

Labour and Employment Law Bulletin

July 2008

Employers – Drive A Honda To Litigation Success

In the much anticipated and landmark case of *Keays v. Honda Canada Inc.*, the Supreme Court of Canada overturned one of the largest punitive damages awards ever granted to a wrongfully dismissed employee at trial. The case is a very favourable one 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 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 which 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, but for just a few days at a time, because of his disability. 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, wrote to Keays and advised him 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 of Justice found that there was no just cause for the termination of Keays' employment and awarded him 15 months' pay in lieu of notice of termination of employment. In addition, the trial judge extended the notice period by 9 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 criticized management at Honda for doubting the sincerity of Keays' illness and "stonewalling" his attempts to be accommodated. The trial judge also found that Keays was a victim of corporate conspiracy between Honda and its insurer, and that he had been intimidated and eventually terminated from employment so that Honda could avoid its obligation to accommodate Keay's disability under the Ontario *Human Rights Code*. The decision was appealed to the Ontario Court of Appeal.

The 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, even though the Court of Appeal found that the Honda's conduct warranted punitive damages, it reduced the award to \$100,000 because it disagreed with some of the findings of fact made by the trial judge.

Supreme Court Ruling

In its decision dated June 27, 2008, the Supreme Court 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, which have been claimed and awarded where an employer's conduct was found to be very grievous and an

employee suffered more hardship than what would normally be expected as a result of loss of employment. But the Supreme Court made numerous other important rulings.

Comment on Notice

On appeal to the Supreme Court of Canada, Honda did not contest the finding of wrongful dismissal that had been made by the trial judge, but argued that the award of 15 months notice of termination was excessive in all of the circumstances. Honda pointed especially to the fact that Keays had no management responsibility. The Supreme Court found that the trial judge had erred when it considered the “flat management structure” at Honda. The Court ruled that in determining reasonable length of notice of termination, courts need to look at the skills and responsibilities of the individual employee and other factors that relate to the individual whose employment was terminated, and that it was an error for the trial judge to have focused his attention on the management structure of Honda’s business. However, based on all of the circumstances, and because the trial judge had also considered the traditional factors of character of employment, the employee’s length of service and his age, the availability of comparable employment having regard to the experience, training and qualifications of the employee, the Supreme Court gave deference to the trial judge’s award of 15 months notice of termination from employment.

Bad Faith (“Wallace”) Damages

Although upholding the notice award, the Supreme Court overturned the additional award of 9 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 previously been approved by the Supreme Court of Canada in a case called, *Wallace v. United Grain Growers Ltd.* The Supreme 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 seeking to confirm his disability. It also held that there was no evidence to support a corporate conspiracy against Keays and that there was no reprisal against Keays as a result of his lawyer’s involvement.

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 aggravated damages. The Supreme Court also confirmed that normal distress and hurt feelings resulting from a dismissal are not compensable.

Punitive Damages

The Supreme Court also held that punitive damages ought not 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 Supreme Court ruled that Honda’s disability program was not discriminatory, but rather was a good faith attempt to monitor the absences of employees who were regularly absent from work. Honda was skeptical about Keays’ condition and was taking steps to confirm how any why it interfered with his ability to work. The trial judge had decided that this was unfair to Keays, but the Supreme 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.

Right to Counsel

The Supreme Court stated that Honda’s refusal to deal with Keays’ lawyer was not inappropriate because there is “no

legal obligation on the part of any party to deal with an employee's counsel while he or she continues with his or her employer." This is actually quite a significant statement. Although it does not represent any change in the current law, it is a very clear ruling that allows an employer to refuse to deal with any of their employees' lawyers, and requires an employee to deal directly with his or her employer so long as they remain employed.

No Punitive Damages Available for Breach of Human Rights Code

Prior to the Supreme Court 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 *Human Rights Code* of Ontario may allow for a court 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 to secure an award of damages in respect of bad faith dismissal.

This decision appears to heighten the threshold required as to what "outrageous" or "reprehensible" conduct is in the employment context. The circumstances of 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 Mr. 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 ruling as to costs.

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 grounds 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 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.

Pallett Valo LLP Labour & Employment Law Group

Representing your best interests in an efficient manner is what our lawyers do best. We have the legal expertise and rich experience to provide creative and pragmatic solutions for a wide variety of employment-related issues. Our approach is to provide advice that minimizes the time, costs and disruption associated with labour and employment disputes. We represent our clients before various provincial quasi-judicial tribunals, in court, and at conciliation, mediation and other proceedings.

We provide support to management in drafting employment contracts and company policies, collective bargaining, collective agreement administration and grievance arbitration. We work for a diverse range of employers in the private and public sectors, and have specialized expertise in the construction industry.

Contact Members of the Labour & Employment Law Group at Pallett Valo LLP

Pamela Yudcovitch

pamyudco@pallettvalo.com

Direct Dial: 905.273.3022 Ext. 218

Andy Balaura

abalaura@pallettvalo.com

Direct Dial: 905.273.3022 Ext. 225

The purpose of this document is to provide information as to recent developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of Pallett Valo LLP or any member of the Firm on the points of law discussed.

If you would like additional copies of the bulletin, or know of anyone who would be interested in joining our mailing list, please contact Marketing Coordinator at marketing@pallettvalo.com.