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## LABOUR AND EMPLOYMENT COMMUNIQUÉ

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### SUPREME COURT OF CANADA RULES IN FAVOUR OF EMPLOYER ... AGAIN

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The Supreme Court released its widely-anticipated decision in *Keays v. Honda Canada* last Friday, and it certainly lived up to its billing as a landmark ruling. While many were surprised by the employer-friendly nature of the decision, it does appear to be the continuation of a judicial trend toward a more moderate perspective on employment law. As discussed in our communiqué of May 27, 2008, the Supreme Court of Canada recently released its decision in *Evans v. Teamsters Local Union No. 31*, in which the plaintiff employee was held to a high standard by the Court when it assessed his efforts to mitigate his damages. Further, in *Mulvihill v. Ottawa (City)* (reviewed in our communiqué of May 6, 2008), the Ontario Court of Appeal adopted a restrained approach to the assessment of *Wallace* damages. The decision in *Keays* is the latest good news for employers and human resources professionals.

#### Summary of Facts

Kevin Keays was a 14-year employee at Honda. He suffered from chronic fatigue syndrome, and was off work, on disability benefits, for a period of time until Honda's insurer deemed him fit to return to work and discontinued the benefits. After being "coached" for excessive absences, Keays was advised of and enrolled in Honda's disability program, which accommodated his disability-related absences.

Over time, Honda became dissatisfied with the level of Keays' absenteeism and the lack of detail in the doctors' notes provided. As a result, Honda asked Keays to see an occupational medicine specialist who would assess what accommodations Keays required. Keays requested that Honda explain the purpose, methodology and parameters of the consultation with the specialist, but Honda declined to provide any such details. By this time, the relationship between Honda and Keays had broken down. Keays refused to attend the meeting, and was dismissed for cause as a result of his insubordination. He sued for wrongful dismissal, sought various damages arising out of the conduct of the dismissal and alleged discrimination and harassment on the part of Honda.

#### The Lower Courts

The trial judge was extremely critical of Honda's behaviour, referring to a "conspiracy", to Honda's "hardball" approach, and to a course of conduct designed to set Keays up for failure and dismissal. He also found that Honda had discriminated against and harassed Keays as a result of his disability. The trial judge awarded Keays 15 months notice and then added nine months of "*Wallace* damages" for the "egregious bad faith" demonstrated by Honda in the course of the dismissal. The trial judge went on to award an unprecedented \$500,000 in punitive damages, a costs premium and costs on a substantial indemnity scale.

Note:

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The trial judge's decision significantly impacted the legal and business communities. Claims for punitive damages became common in wrongful dismissal actions, and employers became hesitant to address attendance concerns involving disabilities given the potential for enormous punitive damages awards.

At the Ontario Court of Appeal the punitive damages were reduced to \$100,000, and the costs premium was reduced. The remainder of the trial judge's decision was upheld. While this tempered the effect of the trial judge's decision somewhat, the reality was that employers remained fearful of multiple and substantial damages arising out of dismissals, particularly those involving disabled employees.

### **The Supreme Court of Canada**

The Supreme Court of Canada struck down the *Wallace* damages, the punitive damages, the costs premium and the costs scale. In other words, the only portion of the trial judge's award that was upheld was the 15 month notice period.

In its decision, the Court appears to have attempted to rationalize the forms of damages available in employment law cases. In so doing, it addressed criticisms of duplication, clarified the nature of behaviour that will warrant punitive damages, and completely revised the court's approach to assessing bad faith damages.

#### ***“Wallace” Damages***

The Court addressed a number of criticisms that have been raised in respect of *Wallace* damages, which are awarded when an employer engages in unfair or bad faith behaviour in the termination process. The Court held that these damages should not be an arbitrary extension of the notice period, but rather must compensate for actual damages suffered by the plaintiff. This is a significant change in the law. Logically, it should mean that employees must prove that they have suffered actual damages as a result of their employer's bad faith behaviour before the employer will be ordered to pay any amount. Recognizing the dramatic change, the dissenting opinion of the Court repeatedly referred to bad faith damages as being “formerly” known as “*Wallace* damages”.

In the case before it, the Court found that there was no evidence that Honda had acted in bad faith when it terminated Keays, and that as a result, bad faith damages were unwarranted.

#### ***High Threshold for Punitive Damages***

The Court also found that there was no evidence of behaviour that would warrant an award of punitive damages. In so doing the Court explicitly rejected certain findings of fact made by the lower courts and also ruled that a breach of human rights legislation is not an independent cause of action that would result in punitive damages. The Court explicitly limited the availability of punitive damages, ruling that “punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.”

#### ***Avoiding Double-Compensation***

One of the criticisms of the lower court decisions, and other cases, was that the same set of facts could be used to justify multiple forms of damages (i.e. *Wallace* damages and punitive damages). The Court made clear that courts should “avoid the pitfall of double-compensation or double-punishment.” Essentially, if the award of actual damages will compensate the victim, penalize the wrongdoer, and deter future misconduct, then no punitive damages should be awarded in the absence of sufficiently egregious behaviour.

### ***The Use of Doctor's Notes***

The trial judge was extremely critical of Honda's requirement that Keays provide a doctor's note for every absence, and found that this requirement constituted discrimination. The wording of the decision suggested that it might never be appropriate to require that an employee with a known disability provide doctors' notes to identify which absences were disability-related.

Writing for the majority, Mr. Justice Bastarache confirmed that the Court accepts that "the need 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 its workforce." The Court also recognized doctors' notes as a legitimate tool for this purpose.

Miller Thomson was retained to intervene at the Supreme Court level on behalf of the Human Resources Professionals Association ("HRPA"). HRPA was concerned about the consequences that this case may have for employers attempting to use doctors' notes as a way to manage absenteeism. At the hearing, Stuart Rudner, a Partner in the Labour & Employment Group, successfully made submissions on this issue.

### **Conclusion**

For employers, the Keays decision should provide more comfort in dealing with disabled employees and more certainty with respect to the types of damages awards they may face in employment-related claims. In particular, the Supreme Court's decision in Keays:

1. recognizes employers' need to control absenteeism and their responsibility for managing their own workforce;
2. confirms that the threshold for punitive damages is high and that only exceptional cases will justify such an award;
3. clarifies the types of damages that can be awarded and seeks to prevent "double-dipping" by confusing the concepts underpinning punitive and *Wallace* damages;
4. rejects the notion that breaches of human rights legislation can constitute an independent actionable wrong; and
5. replaces the arbitrary "*Wallace* bump-up" for bad faith in the course of dismissal with a compensatory approach based upon actual damages suffered.

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