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Honda Canada Inc. v. Keays: The Supreme Court of Canada Strikes Down Landmark Damages Award

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INTRODUCTION

It is difficult to recall an employment law case which has generated as much interest, or created as much debate, as the litigation between Kevin Keays and his former employer, Honda Canada Inc. The trial decision, which was released in 2005, created a shockwave within the employer community, with its blistering critique of Honda's disability management practices, its substantial notice award (which included a significant award of Wallace damages for bad faith in the manner of dismissal) and its unprecedented $500,000 punitive damages award. This award, combined with a subsequent decision requiring Honda to pay over $600,000 in legal costs to Mr. Keays, left Honda facing liability of well over $1 million in relation to the termination of Mr. Keays' employment and the resulting litigation. In late 2006, the Ontario Court of Appeal reduced the award of punitive damages from $500,000 to $100,000, and also ordered a modest reduction in the costs award. However, the Court of Appeal's decision was still highly critical of Honda, and, even after the reductions, the damages award set a very disturbing precedent for Canadian employers.

In a June 27, 2008 decision which surprised many observers, a 7:2 majority of the Supreme Court of Canada reversed the lower court decisions in the *Honda* case. The majority's decision vindicated many aspects of Honda's conduct towards Mr. Keays, and struck down the *Wallace* damages and punitive damages awards in their entirety, limiting Mr. Keays' recovery to 15 months' pay in lieu of notice. The costs award applicable to the lower court proceedings was also reduced, and Mr. Keays was ordered to pay Honda's costs with respect to the appeal to the Supreme Court of Canada.

However, the majority did not stop at addressing the remarkable damages and costs awards in the *Honda* case. The majority also articulated some very important principles which will change the approach to Wallace damages and mental distress damages and likely limit the availability of punitive damages in employment law matters in the future. In addition, while not strictly necessary to the outcome of the case, the majority endorsed the Supreme Court's 1981 decision in *Seneca College of Applied Arts and Technology v. Bhaduaria*, and particularly the finding in that case that the *Human Rights Code* provides a "complete code" for dealing with allegations of discrimination. Based on this principle, the majority the majority refused to recognize the existence of a tort of discrimination and found that a breach of the *Code* cannot constitute an "independent actionable wrong" justifying an award of punitive damages.

FACTUAL BACKGROUND

Mr. Keays was terminated by Honda after 14 years of employment, having worked for Honda for most of his working life. He was employed in Honda's Quality Engineering Department at the time of his termination. He was described by the trial judge as a "dedicated and conscientious employee".

During the course of his employment with Honda, Mr. Keays developed Chronic Fatigue Syndrome (CFS). He received short-term disability benefits and long-term disability benefits for a period of time. Honda's insurer eventually terminated his benefits coverage, based in part on a perceived "lack of objective evidence of total disability". Mr. Keays returned to work, but he continued to be absent from work frequently. Because Honda ran a "lean operation", Mr. Keays' absences caused some disruption to the department and to the operation. Consequently, Mr. Keays began to receive "coaching letters" designed to assist him to improve his attendance.

Following his return to work, Mr. Keays was subject to a disability program, which was similar in concept to many employers' attendance management programs. As part of this disability program, Mr. Keays was required to produce a doctor's note after each and every absence. The trial judge found that this requirement was unreasonable, as Honda had received medical information from Mr. Keays' doctor indicating that he had CFS and would be absent several days per month as a result of his condition. Mr. Keays' absences continued and, in fact, increased over time. The trial judge found that Mr. Keays' increased absenteeism was due to stress caused by Honda's approach to managing his attendance. Ultimately, Honda requested Mr. Keays to meet with the company doctor to explore alternative work assignments. At one of these meetings, a company doctor suggested Mr. Keays might be moved to a position with lighter duties, a position which Mr. Keays considered to be a demotion. Alarmed by the direction of the discussion with the company doctor, Mr. Keays hired a lawyer and had the lawyer write a letter to Honda on his behalf. The trial judge characterized Honda's response to this letter as confrontational, and drew the inference that the letter led Honda to impose a requirement that, as a condition of ongoing accommodation, Mr. Keays must submit to a medical assessment by a company doctor. Although he initially agreed to the assessment, Mr. Keays later advised Honda that he would not participate in the assessment until Honda clarified the purpose, methodology and parameters of the assessment. Honda wrote to Mr. Keays outlining its rationale for requiring the assessment, and, after a final warning, terminated Mr. Keays for insubordination for refusing to meet with Honda's doctor.

