



Honda driven to litigation success

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In the much anticipated and landmark case of *Honda Canada Inc. v. Keays*, the Supreme Court of Canada overturned one of the largest punitive damages awards ever granted at trial to a wrongfully dismissed employee. The case is very favourable for employers and represents a significant judicial shift to limit the scope of damages awarded in wrongful dismissal cases.

FACTS

Kevin Keays was employed by Honda Canada Inc. for approximately 11 years before he was diagnosed with Chronic Fatigue Syndrome in 1997. He ceased work and received disability benefits until 1998, when Honda's insurer discontinued his benefits. Keays returned to work and was placed in a disability program that allowed employees to take absences from work on the condition that they produced a doctor's note confirming that their absences were related to their disability. Upon his return to work, Keays was chronically absent because of his disability, but for just a few days at a time. Honda became concerned about the frequency of Keays' absences and requested a medical evaluation to determine how his disability could be accommodated.

On the advice of his lawyer, Keays refused to meet with the medical expert without explanation of the purpose, methodology, and parameters of the consultation. Honda refused to deal with Keays' lawyer and, on March 28, 2000, advised Keays that his employment would be terminated if he refused to meet with their medical expert. When Keays continued to refuse to meet with the doctor,

Honda formally terminated his employment for insubordination. Keays then sued Honda for wrongful dismissal.

JUDICIAL HISTORY

At trial, the Ontario Superior Court found there was no just cause for the termination of Keays' employment and awarded him 15 months' pay in lieu of notice. In addition, the trial judge extended the notice period by nine months on finding that Honda acted in bad faith in the manner it terminated Keays' employment. Keays was also awarded \$500,000 in punitive damages on the basis that he had been harassed and discriminated against by Honda in an "outrageous manner." The trial judge found that Keays had been terminated from employment so that Honda could avoid its obligation to accommodate Keays' disability under the Ontario Human Rights Code.

On appeal, the Ontario Court of Appeal upheld the trial judgment in all respects, except for the amount of punitive damages. It agreed with the 24-month reasonable notice and bad-faith damages awarded by the trial judge. It also confirmed that a claim for discrimination or harassment under the Ontario Human Rights Code could constitute an "independent actionable wrong" necessary to support an award of punitive damages. However, the court reduced the punitive damage award to \$100,000 because it disagreed with some findings of fact made by the trial judge.

SUPREME COURT RULING

In its June decision, the Supreme Court of Canada clarified and redefined some

aspects of the law of damages in the context of employment law. The case is especially significant in the areas of "punitive" and "bad-faith" damages.

Bad-faith (*Wallace*) damages

Although upholding the notice award, the SCC overturned the additional award of nine months' pay for the bad-faith manner in which Honda had been found to have dismissed Keays. This type of damage award "extending" notice had been approved by the court in a previous case, *Wallace v. United Grain Growers Ltd.* The court found that Honda's conduct during the course of dismissal was not egregiously unfair or in bad faith by being, for example, untruthful, misleading, or unduly insensitive. It found that Honda should not have been faulted for relying on the advice of its medical experts, for requesting to meet with Keays to discuss his absences, or for seeking to confirm his disability.

More significantly, the court held that any damages for bad-faith conduct should be awarded only through an award that reflects actual damages, rather than by an "arbitrary extension" of the notice period. The court expressed concern about the overlap of damages awarded by the lower courts and held that damages for psychological injury in the context of dismissal are intended to be compensatory. Therefore, courts should avoid the pitfall of making overlapping damage awards for both bad-faith and for aggravated damages.

Punitive damages

The SCC also held that punitive damages ought not to have been awarded to Keays at all, because there was no egregious or outrageous misconduct warranting punishment of Honda. The court found that Keays was not harassed by Honda. An important aspect of the case is that the court ruled that Honda's disability program was not discriminatory, but was rather a good-faith attempt to monitor employees who were regularly absent from work. The court has given a signal to employees who seek an accommodation at work by being allowed frequent absences: they have to co-operate by providing ongoing medical explanation for those absences.

