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HONDA DRIVES AWAY A WINNER

Recent Supreme Court of Canada decision will have chilling effects on wrongful dismissal lawsuits

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Over the past few decades, employment law has seen a number of significant shifts in the power struggle between employers and employees. For the most part, those shifts favoured employees as courts expanded their ability to seek additional damages in wrongful dismissal cases. But in the recent decision of *Honda Canada Inc. v. Keays*, 2008 SCC 39, it can be strongly argued that Supreme Court of Canada has put employers back in the driver's seat in the employment relationship.

The plaintiff in this case, Mr. Keays, suffered from chronic fatigue syndrome. Honda Canada dismissed him after he refused to submit to an examination by a doctor chosen by Honda. Keays had missed a lot of time from work apparently due to his condition. Honda wanted to confirm for itself that his absences were actually illness related. Accordingly, when Keays refused to submit to the examination, Honda terminated his employment.

At trial and on appeal to the Ontario Court of Appeal, the courts found that the dismissal was without just cause and awarded Keays damages in lieu of notice. They also awarded "Wallace damages" to reflect a bad faith dismissal on the part of Honda, and punitive damages based on the grounds that the dismissal was linked to Keays' disability. The latter head of damages followed previous decisions which held that termination based on a prohibited ground of discrimination constituted an independent actionable wrong that could result in award of punitive damages against an employer.

However, the Supreme Court of Canada reversed most of the factual findings made by the trial judge and in doing so narrowed the ability of a wrongfully dismissed employee to recover damages beyond those usually awarded for termination without cause.



The most significant aspects of this decision are,

1. the revision made to the assessment of Wallace damages; and,
2. the limitation placed on the ability to be awarded punitive damages in a wrongful dismissal case.

Although the Supreme Court recognized that a wrongfully dismissed worker could claim more than just damages in lieu of notice, to do so, a trial judge must first find that,

(a) at the time the employment contract was entered into, the employer and employee contemplated that a breach of the employment contract could produce mental anguish; and,

(b) the conduct of the employer during the course of the dismissal was “unfair or in bad faith by being, for example, untruthful, misleading or unduly insensitive.”

Once these conditions are met, the court must then assess the actual damages suffered by the employee rather than estimating them by extending the reasonable notice period.

With respect to punitive damages, the Supreme Court of Canada reiterated that such damages should only be awarded in exceptional cases and, more significantly, that they are not available in circumstances where an employee complains that his or her dismissal is based on a prohibited ground of discrimination. According to the majority, since Human Rights Codes generally provide a comprehensive scheme for the treatment of claims of discrimination, a breach of the Code cannot constitute an independent actionable wrong which would support a punitive damages award. The court noted that recent amendments to the Code (which would allow a plaintiff to advance a breach of the Code as a cause of action in connection with another wrong) restrict monetary compensation to loss arising out of the infringement, including any injuries to dignity, feelings and self-respect.

This case is also significant because it potentially restricts the ability of an employee to engage the assistance of a lawyer during an employment dispute. Ontario’s Court of Appeal justified the award of punitive damages because, while Keays was still employed and the parties were discussing the medical examination, Honda had simply refused to deal with his lawyer. To the contrary, the Supreme Court of Canada held that there is “no legal obligation on the part of any party to deal with an employee’s lawyer while he or she continues to be employed by the employer.” While this restriction is narrow, it is hard to see how this conclusion will help an employee, the usually weaker



party, to effectively negotiate with an employer especially in circumstances where the employee needs help in asking for an accommodation based on a disability.

The Honda case shifts liability away from employers. However, despite the favourable judgment, employers ought to still exercise caution when terminating an employee. Employers should exercise good faith when terminating an employee. Furthermore, this judgment does not alter the law that an employer is obligated to accommodate a disabled worker, and that failure to do so can still produce remedies under both the *Ontario Human Rights Code* and amended *Employment Standards Act* that exceed the traditional damages granted for the failure of employer to provide a wrongfully dismissed employee with reasonable notice.