

Surprise decision brings surprise results

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For Law Times

Little more than four months after the Supreme Court of Canada heard the appeal of *Honda Canada Inc. v. Keays*, the court's decision was released. The court had the opportunity to alter the practice of both employment law and the common law in general. The largest punitive damages ever awarded to an employee had the possibility of being reinstated by the highest court in the country and the chance of a new tort of discrimination could have been created, allowing individuals discriminated against to use the court system as a means for remedy. Despite all of this possible change, a surprising decision was reached.

Kevin Keays worked for Honda for 14 years. In 1997, he was diagnosed with chronic fatigue syndrome and went on long-term disability until 1998, when his benefits were discontinued. Returning to work, Keays was placed in a disability program which entitled him to take days off work as long as he met two criteria: that the absence was due to his condition and he provide a doctor's note to Honda supporting the reason for each absence.

Abiding by these rules, Keays provided Honda with the corresponding notes. However, Honda became concerned at how often he was absent from work, as well as the lack of medical evaluation referred to in each doctor's note. In response to these concerns, Honda asked Keays to meet with a new doctor, who Honda had suggested. Keays' counsel advised him not attend such a meeting without an explanation as to what it would entail, which Honda had not provided. After rejecting the notion of the meeting many times, Honda terminated Keays.

As a result of the termination, Keays sued Honda for wrongful dismissal. The trial judge decided in favour of Keays and awarded him 15 months' pay in lieu of notice, with an additional nine months notice due to the manner in which Honda had terminated him. Furthermore, an award of punitive damages was ordered in the amount of \$500,000, designed to punish Honda for discriminating against Keays. The Ontario Court of Appeal upheld the total award of 24 months, yet reduced the

amount of punitive damages to \$100,000. Honda appealed to the SCC.

The court upheld the award of 15 months' pay in lieu of notice. However, this ruling was surprisingly distinct from the two courts below in regards to both the bad-faith and punitive damages.

The court analyzed the four points on which the trial judge had based his finding of bad faith and came to the conclusion that such a finding was either without evidentiary support or consisted of overriding and palpable errors.

According to the court, no evidence existed which indicated that Honda had deliberately misrepresented Keays' and Honda's own doctor's medical views in regards to Keays' disability, or that Honda's doctor took a "hardball" approach towards Keays and his condition. Additionally, the trial judge made an overriding and palpable error by finding that Honda's decision to end Keays' accommodation was a form of reprisal for Keays' retention of legal counsel. Rather, the accommodation was stopped in order to confirm Keays' disability. Also, a further overriding and palpable error was made by the trial judge when he decided to consider Keays' disability during the post-termination period. The court stated, "... this was not compensable under the *Wallace* [*v. United Grain Growers Ltd.*] umbrella because there was no evidence that the disability was caused by the manner of termination."

In regards to the trial judge and Court of Appeal's awards of punitive damages, the court decided that there was no act committed by Honda that deserved such an award. The court cited *Vorvis v. Insurance Corp. of British Columbia* and *Whiten v. Pilot Insurance Co.* as follows: "This court has stated that punitive damages should 'receive the most careful consideration and the discretion to award them should be most cautiously exercised' . . . Courts should only resort to punitive damages in exceptional cases . . . The

independent actionable wrong requirement is but one of the many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be 'harsh, vindictive, reprehensible and malicious,' as well as 'extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment.' The facts of the case demonstrate no such conduct."

The court said in regards to the accommodation program requiring Keays to

provide a note for each absence: "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 apparent from the record that the program was designed to establish a continuous relation between management and treating physician 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."

This decision was far from what many had eagerly waited for. There was no shedding of an precedent from 27 years ago which restricts human rights claims from being heard in the courts. Also, there was no example made of Honda to other employers informing them that each occurrence of discrimination in the workplace will be responded to with an iron fist full of punitive and bad-faith damages. Rather, the court seemed to be content to remain encapsulated in old case law. So, what is to be made of this decision?

Firstly, the court's decision has brought to light the distinction and application of both damages for conduct of dismissal and punitive damages. The court stated: ". . . that courts, when allocating punitive damages, must focus on the defendant's misconduct, not on the plaintiff's loss . . . In this case, [if the facts had justified an award of punitive damages] the same con-

duct underlays the awards of damages for conduct in dismissal and punitive damages. The lower courts erred by not questioning whether the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution, once the damages for conduct in dismissal were awarded. Be that as it may, we now have a clearer foundation to distinguish between damages for conduct in dismissal and punitive damages."

Therefore, punitive damages will be based on "the defendant's misconduct" and damages "attributable to conduct in the manner of dismissal" will be based on the employee's actual loss, as in a tort damage case.

Secondly, we now have a clarification from the decision for both employers and employees as to what guidelines are associated with an employer's duty to accommodate an employee who is disabled and the employee's responding obligation. The employer is required to perform a thorough investigation of the employee's disability and the employee is required to cooperate fully with this process.

In finding that Honda's acts were not worthy of damages for conduct in dismissal or punitive damages, the court has clarified what is acceptable conduct of an employer when accommodating an employee. Unreasonable requests by employers in an attempt to accommodate employees may result in employers constructively dismissing their employees, entitling employees to notice along with potentially additional damages due to the conduct of dismissal where the employee's actual losses will be considered, as well as potential punitive damages as a result of the employer's misconduct, providing the employer's actions are akin to the conduct contemplated in *Whiten* and *Vorvis*. ■

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