

June 27, 2008

Keays v. Honda Canada Inc. – Supreme Court of Canada and Honda in accord

Today the Supreme Court of Canada released its long-awaited landmark decision in *Keays v. Honda Canada Inc.*, arguably the most important employment law case in Canada in years. The case dealt with a number of legal concepts including the interplay between wrongful dismissal and human rights legislation, the scope of the duty to accommodate and damages for an employer's conduct at the time of dismissal. The decision vindicates much of Honda's handling of a tricky employment situation and stands as a sharp rebuke of the trial judge's decision and the Ontario Court of Appeal's application of the law. To fully understand the significance of the decision, a brief review of its history is in order.

factual background – the trial

Keays had been employed by Honda at its Ontario manufacturing facility for 14 years. He developed chronic fatigue syndrome and was off on disability for more than two years. Following his return he was accommodated in the workplace for absences related to his disability for more than a year. When Keays' absenteeism continued to be a problem he was directed by his employer to meet with its occupational medicine specialist. Keays refused to do so without being provided with clarification as to the parameters of the assessment. He also retained a lawyer to represent him in his dealings with Honda. Honda subsequently terminated his employment for disobeying its directive.

The trial judge found that Honda's termination of Keays' employment was without cause and subsequently awarded Keays damages based on a 15 month notice period plus an additional 9 months for the manner of dismissal (the latter referred to as Wallace damages based on the Supreme Court's decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). Most shocking for employment law practitioners was the award of a further \$500,000 in punitive damages on the basis that Honda's treatment of Keays was discriminatory and high-handed. Keays was also awarded costs on a substantial indemnity basis, together with a substantial premium. Honda appealed that decision in its entirety.

Ontario Court of Appeal

The Ontario Court of Appeal refused to interfere with the trial judge's finding that Honda did not have cause to terminate Keays' employment. The period of 15 months notice was upheld as was the 9 month extension for *Wallace* damages connected with the termination of employment and the medical consequences Keays suffered as a result.

On the issue of punitive damages, the Court held that Keays could be awarded punitive damages based on discriminatory conduct contrary to human rights legislation. While a civil action could not be directly based on a breach of the *Ontario Human Rights Code*, the Court determined that acts of discrimination in breach of human rights legislation may be a separate actionable wrong so as to give rise to an award of punitive damages.

However a majority of the Court determined that the quantum of punitive damages should be reduced from \$500,000 to \$100,000. The Court held that the trial judge relied on findings of fact that were not supported by the evidence and the award failed to "accord with the fundamental principle of proportionality". In particular the Court held that there was no evidence to support a finding of a protracted corporate conspiracy, that Honda had been guilty of "outrageous conduct...over a period of five years" or that Honda had run "amok".

On the issue of costs, the Court agreed with the trial judge's award of costs against Honda on a substantial indemnity basis. However it reduced the premium.

Honda again appealed, while Keays cross-appealed.

Supreme Court of Canada

In a very clearly worded decision, a majority of the Supreme Court of Canada allowed Honda's appeal for the most part and dismissed Keays' cross-appeal.

While Honda dropped its allegations of cause for Keays' dismissal in its appeal, it argued that a more appropriate notice period was 8 to 10 months, rather than the 15 months assessed by the trial judge. The Supreme Court held that the often cited principles set out in *Bardal v. Globe & Mail Ltd.* (1960), 24 DLR (2d) 140 (Ont.H.C.) continue to apply to the assessment of notice. In *Bardal* the Court stated:

"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 qualifications of the servant."

The Court held that the trial judge erred in finding that Honda's flat management structure was a factor in determining his reasonable notice, rather than examining his actual functions. Nevertheless on the basis of the *Bardal* factors the Court found that there was no basis to interfere with the 15 month notice assessment.

As for damages for conduct in the manner of dismissal, the Supreme Court reconsidered the *Wallace* approach and made important clarifications to the law. The Court

considered its recent decision in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 and concluded that the “normal distress and hurt feelings resulting from dismissal are not compensable”. Instead damages resulting from the manner of dismissal are only available in the circumstances described in *Wallace*: that is where the employer engages in conduct during the course of dismissal that is unfair or is in bad faith. And unlike *Wallace* and its application by the trial courts thereafter, these damages are to be awarded through an award that reflects actual damages rather than an extension of the notice period. Contrary to the trial judge’s findings, the Court found that Honda’s conduct was in no way an egregious display of bad faith and set aside the additional 9 months’ notice awarded at trial.

The Supreme Court went on to find that neither aggravated damages nor punitive damages should have been awarded in this case. As stated previously, the Court found that Honda’s conduct in dismissing Keys was in no way egregious. Further, the facts of the case did not demonstrate the type of malicious and outrageous conduct that is deserving of punitive damages. Of particular importance, the Court found that the punitive damages awarded by the Court of Appeal resulted in an unnecessary duplication of damages.

The Supreme Court also held that the Court of Appeal erred in concluding that Honda’s “discriminatory conduct” amounted to an independent actionable wrong for the purposes of allocating punitive damages. In accordance with its previous decision in *Seneca College of Applied Arts and Technology v. Bhaduria*, [1981] 2 S.C.R. 181 the Court reiterated that the Ontario Human Rights Code provides a comprehensive scheme for the treatment of claims of discrimination. A breach of the Code cannot constitute an actionable wrong: therefore the legal requirement for the common law remedy of punitive damages was not met. In coming to this conclusion the Court noted the amendments to the Code that take effect June 30, 2008 which permit a plaintiff to advance a breach of the Code in a civil action in connection with a separate actionable wrong, such as wrongful dismissal.

Finally Honda was awarded costs on the appeal and cross-appeal and the cost premium was set aside. In a partial dissent, Justices LeBel and Fish would have upheld the award of Wallace damages.

what Honda means for employers

The Supreme Court’s decision will have a major impact on the law of wrongful dismissal. Employers can take comfort that they will not be subjected to outrageous and duplicative damage awards, even where conduct such as misrepresentation regarding the reasons for dismissal or attacking an employee’s reputation merits Wallace sanctions. In such cases an employee will rightly receive compensation for actual damages since such damages are to be compensatory.

The decision also recognizes that an employer’s efforts in creating a disability program which involves regular contact with an employee’s physician in order to support

treatment, is a legitimate form of accommodation. Mr. Justice Bastarache, who wrote the majority opinion, stated:

“...I accept that the need to monitor the absences of employees who are regularly absent from work is a bona fide work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.”

Any member of our Employment and Labour Relations Group would be pleased to discuss the impact of the Supreme Court’s decision in *Keays v. Honda Canada Inc.*

by [David Elenbaas](#)

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[a cautionary note](#)

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted. © McMillan LLP 2010.