



June 27, 2008

Supreme Court of Canada Issues Landmark Employment Law Decision in *Keays v. Honda Canada Inc.*

On June 27, 2008, the Supreme Court of Canada (“SCC”) released its decision in *Keays v. Honda Canada Inc.* and overturned the decision of the Ontario Court of Appeal and narrowed the scope of *Wallace* damages for the “bad faith” manner of dismissal.

This decision arises from a decision of the Ontario Superior Court of Justice which awarded \$500,000 in punitive damages to a dismissed employee in addition to 24 months salary in lieu of notice. The Ontario Court of Appeal subsequently reduced the punitive damage award to \$100,000, but maintained the 24 months’ reasonable notice (which comprised of 15 months’ reasonable notice plus nine months’ additional notice for “bad faith” dismissal, known as *Wallace* damages).

The SCC set aside both the punitive damage award and the additional nine months notice awarded for the bad faith manner of dismissal.

Background Facts

Mr. Keays was dismissed by Honda Canada Inc. (“Honda”) in March 2000 after 14 years of service with the Company. Shortly after he began employment Mr. Keays started to experience health problems that impacted his ability to attend at work on a regular basis. He was ultimately diagnosed as having chronic fatigue syndrome.

After an extended period of accommodation, Honda required Mr. Keays to see one of Honda’s doctors. Mr. Keays had a negative encounter with Honda’s doctor and refused to meet with the doctor again without receiving clarification from Honda as to the purpose of the meeting and parameters of the medical assessment. Honda refused to provide the requested parameters and dismissed Mr. Keays for insubordination for disobeying its direction to be assessed by the doctor.

Wallace Damages

The SCC overturned the lower courts award of nine months extended notice for *Wallace* damages on the basis that the trial record showed that Honda’s conduct was “in no way an egregious display of bad faith justifying an award of damages for conduct in dismissal.” The



SCC held that the following did not constitute bad faith: (i) requiring an employee to see a company physician after an extended period of accommodation; (ii) the employer's reliance on the doctor's assessment even if the doctor had a "hardball" approach to workplace accommodation issues; (iii) an employer's refusal to deal with a employee's lawyer while the employee was still employed by the company; and (iv) the employee's medical condition deteriorating subsequent to termination without evidence that the disability was caused by the manner of termination.

The SCC engaged in a review of the concept of *Wallace* damages and held that these damages should not be awarded in the ordinary circumstances of dismissal nor should judges arbitrarily increase notice periods when awarding *Wallace* damages. Rather, *Wallace* damages are only available where the employee "can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties" and that *Wallace* 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 of dismissal resulting in additional damages for the bad faith manner of dismissal include:

- ▶ Attacking the employee's reputation by declarations made at the time of dismissal;
- ▶ Misrepresentation regarding the reason for the decision to dismiss the employee;
- ▶ Dismissals meant to deprive the employee of a pension benefit or other right;
- ▶ Wrongfully accusing an employee of theft;
- ▶ Reassuring an employee about their job security while simultaneously contemplating the employees' termination;
- ▶ Firing an employee upon return from disability leave; and
- ▶ Advertising the employee's position prior to advising the employee that he/she is terminated.

As a result, employees claiming *Wallace* damages will have to prove an actual loss as a result of the employer's conduct opposed to the court arbitrarily selecting an increased notice period. In addition, the SCC reiterated that "the normal distress and hurt feelings resulting from dismissal are not compensable". Rather, the conduct of the employer at the time of dismissal must be particularly egregious to justify awarding additional damages for the bad faith manner of dismissal.

Punitive Damages

Punitive damages are additional damages designed to deter and denounce particularly egregious conduct. In the wrongful dismissal context they are only recoverable where the employer's



conduct gives rise to an independent “actionable wrong”. This means that there must be an independent legal claim, in addition to the termination of employment, to justify an award of punitive damages.

The lower courts held that discriminatory behaviour that violates the Ontario *Human Rights Code* constituted an independent actionable wrong. The SCC overturned the punitive damages decision holding that a breach of human rights legislation cannot serve as an independent actionable wrong. Further, the SCC confirmed that human rights claims are to be dealt with by human rights tribunals, not by the courts.

If you would like more information on the issues discussed in this briefing please contact any member of the Labour and Employment Group listed below.

**Members of the Labour and Employment Group
(in alphabetical order)**

Vancouver

Deborah L. Cushing	604.631.9282	dcushing@lawsonlundell.com
Nicholas P. Ellegood	604.631.6706	nellegood@lawsonlundell.com
Patricia Gallivan, Q.C.	604.631.6718	pgallivan@lawsonlundell.com
M.J. (Peggy) O’Brien	604.631.9201	pobrien@lawsonlundell.com
Walter G. Rilkoﬀ	604.631.6719	wrilkoﬀ@lawsonlundell.com
Melanie C. Samuels	604.631.9107	msamuels@lawsonlundell.com
Robert A. Sider	604.631.6722	rsider@lawsonlundell.com
Nicole K. Skuggedal	604.631.6795	nskuggedal@lawsonlundell.com

Calgary

Krista L. Hughes	403.781.9468	khughes@lawsonlundell.com
------------------	--------------	--

Yellowknife

Paul N.K. Smith	867.669.5532	psmith@lawsonlundell.com
-----------------	--------------	--

© 2008, Lawson Lundell LLP. All rights reserved. This brief is provided for general information purposes only and should not be relied on as legal advice or opinion. For more information please contact one of our Labour & Employment lawyers listed above. To be removed from this mailing list please contact our Marketing Manager at genmail@lawsonlundell.com or 604.685.3456.