

# Labour, Employment and Human Rights Law Bulletin

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## Landmark Supreme Court of Canada Decision Significantly Alters the Law Regarding Damages in Wrongful Dismissal Cases

On June 27, 2008, the Supreme Court of Canada released its landmark decision in *Keays v. Honda* (“*Keays*”). The Supreme Court found that the trial judge made overriding and palpable errors and, accordingly, it reduced the notice period from 24 to 15 months, and eliminated the \$100,000 punitive damage award against Honda.

The Supreme Court’s decision in *Keays* is an important victory for Honda, and symbolically for all employers, as it affirms the right of an employer to manage its workforce and monitor the absences of employees who are regularly absent from work.

The decision also provides a clearer foundation for assessing and predicting liability for damages arising out of wrongful dismissal cases thereby ending a period of uncertainty for employers who were unsure as to how *Keays*, and its huge damage awards, could impact their own practices in managing employee attendance.

The Supreme Court has returned to basic contract principles, and restated the Wallace test by limiting awards to actual damages instead of an extension of the notice period. In effect, *Keays* will make damage awards arising out of wrongful dismissal suits more predictable as

employees will have to show proof of actual harm arising out of the manner of dismissal in order to receive monies in addition to the common law notice period. Punitive damages will only be awarded in rare circumstances where a court determines that an employer’s conduct is deserving of punishment.

Finally, the decision also puts an end to speculation that the courts would recognize a new tort of discrimination for violation of human rights legislation.

### Brief Restatement of Facts

Kevin Keays was hired at the Honda plant in Alliston, Ontario in 1986. Shortly after he began working, he started to experience health problems which caused him to be absent from work on a number of occasions. Mr. Keays eventually took a leave from October 1996 to December 1998, during which time he was diagnosed with chronic fatigue syndrome. In 1998, the insurer ended Mr. Keays benefits following a Work Capacity Evaluation. The Evaluation led the insurer to the conclusion that Mr. Keays was able to return to work on a graduated and, later, full-time basis. As a result, Mr. Keays returned to work at Honda, but still had difficulties maintaining regular attendance. Honda began requiring Mr. Keays to submit medical notes to support

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each of his absences. When the medical notes justifying Mr. Keays absences “changed in tone” and no longer appeared as independent evaluations of Mr. Keays’ disability, Honda asked Mr. Keays to meet with the company doctor, to determine how his disability could be accommodated. When Mr. Keays refused, he was fired for insubordination. Mr. Keays sued Honda for wrongful dismissal.

At trial, the judge awarded Mr. Keays 15 months notice plus an additional 9 months for aggravated (i.e. “Wallace”) damages as a result of the “protracted corporate conspiracy” and the manner of termination which the trial judge found was conducted in an egregious and bad faith manner against Mr. Keays. In addition, the trial judge awarded Mr. Keays \$500,000 in punitive damages as well as his costs on a substantial indemnity basis plus a 25% premium for costs.

On Appeal, the Court upheld the notice period of 24 months, but reduced the punitive damages award to \$100,000 - still an unusually high award in employment law cases. The Court of Appeal upheld the award of costs on a substantial indemnity basis, but cut the cost premium in half.

The Supreme Court found that the trial judge made a number of overriding and palpable errors relating to his characterization of Honda’s actions. The Supreme Court found that there was no “corporate conspiracy”, and Honda did nothing wrong when it required Mr. Keays to meet with the company doctor. As a result, the Supreme Court overturned the trial judge’s finding and reduced the notice period from 24 to 15 months, reflecting damages for the common law notice period only.<sup>1</sup> In addition to reducing the notice period, the Supreme Court also eliminated the punitive damages award altogether.

The Supreme Court also reduced the costs awarded by the courts below to partial indemnity, and eliminated the 25% premium. In addition, Mr. Keays was ordered to pay the partial indemnity legal fees of Honda at the Supreme Court level.

## Analysis

The Supreme Court’s decision marks a return to basic contract principles. It restates the method for awarding aggravated (Wallace) damages and clarifies the purpose of aggravated versus punitive damages. As in basic contract law, aggravated damages are those damages that are within the reasonable contemplation of the parties. Therefore, if an employee could show that the manner of dismissal caused mental distress within the reasonable contemplation of the parties, the employee would be entitled to damages. The Court restated the test on how these types of aggravated or Wallace-type damages should be awarded. In its view, aggravated or Wallace-type damages should not be awarded through what it referred to as an “arbitrary” extension of the notice period, but rather by an award reflecting actual damages, as is the case in normal contract law. Examples given by the Court included where an employer has attacked an employee’s reputation at the time of dismissal, or misrepresentation of the reasons for its decision to dismiss the employee, etc.

The Court also distinguished between aggravated and punitive damages thereby providing a clearer understanding of when each should be awarded. In the Court’s view, once compensatory damages were awarded for mental distress, they carried with them an element of deterrence, and were not deserving of an added award for punitive damages. Otherwise, as was the case here, a compensatory award for mental distress for the manner of dismissal, combined with an award for punitive damages meant to punish the employer would result in “double compensation” for the employee and “double punishment” for the

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<sup>1</sup> Honda had not challenged the finding of wrongful dismissal, but only the amount of pay in lieu of notice.

employer. Only in rare cases, where the employer's behaviour is "harsh, vindictive, reprehensible and malicious" or "extreme in its nature", should a court award punitive damages. In the Court's view, Honda's actions were not sufficiently egregious or outrageous to be deserving of punishment in the form of punitive damages.

Finally, the Court agreed with Honda's position that a breach of the *Ontario Human Rights Code* (the "Code") if found, should not lead to an independent actionable wrong deserving of punitive damages in the civil court. Instead, the Court stated that breaches of human rights legislation are more adequately dealt with by the applicable human rights forum.

Overall, the decision strongly supports the right for employers to monitor the absences of employees who are regularly absent from work, and that "this 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."<sup>2</sup> Employers should also note that the decision affirms that there is no legal obligation to deal with an employee's counsel while he or she continues in employment.

### **June 30, 2008 Changes to the Human Rights Code**

The new changes to the *Code* come into affect on June 30, 2008. *Keays* affirms that an employee will only be able to recover damages for breaches of the *Code* if it is in conjunction with a wrongful dismissal suit or some other actionable wrong. *Keays* affirms that if a complaint centres only on the alleged breaches of the *Code*, the complaint will be properly dealt with by the Human Rights Tribunal.

Employers should be aware that the new *Code* does not require an employee to make an election upfront as to which forum they will pursue if their rights under the *Code* have been violated. Instead, an employee could file a civil suit for wrongful dismissal, including a claim for human rights damages, while still pursuing a remedy for the alleged human rights violation with the Tribunal.

### **Please Contact Us**

To find out more about how the Supreme Court of Canada's decision in *Keays v. Honda*, or changes to the *Code* could affect your organization, please contact one of the members of the Labour, Employment and Human Rights Group.

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<sup>2</sup> At para. 71.

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