WRONGFUL DISMISSAL - BAD FAITH DAMAGES IN CANADIAN EMPLOYMENT LAW: *HONDA CANADA INC. V. KEAYS*

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The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal.[1]

It is one of the most important concepts in workplace law—or at least it was. Since Justice Iacobucci's decision in *Wallace*, employers have had to play nicely at the time of dismissal or risk paying additional damages to dismissed employees. This behaviour expectation was a welcome shift in the law, brought on by the recognition of the inherent power imbalance in the employment relationship and the need to protect employees at a time when they are most in need of protection.

Before *Wallace*, employers could play legal hardball with relative impunity. Trumped-up allegations of misconduct, bogus reasons for dismissal, malicious references, or dragged out litigation based on frivolous defences may have been improper conduct, but there was seldom an incentive to stop it.

Then came the case of Jack Wallace, a fifty-nine-year-old printing press salesman who, after fourteen years of stellar service, was dismissed without explanation based on false allegations of misconduct that were deliberately created in order to mount a defence to his legal claim. The Supreme Court found that the employer's conduct in handling Wallace's dismissal was so cruel that normal employment law damages, which indemnify lost salary only, could not adequately compensate him for his loss. Iacobucci J, who wrote the decision, reasoned that employees were particularly vulnerable at the time of dismissal and in need of additional protection. With the stroke of a pen, the duty of good faith then became the law of the land. Employers who breached this duty would pay additional "bad faith damages", above and beyond the employee's normal severance.

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1 *Wallace* v. *United Grain Growers Limited* [1997] 3 S.C.R. 701, 152 D.L.R. (4th) 1 at para. 95, Iacobucci J [*Wallace*].

The Supreme Court's recent decision in *Honda v. Keays* has reversed these standards again.[2] Gone is the principle of extending the notice period for bad faith behaviour. Instead, the courts are to award damages based on an employee's actual loss.

This paper will:

1. Summarize the *Keays* decision as it relates to damages for mental distress and bad faith;
2. Discuss how the courts should award damages for mental distress and bad faith in light of *Keays;*
3. Discuss some of the problems with the majority's approach in *Keays*; and
4. Conclude by suggesting that the minority's decision should be preferred.

KEAYS V. HONDA CANADA INC. – BACKGROUND

Kevin Keays participated in the production of the first vehicle to roll off the assembly line at Honda's plant in Alliston, Ontario, in 1986. Keays was a dedicated and proud employee and intended to devote his working life to Honda. Unfortunately, his plans were thwarted by his health problems.

After a brief stint on the production line, Keays was moved to the quality engineering department. Despite receiving excellent performance ratings for most of his work, Keays received negative attendance assessments. Keays' coworkers bemoaned the extra responsibilities brought on by having to cover for his mounting absences.

Keays' health deteriorated and he was diagnosed with Chronic Fatigue Syndrome ("CFS"). He was eventually forced off work and onto Honda's long-term disability insurance plan for a two-year period. In 1998, Honda's disability insurer, London Life, terminated Keays' benefits, arguing that there was not enough objective medical evidence of Keays' illness to support his continued absence from work.

Under protest, Keays returned to Honda in December, 1998. Within a month of his return to full-time work, Keays needed more time away. In August, 1999, Keays was disciplined for his absences. Disagreeing with that decision, Keays complained that he was unable to live up to Honda's attendance expectations. Honda responded that there was a special attendance-related program available for him that would exempt him from further discipline.

Keays had his doctor complete the necessary forms to take ad-

2 2008 SCC 39, 294 D.L.R. (4th) 577 [*Keays*].

vantage of Honda's attendance program, which required that he validate further absences with a doctor's note. This requirement may have aggravated Keays' symptoms and led to more time away from work.

Originally, Keays' doctor predicted that Keays would be absent approximately four days each month. However, Keays was absent six times the next month due to the increased stress that arose partly from having to justify his absences. Since this amount exceeded his doctor's initial prediction, Honda required Keays to see one of the company's own medical doctors.

