

**IS WALLACE DEAD? THE *KEYS* TO THE
MYSTERY DAMAGES IN WRONGFUL DISMISSAL
REVISITED**

DONALD B. JARVIS

LAURA KARABULUT

This paper is for general discussion purposes and does not constitute legal advice or an opinion.

For legal advice regarding your particular circumstances, please contact us.

TABLE OF CONTENTS

INTRODUCTION	1
THE LEGAL FRAMEWORK: GENERAL PRINCIPLES	1
(i) Vorvis v. Insurance Corp. of British Columbia	2
(a) Distinction Between Aggravated And Punitive Damages	2
(b) Limits on Recovery	3
(ii) Wallace v. United Grain Growers Ltd.	3
(a) Wallace “Bump up”	5
KEAYS AND THE REFORMULATION OF WALLACE	7
(i) Honda Canada Inc. v. Keays	7
(a) Background	7
(b) Superior Court of Justice	7
(c) Ontario Court of Appeal	8
(d) The Supreme Court of Canada	9
(ii) Piresferreira v. Ayotte and Bell Mobility Inc.	14
(a) Background	14
(b) Superior Court of Justice	17
CONCLUSION	19

INTRODUCTION

Terminating an employment relationship can be an expensive process. In the absence of just cause, an employee may be entitled to more than simply reasonable notice and his or her statutory entitlements under the *Employment Standards Act, 2000*¹. The employee may also be entitled to compensation for the way he or she was treated in the dismissal process. Compensation for such treatment can include bad faith damages, aggravated, moral and punitive damages. The appropriateness and availability of such damage awards is still a hotly debated area of the law. The Supreme Court of Canada's recent decision in *Honda Canada Inc. v. Keays*² has resolved some aspects of the debate and reformulated the award of damages for bad faith dismissal. However, the debate is far from settled.

THE LEGAL FRAMEWORK: GENERAL PRINCIPLES

It is trite law that an employer can unilaterally terminate an employment contract of indefinite duration either for just cause or by giving the employee reasonable notice or compensation in lieu of reasonable notice. In determining what the reasonable notice period should be in a particular case, Canadian courts generally consider the non-exhaustive list of factors set out in *Bardal v. Globe & Mail Ltd.*³. These factors include the employee's length of service, age, experience, training and qualifications, the character of employment, and the availability of similar employment. Since the late 1980s, developments in jurisprudence have paved the way for additional forms of damages in wrongful dismissal actions. Until recently, two decisions of the Supreme Court of Canada (or the "SCC"), laid the foundation upon which the law of damages in wrongful dismissal rests: *Vorvis*⁴ and *Wallace*⁵.

¹ S.O. 2000, c.41.

² 2008 SCC 39 ("*Keays*").

³ (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J.). ("*Bardal*").

⁴ *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 ("*Vorvis*").

⁵ *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 ("*Wallace*").

The 2008 decision of the Supreme Court of Canada *Keays*, however, has significantly modified the circumstances and manner in which wrongful dismissal damages may be awarded, particularly as they relate to damages for bad faith, mental distress damages and punitive damages.

(i) *Vorvis v. Insurance Corp. of British Columbia*⁶

In *Vorvis*, the employment of a 49-year-old solicitor with more than seventeen years of service was terminated. Vorvis claimed damages for wrongful dismissal. In addition, he claimed damages for the conduct of his superior, Reid, arguing that Reid's "productivity inquisitions" had caused him mental distress which required medical attention. At trial, Mr. Justice MacFarlane awarded Vorvis damages for wrongful dismissal. However, despite his finding that Vorvis was a "diligent" employee and that Reid had treated him in a "most offensive" manner, the Judge rejected Vorvis's claims for mental distress and aggravated and punitive damages. The British Columbia Court of Appeal unanimously dismissed Vorvis's claim for mental distress and refused his claim for punitive damages. Vorvis appealed to the Supreme Court of Canada.

