

Supreme Court of Canada decision in *Honda v. Keays*

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Facts:

Keays was a 14 year employee of Honda when he was terminated. Keays started on the production line, but had moved up to the Quality Engineering Department. Keays was diagnosed with Chronic Fatigue Syndrome in 1997. He was off on disability from 1996 until December 1998. In 1998, his LTD insurance provider decided that he was fit to return to work and discontinued benefits. Keays went back to work but had absentee problems within a month of his return. He was “coached” by way of written report in August 1999. “Coaching” is the first step in Honda’s disciplinary process. During this “coach” Keays was placed under Honda’s “Disability Program.” This program permitted employees who would otherwise have been disciplined under Honda’s “Attendance Management Program” to take absences if they presented a doctor’s note that the absence was related to the disability. Honda asked Keays to meet with Dr. Afoo. Dr. Afoo allegedly “threatened” to send Keays back to the production line.

The Supreme Court found that Keays missed more work than his diagnosing physician had predicted, and the doctor’s notes “changed in tone.” Basically, the notes began to read “Kevin tells me that he missed work yesterday due to his CFS.”

In early 2000, due to ongoing increased absences, Honda asked Keays to meet with Dr. Brennan, an occupational medicine specialist, to see about accommodation. Keays obtained counsel, thinking that he’d ultimately be terminated. Honda again met with Keays to again discuss a meeting with Dr. Brennan. After advice from his counsel, Keays refused to meet with the doctor without clarification as to the purpose of the meeting. Keays was subsequently absent from work for a week. Upon his return, Honda presented him with a letter noting that the situation was unacceptable and should he choose not to meet with the doctor, he would be terminated. Later that day, Honda phoned Keays to discuss the letter. Keays refused to see the doctor and was thus terminated.

Decisions Below:

Ontario Superior Court of Justice

Justice McIsaac found that Keays had been wrongfully dismissed. He found that Honda had failed to show just cause for termination. The Court found that Keays was not refusing Honda’s attempt to accommodate, rather, that “he was only ‘balking’ at the accommodation avenue that Honda was attempting to impose” (para 18). McIsaac found further that Keays had a “history of mistreatment in relation to his CFS,” he’d been “hounded over his absences,” Honda’s accommodation program was discriminatory and that, given this “constellation of abusive circumstances,” Keays had a reasonable excuse for not wanting to go see Dr. Brennan. McIsaac found that the termination was disproportional to Keays’ “alleged insubordination.”

Mclsaac awarded 15 months' notice, but increased it to 24 months given the "egregious bad faith displayed by Honda in the manner of this termination and the medical consequences flowing therefrom."

Mclsaac found that he was without jurisdiction to consider the plaintiff's argument that the Courts should have jurisdiction to consider "discrimination" outside of the OHRC, effectively, that Mclsaac should consider Bhadauria outdated.

The Court also awarded \$500,000 in punitive damages. Mclsaac found that Honda's conduct amounted to discrimination and harassment, and that this constituted an independent actionable wrong. He found Honda's actions to be "outrageous and high handed."

Ontario Court of Appeal

The Court of Appeal upheld Mclsaac's decision with respect to unjust dismissal. The Court found that Keays was justified in declining to meet with Dr. Brennan and that termination was disproportionate to his actions. The Court also found that the award of 15 months' notice and the Wallace extension were reasonable.

The Court of Appeal also upheld the trial judge's finding that Honda's treatment amounted to discrimination and harassment and finds that it was open to the trial judge to award punitive damages but reduced the quantum to \$100,000. The Court of Appeal discounted some of Mclsaac's "erroneous findings of fact" such as "corporate conspiracy," or Honda's "outrageous conduct after March 2000." Further, the Court found that Honda's "conduct cannot fairly be described as malicious."

Supreme Court of Canada

Issues:

1. What factors should be considered when allocating compensatory damages in lieu of notice for wrongful dismissal?
2. A review of the basis for and calculation of damages for conduct in dismissal.
3. Should "discrimination" be an independently actionable tort?