The trial judge was highly critical of Honda's approach in a number of respects. Among other things, he found that Honda adopted an overly sceptical view of Mr. Keays' diagnosis of CFS, despite the fact that the medical evidence confirmed that he was disabled. According to the trial judge, the decision to require a medical note after every absence when Mr. Keays' doctor had already advised Honda to expect several absences per month constituted harassment. The trial judge also found that Honda "stonewalled" Mr. Keays, rather than responding in good faith to his questions and concerns. He found that Honda retaliated against Mr. Keays after receiving his lawyer's letter, by demanding that he submit to a medical assessment by the company doctor – an individual who the trial judge felt was predisposed to doubt the legitimacy of Mr. Keays' diagnosis. In the trial judge's view, it was reasonable for Mr. Keays to decline to participate in this medical assessment, and therefore Honda did not have cause to dismiss Keays for insubordination. In the end result, the trial judge awarded Mr. Keays a notice period of 15 months' pay in lieu of notice. He then awarded an additional 9 months' pay in lieu of notice (for a total of 24 months' pay in lieu of notice) as Wallace damages, to reflect his finding that Honda acted in bad faith in the manner of dismissal. Relying on a finding that Honda had breached the *Human Rights Code* by failing to accommodate Mr. Keays' disability, the trial judge went on to award the unprecedented sum of $500,000 in punitive damages. He subsequently ordered Honda to pay over $600,000 in legal costs to Mr. Keays.

The Ontario Court of Appeal upheld the trial judge's finding that Honda did not have cause to dismiss Mr. Keays, his award of 15 months' pay in lieu of notice, and his extension of the notice period from 15 to 24 months as Wallace damages. The Court of Appeal also unanimously agreed that an award of punitive damages was appropriate, but the majority of the Court decided that the punitive damages award should be reduced form $500,000 to $100,000. The majority pointed to some of the more strongly worded findings in the trial judgment, and found that the evidence did not support these findings. Examples included findings by the trial judge that Honda's misconduct was "planned and deliberate and formed part of a corporate conspiracy", that Honda had engaged in "outrageous conduct … over a period of five years without a hint of modification of their position that Mr. Keays was the one in the wrong", that Honda "clearly benefited from their misconduct because they rid themselves of an irritation that they viewed as a 'problem' associate", and that "Honda ran amok as a result of their blind insistence on production 'efficiency' at the expense of their obligation to provide a long-time employee reasonable accommodation that included his own physician's participation". The dissenting judge, Justice Goudge, felt the trial judge had a rational basis for making the $500,000 punitive damages award, and would not have disturbed it. The majority of the Court of Appeal also reduced the costs award by $77,500.

Honda appealed the Court of Appeal's decision, and Mr. Keays cross-appealed the reduction in the damages and costs awards. Notably, Honda did *not* appeal the Court of Appeal's finding that it did not have cause to dismiss Mr. Keays, so the issues before the Supreme Court were limited to damages issues. At the Supreme Court of Canada, Mr. Keays supported by certain intervenors–urged the Supreme Court to revisit the *Bhadauria* decision, and recognize a district tort of discrimination, to reflect the central role played by human rights issues in many employment law disputes, and to ensure that appropriate remedies are available to employees who pursue human rights claims in the courts.

THE SUPREME COURT'S DECISION

Justice Bastarache (writing for the 7:2 majority) took a very different view of both the law and the facts than the courts below. As a result, it is not surprising that he reached a very different result.

