



Supreme Court of Canada overturns \$100,000 punitive damages award in wrongful dismissal and restates law of damages in employment cases

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Readers of Focus will recall the largest punitive damage award in a wrongful dismissal action from *Keays v. Honda*, a case in which the terminated employee was awarded, in addition to 24 months' notice (nine by way of *Wallace* damages), the jaw-dropping sum of \$500,000 in punitive damages (See "[The "Large Whack": Honda hit with record damages for 'corporate conspiracy' in dismissal of employee with Chronic Fatigue Syndrome](#)" on our Publications page). On appeal, the trial judge's decisions in respect of the notice period and the *Wallace* damages were upheld. However, the Ontario Court of Appeal reduced the punitive damages award to \$100,000 on the basis that the original \$500,000 amount was disproportionate (see "[Out of proportion: Appeal court trims punitive damages awarded to terminated chronic fatigue sufferer](#)" on our Publications page). Since these decisions, the courts have continued to see a dramatic increase in claims for punitive damages in addition to *Wallace* damages. Meanwhile, the legal and human resources world has been anxiously waiting to see whether the Supreme Court of Canada would re-instate, or further reduce, this massive damage award.

On June 27th the Supreme Court of Canada released its decision in *Honda v. Keays* (June 27, 2008) and, in doing so, restated the law of damages in wrongful dismissal cases. Although the Court upheld the wrongful dismissal and the 15-month notice period awarded by the trial judge, it set aside entirely the already reduced punitive damages award of \$100,000. The Court held that discrimination does not constitute an "independent actionable wrong" and made it clear that the threshold for punitive damages is very high and will only be met in exceptional cases. The award of nine months' *Wallace* damages was also overturned, with the Supreme Court pausing to change the way in which such damages will be allocated - no longer by way of extending the notice period, but instead by awarding monetary amounts based on the actual damages suffered. The Court also recognized that the lower courts' decisions exemplified the confusion between damages for the employer's conduct in dismissal (i.e. *Wallace* damages) and punitive damages. The Court emphasized that the double-compensation/punishment that arose in this case should be avoided.

By way of background, Keays was employed by Honda for 14 years before his employment was terminated. He suffered from Chronic Fatigue Syndrome, which led to numerous absences from work. The employer offered accommodation but required Keays to meet with a staff doctor. Keays



refused and his employment was subsequently terminated (for full details of the case, see “[The “Large Whack”: Honda hit with record damages for “corporate conspiracy”](#) in dismissal of employee with Chronic Fatigue Syndrome” on our Publications page).

At trial, the Court found that Keays was wrongfully dismissed and awarded 15 months’ notice. Based on Honda’s conduct, which the judge found amounted to discrimination under the Ontario *Human Rights Code*, the notice period was extended by nine months. Based on the same violation of the *Human Rights Code*, Honda was further sanctioned by \$500,000 in punitive damages. On appeal, the trial judge’s decisions regarding the appropriate notice period, as well as the *Wallace* damages were upheld. However the Court of Appeal reduced the punitive damages to \$100,000. Honda further appealed to the Supreme Court arguing that the notice period of 15 months’ was excessive and that its conduct in dismissing Keays did not deserve either *Wallace* damages or punitive damages.

THE SUPREME COURT OF CANADA – FACTORS FOR DETERMINING REASONABLE NOTICE

The Supreme Court of Canada began its analysis by considering whether the 15 months’ notice was appropriate in the circumstances. It clarified what factors should be considered by a court when determining the appropriate notice period by citing the decision in *Bardal v. Globe and Mail Ltd.* (1960). In *Bardal*, it was held that the factors that should be considered include:

- the character of the employment;
- the employee’s length of service;
- the age of the employee; and
- the availability of similar employment.

The Court stated that the above factors must be applied on a case-by-case basis and that no particular factor should be given disproportionate weight. In this respect, the Supreme Court found that the lower level courts were mistaken in focusing too much on Honda’s flat management structure, and lengthening the notice period on that basis. The Supreme Court noted that Honda’s non-hierarchical management structure “said nothing of Keays’ employment” and that it is the employee’s actual functions that must be the focus of the courts when determining the character of employment and therefore the appropriate notice period.

In spite of this error at the lower levels, the Supreme Court did not overturn the 15-month notice period. The Court’s consideration took into account the fact that Keays was one of the first employees hired at Honda’s plant and that he had spent his entire adult working life with Honda. In addition, he did not have any formal education and suffered from an illness. The Supreme Court found that all of these factors would substantially reduce the employee’s chances of finding other employment and therefore the 15-month notice period was appropriate.

