

# Current Workplace Issues

## Court Awards \$500,000 in Punitive Damages to Wrongfully Dismissed Employee

### KATHRYN HORDIENKO

In the recent ground-breaking decision of *Keays v. Honda Canada Inc.*, the Ontario Superior Court of Justice awarded a wrongfully dismissed employee 15 months pay in lieu of notice, nine months pay in lieu of notice for additional *Wallace* damages, and \$500,000 for punitive damages. This is the largest punitive damages award in Canadian employment law.

#### Facts

Mr. Keays was employed by Honda for 14 years and during that time he was diagnosed with Chronic Fatigue Syndrome ("CFS"). Due to his illness, Mr. Keays went on short-term and long-term disability leave. Eventually, the insurer terminated his benefits and Mr. Keays was forced to return to work, where he continued to experience frequent absences. Honda attempted to accommodate Mr. Keays by assigning him to a program that recognized his absences as non-disciplinary in nature and required him to provide medical notes for each absence. When Mr. Keays' absences were higher than expected, Honda asked that Mr. Keays be examined by the company physician. The physician then threatened to return Mr. Keays to his regular position. Mr. Keays retained legal counsel to address his concerns, and was consequently removed from the accommodation program and ordered to visit another specialist to examine his medical condition. Mr. Keays refused to see the other specialist without knowing details of the examination. As a result, Honda dismissed him for insubordination.

#### Cause for Dismissal

The Court held that Mr. Keays' conduct was not insubordinate and that he had been wrongfully dismissed. In light of the fact that Mr. Keays' file clearly indicated that he had CFS, the Court held that Honda's direction to attend a specialist was unreasonable and not done in good faith. The request was made as a prelude to his termination and Mr. Keays' refusal to attend the examination was justified as a result of the "constellation of abusive circumstances" created by Honda. According to the Court, Mr. Keays "wanted nothing more than to have that relationship maintained with an appropriate accommodation of his disability."

#### Wallace Damages

In addition to the 15 months pay awarded to Mr. Keays for his 14 years of employment at Honda, the Court awarded an extraordinary 9 months pay in lieu of notice for bad faith dismissal sufficient to justify an increased notice period. This award was based on the Supreme Court of Canada decision in *Wallace v. United Grain Growers Ltd.*

The Court specifically noted that Honda's order for Mr. Keays to meet with its

2000, 10235 - 101 STREET  
EDMONTON, AB T5J 3G1  
PH: 780.423.3003

400 THE LOUGHEED BUILDING  
604 1 STREET SW  
CALGARY, AB T2P 1M7  
PH: 403.260.8500

201, 5120 - 49TH STREET  
YELLOWKNIFE, NT X1A 1P8  
PH: 867.920.4542

www.fieldlaw.com

specialist was "callous and insensitive." As a result of Honda's conduct as a whole, Mr. Keays became depressed and was unable to continue working post-termination. The Court went on to note that its physician had already determined that Mr. Keays was malingering and that the cure for CFA was a return to work, drawing into question whether the meeting was scheduled in good faith. The unilateral removal of Mr. Keays from the special accommodation program upon him having retained legal counsel was further evidence of the "egregious bad faith" exercised in the manner of his termination.

### **Punitive Damages**

The Court concluded that this case fell into the category of an "independent actionable wrong", amounting to conduct so egregious that it merited punishing Honda with an award of \$500,000 in punitive damages.

The Court held that the treatment of Mr. Keays amounted to discrimination and harassment. It noted that the fact that Mr. Keays "did not carry a white cane, use a hearing aid, or get around in a wheelchair, did not make him any less deserving of workplace recognition of his debilitating condition." The Court went on to state that Mr. Keays was forced to earn accommodation, which was reluctantly provided by Honda throughout the years, requiring an abundance of medical documentation that was not requested of non-disabled employees. This was deemed to be an "assault on his personal dignity".

### **Conclusion**

This strongly-worded decision is being appealed by Honda. However, pending any possible future reconsideration of the decision, employers must be wary of the consequences that this case may have upon them. This case re-emphasizes the need for employers to tread carefully with respect to disabled employees, and to be cautious of any conduct which may be viewed as retaliatory or punitive in nature, in accordance with human rights legislation. All policies relating to medical information being required by employees to substantiate absences, particularly when dealing with a long-standing illness or disability, must be re-evaluated to ensure that such a requirement is not overly onerous on disabled employees. This case should serve as a reminder that absences of disabled employees may be justified in light of clear medical documentation substantiating their ailment, and that employers should think twice about terminating an employee on the basis of his or

her refusal to attend an employer-ordered independent medical assessment.

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The Labour and Employment Group  
Edmonton 780-423-3003  
Calgary 403-260-8500

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