At the Supreme Court of Canada, Mr. Justice McIntyre's majority decision clarified the distinction between aggravated and punitive damages, and established limits for the recovery of such damages.

(a) Distinction Between Aggravated And Punitive Damages

The Supreme Court of Canada stated that the purpose of aggravated damages is to compensate the employee for intangible losses caused by the employer's behaviour. Thus, mental distress damages for manifest emotional pain and suffering are an example of "aggravated damages" insofar as they are designed to be compensatory for the intangible and non-pecuniary losses suffered by the employee. Conversely, the Supreme Court of Canada held that "punitive damages" (sometimes referred to as exemplary damages) are non-compensatory damages intended to punish the defendant for harsh, vindictive, reprehensible or malicious conduct.

The Supreme Court of Canada stressed that aggravated and punitive damages are to be awarded only in exceptional cases, where the defendant's conduct is particularly offensive. Before punitive damages could be

⁶ *Supra* note 4.

available in a wrongful dismissal action, three conditions would have to be satisfied:

1. the employer must have committed an independently actionable wrong;
2. the employer's conduct must have been harsh, vindictive, reprehensible, or malicious in nature; and
3. the employee must demonstrate that compensatory damages, including aggravated damages, would be an insufficient deterrent and punishment.

(b) Limits on Recovery

The Supreme Court of Canada concluded that aggravated damages are not generally available in breach of contract cases and, in particular, upon breach of an employment contract. This is because the parties to a contract contemplate that it may be terminated on notice at the time the contract is entered into. The Court held, however, that where the employer's conduct is so egregious as to constitute an independently actionable wrong, perpetrated during the employee's dismissal, aggravated damages and punitive damages may be appropriate.

In *Vorvis*, Justice McIntyre concluded that the mental distress claim did not arise from the dismissal itself, but from the pre-dismissal conduct of Vorvis's supervisor. Accordingly, such conduct could not be said to have aggravated the damages caused to the plaintiff from his dismissal. Further, Justice McIntyre determined that Reid's conduct was not sufficiently offensive, standing alone, to constitute an independently actionable wrong separate from Vorvis's dismissal and, as a result, ruled that aggravated and punitive damages could not be awarded.

(ii) *Wallace v. United Grain Growers Ltd.*⁷

In *Wallace*, a 59-year-old employee was summarily discharged after fourteen years of employment with Public Press, a wholly-owned subsidiary of United Grain Growers (UGG). Before he joined the company, Wallace worked for twenty-five years for a competitor. He agreed to leave his former job based on assurances made by UGG that his

⁷ *Wallace*, *supra* note 5.

employment would continue until retirement if he performed as expected. His success at the company surpassed expectations, and he remained the top salesperson in each of his fourteen years with the company. Wallace was found to have been dismissed without cause and without notice. However, for more than two years prior to the commencement of the trial, the company maintained its allegation that Wallace's dismissal had been for cause, which resulted in false rumours that harmed Wallace's reputation and made it impossible for him to find work in his industry. He became severely depressed.

At trial, Wallace was awarded twenty-four months of reasonable notice and \$15,000 in aggravated damages for mental distress. The trial judge refused to award punitive damages. The Manitoba Court of Appeal overturned the award of aggravated damages on the basis that the employer had not engaged in any conduct which would amount to a separate actionable wrong, and reduced the reasonable notice period to fifteen months. Wallace appealed this decision to the Supreme Court of Canada.

The Supreme Court of Canada affirmed that *Vorvis* was an accurate statement of the law with respect to aggravated damages: an independently actionable wrong must be found before aggravated damages could be awarded. Mr. Justice Iacobucci, writing for the majority, agreed with the Court of Appeal that because the employer's conduct did not constitute an independently actionable wrong, no additional mental distress damages could flow from Wallace's wrongful dismissal action. Further, the Court held that even if the employer could have foreseen Wallace's mental distress, it would have been insufficient to ground an independent actionable wrong. The Court refused to recognize the tort of "bad faith discharge" as a separate actionable wrong in and of itself. Mr. Justice Iacobucci stated:

An employment contract is not one in which peace of mind is the very matter contracted for (see e.g. *Jarvis v. Swans Tours Ltd.*, [1973] 1 Q.B. 233 (C.A.)) and so, absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence, subject to what I say on employer conduct below.⁸

The Supreme Court of Canada also declined to award punitive damages, upholding the trial judge's finding that the employer's conduct was not sufficiently harsh, vindictive, or malicious to warrant such an award.