Keays claimed that during this meeting Honda threatened to move him back to the physically demanding production line which he feared would worsen his condition. Keays immediately complained but was assured that this was not Honda's intention "at that time". According to McIsaac J, who presided over the initial trial, the possibility of being sent back to production line labour loomed as a real possibility given "Honda's reluctance to acknowledge the validity of his disability and his need for reasonable accommodation".[3]

In January and February of 2000, Keays missed fourteen days of work. In response, Honda retained an occupational specialist, Dr. Brennan, who was asked to review Keays' medical file to determine whether his absences were justified. Dr. Brennan found significant gaps in the medical file and requested a personal meeting with Keays to begin a "heuristic" assessment of his accommodation needs.

In the meantime, due to the frustration and stress of the situation, Keays retained legal counsel to attempt to mediate his concerns. Kaeys did so despite Honda's unwritten policy of discouraging third party advocates, such as lawyers, from participating in workplace disputes. According to McIsaac J, Keays had little choice:[4]

> He had been "coached" and was heading up the ladder of progressive discipline towards termination. He had spent his entire adult life at Honda and felt that his world was coming down on his head. He was absolutely alone and without resources. The deck was stacked against him and he was only a minnow compared to the Leviathan that Honda represented.

Keays' lawyer wrote to Honda outlining his concerns, offering to work towards a resolution and requesting that further contact be made through counsel. Honda ignored the letter and again met with Keays, without his lawyer present, insisting that he meet with Dr. Brennan because Honda believed that Keays was able to attend work on a regular basis and no longer accepted the legitimacy of his absenc-

3 *Keays v. Honda Canada Inc.*, 2005 CanLII 8730, 40 C.C.E.L. (3d) 258 (Ont. S.C.) at para. 9 [Trial Judgment].
4 *Ibid.*, at para. 12.

es. Honda may also have attempted to persuade Keays to reject his lawyer's advice. On 28 March 2000, Honda restated its position to Keays in a letter, concluding with the ultimatum that Keays must either meet with the company's doctor or be fired.

Since Honda refused to deal directly with Keays' lawyer, Keays refused to meet with Honda's doctor. On this basis, Honda then terminated Keays for cause, arguing that refusing to meet with the company's doctor amounted to insubordination. Keays learned of his dismissal from a co-worker who phoned him at home to tell him that his termination had been announced to the department.

Following his dismissal, Keays suffered from post-traumatic stress disorder and qualified for a disability pension. He continued in his disabled state, up until the time of his trial, almost five years later.

THE TRIAL JUDGMENT

From the outset of the trial judgment, McIsaac J noticeably sided with Keays, finding that Honda did not have cause for dismissal and that its treatment of Keays' illness was discriminatory and deserving of a "large whack" in order to "wake up a wealthy and powerful defendant to its responsibility".[5] After a twenty-nine-day trial, Justice McIsaac awarded Keays fifteen months' salary for wrongful dismissal damages and an additional nine months' salary for bad faith or *Wallace* damages. Keays was awarded an additional $500,000 in punitive damages based on McIsaac J's finding that Honda had discriminated against him both before and after he was terminated him in order to avoid its obligation to accommodate him.[6] This punitive damage award is the largest ever in a Canadian wrongful dismissal case.

BAD FAITH DAMAGES – ONTARIO SUPERIOR COURT OF JUSTICE

McIsaac J found four separate grounds of bad faith behaviour, justifying the increased notice period:

1. The March 28 letter was callous and insensitive and Honda deliberately misrepresented the views of its own doctor for the purpose of intimidating Keays into meeting with them.

2. Keays was being set up when he was asked to see Honda's doctor, because Honda knew that its doctor would not accept Keays' claims of illness.

5 *Ibid.*, at para. 62.

6 Keays was also was awarded costs of $610,000 which included a substantial premium based on the results.

3. Keays' condition worsened after the dismissal: he became depressed, developed an adjustment disorder for three to four months, and has been unable to work since then.

