

## ***Honda Canada Inc. v. Keays:***

### **Labour Group**

Eric Durnford, Q.C.  
Nancy F. Barteaux

### **Legal Analysts**

Amy Bradbury

### **The Supreme Court Of Canada Dramatically Reduces Damages To A Wrongfully Dismissed Employee**

#### ***Introduction***

The Supreme Court of Canada, in a split decision, recently considered the Ontario case of ***Honda Canada Inc. v. Keays***. This case involved a 14-year employee who suffered from chronic fatigue syndrome. Keays had been receiving disability insurance benefits but returned to work when his benefits were discontinued. Honda had a disability program which allowed for absences that were related to the employee's disability without invoking Honda's attendance management program. Keays missed substantial time from work and Honda began to question the validity of his absences and the quality of his physician's notes. Honda asked Keays to meet with the company physician to discuss his disability and how it could better be accommodated. Keays initially agreed to meet with the company physician but later refused and was ultimately terminated.

The trial judge found that Keays had been wrongfully dismissed and awarded 15 months' reasonable notice which was extended to 24 months due to bad faith by Honda in the manner of Keays' termination (i.e., *Wallace* damages). The trial judge also awarded \$500,000.00 in punitive damages due to the acts of discrimination and harassment by Honda and its attempt to have its physician involved in Keays'

care. Finally, the trial judge awarded costs on an indemnity basis with a 25% premium, resulting in a total award of costs of \$610,000.00.

The Court of Appeal upheld the finding of wrongful dismissal as well as the award of reasonable notice and *Wallace* damages. However, with respect to punitive damages, the Court of Appeal found that the trial judge went too far in characterizing Honda's behaviour as a "protracted corporate conspiracy" and reduced the punitive damage award to \$100,000.00. The Court of Appeal also reduced the amount awarded in costs.

The majority of the Supreme Court of Canada began its decision by noting two palpable and overriding errors of the trial judge. First, the trial judge characterized Honda's behaviour as "planned and deliberate and formed a protracted corporate conspiracy" which was not supported by the evidence. Second, the trial judge found that the conduct had continued for five years when, in fact, the period was approximately seven months. The trial judge considered the time to begin to run with the discontinuance of disability benefits by the third party insurer. However, the Supreme Court of Canada noted that Honda played no role in that decision and therefore should not be held responsible for those actions.

#### ***Reasonable Notice***

With respect to the period of reasonable notice, the Court confirmed the traditional four factors in the *Bardel* decision are relevant, namely: the char-

acter of employment, the length of service, the age of the employee, and the availability of similar employment, having regard to the experience, training and qualifications of the employee. The Court did not directly address the issue of whether the employee's position within the hierarchy of Honda's corporate structure was relevant but noted that, in this case, the "flat management structure" of Honda was not relevant to determining the length of reasonable notice. However, the Court found no basis to interfere with the 15-month notice period awarded by the trial judge.

### ***Wallace Damages***

With respect to the award of *Wallace* damages, the Supreme Court of Canada enumerated the following findings of fact made by the trial judge to support the extension of the notice period to 24 months:

In the letter dated March 28, Honda deliberately misrepresented the views of its doctors.

Keays was being "set up" when asked to see Honda's doctor.

Keays' condition worsened after the dismissal: he became depressed, developed an adjustment disorder for 3-4 months, and has been unable to work since then.

Honda's decision to cancel the "accommodation" was a form of reprisal for Keays' retaining legal counsel.

The Supreme Court of Canada disagreed with these findings and found that there was not egregious conduct on the part of Honda to justify any award of *Wallace* damages.

The Court found that the trial judge erred in faulting Honda for relying on the advice of its medical experts,

in finding that Honda was trying to intimidate Keays, and for attempting to get Keays to see its physician. The Court found that Honda recognized that Keays had a disability and was trying to determine how to accommodate him. Further, terminating Keays was not a form of reprisal for retaining legal counsel, nor was it Honda's decision to no longer accommodate Keays and accept his doctor's notes. Finally, the Supreme Court of Canada found that a consideration of Keays' condition after termination was not compensable as *Wallace* damages.

