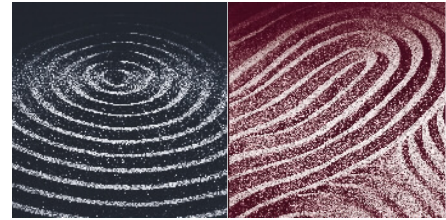


MILLER THOMSON LLP

Barristers & Solicitors
Patent & Trade-Mark Agents

Scotia Plaza
40 King St. West, Suite
5800
P.O. Box 1011
Toronto, ON Canada
M5H 3S1
Tel. 416.595.8500
Fax. 416.595.8695
www.millerthomson.com



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What Happens After the Trial...

Stuart Rudner

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What happens after the trial...

Damages aren't the only thing employers need to worry about. Opponent's legal costs can also be punishing, as Honda found out to the tune of \$610,000

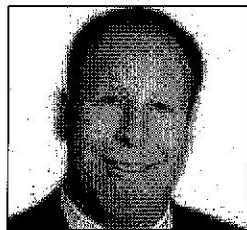
Last year's court decision in *Keays v. Honda Canada Inc.* made headlines due to the extensive damages awarded to Kevin Keays, who suffered from chronic fatigue syndrome. Keays, who was found to have been wrongfully dismissed, was awarded 24 months' notice, plus an additional \$500,000 in punitive damages.

The punitive portion dwarfs any previous award of this type in a wrongful dismissal claim. Although this decision has met with some skepticism, it certainly came to the attention of HR professionals across the country.

Having decided upon the issue of liability, and the amount of damages, the only task left for the trial judge was to determine the issue of costs. Last month, the judge rendered his decision and, once again, Honda was hit hard. It was ordered to pay \$610,000 in costs to Keays.

The release of the costs decision in *Keays* provides a useful opportunity to review what happens in litigation after the trial. It is an element of litigation that is often ignored. At the early stages of litigation, parties are so far from trial that they focus on gathering evidence and, in most cases, considering settlement. If they actually get to trial, the parties are focused on winning; they live and breathe the trial for as long as it lasts. Then, of course, the trial reaches its conclusion and there is often a real letdown. Unlike the courtroom dramas on television, judgment is typically not rendered immediately. Instead, the trial is usually followed by a period of several months of waiting, not knowing when the verdict will be delivered.

In most cases the judge will not even reconvene the parties to render a decision. Instead, it is faxed to their lawyers. This first portion of the de-



LEGAL VIEW

STUART RUDNER

cision will typically address liability and damages. It will not usually refer to costs, as this is something the parties must make submissions on once they know the outcome of the action. Although the parties already know who "won" by the time they make submissions on costs, they should not downplay the importance of this step. As we see from *Keays*, costs awards can be substantial.

The general rule is the winning party is entitled to reimbursement for legal costs. Legal costs include fees paid to lawyers, disbursements and, of course, GST. However, the manner in which this actually plays out can vary significantly.

Two levels of cost recovery

In Ontario, there are two "levels" of cost recovery: partial indemnity and substantial indemnity, known as "party and party costs" and "solicitor and client costs," respectively. There is no "complete indemnity" — you will never recover all of your costs.

The default is partial indemnity, which is usually about 50 per cent of the actual costs. Substantial indemnity costs can be awarded where the court feels one party should be ordered, for whatever reason, to reimburse the other for a larger portion of their costs than usual. This can occur

where a party was unreasonably difficult during the course of litigation or took steps that added unnecessarily to the time and cost of litigation.

Offers to settle

Offers to settle can play a very important part in the costs award. Not surprisingly, the Rules of Civil Procedure have been drafted to encourage early settlement of litigation. As a result, there is a "penalty" built into the rules for parties who turn down offers and then achieve a lesser result at trial. For example: the plaintiff offers to accept \$50,000 to settle its claim, but the defendant does not accept. At trial, the plaintiff obtains judgment for \$60,000; the plaintiff has "beaten" its offer, and the defendant would have been better off accepting it. As a result, the defendant is likely to be on the hook for substantial indemnity costs, at least from the time the offer was made.

In some cases, it is possible for the parties to agree on the amount without going before a judge. In fact, sometimes they will reach an agreement on costs before the decision on liability and damages is even rendered. For example, they might agree that whichever party wins will be entitled to a certain amount in costs from the other.

If no agreement can be reached, submissions must be made to the trial judge. This can be done by reconvening all the parties in the courtroom or in writing. Each judge has her own preference in this regard.

Judge very critical of Honda's actions

In rendering the costs portion of his decision in *Keays*, Justice John McIsaac did not miss the opportunity to confirm his disdain for Honda's conduct, referring to its behaviour as outrageous, high-handed and ex-

remely egregious. Justice McIsaac considered:

- the outstanding success enjoyed by Keays in the litigation;
- an undisclosed settlement offer from Honda, which the court called "insulting";
- the complexity of the issues; and
- the reprehensible conduct of Honda toward a "decent and dedicated employee whose only 'fault' was his disability."

The judge also referred to Honda's refusal to deal directly with Keays' lawyer during the course of events leading to termination, deeming it an "extremely aggravating circumstance in a society that places importance on the rule of law," and commenting that "it is shocking to see such a degree of intransigence on the part of a corporation of Honda's worldwide stature."

The costs reflected 29 days of trial and Justice McIsaac awarded costs at the substantial indemnity level. He also acceded to the request of Keays' counsel for a premium.

Awarding a premium: David and Goliath

A premium is something that is awarded in fairly limited circumstances. In this case, it was awarded due to the outstanding result achieved, as well as the "risk" taken on by Keays' counsel due to the fact he could not afford to pay his legal fees during the course of litigation; Keays' lawyers may not have been paid if he lost. Justice McIsaac referred to the litigation as a "classic case of David and Goliath where the 'little guy' won against all odds."

Keays sought \$575,000 in costs, plus a 25-per-cent premium. Justice McIsaac awarded a total of \$610,000, including disbursements and GST. However, the battle is not over yet. The decision is under appeal.

Stuart Rudner practices commercial litigation and employment law with Miller Thomson LLP's Toronto office. He can be reached at (416) 595-8672 or by e-mail at srudner@millerthomson.ca.