4. Honda's decision to cancel the accommodation it was providing him was a form of reprisal against Keays for retaining legal counsel.

In finding that Keays was entitled to bad faith damages, McIsaac J considered Keays' post-traumatic disorder, and his inability to find other work as factors in reaching the award.

BAD FAITH DAMAGES AT THE ONTARIO COURT OF APPEAL

The Court of Appeal found that there was ample evidentiary support for McIsaac J's findings regarding Honda's conduct leading up to and culminating in Keays' dismissal, along with the health problems that he suffered thereafter, and that these findings were therefore not open to attack on appeal. In considering the quantum of the award for bad faith damages, Goudge J stated that, while the nine-month extension appeared very generous, it must be assessed with regard to the circumstances. In particular, considering Keays' disability and the inherent vulnerability that he experienced at the time of dismissal, the Court upheld the nine-month award as appropriate.[7]

BAD FAITH DAMAGES AT THE SUPREME COURT OF CANADA

The Supreme Court significantly departed from the trial decision and the judgment of the Court of Appeal. In a 7–2 majority, the Supreme Court agreed that Honda did not have cause for Keays' dismissal and that he had been wrongfully dismissed. However, it overturned the lower courts' award of bad faith damages and concluded that the facts did not provide any basis to award punitive damages. Bastarache J, writing for the majority, found that all four grounds of bad faith relied upon by McIsaac J were unsupported by the evidence.

Having overturned these awards, the Supreme Court then set out to redefine the Canadian approach to allocating damages for bad faith and mental distress in employment dismissal cases, relying mostly on its own recent decision in *Fidler v. Sun Life Assurance Co of Canada.*[8]

7 The majority of the Court of Appeal reduced the punitive damage award from $500,000 to $100,000, finding that some of the facts relied upon by Justice McIsaac at trial were not supported by the evidence and that any award for punitive damages must be proportional. It also allowed Honda's appeal on the issue of the cost premium, reducing the initial premium awarded by half.

8 [2006] 2 S.C.R. 3, 2006 SCC 30 [*Fidler*].

In *Fidler*, the Supreme Court moved away from its earlier decisions in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper* and *Vorvis v. Insurance Corp. of British Columbia,* which had emphasized that personal injury that was separate from the fact of the dismissal itself—known as an independently actionable wrong—was required in order to obtain damages for mental distress in breach of contract cases, which extends to employment dismissal.[9] In those decisions, the Supreme Court had relied on the rule that damages for dismissal were confined to the failure of the employer to provide proper notice. Damages for the actual loss of one's job and the pain or distress that may have been suffered as a result of that loss were unavailable.

The reasoning in those cases was that an employment contract was not one in which peace of mind was the very matter contracted for. It followed, therefore, that in the absence of some independently actionable wrong, such as defamation or the intentional infliction of mental suffering, the fact that an employee may have suffered mental distress from the dismissal was generally not compensable.

In *Fidler*, the Supreme Court departed from the 'peace of mind' cases and affirmed that damages for mental distress must be available only when that distress was in the reasonable contemplation of the parties when the contract was formed. In other words, what was the promise that the parties bargained for when they created the employment contract?

Employment contracts are always subject to termination upon providing the employee with advance notice of that termination or pay in lieu of notice. Therefore, when the contract was formed, damages for mental distress resulting from the termination of the contract would not ordinarily be in the contemplation of the parties, as the termination of the contract, with notice, was always a distinct possibility and permitted as part of the bargain the parties made.

In *Wallace*, however, the Supreme Court established that employers must act in good faith and with fair dealing when terminating employees. This obligation required employers to act, *inter alia,* in a candid, reasonable, honest and forthright manner. Since this time, there has clearly been an expectation at law, that when employers do not act in good faith at the time of termination, the employee may recover additional damages by way of an extension of the notice period. Therefore, at least since the *Wallace* decision, damages for mental distress based on the manner of termination have been a foreseeable harm compensable in the absence of an independently actionable wrong.

