

Supreme Court of Canada Overturns *Honda v. Keays*

In a landmark 7-2 decision dated June 27, 2008, the Supreme Court of Canada struck down the largest punitive damages award ever handed down in a Canadian wrongful dismissal case. The Court also made significant changes to the “Wallace” damages doctrine, which will have an enormous impact on dismissals in the upcoming years.

Mr. Keays was diagnosed with chronic fatigue syndrome and argued that: 1) Honda's attempts to accommodate him were unreasonable and harassing; and 2) its decision to terminate his employment was unwarranted. At trial, Justice McIsaac agreed with Mr. Keays and found that 15 months was reasonable notice in the circumstances. Justice McIsaac increased the period of reasonable notice to 24 months to compensate for the employer's bad faith at the time of dismissal and also awarded Mr. Keays \$500,000 in punitive damages. Honda appealed the trial judge's decision. In 2006, the Ontario Court of Appeal upheld most of Justice McIsaac's decision, but reduced the punitive damages award to \$100,000.00. Honda and the Plaintiff both appealed the Ontario Court of Appeal's decision to the Supreme Court of Canada.

The Supreme Court of Canada reviewed the trial judge's factual findings and held that Mr. Keays was entitled to 15 months of notice.

Justice Bastarache next considered whether Mr. Keays was entitled to so-called “Wallace” damages. In considering this issue, Justice Bastarache reviewed the state of the law with respect to such damages, and determined that the doctrine required an overhaul.

Justice Bastarache first noted that this case shed light on the potential for double compensation when an employee sought both “Wallace” damages and punitive damages. In order to avoid such double compensation, Justice Bastarache emphasized that damages for bad faith at the time of termination must be limited to compensatory damages. In order to ensure that bad faith termination damages are compensatory and not punitive, Justice Bastarache ruled that it is no longer appropriate for courts to arbitrarily extend the notice period in wrongful dismissal cases to account for bad faith on the part of the employer. In place of such a bump in the notice period, the Court, relying on its 2006 decision in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, found that a plaintiff must demonstrate that mental distress damages were in the contemplation of the parties when they formed the employment contract. Further, even where such damages are in the contemplation of the parties, the amount of damages should be fixed in the same manner as other mental distress damages awards. That is, the award should reflect the actual damages that resulted from the employer's conduct. Justice Bastarache stated that limiting an award for “bad faith termination” to compensatory damages, rather than punitive damages, would avoid double compensation.

In this particular case, the majority reviewed the facts and determined that Honda did not act in bad faith when terminating Mr. Keays. Significantly, the majority ruled that it is a *bona fide* work requirement for an employer to monitor the absences of an employee who is frequently absent. This finding will no doubt provide comfort to employers with absenteeism issues.

The reformulation of “Wallace” damages will likely have significant ramifications going forward. For the past decade, plaintiffs have routinely claimed notice bump-ups due to perceived bad faith conduct by their employer at the time of dismissal. The requirement to prove actual damages will hopefully curtail such routine claims. However, by linking damages for bad faith terminations to the plaintiff’s actual loss, there is the potential for much higher awards if a plaintiff can prove that the manner of termination had a major effect on his or her well-being.

With respect to punitive damages, Justice Bastarache found that Honda’s conduct in this case was not sufficiently egregious or outrageous to warrant rebuke from the courts. Further, the majority also addressed whether Honda’s discriminatory conduct could amount to an “independent actionable wrong” for the purposes of awarding punitive damages. Initially, Justice Bastarache stated that he would not affirm whether a breach of the *Human Rights Code* could amount to an independent actionable wrong on which an award of punitive damages could be based. However, later in the decision, he found that *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181 (“*Bhadauria*”) stands for the proposition that a breach of the *Human Rights Code* cannot amount to an independent actionable wrong on which an award of punitive damages can be based. Justice Bastarache then declined to reconsider the *Bhadauria* decision, as he concluded on the facts that Honda had not breached the *Human Rights Code* in any event. It is noteworthy that Justice Bastarache specifically referred to the new amendments to the *Human Rights Code* as reinforcement that such a breach is not an independent actionable wrong for the purposes of claiming punitive damages, as only compensatory damages can be awarded under that legislation.

Thus, this decision affirms that punitive damages should only be awarded in exceptional circumstances, where the employer’s conduct merits punishment beyond the level of damages suffered by the plaintiff.

In summary, while it is only half-way through the year, the Supreme Court of Canada decision in *Honda Canada Inc. v. Keays* is almost certain to be the biggest decision in employment law in 2008. The ongoing ramifications of the decision will be felt over the upcoming months and years. At first glance, however, this decision appears to be a very positive one for employers.