(a) Wallace “Bump up”

Despite the SCC's findings with respect to aggravated and punitive damages, however, Mr. Justice Iacobucci created a new rationale for providing damages to discharged employees which would not have been recoverable under the *Vorvis* tests. He determined that employers have an obligation of good faith and fair dealing in the manner of dismissal. This obligation required employers to be candid, honest, reasonable, and forthright, and to refrain from bad faith actions, such as being untruthful, misleading, or unduly insensitive in the course of dismissing an employee:

⁸ *Ibid.* at paragraph 73.

The Court of Appeal concluded that there was insufficient evidence to support a finding that the actions of UGG constituted a separate actionable wrong either in tort or in contract. I agree with these findings and see no reason to disturb them. I note, however, that in circumstances where the manner of dismissal has caused mental distress but falls short of an independent actionable wrong, the employee is not without recourse. Rather, the trial judge has discretion in these circumstances to extend the period of reasonable notice to which an employee is entitled. Thus, although recovery for mental distress might not be available under a separate head of damages, the possibility of recovery still remains. [Emphasis added.]⁹

As a result of the *Wallace* decision, employees were able to seek compensation through an extension of the reasonable notice period for various injuries including humiliation, embarrassment, and mental pain. Such awards were commonly referred to as “*Wallace* damages”. The Supreme Court of Canada in *Wallace* held that such damages may only be awarded if the injury arises not from the dismissal itself, but from the manner in which the dismissal is effected by the employer.

Notably, Mr. Justice Iacobucci cautioned against a routine assertion of such claims and stated that:

...I do not intend to advocate anything akin to an automatic claim of damages under this heading in every case of dismissal.¹⁰

Despite this qualification, over the last decade, *Wallace* damages were sought in most wrongful dismissal actions and employers had to defend themselves against such claims, regardless of whether such allegations were supported by the evidence.

⁹ *Ibid.* at paragraph 74.

¹⁰ *Wallace, supra* at paragraph 101.

As a result of the recent decision of the Supreme Court of Canada in *Keays*, the awarding of *Wallace* damages has now been reformulated and such damages are no longer available by way of an extension of the reasonable notice period.

KEAYS AND THE REFORMULATION OF WALLACE

(i) *Honda Canada Inc. v. Keays*¹¹

The Supreme Court of Canada's decision in *Keays* restated the law of damages in wrongful dismissal cases. Most significantly, the SCC reformulated the manner and circumstances in which damages for bad faith in the manner of dismissal may be awarded. The Supreme Court of Canada has now made clear that its former approach of extending the reasonable notice period on account of *Wallace* damages should be revisited and revised.

(a) Background

The plaintiff, Keays, was employed with the defendant, Honda, for eleven years. He worked on the assembly line and was then transferred to an administrative position when he was diagnosed with Chronic Fatigue Syndrome. The employee ceased work for a period of time. When he returned, he was placed in a disability program that allowed employees with disabilities to take absences from work if they provided doctors' notes confirming that the absences were related to the disability. The employer became concerned about the frequency of the employee's absences and asked the employee to meet with its doctor, an occupational medical specialist. The employee refused to do so. The employer provided the employee with a letter advising that it supported his return to work but that his employment would be terminated if he refused to meet with the company's doctor. The employee remained unwilling to meet the doctor. The plaintiff's employment was then terminated, after fourteen years of service. The employee commenced an action for wrongful dismissal.

(b) Superior Court of Justice

The trial judge allowed the plaintiff's action. The trial judge rejected Honda's characterization of Mr. Keays's conduct as insubordination justifying his dismissal and held that he had been wrongfully dismissed.