In *Honda,* having clarified that damages for mental distress and for the manner of termination are compensable under the *Fidler* approach, Bastarache J proceeded to revise the method by which Canadian courts are to award these damages. In doing so, he clarified that the approach founded in *Wallace*, which extends the notice period,

9 [1966] S.C.R. 673, at 684; [1989] 1 S.C.R. 1103.

should be replaced with an approach that considers the actual damages suffered by the employee. It is worth reproducing what Bastarache J had to say about these damages:[10]

> 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).

Bastarache J clearly did not intend to abolish the principle that damages for the manner of dismissal can and should be awarded where the facts are meritorious. The damages formerly known as *Wallace* damages are still available to employees. Only the manner of awarding those damages has been revised. This is obvious from the minority judgment, where LeBel J stated:[11]

> Justice Bastarache explains that *Wallace* damages will be available where "the manner of dismissal caused mental distress that was in the contemplation of the parties" (para. 59). But because this Court held in *Wallace* that employers have an obligation of good faith and fair dealing when dismissing employees "and created the expectation that, in the course of dismissal, employers would be 'candid, reasonable, honest and forthright with their employees'" (para. 58), an employer's failure to properly discharge that obligation makes it foreseeable that a dismissal might cause mental distress. A failure to show good faith may therefore justify an award of compensatory damages.

Based on the majority and minority decisions, employees will always be able to demonstrate that mental distress or damages arising from the manner of dismissal were in contemplation of the parties at the time the contract was formed. Consequently, in order for employees to make out these claims, they must now prove they have suffered actual damages. Once this hurdle is met, the courts can award damages based on an actual economic or personal loss rather than based on an "arbitrary" extension to the notice period.

10 *Keays, supra* note 2 at para. 59.
11 *Ibid.* at para. 114.

PROVING KEAYS DAMAGES

The new approach to awarding damages based on the manner of dismissal, which I herein refer to as "*Keays Damages*", emphasizes that the fundamental nature of mental distress damages or damages based on the conduct of dismissal should be compensatory in nature and not punitive. How then should Canadian courts handle employment claims based on mental distress and the manner of dismissal?

At the time of writing, only a few trial judgments have considered the impact of *Keays* on claims related to the manner of dismissal. Some of these cases merit discussion. In *Saulnier v. Stitch It Canada's Taylor Inc.*, McLellan J found that the defendant had not made out its allegation of cause for dismissal and that the plaintiff had been wrongfully dismissed.[12] The plaintiff had also sued for bad faith damages based on the accepted fact that she had been terminated in the food court of the mall where she worked and had been required to turn in her keys and company uniform there, presumably in the presence of many others. In denying that this conduct was sufficient to award additional damages for bad faith, McLellan J cited *Keays* and concluded that "the burden is now more difficult for a plaintiff to establish damages for the nature of the dismissal...or '*Wallace* factor' damages."[13]

Keays focuses on whether an employee has suffered an actual loss. There is simply no support in the *Keays* decision for any suggestion that employees now have a more difficult threshold or onus to show that an employer has actually acted in bad faith. Rather, the decision contains language that states that when the court assesses an employer's conduct, it should continue to apply the standard of reasonableness. Specifically, by relying on the decision and "the examples in *Wallace*", Bastarache J must be taken to have imported the reasoning of Iacobucci J in *Wallace.*[14] In the *Wallace* case Iacobucci J established that the obligation of good faith and fair dealing is incapable of precise definition, but at a minimum required employers to treat employees candidly, reasonably, honestly and to refrain from engaging in conduct that is unfair or in bad faith by being untruthful, misleading, or insensitive or causing employees humiliation, embarrassment, or damage to their self-esteem.[15] Accordingly, the focus remains on whether an employer has acted candidly, reasonably, and honestly in the manner of dismissal. There is no new or higher threshold for establishing bad faith conduct.