WALLACE DAMAGES RESTATED



The Supreme Court of Canada then focused on the lower court findings about the employer's conduct in the dismissal and whether that conduct warranted the award of additional damages. The Court began its analysis by stating that all compensatory damages arising from a breach of contract will be assessed by determining what was reasonably contemplated by the parties. In the employment context, at least since *Wallace v. United Grain Growers Ltd.* (1997), there is an expectation by both the employer and the employee that the employer will act in good faith in the manner of dismissal. This obligation of good faith is contemplated by the parties and, therefore, should the employer breach it through its conduct there are foreseeable and compensable damages.

The Court then considered the manner in which such damages are awarded, *i.e.* by lengthening the notice period, and stated:

“...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...not through an arbitrary extension of the notice period, but through an award that reflects the actual damages.”

Having changed the manner in which these damages are awarded, the Court went on to provide examples of conduct that would result in compensable damages. Such conduct includes attacking the employee's reputation at the time of dismissal, making misrepresentations regarding the reasons for dismissal, and of course, the conduct discussed in *Wallace*. It found that Honda's conduct fell well short of the above examples, and did not amount to a breach of the company's good faith obligation. As a result, the award of nine months' additional notice was set aside.

PUNITIVE DAMAGES AND WHETHER DISCRIMINATION IS AN INDEPENDENT ACTIONABLE WRONG

In light of the Court's determination that the employer's conduct in the dismissal did not warrant compensatory damages, it was not surprising that the Court also set aside the already reduced award of \$100,000 in punitive damages. The Supreme Court made it clear that punitive damages are restricted to deliberate wrongful acts that are so egregious they are deserving of punishment on their own. Such acts or conduct must be harsh, vindictive, malicious and reprehensible. The Court found that Honda's conduct in the dismissal did not meet these criteria.

The Court also noted that in order to award punitive damages there must first be an independent actionable wrong. The lower courts found this in Honda's discriminatory behaviour and resulting breach of the Ontario *Human Rights Code*. The Supreme Court, however, stated that the findings supporting this were “demonstrably wrong” and overturned the award of punitive damages on two bases. First, there was no evidence of discriminatory behaviour on the part of Honda and, therefore, no violation of the Ontario *Human Rights Code* to constitute the independent actionable wrong. Second, even if Honda's conduct did amount to discriminatory behaviour under the Ontario *Human*



Rights Code, the law in Canada is such that a breach of the *Code* does not amount to an independent actionable wrong. The *Code* itself provides a comprehensive enforcement scheme for violations of its provisions. The Court stated that to recognize a breach of the *Code* as an independent tort would be to undermine the intent of the legislature.

In finding that there was no basis for the award of punitive damages the Court also noted the apparent overlap in the lower courts' decisions between damages for the employer's conduct in the dismissal and punitive damages. Both sets of damages arise from the employer's conduct, but the Court warned that double-compensation should be avoided. Courts were cautioned to consider carefully whether punitive damages are necessary for denunciation, deterrence and retribution once the employer's conduct has already been sanctioned by the award of compensatory damages.

On the issue of costs, the Supreme Court awarded Honda its costs on the appeal and cross-appeal. Furthermore, based on its findings regarding Honda's conduct in the dismissal, which did not amount to bad faith, it ordered that the costs at the lower levels of trial, originally awarded to Keays on a substantial indemnity scale, be awarded on the lesser, partial indemnity scale, thereby significantly reducing the costs recovered by Keays in the litigation. The additional costs premium, originally set at \$155,000 then reduced to \$77,500 by the Court of Appeal, was set aside entirely by the Supreme Court

In Our View

The Supreme Court's rationalization of the law of damages in wrongful dismissal cases was much needed for several reasons. The apprehension that arose from the original punitive award of \$500,000 and the potential for "run-away" damages, out-of-proportion punitive damages, and the duplication of damages has been alleviated. Consequently the number of claims duplicating damages for conduct and punitive damages should diminish. Employers will be pleased that the decision makes it clear that the test for an award of punitive damages remains high and such damages will only be awarded in exceptional cases where the employer's conduct is so malicious and reprehensible that the conduct itself must be punished. The Supreme Court warned that even in such cases courts must still give careful consideration to whether punitive damages are appropriate, particularly where the employer's conduct was already sanctioned by *Wallace* damages, and the awarding of additional damages may, therefore, result in duplication. The Supreme Court's decision also significantly enforces the ability of employers to monitor and manage the attendance of its employees and to pursue documentation for absenteeism. The Supreme Court stated:

"...I accept that the need to monitor the absences of employees who are regularly absent from 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."



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