

LITIGATION UPDATE

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Tighter Rules on Damages in Wrongful Dismissal Cases

A new Supreme Court of Canada decision provides both relief and clarity for employers facing potential wrongful dismissal actions.

By Carole McAfee Wallace and Elisabeth Patrick

On June 27, 2008, the Supreme Court of Canada (SCC) released its much-anticipated ruling in *Honda v. Keays*. The SCC dramatically reduced the damages awarded by lower courts in the wrongful dismissal action and clarified the circumstances relating to various types of damages a terminated employee may be awarded.

THE FACTS

Keays, a Honda employee, was diagnosed with chronic fatigue syndrome in 1997. He stopped working and received disability benefits until the insurer discontinued them in 1998. After that he returned to work, but was absent often. Honda placed him in a program that allows disabled employees to take absences so long as they provide medical notes that confirm their absence is related to their disability. Employees in this program are not subject to Honda's normal attendance policy.

Honda claimed the medical notes Keays submitted provided limited information and were merely repeating what Keays had told his doctor. In March 2000 Honda demanded he meet with an occupational medicine specialist to determine how his disability could be accommodated. On the advice of counsel, Keays refused to meet with the specialist unless Honda explained the purpose, methodology, and parameters of the consultation. Honda refused Keays' demand and terminated his

employment. Keays, who had worked at Honda for 14 years, sued for wrongful dismissal.

LOWER COURT DECISIONS

The trial judge concluded that Honda's termination of Keays was not proportional to his refusal to meet with the specialist and held that he was entitled to a 15-month notice period for the wrongful dismissal. The trial judge extended the notice period to 24 months on the basis of "egregious bad faith" Honda displayed in the manner of the termination and the medical consequences flowing from the termination.

Finding that Keays, "...proved that Honda committed a litany of acts of discrimination and harassment in relation to his attempts to resolve his accommodation difficulties", the trial judge also awarded Keays \$500,000 in punitive damages and costs with a 25% premium.

The Court of Appeal upheld the trial court's decision, though it reduced the punitive damages to \$100,000 and reduced the cost premium.

THE SUPREME COURT DECISION

The Supreme Court upheld the trial judge's decision that Keays was entitled to a 15-month notice period as compensation in lieu of notice for wrongful dismissal, but struck down the award of punitive damages and the cost premium.

Reasonable Notice Period

The SCC confirmed that, absent termination for just cause, the notice required is decided on a case-by-case basis and is based on the character of the employment, the length of service, the employee’s age, and the availability of similar employment, given the employee’s experience, training, and qualifications.

Damages for the “Manner of Dismissal”

The SCC rejected the trial judge’s factual conclusion that “Honda’s manner of dismissing Keays was an egregious display of bad faith that warranted an extension of the notice period to 24 months.” As a result, the SCC struck down the damages award related to the manner in which Keays was terminated.

The SCC confirmed that damages based on an employer’s conduct during dismissal are available, but only “where the employer engages in conduct during the course of dismissal that is ‘unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive’.” According to the SCC, these damages may be awarded if the employee can prove that the manner of dismissal caused mental distress that was within the contemplation of the parties. Because such damages are compensatory, however, they must reflect the actual damages suffered and should not be measured by an arbitrary extension of the notice period.

The SCC gave examples of conduct that could result in such damages, including: attacking the employee’s reputation at the time of dismissal, misrepresenting the reason for its decision, and dismissing an employee to deprive them of a pension benefit or other right.

Punitive Damages

The SCC distinguished between aggravated and punitive damages, noting that there was confusion between them in light of earlier decisions and given that both have to do with the employer’s conduct at the time of dismissal. Regarding punitive damages, the SCC reiterated they “are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own”. In addition, conduct meriting punitive damages must be harsh, vindictive, reprehensible, malicious and so extreme in nature that it is deserving of condemnation and punishment by any reasonable standard. The SCC concluded punitive damages did not apply in this case because the facts do not demonstrate such conduct.



The SCC noted the Human Rights Code (HRC) had not been breached, but confirmed that a breach of the HRC is not an independent actionable wrong and so it cannot be grounds for an award of punitive damages.

Disability and Accommodation

The trial judge had awarded punitive

damages on the basis of discriminatory conduct because it found that the accommodation provided by Keays’ admission to the disability program was itself discriminatory since Keays had to present notes from his doctor to support his absences, whereas those not in the program did not have to provide such notes if they were absent. The SCC rejected this view, concluding that the requirement of medical notes was, in effect, an important part of the accommodation. The SCC was of the view that the reason Honda required regular contact with the employee’s family doctor in order to support treatment.

This final decision on the Honda v Keays case is undoubtedly a relief to employers who may have faced exposure to punitive damage claims. With respect to the compensatory damages awarded as a result of the employer’s conduct at the time of dismissal, it remains to be seen how these damages will be calculated since the SCC has now said that they should not be based on an extension of the notice period. In particular, it is not known whether the amounts awarded will increase, decrease, or remain the same. The decision is also welcome because it provides useful guidance regarding behavior that may give rise to different types of damages in wrongful dismissal actions. □

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