

Honda Canada v. Keays at the SCC: Re-thinking compensation for the manner of dismissal

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In a judgment handed down this summer, the Supreme Court of Canada (“SCC”) reformed the law as it pertains to “Wallace” damages. “Wallace” damages stemmed from a 1997 SCC decision, *Wallace v. United Grain Growers* (“Wallace”), which held that employees could be awarded additional damages based on the manner in which the dismissal was effected by the employer. The Court in *Wallace* indicated that an employer’s bad faith at the time of dismissal could be compensated by way of an extension of the notice period.



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This culminated in one of the highest ever awards for “Wallace” damages and punitive damages in relation to the manner of dismissal in *Honda Canada v. Keays* (Ontario, 2005). Keays was a 14-year employee of Honda Canada who developed Chronic Fatigue Syndrome. As part of Honda Canada’s disability program, Keays was required to produce medical documentation to explain his absences. When Keays refused to meet with an occupational medical specialist in order to determine how his medical condition could be accommodated, his employment was terminated.

At trial, in addition to an award of 15 months of notice, Keays was awarded an additional 9 months for “Wallace” damages, as well as \$500,000 in punitive damages. The Ontario Court of Appeal upheld the “Wallace” damages but reduced the award of punitive damages to \$100,000.

When *Honda Canada v. Keays*, 2008 SCC 39, reached the SCC, both the award for “Wallace” damages and the award for punitive damages were set aside. The majority held that aggravated damages will only be ordered where employees have proven that they have suffered actual compensable mental distress arising from the bad faith manner of dismissal. The majority also confirmed that punitive damages were only to be awarded in exceptional cases. The two dissenting judges would have upheld the award for aggravated “Wallace” damages on the basis that Honda Canada’s actions were discriminatory and undertaken in bad faith.

Justice Bastarache, for the majority, held that aggravated “Wallace” damages attributable to the manner of dismissal are no longer to be awarded as an extension of the notice period. He held that if an employee can prove that the bad faith manner of dismissal caused mental distress, aggravated damages should be awarded so as to reflect the employee’s actual damages. Justice Bastarache gave several examples of conduct that might result in compensable damages: 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.

The majority underscored that punitive damages for bad faith dismissal will only be available in the case of wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. Where aggravated damages are awarded, courts must also be cautious not to duplicate the denunciation, deterrence, and retribution aspects of those awards in further awarding punitive damages. The majority held that discriminatory conduct did not amount to an actionable wrong that could lead to an award of punitive damages.

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The decision in *Honda Canada v. Keays* will likely lead to few awards of aggravated or punitive damages in relation to the bad faith manner of dismissal. However, the impact of the decision on employee claims is not all restrictive. Where an award of compensable damages is in fact warranted, the focus on actual proven damages may mean that some of these awards will result in a higher monetary award than would have resulted from an award of some months of additional notice. If the employee's proven mental distress is of a serious and longstanding nature, compensation for this distress might exceed the former "Wallace" damages.

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