Assessing conduct at the time of dismissal based on reasonableness is also to be preferred as it remains consistent with Iacobucci J's policy based arguments in *Wallace* where he noted that employees are most vulnerable at the time of their dismissal, and hence, most in need of protection at that time. In recognition of that need, Iacobucci J held that the law ought to minimize the damages (both economic and personal) that flow from a dismissal and on that basis created the obligation that employers act in good

12 2008 NBQB 269 (CanLII).

13 *Ibid.*, at para. 14.

14 *Keays, supra* note 2 at para. 59.

15 *Wallace, supra* note 1 at paras. 98–103.

faith, which the court continued to support in *Keays*. Holding employers to any lesser standard detracts from the deterrent effect that the principle of acting in good faith represents.[16] Indeed, that very concern was dealt with in *Wallace*, where Iacobucci J stated:

> I note that there may be those who would say that this approach imposes an onerous obligation on employers. I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law.[17]

If the focal point of assessing misconduct in order to make out *Keays* damages for mental distress or the manner of dismissal remains what is reasonable, the more vexing question is how Canadian courts are to judge the quantum of the damages if the "arbitrary" extension to the notice period no longer applies. According to Bastarache J, damage awards must reflect the actual damages suffered. Unfortunately, he provides no guidance on the approach to use in order to avoid the arbitrariness of extending the notice period while compensating an employee for his or her actual loss.

One principled method of assessing the actual damages suffered for mental distress or bad faith is to consider whether the manner of dismissal has made it more difficult for an employee to obtain other employment. The extended period of unemployment, or loss of earnings, would then be compensable as *Keays* damages. Take, as an example, an employee who is able to demonstrate that her employer engaged in unfair dealing at the time of dismissal and that she has had a more difficult time finding other employment as a result. The employee leads evidence at trial showing that she would have been able to find another job within six months from the date of her termination, which coincides with her notice period, but due to the conduct of her former employer it took her nine months to reemploy. Under the majority's approach in *Keays,* the trial judge must award that employee additional *Keays* damages for the actual loss she has suffered. If her loss is an additional three months of unemployment, the additional damage award must then reflect her lost salary and benefits for those three months. Here, the employee receives an award that is tantamount to an extension of the notice period, although that award is founded in her actual loss, is not arbitrary, and, therefore, is consistent with the approach set forth in *Keays*.

However, aside from employees who have had a more difficult time finding another job, is everyone else who has been subjected to unfair treatment in the manner of dismissal to be denied additional compensation simply because there is no non-arbitrary method to assess the damages? Bastarache J cannot possibly have intended to endorse an approach that does not minimize the damages that flow from unfair treatment at the time of dismissal.

16 *Wallace, supra* note 1 at para. 95.
17 *Wallace, supra* note 1 at para. 107.

Prior to *Keays*, a terminated employee would not properly be awarded compensation for loss of income arising from an inability to work because of the mental distress suffered from the manner of termination if the court had awarded *Wallace* damages for bad faith for the same misconduct. To do so under the *Wallace* approach would be to double-compensate for a single wrong. Consider a young man who, after three years in a job, is subjected to bad faith dismissal which can be proven to have caused a five-year mental breakdown preventing his return to work. Under the *Wallace* approach, the employee would receive an extension of the notice period for a few months in order to compensate him for the manner of his dismissal, but he would not also receive an award equal to five years' lost wages in order to compensate him for his loss. The Manitoba Court of Appeal considered this very hypothetical and argued that awarding five years' compensation would be a ridiculous result.[18] However, pursuant to the compensatory approach set forth in *Keays*, is the employer now to indemnify the employee's five-year period of unemployment, if it is shown that its conduct was the cause of his loss? The majority's decision in *Keays* overturned McIsaac J's factual finding that Keays' post-employment disability was caused by Honda's conduct, so it did not have to deal with this hypothetical. Notwithstanding this, its judgment is clear in that, as long as causation is proven, the employer must compensate the employee for the harm he has suffered. While this represents a welcome improvement in the prospects of employees who have been caused such personal injury that they are no longer capable of work, these cases represent only the most exceptional facts.