(a) THE LEGAL ANALYSIS

Returning to first principles, Justice Bastarache noted that every employment contract contains an implied term allowing the employer to terminate the relationship in the absence of cause, provided the employer gives the employee reasonable notice of its intention to do so. Where the employer fails to comply with its implied obligation to provide reasonable notice of termination, damages are available to compensate the employee for losses that would have been foreseeable by the parties at the time they entered the contract. Generally speaking, such losses are limited to damages for the failure to provide reasonable notice of termination, and psychological harm or mental distress arising from the fact of the termination is not compensable. Justice Bastarache stated:

The contract of employment is, by its terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.

However, as Justice Bastarache noted, past Supreme Court of Canada decisions have recognized that there are some categories of psychological harm or mental distress which the parties will be considered to have contemplated at the time they entered into the contract, and which should therefore be considered compensable. Examples include psychological harm arising from the employer's breach of its obligation of good faith and fair dealing in the manner of termination (traditionally referred to as Wallace damages), psychological harm arising from an independent actionable wrong by the employer, and psychological harm arising from the breach of a contract designed to secure a psychological benefit. In the *Honda* case, the majority held that the distinction between Wallace damages and the other categories of damages for psychological harm should be eliminated, and damages for breach of the employer's obligation of good faith and fair dealing should no longer be limited to an extension of the notice period:

[T]here is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination…. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation concerning the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance….

The Supreme Court also reiterated in *Honda* that punitive damages are to be reserved for very exceptional cases. Not only must there be an independent actionable wrong to warrant punitive damages, but punitive damages are to be restricted to conduct that is "harsh, vindictive, reprehensible and malicious", that is "extreme in nature and such that by any standard it its deserving of full condemnation and punishment", to "advertent wrongful acts that are so malicious and outrageous they are deserving of punishment on their own". It was in the context of its discussion of punitive damages that the majority adopted the principle that "the [*Human Rights*] *Code* provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the *Code* cannot constitute an actionable wrong". However, ultimately, it was not necessary for the majority to rest its decision on this finding as, as discussed further below, the majority was of the view that there had been no breach of human rights legislation or any other egregious conduct of the kind necessary to justify an award of punitive damages.

(b) THE FACTUAL ANALYSIS

In reviewing the facts, Justice Bastarache was much less critical of Honda's actions than the courts below and highlighted different aspects of the evidence than those highlighted by the trial judge and the Court of Appeal. For example:

- Justice Bastarache observed that the insurer's decision to discontinue Mr. Keays' benefits was based on a medical opinion that Mr. Keays could return to work without restrictions. Mr. Keays' benefits. He also emphasized that that decision was made independently by the insurer – not Honda – and that the courts below had erred in attributing responsibility to Honda for the discontinuation of Mr. Keays' Benefits
- Justice Bastarache saw the requirement to produce a medical note after every absence as part and parcel of Honda's disability program, a program which permitted Mr. Keays to be absent from work without being subject to disciplinary action if he provided appropriate medical verification of the reasons for his absence. Mr. Keays was providing in support of his absences. Mr. Keays meet with its own physicians. These concerns, in turn, provided a legitimate basis for Honda's request that He also observed that the tenor of the medical notes being provided changed over time, that they had become "cryptic" and their tone provided Honda and its physicians with legitimate grounds to question the objectivity of the medical information Mr. Keays was providing in support of his absences. These concerns, in turn, provided a legitimate basis for Honda's request that Mr. Keays meet with its own physicians.
- Justice Bastarache noted that Honda had not merely refused to communicate with Mr. Keays' lawyer, but had advised Mr. Keays that they were not responding to his lawyer because they had a practice of dealing with their associates directly, rather than through third parties.
- Justice Bastarache also pointed out that Honda had written Mr. Keays a letter in which they did provide some explanation why they were requiring him to meet with their physician. In that letter, Honda indicated that it had received differing medical opinions concerning whether Mr. Keays' condition prevented him from attending work on a regular basis. In the same letter, Honda also urged Mr. Keays to reconsider his refusal to meet with the company physicians, and warned him that he would face termination if he maintained his refusal. They also gave him a further opportunity to reconsider his position before proceeding with the termination.

