Family Day; the Court of Appeal decision determined when *Wallace* damages may be awarded.

Family Day Arbitration Award

Shortly after the re-election of his Liberal government in October 2007, Premier Dalton McGuinty announced Family Day, a new public holiday under the *Employment Standards Act*. The holiday was created by Regulation, meaning there was no legislative debate or discussion about the implications or repercussions of adding a new day to the list of "public holidays" under the *Employment Standards Act*.

The creation of Family Day produced some difficulties for workplaces. Many employers were confused about their obligation to recognize Family Day, and employees were confused about their entitlement to the holiday, designated as the third Monday in February, especially in instances in which the employer was already providing one or more public holidays in addition to those mandated by the *Employment Standards Act*. In particular, employers who had bargained collective agreements with unions and had negotiated the number of public holidays now felt that the inclusion of an additional public holiday was unfair and contrary to cost assumptions that they had made during the collective-bargaining process.

Fortunately for employers, there exists a provision in the *Employment Standards Act* that provides that where one or more provisions in an employment contract relating to a subject matter provide a greater benefit to an employee than the provision of the Act, the greater benefit shall prevail. That argument was used successfully by Shepherd Village Inc., in an arbitration with the Service Employees International Union, Local 1.on. The union grieved that Shepherd Village had failed to recognize Family Day despite the fact that it was proclaimed as an additional public holiday, increasing the number of public holidays under the *Employment Standards Act* from eight to nine per year. The collective agreement between the parties provided for 12 paid holidays, which included one movable day per year (the anniversary date of an employee's hiring) and a second floating day to be taken between January and October at the mutual convenience of the employer and the employee. In an arbitration award released on March 28, 2008, arbitrator Kevin Burkett concluded that the floating holidays were "directly related" to the public holidays granted and concluded that the collective agreement in question contained a "greater benefit" than did the *Employment Standards Act*. As such, the collective agreement applied and the employer was not compelled to provide Family Day as an additional public holiday.

There are many variations in collective agreements on paid holidays. Different interpretations

(Continued on reverse)

Good news... *(cont'd.)*

may be made by arbitrators, depending on the specific language in a collective agreement. Although differences between the parties may be arbitrated, the question of whether an employer and a union agree that Family Day must be given as a public holiday will undoubtedly be raised in subsequent rounds of collective bargaining.

2. Ontario Court Limits the Application of *Wallace* Damages

Since the Supreme Court of Canada's decision in the *Wallace* case in 1997, trial judges have had the ability to award damages in addition to damages for failure to give reasonable notice of termination. These additional, or *Wallace*, damages have, in many cases, been awarded when courts have decided that employers have terminated employees in bad faith. The circumstances in which *Wallace* damages have been awarded have increased, as has the range of *Wallace* damages. Employers must now be extremely cautious not only about the manner in which an employee is terminated, but also about the reasons that are given to an employee for his or her termination.

In a decision of the Ontario Court of Appeal released on March 25, 2008, titled *Mulvihill v. City of Ottawa*, the Court made it clear that trial judges must be careful in awarding *Wallace* damages. The Court of Appeal indicated that it would be prepared to scrutinize an award of *Wallace* damages carefully so that it could fully understand the factual and legal bases upon which such awards were granted. In *Mulvihill*, the Court reversed an award of approximately five and a half months of *Wallace* damages, and $50,000 in costs that the plaintiff had won at trial following her termination by the *City of Ottawa* from an administrative position in 2004 based on an allegation of insubordination. Although the plaintiff was originally dismissed for cause, the *City of Ottawa* withdrew the allegation after examinations for discovery and paid the plaintiff what it believed was owing to her on a reasonable notice basis, that is, three months' salary.

However, the trial judge disagreed, and enlarged the period of reasonable notice to four and a half months and awarded the plaintiff *Wallace* damages for what was described as a "mistake" by the City in terminating the plaintiff while she was on a medical leave for stress, and for her firing, which the trial judge deemed "not warranted."

The Court of Appeal found that the two latter events, as described by the trial judge, were not, either singularly nor taken together, a basis upon which to award *Wallace* damages. It is significant that the Court of Appeal indicated that the mere fact that cause was alleged, and not ultimately proven, did not automatically mean that *Wallace* damages are to be awarded. The court indicated that as long as an employer has a "reasonable basis" upon which to believe that cause for dismissal exists, the employer should be free to take that position without fear that failure to succeed on the allegation of cause will automatically expose it to a finding of bad faith, and thus an award of *Wallace* damages. The court stressed that in determining whether *Wallace* damages should be awarded, trial judges must consider all the circumstances that an employer dealt with at the time of dismissal. An allegation of cause is but one of these circumstances.

The *Mulvihill* decision is welcome news to employers who have, over the last decade, struggled with the perception that an allegation of cause, even if it is later withdrawn, might invite a court to award *Wallace* damages against it. In effect, employers under the *Mulvihill* decision may now be free of the implicit intimidation that existed when considering whether or not to allege cause at the time of dismissal.

Thomas Stefanik provides advice to clients in all aspects of labour relations and employment law and represents both private and public sector employers in a wide variety of legal settings.

Tom can be reached at 416 777 5430, or tstefanik@torkinmanes.com.