The vast majority of employees subjected to bad faith at the time of dismissal will not be rendered incapable of work. In fact, these employees will have to return to work as soon as possible, which represents the real problem with Bastarache J's approach in *Keays*. Employees have both a legal and a personal obligation to return to work as soon as possible following dismissal. The law requires employees to reasonably mitigate their losses by searching for other employment and the economic realities of being unemployed require employees to limit their financial losses by speedily returning to work. Therefore, the majority of employees will now find it more difficult to receive compensation for their employers' bad faith conduct, since they will have returned to work during the notice period notwithstanding that they may have been treated improperly.

Consider, as another example, an employee who is treated in bad faith at the time of her dismissal and is able to reemploy during the period of reasonable notice. Should she be left without compensation for having been treated unfairly because her personal circumstances required her to return to work faster than the employee in the example above, whose unemployment was extended as a result of her employer's conduct? If most employees will return to work as soon as possible because they have to, then is there now, in light of *Keays,* a sufficient deterrent to prevent employers from acting unfairly at the moment when employees are most in need of protection?

18 *Whiting v. Winnipeg River Broken Head Community Futures Development Corp.*, (1998), 159 D.L.R. (4th) 18 at para. 45.

In order to ensure that employers treat people fairly, reasonably, and decently at a time of trauma and despair, *Keays* damages must be made available to employees who have mitigated their losses by securing other work during the notice period. These damages should not be in dispute given the recent Supreme Court decision in *Evans v. Teamsters Local Union No. 31*, where Bastarache J again, writing for the majority, explicitly confirmed that damages for bad faith are not subject to mitigation:

> The employee's ability to replace the lost income through mitigation is irrelevant, as this does not alter the suffering caused by the means of dismissal. In my view, *Wallace* damages ought therefore to be completely exempt from the need to mitigate.[19]

If *Keays* damages are supposed to be awarded to those employees who have mitigated, how then do these employees meet the requirement to demonstrate an actual loss? First, it is open to the courts to accept an employee's medical evidence of mental suffering or distress as the basis for *Keays* damages, provided the employee can show there was a causal effect between his or her mental distress and the employer's bad faith conduct. *Keays* damages represent a unification of the damages formerly known as *Wallace* damages for bad faith and aggravated damages for mental distress. If an employee can demonstrate that his or her mental distress was caused by the employer's treatment, then those damages are compensable regardless of whether the employee has been able to reemploy. Would the majority of the Supreme Court have awarded Mr. Keays damages for either bad faith or mental distress had they found that McIsaac J's findings of fact were supported by the evidence? Clearly, the minority would have.[20]

Second, we must look to the dissenting judgment of LeBel J for guidance. In his judgment, LeBel J affirms the commonly accepted view that the contract of employment often reflects substantial power imbalances and, as a result, must be performed and terminated fairly and in good faith.[21] In respect of damages for mental distress or bad faith, LeBel J endorsed an approach that would have awarded Mr. Keays damages for bad faith based on what was reasonable and adequate compensation for his loss:[22]

> The nature of the events leading up to Mr. Keays' termination makes it reasonable to conclude that the conduct of Honda surrounding his termination, and not the fact of termination alone, led to his worsened state. Accordingly, an award of damages can be justified in this case on the basis of Honda's conduct and of the harm Mr. Keays suffered as a result. Although, as Justice Bastarache explains, Wallace damages are intended to be compensatory, given the lack of evidence on the precise loss Mr. Keays suffered as a result of Honda's conduct, I would uphold the compensation the trial

19 (2008), 292 D.L.R. (4th) 577, (2008), 65 C.C.E.L. (3d) 1 [*Evans*]; *Ibid*, at para. 32.

20 *Keays*, *supra* note 2 at paras. 113 and 117.

21 *Ibid.*, at para. 81.

22 *Ibid.*, at para. 117.

> judge granted over and above the 15-month notice period. The quantum of the damages appears reasonable and would give Mr. Keays adequate compensation.

