

# You Raise the Issue

**LEAH FITZGERALD**

**Question: I keep reading about these huge damages awarded in wrongful dismissal actions in the United States. How is that reflected, or not, in Canada?**

**Answer**

In Canada, damages that can be awarded in wrongful dismissal suits, (in addition to whatever the Court decides what the reasonable notice period *should* have been), also include *Wallace* damages and punitive damages.

**Wallace damages**

Wallace damages are related to an employer’s misconduct at the time of termination, (called “Wallace damages” after the 1997 Supreme Court of Canada case which established them), because employers have an obligation of good faith and fair dealing regarding the manner in which they dismiss employees and in their conduct prior, and subsequent to, a termination.

*Wallace* damages are meant to compensate the employee, not punish the employer. They tend to extend the notice period required to terminate the employee

**Punitive Damages**

The objective of punitive damages is to punish the employer, not compensate the employee. It requires that the employer’s conduct must also constitute an independent actionable wrong, (in addition to wrongful dismissal), before a court will go into a determination as to whether the employer’s conduct was sufficiently reprehensible to warrant such punishment.

**The Latest Word**

Most recently, the Ontario Court of Appeal, in *Keays v. Honda Canada Inc.*, [2006] O.J. No. 3891 (C.A.)(QL), confirmed the trial court’s award of an extra nine months notice for Wallace damages, (in addition to the 15 months reasonable notice the court found Keays was entitled to), for the employer’s bad faith prior and during termination.

However, the majority of the Court of Appeal reduced the \$500,000 in punitive damages awarded at trial to \$100,000, holding that punitive damage awards are generally, [*in Canada*], far more modest, and that awards of \$500,000 can only be justified by extraordinary circumstances.

Keays was considered an exemplary employee for his first 10 years with Honda, then his attendance began to suffer due to chronic fatigue syndrome. Honda first disciplined him for those absences, then required him to produce a doctor’s note each time he was absent, with the doctor estimating how often he would be absent. When Keays began to be absent more frequently than the doctor’s estimates, Honda demanded he see a company physician, then a



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second company physician. Keays refused the second request unless the parameters of medical assessment were clearly stated, and Honda terminated him for insubordination..

The Court confirmed that discrimination in the work environment, if combined with a civil action for wrongful dismissal, for instance, is actionable in the court system, not just the human rights tribunal context, (where damages can be significantly less due to statutory limits on awards).

Therefore, unless an employer's behaviour is extraordinary horrendous and amounts to a separate actionable wrong (such as discrimination), it appears that, in Canada at least, we won't be reaching those huge damage awards given in the United States anytime soon. On the other hand, salary in lieu of notice for 24 months work and \$100,000 is still a lot of money, so care is required and highly advised.

If you have any concerns about an employee, or a manager's behaviour towards employees, in a possible termination/dismissal context, we suggest that you contact your lawyer as soon as possible.

**DISCLAIMER** this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

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