Based on these facts, Justice Bastarache concluded that "Honda's conduct in dismissing Keays was in no way an egregious display of bad faith justifying an award of damages for conduct in dismissal." In writing Mr. Keays a letter setting out the medical opinions it had received regarding Mr. Keays' ability to attend work on a regular basis, Honda was simply conveying the advice of the medical experts it had properly retained to advise it regarding the matter. These medical experts were not expressing inappropriate scepticism about the legitimacy of his condition or "playing hardball" with Mr. Keays. In Justice Bastarache's view, the decision to stop accepting notes from Mr. Keays' doctor unless Mr. Keays participated in a medical assessment by a company doctor was not a reprisal for the letter from Mr. Keays' lawyer. It was a consequence of Mr. Keays' refusal to cooperate with Honda's efforts, triggered by the deficiencies in the medical notes he was providing, to better understand his disability.

Justice Bastarache further concluded that Honda had not breached Mr. Keays' rights under the *Human Rights Code* or engaged in any conduct which could be considered "harsh, vindictive, reprehensible or malicious". Accordingly, even if a breach of the *Human Rights Code* could constitute an independent actionable wrong justifying punitive damages (which the majority found was not the case), punitive damages were not justified in the *Honda* case. In support of this conclusion, Justice Bastarache made a number of findings helpful to employers:

- The majority recognized that Hondas disability program was not discriminatory, but rather should be viewed as a form of accommodation. The trial judge had characterized Honda's disability program as discriminatory because employees like Mr. Keays had to "earn" each dispensation from being "coached" with respect to absences by providing a doctor's note for each absence. The trial judge likened the treatment of the employee under this program to a "child who is suspected of 'playing hooky' from school". The trial judge also suggested that the requirement of doctors' notes improperly deterred employees from using the disability program. However, in a strong endorsement of the accommodative component of attendance management programs, Justice Bastarache held:

The requirement of notes was in effect part of the accommodation because it permitted absences without the possibility of the same leading to disciplinary action for failing to meet work requirements. There was no detriment in being part of the disability program and being treated differently from persons with 'mainstream illnesses'. The differential treatment was meant to accommodate the particular circumstances of persons with a particular type of disability and to provide a benefit to them. It is indeed apparent from the record that the program was designed to establish a continuous relation between management and treating physicians and monitor absences in order to establish in particular an expected rate of absences which would not give rise to disciplinary action. The suggestion that the program itself was discriminatory is not supported by the facts.

In another similar statement at a later point in his decision, Justice Bastarache referred with approval to Justice Abella's dissenting judgment in the Supreme Court's 2007 decision in *McGill University Health Centre* (with which Justices Bastarache and McLachlin concurred) and stated:

The object of the disability program is to maintain regular contact with the family doctor in order to support treatment. It allows for disability-related absences, a form of accommodation determined in consultation with doctors. The program requires that medical notes be provided to establish that absences are in fact related to disability. There is no stereotyping or arbitrariness here (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés* de l'Hôpital *general* de Montréal, [2007] 1 S.C.R. 161, 2007 SCC4, at para. 49). In addition, I accept that the need to monitor the absences of employees who are regularly absent form 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.