¹¹ *Keays*, *supra* note 2.

The trial judge was highly critical of Honda's conduct and called its treatment of Keays "outrageous" and a course of action that "should make the blood boil of any right-thinking individual". He found that the company engaged in "nothing less than a conspiracy to insinuate [Honda's specialist] into [Keays's] long-established medical relationship with his own doctors and, hopefully, to exclude them from any participation in advocating for his patient's rights".

The trial judge determined that appropriate period of notice of termination was fifteen months. He then increased the notice period by nine months based on *Wallace* to take into account the manner of the plaintiff's dismissal, which he found was in bad faith. The trial judge also awarded Keays a record-setting \$500,000 in punitive damages, based on the finding that the employer had both discriminated against and harassed the employee. Key aspects of the trial judge's decision were as follows:

- The requested meeting with the occupational medical specialist was not made in good faith, but was a prelude to terminating the employee's employment.
- The employee had just cause not to follow the employer's direction.
- Dismissal was not a proportional response to the alleged insubordination of refusing to meet with the employer's occupational medical specialist.
- The employer's requirement to have every absence validated defied the nature of Chronic Fatigue Syndrome, whose diagnosis is based solely on the self-reporting of the patient.

(c) Ontario Court of Appeal

On appeal, the Court of Appeal reduced the punitive damages award from \$500,000 to \$100,000, but otherwise upheld the trial judge's decision. Key considerations for the majority of the Court of Appeal were as follows:

- While the employer was found not to have planned a corporate conspiracy, the employer's intention to intimidate and terminate the plaintiff's employment was for the purpose of depriving him of accommodation.
- The employer had a duty to accommodate and must have known it was wrong to terminate the employee's accommodation as an act of

retaliation against him for refusing to meet with the employer's occupational medical specialist.

- The employer was also aware that the employee was dependent on his employment for disability benefits.
- Finally, the employer was aware that the employee was a particularly vulnerable victim because of his precarious medical condition.

In determining the appropriate quantum of punitive damages, the majority looked at the proportionality of the size of the punitive damages award versus the blameworthy conduct. The Court of Appeal found that the duration of the employer's misconduct was not five years as found by the trial judge, but seven months. There was no injurious conduct by the employer following the employee's dismissal. Accordingly, a lesser award of punitive damages (\$100,000) could achieve the appropriate deterrence.

(d) The Supreme Court of Canada

Honda and Keays both appealed the Court of Appeal's judgment to the Supreme Court of Canada. While the SCC agreed with the trial judge that fifteen months' notice of termination was reasonable in the circumstances, the SCC reversed many of the other findings of the lower Courts, including significantly reducing what had been a record-setting award of monetary damages for wrongful dismissal.

Most significantly, the Supreme Court of Canada ended the approach that it had established in *Wallace* of extending the notice period to compensate for "bad faith" conduct in the manner of dismissal.

Reasonable Notice

Justice Bastarache, writing for the majority, adopted the *Bardal* factors but found that they must be applied on a case-by-case basis and that no particular factor should be given disproportionate weight. In this respect, the SCC found that Honda's "flat-management structure" should not be a relevant factor in determining the length of notice. What matters are the factors set out in *Bardal* in determining the character of employment and therefore the appropriate notice period. The SCC found that, despite the error of the lower Courts in focusing on Honda's "flat management structure", the fifteen-month notice period was entitled to deference.

Having regard to the *Bardal* factors, the trial judge's finding of fifteen months of notice was reasonable in the circumstances.

The end of the Wallace “bump up”

Justice Bastarache next considered whether 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 exposed 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 dismissal 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 an extension of the notice period, the Court, relying on its 2006 decision in *Fidler v. Sun Life Assurance Co. of Canada*¹², held that compensatory damages arising from a breach of contract will be assessed by determining what was reasonably contemplated by the parties at the time the contract was entered into. In the employment context, particularly since *Wallace*, the Supreme Court of Canada found that there is an expectation by both the employer and employee that the employer will act in good faith in the manner of dismissal. This obligation of good faith is contemplated by the parties. Therefore, if the employer breaches this obligation through its conduct, there are foreseeable and compensable damages.