LeBel J would have awarded bad faith damages in spite of there being no evidence of a precise loss that Mr. Keays suffered, by selecting an amount that appeared reasonable in the circumstances. While this arguably presents an element of arbitrariness, courts routinely make arbitrary assessments of damages for tort claims in the personal injury and employment context in the absence of a precise loss, such as in claims for defamation and the intentional infliction of mental suffering. Under LeBel J's approach, as long as the damages are not tied to the notice period, are based on reasonableness, and provide adequate compensation, the award would be consistent with the majority's decision in *Keays*.

The recent case of *Fox v. Silver Sage Housing Corporation* illustrates the difficulties with the majority's judgment in *Keays* and demonstrates why LeBel J's approach should be preferred.[23] In *Fox*, the court was asked to determine whether the plaintiff, who was wrongfully dismissed, was also entitled to damages based on the manner of his dismissal. In the reasons for judgment, McMurtry J accepted as fact that Silver Sage untruthfully disguised Fox's termination, was not straightforward with Fox at the time of his termination, terminated Fox based on an intense personal dislike for him, wrote a three-page letter to Fox's wife's employer and a politician suggesting how they should deal with her, orchestrated a phoney budgeting process in order to disguise the true reasons for Fox's termination, and did not act candidly, reasonably, and in good faith. As a result of these actions, McMurtry J accepted that both Fox and his wife suffered stress and depression.

In spite of having an open and shut case for bad faith, if not punitive damages, McMurtry J considered the *Keays* case and found that "as bad as this employer's behaviour was towards Mr. Fox, he has not proven that the stress and depression he suffered is related to the manner in which he was treated."[24] No additional damages were awarded to Mr. Fox. Here, it was clearly accepted that the employer had acted in bad faith and the employee had suffered stress and depression. If *Keays* is to be interpreted in such a manner, what deterrent devices do courts retain to ensure that employers do not dismiss employees in bad faith with impunity?

In stark contrast with *Fox* is Brown J's decision in *Bru* v. *AGM Enterprises Ltd.*[25] In this case, Ms. Bru argued that the employer had dismissed her, while it alleged that she had resigned. In finding that Ms. Bru had not resigned, Brown J also concluded that the employer had treated Ms. Bru unfairly and improperly at the time of her dismissal and that it had stonewalled her attempts to communicate that she had not

23 2008 SKQB 321 (CanLII) [*Fox*].
24 *Ibid.* at para. 44.
25 2008 BCSC 1680 [*Bru*].

intended to resign. At trial, Ms. Bru called her general physician, who gave evidence that she had suffered reactive depression as a result of the employer's conduct and that she was restricted from finding other work for a six month period. In assessing bad faith damages in light of *Keays*, Brown J awarded Ms. Bru damages in lieu of her lost income for the six month period less what she was awarded for wrongful dismissal damages so that she would not be double compensated. In addition, the Court awarded Ms. Bru $12,000 for the mental distress and related health problems she suffered. It is submitted that this is the correct interpretation of *Keays*: Ms. Bru was compensated based on her loss of earnings and the Court was not limited in awarding additional damages in the absence of a precise loss by simply assessing what was reasonable in the circumstances.

CONCLUSION

In light of *Keays*, the Supreme Court has clarified that employment law damages are intended to be compensatory. However, this ought not to be taken as also standing for the proposition that such damages should never be used to denounce improper conduct. Wrongs should be compensable. Recall Iacobucci J's statements in *Wallace*: the point at which the employment relationship ends is when the employee is most vulnerable, and hence, most in need in protection. Keeping these challenges in mind, the minority decision of LeBel J is to be preferred in terms of policy and principle. If LeBel J's approach is adopted, employment law damages will be tied to the wrong, rather than the period of reasonable notice, and will be based on what is reasonable in the circumstances in order to adequately compensate the employee who has been subjected to harm. Thus, employees such as Mr. Fox would be compensated fully for their injuries and employers who treat their employees unfairly will rightly be made to pay.