

EMPLOYERS' ALERT**48 Months of *Wallace* Damages
Awarded By Jury****Unprecedented Decision**

In *Jessen v. CHC Helicopters International Inc.*, a jury in Nova Scotia awarded Ms. Jessen 4 months' pay in lieu of reasonable notice after she sued CHC for wrongful dismissal. This time period was extended by an additional 48 months in *Wallace* damages as a result of the jury's conclusion that CHC had engaged in bad faith conduct and unfair dealing at the time of Ms. Jessen's termination. Because the case was decided by a jury, the court decision does not contain a summary of the facts surrounding Ms. Jessen's termination. As a result, it is not clear from the decision what conduct CHC engaged in to warrant an award of *Wallace* damages. Wrongful dismissal awards, however, rarely exceed 24 months, even when *Wallace* damages are awarded. This case is, therefore, noteworthy for the fact that the *Wallace* damage award on its own exceeds wrongful dismissal awards generally. The jury award is currently under appeal and given that its magnitude is inconsistent with previous court decisions, it likely will not be upheld by the Court of Appeal.

No Obligation to Mitigate

Another noteworthy aspect of *Jessen* is the fact that the court held that the *Wallace* damages awarded to Ms. Jessen were subject to her duty to mitigate. In other words, CHC would be entitled to a credit for any income that Ms. Jessen earned during her 52 month notice period. In arriving at this conclusion, the court relied on an Ontario court decision released in 1999 which also concluded that *Wallace* damages are subject to an employee's duty to mitigate. What is puzzling is that there is a more recent Ontario court decision which disagreed with this conclusion which was not mentioned in *Jessen*. Moreover, in a 2002 decision, the Ontario Court of Appeal suggested that *Wallace* damages should not be subject to an employee's duty to mitigate, although it left this issue to be decided in another case, as it was not crucial to the disposition of the case before it. This case was also not referred to in *Jessen*. It will be interesting to see if this aspect of *Jessen* will be upheld on appeal and, if so, whether other jurisdictions will follow suit.

**WHAT'S NEW AT
RUBIN THOMLINSON LLP**

- Registrations have begun for our two-day harassment and investigation training program for HR/legal professionals, *Respect at Work*, scheduled for January 19/20, 2006. Please contact us for more information.
- Join us the morning of January 31, 2006, for a discussion of the most important employment law cases of 2005 – stay tuned for invitations!
- Janice Rubin and David A. Whitten spoke on "Managing Employee Terminations" at the HRPAAO on November 16, 2005

We work with our clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at contact@rt-law.ca

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What Does this Mean for Employers?

- *Jessen* serves as a reminder for employers that their financial obligations to a dismissed employee can increase significantly if they engage in bad faith conduct or unfair dealing at the time of dismissal.
- Subjecting *Wallace* damages to an employee's duty to mitigate seems to detract from their purpose of compensating employees for the harm that they experience as a result of their employer's bad faith conduct or unfair dealing. That said, if this aspect of *Jessen* is upheld on appeal and followed in other jurisdictions, employers will be entitled to a credit for any income earned by dismissed employees during their reasonable notice periods, including those increased by *Wallace* damages.

DID YOU KNOW?

- Over 15,000 complaints were filed last year with the Ministry of Labour, alleging breaches of the *Employment Standards Act, 2000*.
- Of these complaints, the top 5 alleged violations concerned:
 1. Vacation Pay
 2. Unpaid Wages
 3. Termination Pay
 4. Overtime
 5. Public Holidays

If ever in doubt, contact an employment lawyer!

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.