No punitive damages available for breach of Human Rights Code

Prior to the SCC decision in *Honda*, there was uncertainty as to an employee's right to make overlapping claims related to discrimination under both human rights legislation and in a claim for wrongful dismissal. The *Honda* decision clarifies that a party seeking punitive damages in a case involving breach of contract must establish an "independent actionable wrong" beyond the fact of the breach of the contract, and that a breach of human rights legislation cannot constitute an "independent actionable wrong" to support a claim for punitive damages in a civil action. The court stated that a Human Rights Code is "a comprehensive scheme for the treatment of claims of discrimination." Although the recently amended Ontario Human Rights Code may permit a court to award damages related to "injuries to dignity, feelings and self-respect," this does not mean that an employee can base a claim for punitive damages on an allegation of discrimination.

IMPACT OF RULING

The *Honda* decision will have a significant impact on employment law litigation. It is a positive development for employers because it eliminates extensions of the notice period where the employer is alleged to have acted in bad faith in the manner

they conducted a dismissal. A *Wallace* "bump" has recently been requested by employees as a matter of course in wrongful dismissal cases. Wrongfully dismissed employees will now be limited to pursuing a separate claim for fixed compensatory or aggravated damages for an employer's bad-faith conduct. By having to prove that actual damages were incurred as a result of the employer's conduct in the manner of dismissal, employees have a more onerous standard to meet.

This decision also appears to heighten the threshold as to what constitutes "outrageous" or "reprehensible" conduct. The misconduct must be very exceptional to attract an award of damages. Employees will also be unable to claim punitive damages solely for breach of the human rights code by an employer and may be required to seek recourse by filing a human rights complaint.

The decision also provides comfort to employers struggling with how to monitor ongoing absenteeism. It recognizes an employer's need to monitor employee absences in managing its workforce. It suggests that the courts may be reluctant to challenge good-faith steps taken by an employer to manage workplace absenteeism. It also confirms that employees need to co-operate with employers with a view to achieving viable accommodations of any disability that may impact an employee's performance or attendance.

However, employers should remember that Keays' claim for wrongful dismissal did succeed on the basis that it was wrong of Honda to consider that it had just cause to terminate Keays' employment just because he wouldn't see their medical expert. Prudent employers should still carefully strategize when to assert just cause and how to reduce potentially costly awards related to notice of termination.

LITIGATION STRATEGIES

Right now, claims resulting from an alleged "bad-faith discharge" will be much less likely to succeed. The probable application of *Honda* raises questions for both employers and employees, and provides

all parties with a good reason to reassess their strategy in handling a claim for wrongful dismissal. Any party to a court action can be penalized by a court for persisting with an unmeritorious claim, by virtue of the courts' discretion in awarding legal costs.

On the employee side, the number of claims asserted for an employer's bad-faith conduct throughout litigation will certainly decrease. Counsel for employees may see little value in advancing bad-faith and punitive damage claims that are likely to fail in the wake of the *Honda* decision, if there is a risk in being penalized later with an unfavourable costs ruling.

Employers who are currently involved in wrongful dismissal litigation where a claim for punitive or bad-faith damages has been asserted might now be in a position to consider two complementary strategies.

First, the *Honda* case provides employers with fertile ground on which to settle existing wrongful dismissal actions. Where the real issue between the parties is the length of the notice period, this is a good time for an employer to make a reasonable offer to settle and avoid litigation. The employee may now be more inclined to settle.

Second, the case also provides good ammunition for a motion for summary judgment or a motion to strike those portions of the statement of claim dealing with bad-faith or other types of "punitive" damages. Pallett Valo LLP litigators have already been able to cite the *Honda* case to succeed in obtaining a consent order to strike a \$2.5-million claim for *Wallace* and punitive damages. The courts will likely see an increase in the number of such motions brought in the wrongful dismissal context. In our experience, there are many cases before the courts where this type of motion stands a substantial chance of success. The time is right to drive a "Honda" into court.

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