The SCC then considered the manner in which such damages are awarded, such as by lengthening the notice period, and stated:

¹² [2006] 2 S.C.R. 3.

...[N]o 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 other cases dealing with moral damages. Thus, 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.¹³

The Supreme Court of Canada essentially reformulated the test for awarding damages for bad faith dismissal. In order to succeed in a claim for such damages, the following principles are to be applied:

- Such damages are available only where the employer engaged in conduct during the course of dismissal that was unfair or was in bad faith.
- Such an award must be limited to compensatory damages and not be punitive.
- In order to be entitled to damages for bad faith, a plaintiff must demonstrate that mental distress damages were in the contemplation of the parties.
- Such damages should not be awarded through an arbitrary extension of the notice period. Rather, an award should reflect the actual damages that resulted from the employer's conduct.

The Supreme Court of Canada provided examples of conduct that would result in compensable damages. Such conduct includes 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 such as permanent status. In the circumstances of *Keays*, the Supreme Court of Canada found that Honda had not engaged in unfair or insensitive conduct

¹³ *Keays, supra* at paragraph 59.

in dismissing Keays that would justify an award of compensatory damages for bad faith termination. As a result, the Court set aside the award of nine months of additional notice previously awarded by way of “Wallace” damages.

Punitive Damages

The Supreme Court of Canada also revisited awards of punitive damages in wrongful dismissal cases. The Court reviewed its findings in *Vorvis* where it had held that punitive damages are recoverable provided the defendant’s conduct said to give rise to the claim is itself “an actionable wrong”.

The Supreme Court of Canada addressed the need to avoid duplication in damage awards, which it found had occurred in this case. The Court noted the distinction between compensatory damages for bad faith conduct and punitive damages. It held that while both sets of damages arise from the employer’s conduct, damages for conduct in the manner of dismissal are meant to be compensatory whereas punitive damages are to be restricted to wrongful acts that are “so malicious and outrageous that they are deserving of punishment on their own”¹⁴. Such acts or conduct must be harsh, vindictive, malicious and reprehensible. Further, in allocating punitive damages, courts must focus on the defendant’s misconduct, not on the plaintiff’s loss. Thus, the Supreme Court of Canada held that there are two requirements for awarding punitive damages. First, there must be an independent actionable wrong. Second, as held in *Vorvis*, the 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”¹⁵.

In this case, the Supreme Court of Canada found that the lower Courts’ award of punitive damages was based on Honda’s discriminatory conduct and resulting breach of the Ontario *Human Rights Code*¹⁶. The

¹⁴ *Keays, supra* paragraph 62.

¹⁵ *Keays, supra* at paragraph 68.

¹⁶ R.S.O. 1990, c. H.19 (“Code”).

Court of Appeal had also relied on Honda's refusal to deal with Keays's counsel as part of its reasons for justifying an award of punitive damages, albeit a reduced amount. The Supreme Court of Canada found, however, that Honda's conduct was not sufficiently egregious or outrageous to warrant rebuke from the courts. Further, as long as an employee and employer are in an employment relationship, the "parties are always entitled to deal with each other directly" and that there was no obligation on the part of Honda to deal with Keays's counsel.¹⁷

The majority judgment 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 he would not affirm whether a breach of the *Code* could amount to an independent actionable wrong on which an award of punitive damages could be based. However, later in the decision, he suggested that, even if Honda's conduct did amount to discriminatory behaviour under the *Code*, based on the SCC's decision in *Bhadauria*¹⁸, a breach of the *Code* cannot amount to an independent actionable wrong on which an award of punitive damages can be based.¹⁹ It is noteworthy that Justice Bastarache specifically referred to the recent *Code* amendments as reinforcing the view that a breach of the *Code* is not an independent wrong for the purposes of claiming punitive damages, as only compensatory damages can be awarded under that legislation.

