

Blakes Bulletin

Labour & Employment

Supreme Court Slashes Damages Award in Landmark Employment Case

In a decision released on Friday, June 27, 2008, the Supreme Court of Canada overturned the decision of the Ontario Court of Appeal in *Keays v. Honda Canada Inc.* and determined that the plaintiff, Kevin Keays, should not have been awarded any damages beyond damages for Honda's failure to provide reasonable notice of termination. The only aspect of the original trial decision that survived this appeal was the determination that the plaintiff was entitled to a 15-month notice period. The Supreme Court found that **neither** extended notice period damages ("*Wallace*" damages, so named after the 1997 Supreme Court of Canada decision in which extended notice period damages were awarded in a wrongful dismissal case) nor punitive damages should have been awarded or upheld in the lower courts. In addition, the Supreme Court reversed the lower court decisions on costs and set aside the cost premium Keays had received.

Keays was terminated by Honda after 14 years of employment. By the time of his termination, Keays had been diagnosed as suffering from Chronic Fatigue Syndrome. He was dismissed after refusing to see Honda's physician following a protracted dispute with Honda over Honda's efforts to manage his attendance. The trial judge found that Keays had been wrongfully dismissed and that Honda had been "callous and insensitive" in its treatment of Keays. In addition to finding that Keays was entitled to a 15-month notice period, the trial judge extended the notice period by nine months because of the employer's "bad faith" conduct in relation to Keays dismissal, and awarded Keays C\$500,000 in punitive damages. The Ontario Court of Appeal reduced the punitive damages award to C\$100,000, but did not otherwise disturb the damages awarded to Keays by the trial judge.

The Supreme Court held that an award of extended notice period damages was not justified on the facts of the case. It found that the trial judge had made several serious errors in making his award of such damages. With respect to punitive damages, the Supreme Court found that such damages had to be reserved for cases where the facts revealed deliberate wrongful acts that

are "so malicious and outrageous" that they are deserving of punishment on their own.

The decision of the Supreme Court warns trial judges to avoid duplication in damages awards. It also changes the law with respect to how damages are awarded in respect of the employer's conduct at the time of dismissal. This decision does away with the *Wallace* concept of an extension of the notice period as a response to an employer's bad faith actions. Now, to the extent that an award of damages is justified because an employer acts in bad faith in the manner of dismissal, damages will be awarded on the same basis as in all other cases dealing with damages for mental distress arising from a breach of contract. Among other things, this means that damages will be awarded in an amount that reflects the actual damages resulting from the employer's actions. Of note is the fact that the judgment makes it clear that damages will not be available for the normal distress and hurt feelings experienced by an employee because of a termination of employment. The Supreme Court gave three examples of the type of conduct that could result in compensable damages to an employee: attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right.

Employers will also be interested in the Supreme Court's statements concerning attendance management programs. In support of its finding that there was no evidence of discrimination by Honda, the Supreme Court expressly accepted that the need to monitor the absences of employees who are regularly absent from work is a *bona fide* requirement in light of the nature of the employment contract and the responsibility of the employer for the management of its workforce.

In the result, this decision is good news for employers. Although the Supreme Court declined to decide whether a breach of human rights legislation could found an award for punitive damages, the Supreme Court set the bar very high for awards of punitive damages and damage awards for bad faith in the manner of dismissal.

If you have any questions, please contact Connie Reeve at 416-863-2778 or another member of the Labour & Employment Group.

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