- Justice Bastarache also held that "[c]reating a disability program such as the one under review in this case cannot be equated with a malicious intent to discriminate against persons with a particular affliction" of the kind which would be necessary to justify an award of punitive damages.
- Justice Bastarache rejected the findings in the courts below that punitive damages could be justified based on Honda's refusal to remove Mr. Keays' "coaching record" from his file and/or on the allegation that Honda had engaged in a reprisal against Mr. Keays. He also rejected the finding that a single suggestion by one of Honda's doctors that Mr. Keays might be moved to a position with lighter duties could be considered harassment justifying an award of punitive damages.
- Justice Bastarache also held that the Court of Appeal had wrongly based its award of punitive damages on the finding "that Honda knew that Keays valued his employment and was dependent upon it for disability benefits." Justice Bastarache noted that all employees value their jobs; what mattered was "Honda's conduct with regards to Keays' need for medical attention and special attention". Justice Bastarache felt it was wrong to hold Honda accountable for the insurer's decision to terminate Mr. Keays' disability benefits and award punitive damages against Honda on that ground.
- Justice Bastarache also felt that the Court of Appeal erred in awarding punitive damages based on a finding that Honda knew Mr. Keays was particularly vulnerable because of his medical condition. In fact, Honda was not aware of the nature or seriousness of Mr. Keays' medical condition, because Mr. Keays "would not facilitate an exchange of information about it".
- Finally, Justice Bastarache held that Honda's refusal to deal with Mr. Keays' lawyer should not have been relied on to award punitive damages. He helpfully stated that "[t]here 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". He did criticize Honda for telling Mr. Keays "that hiring outside counsel was a mistake and that it would make things worse". He described that conduct as "egregious", "ill-advised" and "unnecessarily harsh". However, he was of the view that that conduct alone was not sufficient to justify an award of punitive damages.

(c) THE END RESULT

In the end result, the Supreme Court unanimously upheld the award of 15 months' pay in lieu of notice. Although the majority disagreed with the trial judge's approach of taking Honda's "flat management structure" into account as a factor in assessing the character of employment (and thus in increasing the notice period), the majority felt the 15 month notice period

could be justified based on Mr. Keays' limited prospects for re-employment. The majority further held that the case was not an appropriate case either for an award of *Wallace* damages or for an award of punitive damages, and also further reduced the costs award. The two dissenting judges agreed that punitive damages should not have been ordered, but would have allowed the award of *Wallace* damages to stand.

CONCLUDING COMMENTS

The Supreme Court of Canada's forceful decision in the *Honda* case appears to be a positive development for employers. Hopefully, it will assist in curtailing the very common practice among plaintiffs' counsel of alleging human rights violations in order to support large damages claims, as well as the trend towards ever-higher damages awards in employment law cases. Many employers will also be reassured to know that, as a result of this decision, $500,000 punitive damages awards – and, indeed, even $100,000 punitive damages awards – are unlikely to become the norm in Canadian employment litigation.

Having said that, it remains to be seen whether trial courts will follow *Honda* or seek to distinguish it on its facts. It also remains to be seen how trial judges will quantify "moral damages" related to the manner of dismissal. Under the *Wallace* approach of extending the notice period, employers had some certainty concerning the extent of their liability. *Honda* provides little guidance to trial judges on how such damages should be calculated, and therefore little certainty to employers regarding their potential liability.

In addition, Honda's experience provides a cautionary tale for employers. Social mores regarding the appropriate treatment of employees with disabilities are evolving, and judicial views are evolving along with them. While Honda was ultimately successful, and its actions were largely vindicated, it is worth noting that the trial judge, three judges of the Court of Appeal, and (to a somewhat lesser degree) two judges of the Supreme Court of Canada all felt Honda's conduct towards Mr. Keays was deserving of significant censure. Perhaps because of this, it took over eight years to resolve the issues arising from his termination. Hundreds of thousands of dollars were expended in the litigation process, and Honda was exposed to a great deal of public criticism along the way. The lesson to be learned from Honda's experience is *not* that employers should shy away from proactively managing complex disability cases or from making "tough decisions" where the circumstances would appear to necessitate them. The lesson is that, by carefully considering its strategy, ensuring that it remains on the "high road" at all times, remaining mindful of how a third party might view its treatment of the employee, and obtaining legal advice at critical junctures along the way, an employer can do much to insulate its ultimate decision to terminate the relationship from criticism and to reduce the risk of costly and protracted litigation.

Your Hicks Morley lawyer would be pleased to discuss the implications of this significant new decision further with you.

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