The reformulation of "*Wallace*" damages by the Supreme Court of Canada will have significant ramifications going forward. For the past decade, plaintiffs have routinely claimed notice extensions due to alleged bad faith conduct by their employer at the time of dismissal. The requirement to prove actual damages will hopefully curtail such routine claims.

On the other hand, 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

¹⁷ *Keays, supra* at paragraph 77.

¹⁸ [1981] 2 S.C.R. 181.

¹⁹ *Keays, supra* at paragraph 64.

or her well-being. A plaintiff may also be awarded significant damages if he or she can establish that the conduct of the employer and/or its representatives caused injury to the plaintiff during the course of employment.

(ii) *Piresferreira v. Ayotte and Bell Mobility Inc.*²⁰

In a recent judgment, the Ontario Superior Court of Justice awarded more than \$500,000 in damages jointly against a supervisor and his employer, Bell Mobility, for intentional and negligent infliction of emotional distress, mental suffering and psycho-traumatic disability. The Court found that the plaintiff's supervisor engaged in abusive treatment which had caused the plaintiff to suffer post-traumatic stress and long-term depression that precluded the plaintiff from returning to any kind of employment. The Court also found that the employer was vicariously liable for all of the supervisor's conduct and the resulting injuries it caused the plaintiff. The Court further determined that the plaintiff was constructively dismissed and awarded damages representing 12 months of pay in lieu of notice of termination against Bell Mobility, with no deduction for long-term disability benefits received during the notice period.

(a) Background

The Plaintiff, Marta Piresferreira, commenced employment with Bell Mobility as an account manager. Commencing in 1997, Piresferreira's supervisor was Richard Ayotte. From 1996 to 2003, Piresferreira received excellent performance reviews, and received only minor criticism relating to paperwork and presentations. In 2004, Piresferreira encountered significant difficulties and missed a number of her sales objectives. The Court found that the problems impacting Piresferreira's achievements of her 2004 targets were caused by external circumstances that were beyond her control. Following Piresferreira's poor results in 2004, her supervisor, Ayotte became displeased with her. It was Ayotte's position that Piresferreira failed to implement his suggestions on improving her sales. By mid-2005, Piresferreira's sales results began to improve. Notwithstanding, Ayotte's negative treatment of Piresferreira continued.

²⁰ [2008] O.J. No. 5187 (S.C.J.) ("*Piresferreira*"), notice of appeal was filed with the Court of Appeal on January 9, 2009.

At trial, Ayotte described himself as a “hands-on manager”. He acknowledged that he used language that was “not the norm in the workplace”. He swore at people and said “Jesus Christ” a lot. If he wanted to get someone’s attention, he would raise his voice or yell at them. He also acknowledged that there were situations where he would have yelled at the team and would have yelled at individuals, including Piresferreira. He considered raising his voice an acceptable and effective strategy to get people motivated and to get them to do what he wanted.

While many employees endured Ayotte’s inappropriate behaviour, matters came to a head in the spring of 2005. During an argument on May 12, 2005, Ayotte assaulted Piresferreira. The events leading up to the incident were as follows. Ayotte arranged for technical staff from Research in Motion to come to Ottawa on May 12 and 13 to meet with Bell Mobility’s government clients who were having technical problems with their BlackBerry devices. Piresferreira attempted but was unable to secure the availability of one of her major clients at Industry Canada on the scheduled days. She advised Ayotte the morning of May 12, 2005. He became extremely angry with her. He yelled and swore at Piresferreira in front of the Senior Associate Director of Marketing, saying that she did not know what she was doing and that she was not doing her job. Piresferreira was very upset, apologized and left.