General Damages: The 15-Month Notice Period

Honda did not appeal the finding of wrongful dismissal. Rather, they argued that the 15-month notice period was excessive and that the trial judge failed to conduct proper analysis of Keays' job functions; such as the fact that his job consisted primarily of data entry, Keays' little formal education and the fact that he had no management function.

The trial judge relied on:

Bardal and Minott v. O'Shanter Development Co.(1999), 168 D.L.R. (4th) 270 (Ont. C.A.), at p. 293, wherein it was held that an appropriate notice period is to be determined in consideration of factors including, but not limited to, the character of the employment, length of service, the age of the employee and the availability of other employment.

The Court found that no one *Bardal* factor should be given disproportionate weight.

Although the Court found that Mclsaac erred in not considering Keays' actual functions, they upheld the 15 months.

Damages for Conduct in Dismissal

The Court found that “in no way [was Honda’s conduct] an egregious display of bad faith justifying an award of damages for conduct in dismissal.” The Court found specifically that it was time to reconsider the *Wallace* approach given that McIsaac had justified the award based on “overriding and palpable factual errors.” The Court disagreed with all four foundations upon which McIsaac had based the *Wallace* award.

The Court examined the current state of the law with respect to damages for wrongful dismissal. The law stems from an implied obligation in the employment contract to give reasonable notice in the absence of just cause. In *Vorvis v. Insurance Corp. of British Columbia*, the Supreme Court found that in cases of wrongful dismissal, aggravated damages could be awarded where “the acts complained of were also independently actionable” .

Wallace interpreted *Vorvis* strictly; finding that, “absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence.”

The Supreme Court found in *Fidler* , however, that an independently actionable wrong was no longer required. Rather, the Court returned to *Hadley v. Baxendale*. “Thus, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover (para. 42 *Fidler*; p. 1102 of *Vorvis*).”

We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: “what did the contract promise?” The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.

Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.” (para. 98)

The Court went on to conclude:

To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between “true aggravated damages” resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no 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 all 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. Examples of conduct in dismissal resulting in compensable damages are 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, permanent status for instance (see also the examples in *Wallace*, at paras 99-100).

In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case.

The Court reversed the trial judge's finding of Honda's bad faith and therefore found that damages for conduct in dismissal were not justified.

Punitive Damages

Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.

The Supreme Court upheld its decision in *Bhadauria* that a breach of the *Human Rights Code*, such as discrimination, cannot constitute an actionable wrong. The Court disagreed with the trial judge's finding that the doctor's note requirement was discriminatory since other employees with "mainstream illnesses" (such as colds, flus, etc...) were not required to bring in notes from their doctor before returning to work. The Supreme Court found that the doctor's note requirement was meant to accommodate those persons with disabilities in order to provide them with a benefit.

The Supreme Court also found that Honda's conduct did not merit punitive damages since it did not amount to "harsh, vindictive, reprehensible and malicious" nor was it "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" as required by *Vorvis*.

The Cost Premium

The cost premium was set aside.

Dissent

Justices Lebel and Fish stressed that any review of the categories for dismissal should keep in mind the power imbalance inherent in employment contracts, recognizing that they should be terminated fairly and in good faith. They agreed with the majority that the punitive damages award overlapped with the "Wallace damages" award and was unfounded. However, they would have upheld the damages for manner of dismissal (formerly "Wallace damages"). They thought there was sufficient grounds for the trial judge to find discrimination and harassment.

With respect to the reformulation of "Wallace damages" the judges in dissent found that where an employer failed in its duty to be "candid, reasonable, honest and forthright with their employees," as required by *Wallace*, it would be foreseeable that a dismissal would cause mental distress, therefore justifying compensatory damages. They went on to find that Honda's bad faith conduct in the dismissal would have warranted a damages award.

Further, they found that Honda's treatment was discriminatory and that accommodation should be done on a case-by-case basis. They found that in Keays' situation, the doctors' notes requirement was discriminatory rather than accommodative.

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