

# Supreme Court of Canada –The Honda and Keays Decision

Ruling provides clarification on: damages for bad faith in the conduct of dismissal; the difference between bad faith damages and punitive damages; and, what an employer may reasonably require of an employee in order to accommodate the employee's disability at the workplace.

Having attended the Supreme Court of Canada appeal of *Honda Canada Inc. v. Keays* ["Honda"] on February 20, 2008 and hearing the questions that the Justices asked counsel in this case, it is not surprising that clarification was provided in three important issues for employment relationships. In the decision released on June 27, 2008, the Court explained how to calculate damages for bad faith in the conduct of dismissal, distinguished between damages for bad faith and punitive damages, and clarified an employer's duty to accommodate a disabled employee.

In *Honda*, the employee sued the employer for wrongful dismissal. The Trial Judge awarded the employee twenty-four months notice, where fifteen months were for pay in lieu of notice and nine months were due to the manner in which the employee was terminated. Additionally, the Trial Judge awarded the employee \$500,000 in punitive damages. The employer appealed this decision resulting in the Ontario Court of Appeal upholding the total award of notice and only reducing the punitive damages to \$100,000.

On appeal to the Supreme Court of Canada, the Court decided to uphold the fifteen months pay in lieu of notice. However, the additional months for bad-faith in the conduct of dismissal and the monetary award for punitive damages were both set aside. While explaining the reasons for setting aside these damages, the Court provided clarification on the three points stated above.

First, in expressing the reasons for setting aside the award of damages

for bad faith in the conduct of dismissal, the Court provided a clarification on how to calculate these awards in future cases. The Court stated, "...in cases where damages [for bad faith in conduct of dismissal] are awarded, no extension of the notice period is to be used to determine the proper amount to be paid... 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."

Secondly, by setting aside the award for punitive damages, the Court took the opportunity to provide clarification on the difference between damages for conduct in dismissal and punitive damages so that employees would not receive double recovery in future situations. The Court stated, "[E]ven if the facts had justified an award of punitive damages, the lower courts should have been alert to the fact that compensatory damages were already awarded. This stems from the important principle that courts, when allocating punitive damages, must focus on the defendant's misconduct, not on the plaintiff's loss. In this case, the same conduct 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



Ronald S. Minken,  
B.A. (Hon.), LL.B.  
Senior Employment  
Lawyer



Sara A. Kauder, LL.B.

distinguish between damages for conduct in dismissal and punitive damages."

Thirdly, since the Court found that the employer had not committed any actions towards the employee that were worthy of either damages for bad faith in conduct of dismissal or punitive damages when attempting to accommodate the disabled employee, the Court provided clarification on what is to be considered reasonable steps for an employer to take when attempting to fulfill their duty to accommodate. Pursuant to the decision found in *Honda*, employers are now able to request such additional information as doctor's notes and repeat medical examinations when attempting to accommodate a disabled employee, as long as these requests are made for such a purpose. Therefore, if these requests are not fulfilled by the disabled employee, then the employer is permitted, according to *Honda*, to terminate the employee with notice and not worry that they have acted in bad faith in the conduct of dismissal or committed an act that is "harsh, vindictive, reprehensible and malicious", thereby worthy of punishment through an award of punitive damages. **MB**

---

*This article in a series of Employment Law Issues is contributed by Minken & Associates Professional Corporation – Employment Lawyers. Keep on the watch for future articles on Employment Law or go to [www.employmentlawissues.ca](http://www.employmentlawissues.ca).*

*Disclaimer: This article is not legal or professional advice. If you require legal advice on employment issues contact an employment lawyer.*