Later in the day, when Piresferreira returned to the office and was getting out of the elevator, she ran into Ayotte. Ayotte started yelling at her and saying that she was not doing her job. He also said something to the effect of “...you don’t know what the fuck you are talking about”. Piresferreira kept insisting that she had done everything that she could have in order to arrange the appointment. She wanted to show him an email on her BlackBerry to Industry Canada as proof of her attempts to contact the client. Ayotte kept walking, repeated that he was not interested and told Piresferreira to get away from him. He then stopped, turned around and glared at her. Piresferreira then held the BlackBerry out to Ayotte, which would have been a couple of feet away from him. Ayotte pushed Piresferreira on her left shoulder, telling her to get away from him. Piresferreira took a step back and balanced herself against a filing cabinet. Ayotte then proceeded to his office and sat at his desk. Piresferreira followed him to his office. From his door, she told him that he should not have done that. Ayotte told her “to get the hell out of his office” and that he had done nothing. Piresferreira was shaken, felt violated, collected her things and went home.

After the incident of May 12, 2005, Ayotte prepared a Performance Improvement Plan (“PIP”). The Court found that the PIP for Piresferreira was Ayotte’s strategy of warding off any complaint she may have considered making in regard to his conduct that day. The PIP required Piresferreira to take certain remedial steps regarding her work and meet with Ayotte on a daily basis to report on her progress, with the threat of “further disciplinary action up to and including dismissal”.

The next day, a Friday, Piresferreira honoured a pre-existing commitment to meet with a client to close a deal. After the meeting, she did not attend at the Bell Mobility office. She took the three days of the following week off. Throughout her time off, she remained in emotional stress. When she returned to work on Thursday, May 19, 2005, Ayotte acted as if nothing had happened and asked if she was ready to meet with him. He then presented her with the PIP and asked her to review and sign it. Piresferreira briefly looked through the document. She refused to sign it and left the office. She then formally complained to a Bell Mobility human resources representative about the events. The representative reported the complaint to Ayotte’s supervisor.

Piresferreira subsequently went on sick leave due to stress. She never returned to work. She was then contacted by letter from Bell Mobility, not to see how she was doing, but to advise that her complaint had been investigated, that Ayotte would receive a written disciplinary warning for his unacceptable behaviour and asked to attend two courses on effective communication and conflict resolution. She was also advised that the actions taken by Bell Mobility were the right response to the “gravity of the complaint” and that the case was considered closed.

The Court noted that at no time prior to Piresferreira’s commencement of her action did anyone from Bell Mobility human resources or management contact Piresferreira to obtain further information about the May 12, 2005 incident, to ask her how she was doing, to offer an apology, or discuss a possible return to work.

Piresferreira commenced an action against Bell Mobility in August 2005 and subsequently against Ayotte. In September 2005, Bell Mobility’s lawyer proposed options to have Piresferreira to return to work, and assist her and Ayotte in an effort to “work out their differences” so she could again report to him. As an alternative, Bell Mobility was prepared to have Piresferreira report directly to Ayotte’s superior. Ayotte continued in his

position until his retirement on September 30, 2006. On September 19, 2006, Piresferreira's lawyer responded to Bell Mobility and advised that Piresferreira would not return to work at Bell Mobility because, "by virtue of the assault and Bell's response to it, the work environment was a poisoned one" and in any event, "Piresferreira declined this form of accommodation because she did not feel capable of returning to work". When Piresferreira did not return to work, Bell Mobility took the position that she resigned effective September 19, 2006.²¹

(b) Superior Court of Justice

Following twelve days of hearing, on December 3, 2008, the Court released its 57-page decision. The trial judge found that Piresferreira had suffered assault and battery, intentional and negligent infliction of emotional distress, mental suffering, psycho-traumatic disability and constructive dismissal. The injuries and damages suffered were found to be as a result of Ayotte's conduct, for which Bell Mobility was found to be vicariously liable.

The trial judge found that there was no dispute that Ayotte had pushed Piresferreira and had intended to do so. Ayotte's claims of self-defence and provocation were entirely rejected. The trial judge found that Piresferreira was already vulnerable as a 60-year-old woman in a male-dominated workplace. The trial judge found the assault caused the chain of events leading to Piresferreira's disability. Ayotte was also found guilty of intentional infliction of emotional distress as his action of placing Piresferreira on a PIP after having assaulted her was "flagrant and outrageous". Bell Mobility was found vicariously liable for both of these torts.

