

Wrongful Dismissal Update –  
2008 Decisions of the Supreme Court of Canada

**Part IV – Wrongful Dismissal: Punitive and Bad Faith Damages Scaled Back Dramatically: Keays v. Honda**

By Kenneth Krupat

In 2008, the fourth decision of the Supreme Court of Canada (as reviewed in this series of articles) was the most widely anticipated decision. Many employment lawyers and commentators were predicting that the Supreme Court would issue a wide ranging decision that would expand the availability of punitive damages for dismissed employees. Contrary to the expectations of many, the decision scaled back dismissal damages, changed the nature of “bad faith claims” and focused on the particular facts of the case that was before the Supreme Court.

Keays had worked for Honda for 11 years before being diagnosed with Chronic Fatigue Syndrome. He was off work for a period of time on disability benefits and then returned. He continued to require frequent absences from work. Honda followed up by asking Keays to meet with its own medical specialist. Keays refused because Honda would not provide an explanation of the specialist’s purpose, methodology and parameters of the intended meeting. Keays was worried that Honda was simply trying to use its own favoured doctor to assist Honda to force Keays back to work without a proper detailed review or understanding of the circumstances. After Keays continued to refuse to meet with Honda’s specialist, he was dismissed by Honda.

At trial, Keays was awarded 15 months pay for wrongful dismissal. The Trial Court also held that Honda had committed acts of discrimination, harassment and misconduct. It increased the notice period to 24 months and awarded punitive damages of \$500,000, which would have set a new standard in Canadian employment law decisions. The Court of Appeal of Ontario reduced the punitive damages awarded to \$100,000. Honda appealed to the Supreme Court of Canada.

In a 7-2 decision, the Supreme Court of Canada eliminated the bad faith damages and the punitive damages that had been awarded to Keays. It upheld a finding that Keays had been wrongfully dismissed and was entitled to 15 months’ compensation. However, it eliminated all other damages that Keays had been awarded at the Trial Court level.

The *Keays v. Honda* decision is very significant because it has redefined the damages that are available to dismissed employees. Since the Supreme Court of Canada’s decision in *Wallace v. United Grain Growers* in 1997, Canadian Courts have been awarding damages for bad faith conduct by employers in wrongful dismissal situations. Courts have awarded these damages by

extending the notice period to which employees are entitled – where employees are treated in a bad faith manner. In *Keays v. Honda*, the Supreme Court has changed *Wallace* and has redefined when damages will be available.

The first noteworthy point is that the Supreme Court of Canada extensively reviewed the facts of the case. Although the Supreme Court has stated on numerous occasions that its job is not to review factual details of cases, *Keays v. Honda* is very much a decision in which the Supreme Court scrutinizes almost all of the factual findings made by the Trial Court and proceeds to reverse the Trial Court's findings and conclusions. The Supreme Court defines the Trial Court's findings as "palpable and overriding." In using this wording, the Supreme Court cloaks itself with the judicial prerogative to make entirely different factual conclusions than those made by the Trial Court.

Essentially, the Supreme Court took a very different view of the manner in which Honda had treated Keays. It held that none of the "four foundations" for bad faith damages as held by the Trial Judge were valid. The Supreme Court went through its interpretation of the facts in detail. It concluded that Honda was trying to rely on expert advice and was not being "callous" or insensitive. It rejected the Trial Judge's conclusion that Honda had set Keays up for failure or that Honda was taking a "hardball" approach. It also rejected the Trial Court's conclusions that Honda had decided to stop accepting medical notes from Keays as a reprisal against Keays for seeking legal advice. Finally, the Supreme Court rejected the notion that Keays' disability after dismissal was caused by the manner of his termination.

Once the Supreme Court came to such a dramatic reversal of the factual findings and conclusions of the Trial Court, Keays' legal case had been eviscerated. With the Supreme Court's factual findings that Honda had acted appropriately, there was no remaining basis for considering or discussing bad faith or punitive damages. Even so, the Supreme Court proceeds to analyze these types of damages and makes pronouncements that are intended to apply to future cases.

The Supreme Court makes a number of points:

- ◆ Damages for mental distress should only be awarded where they were contemplated by the parties at the time the contract started. In most cases, employees expect to be dismissed eventually, so mental distress damages for hurt feelings should not be awarded simply because the employees have been dismissed.
- ◆ Employers still have an obligation of good faith and fair dealing in the manner they dismiss employees. If employers breach this duty, then employees are entitled to damages – as long as they can prove that they have suffered actual damages. According to the Supreme Court,

employees are no longer entitled to an extension of their notice period simply because of this type of bad faith treatment.

- ◆ Punitive damages are only to be awarded where the acts by the employer are “so malicious and outrageous that they are deserving of punishment on their own.” Breach of the *Human Rights Code*, for example, is not sufficient on its own to warrant an award of punitive damages.

The crux of *Keays v. Honda* is spelled out by Justice Bastarache who accepts that the need of employers to “monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of the workforce.”

The majority decision of the Supreme Court is devoid of any language that is empathetic to employees. Much like the Supreme Court’s other 2008 decisions in *RBC* and *Hydro-Quebec*, the majority focus is on the need for employers to be able to run their businesses efficiently. The Supreme Court in *Keays v. Honda* makes it dramatically more difficult for dismissed employees to obtain damages for bad faith – and even more difficult to ever obtain punitive damages.

Justice Lebel delivers a partial dissent to the reasons of Justice Bastarache. Surprisingly, Justice Abella sides with the majority even though she was the lone dissenting voice in both *Evans* and *RBC*. Only Justice Fish supports Lebel in the dissenting view.

Justice Lebel concludes that the extended damages that had been awarded to Keays at the Trial Court level should have been upheld. Justice Lebel notes that the trial in this case lasted 30 days. The Trial Court heard extensive evidence and was best positioned to make factual findings and conclusions. Justice Lebel disagrees that the Supreme Court should overturn so many findings of fact that were “generally supported by the evidence.”

The most significant gap between the majority and the minority decisions in *Keays v. Honda* is the extent to which the judges are prepared to review and wholly revise factual findings and conclusions. Since Bastarache and Lebel come to such contrasting views of the factual background, it is not surprising that they have completely different approaches to the applicable law afterwards.

The minority agrees with the majority’s approach to redefining bad faith damages. However, the minority would have upheld the damages for bad faith that were awarded by the Trial Judge on the basis of Honda’s conduct and the harm it caused to Keays. The minority would have also left the door open for litigants to argue that breaches of human rights legislation can lead to awards of extended damages.

### **Conclusion – Effect of *Keays v. Honda* Yet to be Determined**

The full effect of *Keays v. Honda* remains to be determined. The Supreme Court has dramatically altered the existing landscape. Courts should no longer award simple notice period extensions as a result of breach of the duty of good faith. But damages for breach of good faith are still available. In fact, it is arguable that the amount of damages that can now be awarded for breach of the duty of good faith may be much higher than the amounts that were previously being awarded. However, to get these damages, dismissed employees will have to have evidence to show that they have suffered losses as a result of their former employer's actions.

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