With respect to *Wallace* damages generally, the Court noted that the normal distress and hurt feelings resulting from dismissal are not compensable, and only conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading, or unduly insensitive" will result in *Wallace* damages. This requires employers to be "candid, reasonable, honest and forthright with their employees" at the time of dismissal. As such, the Court held that "true aggravated damages" are not to be compensated by an extension of the notice period following the Supreme Court of Canada decision in *Wallace* but is a fixed amount awarded according to the same principles and in the same way as any other moral damages. Therefore, "if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded... through an award that reflects the actual damages." The Court gave, as examples, of true aggravated damages the following: "attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision or dismissal meant to deprive the employee of a pension benefit or other right..."

The Court concluded that Honda had not acted in "bad faith" and as such, there was no justification for awarding an extension of the notice period as *Wallace* damages.

**This article is produced by Huestis Ritch to keep our clients and friends informed of current legal issues. It is intended for general information purposes only. If you have any questions or comments on the above, or if you would like to be added to our mailing list, please feel free to contact any member of our labour group at (902) 429-3400 or by email: Eric Durnford—eric.durnford@hrlaw.net, Nancy F. Barteaux —nancy.barteaux@hrlaw.net, Amy Bradbury — amy.bradbury@hrlaw.net**

## ***Punitive Damages***

The Supreme Court of Canada reviewed earlier decisions on punitive damages and noted that punitive damages are awarded when the defendant's actions giving rise to the claim are an "actionable wrong." However, an actionable wrong does not require an independent tort and can include a breach of the contractual duty of good faith, a breach of a distinct and separate contractual provision or breach of a fiduciary duty.

The Court held that the facts in this case did not warrant an award of punitive damages. The Court also discussed the need to avoid duplication in damage awards noting that "[d]amages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own."

The trial judge awarded punitive damages as a result of the discriminatory conduct of Honda. This conduct included requiring Keays to bring a doctor's note to justify each absence when other employees were not required to do so. However, the Supreme Court found that this requirement was part of the accommodation of Keays' condition by allowing for illness-related absences without being subject to discipline for excessive absenteeism. In addition, the trial judge noted Honda's refusal to remove a coaching record from Keays' file as discriminatory. However, this record was not disciplinary and was used to allow entry into the disability program.

The trial judge also found that Keays had been harassed as a result of a physician suggesting that Keays take a position with light duties. However, this was only a suggestion that was never acted upon by Honda. Punitive damages were also awarded at trial based on a finding that Honda had retaliated against Keays for hiring legal counsel. The Court noted that these two grounds for awarding punitive damages were also used to award *Wallace* damages and the Court had earlier found them to be groundless.

The Court of Appeal found that punitive damages should be awarded because Keays valued his job and depended on it for disability benefits. However, the Supreme Court noted that all employees valued their jobs. It was also noted that Honda played no role in the insurer's decision to discontinue disability benefits and that Honda was not aware of the seriousness of Keays' medical condition.

On the whole, the Supreme Court of Canada held that Honda's conduct was not so egregious or outrageous to warrant an award of punitive damages.

## ***Costs***

The Supreme Court of Canada also set aside the cost premium award noting that the risk of non-payment of lawyer's fees was not a relevant consideration in awarding costs.

Costs of the appeal and cross-appeal to the Supreme Court of Canada were awarded to Honda. At the lower levels, costs were awarded to Keays on a partial indemnity scale.

## ***Conclusion***

Overall, this decision is good news for employers. It reiterates the limited circumstances under which *Wallace* damages and punitive damages may be awarded. In addition, it approved of Honda's ability to monitor absences and request medical information from employees who are being accommodated.

**This article is produced by Huestis Ritch to keep our clients and friends informed of current legal issues. It is intended for general information purposes only. If you have any questions or comments on the above, or if you would like to be added to our mailing list, please feel free to contact any member of our labour group at (902) 429-3400 or by email: Eric Durnford—eric.durnford@hrlaw.net, Nancy F. Barteaux —nancy.barteaux@hrlaw.net, Amy Bradbury —amy.bradbury@hrlaw.net**