The trial judge determined that Piresferreira suffered severe and prolonged mental injury and was awarded \$50,000 in general damages. However, this award was reduced to \$45,000 due to the contingency that Piresferreira may not have worked until retirement and may have suffered anxiety due to personal circumstances she experienced following her dismissal (including the death of close friends, minor medical problems and her partner's serious injury in a motor vehicle accident). Bell Mobility's failure to treat Piresferreira's claim seriously constituted a constructive

²¹ *Piresferreira, supra* at paragraph 102.

dismissal as it was not possible for her to return work. Based on the *Bardal* factors, the trial judge determined that twelve months was reasonable notice of termination in the circumstances.

The trial judge also awarded past and future loss of income based on Piresferreira's average annual salary of \$110,880 over the previous three years, for an award of \$500,924. This amount was reduced to \$450,832 for the same contingencies as applied to the general damages award. Piresferreira was also awarded special damages of \$5,122. The trial judge did not deduct long-term disability benefits Piresferreira received on the basis that "there is no reason why [the employer] should have the damage award it is obliged to pay to Piresferreira reduced because she had the misfortune of becoming disabled as a result of its treatment of her" and because the plaintiff had paid into these benefits.²² The Court also awarded Piresferreira's partner \$15,000 pursuant to the *Family Law Act*²³ as damages relating to the loss of guidance, care and companionship that she might reasonably have expected to receive from Piresferreira if she had not suffered at the hands of Ayotte and Bell Mobility. In total, the Court awarded \$500,955 in damages. Ayotte and Bell Mobility were found jointly and severally liable to pay the damages.

The Court refused, however, to award additional amounts representing moral, punitive and aggravated damages. The Court, relying on the Supreme Court of Canada's judgment in *Keays*, held that while Bell Mobility's breach of the employment contract may have entitled Piresferreira to moral damages in the amount of \$45,000, an award of such damages was already made against the employer in regard to assault, battery, and the intentional and negligent infliction of emotional distress and mental suffering. Regarding the claim of aggravated damages, the Court found that compensatory damages under this head were already dealt with under the claim for moral damages. On the issue of punitive damages, the Court found that Ayotte's conduct as Bell Mobility's representative was "harsh and vindictive and deserving of punishment". However, the behaviour of Bell Mobility's other representatives were not so egregious that it would have warranted punitive damages for breach of contract. In

²² *Piresferreira*, *supra* at paragraph 251.

²³ R.S.O. 1990, c. F.3.

any event, the Court found that the conduct of Bell Mobility and its representatives had resulted in “significant compensatory damages” against Bell Mobility and that no further punitive damages would be required.

Finally, the Court held that to award damages payable under both the “contract and tort claims would amount to double recovery...”. Accordingly, the Court found that no damages were payable under the wrongful dismissal claim since the plaintiff was already being compensated for the way she was dismissed under the tort claims.

Not surprisingly, Bell Mobility has filed an appeal of the trial judge’s decision.

CONCLUSION

The Supreme Court of Canada’s decision in *Keays* is a significant development in the law of wrongful dismissal damages. It 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 and there has been an independent actionable wrong. The Supreme Court of Canada’s decision has also clarified the circumstances and restricted the manner in which *Wallace* damages may be awarded.

As the recent decision of *Piresferreira* demonstrates, however, courts may not be reluctant to award significant damages in employment-related cases, particularly where a plaintiff is able to establish that his or her employer’s conduct and/or the conduct of its representatives caused the plaintiff losses and had a major effect on his or her well-being. It is anticipated that the appeal of *Piresferreira* will be followed as closely as *Keays* was over the last few years. Another significant issue which may emerge in the post *Keays* era is the extent to which plaintiffs will combine and assert both wrongful dismissal breach of contract claims with tort claims.