DIFFERENT DOESN'T NECESSARILY MEAN DIFFERENT:

A DISCUSSION OF *HONDA CANADA INC. V. KEAYS*

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When the Supreme Court of Canada awarded Kevin Keays $500,000 in punitive damages on top of damages equal to fifteen months' reasonable notice in the 2008 case, *Honda Canada Inc. v. Keays* ("*Keays*"), it became one of the most controversial decisions to come out of Canada's highest court in over a decade.[1] Employees and their representatives viewed the decision as adding another arrow to their quiver, particularly as regards punitive damages, but the case opened the door to a number of new questions and problems. While mainstream media seized, with some reason, upon the unprecedented punitive damages award, in reality that was only one of the important employment law issues dealt with in the contentious decision.

The principles and underlying approach taken by the trial judge withstood a challenge before Ontario Court of Appeal, though the Court reduced the punitive damages award from $500,000 to $100,000, which served to heighten anxiety among employers general.

When the Supreme Court of Canada granted leave to appeal and cross-appeal both sides expected that the Court would provide some needed direction to all stakeholders. It is unlikely that anyone fully anticipated the broad and sweeping impact the decision would ultimately have in wrongful dismissal law. The Court took the opportunity to emphasize the proper considerations when awarding damages in employment law cases and, in so doing, adopted an approach that was principled, reasoned and had as its foundation a well-established judicial methodology. In short, the Court "pulled back on the reins", clearly re-establishing the principles to be applied by lower courts when awarding damages in employment law cases. This is a welcome decision that demonstrates how far the Supreme Court is prepared to go in order to "right the ship" where it believes lower courts have misapplied or otherwise extended principles established by the highest court beyond what was reasonably intended.

An understanding of the subtext is as important as the main findings in order

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1 *Honda Canada Inc. v. Keays*, [2005] O.J. No. 1145 Keays, [2005] O.T.C. 222 (supplemental reasons at (2006), 48 C.C.E.L. (3d) 86), var'd at (2006), 82 O.R. (3d) 161 (C.A.) (motion to stay execution at (2007), 285 D.L.R. (4th) 332 (C.A.), rev'd at (2008) SCC 39 .

to grasp the practical significance of *Keays*.

BACKGROUND

Kevin Keays commenced employment with Honda Canada Inc. ("Honda") in 1986 working on the production line at the assembly plant in Alliston, Ontario. After approximately twenty months, Mr. Keays joined the Quality Engineering Department. Mr. Keays was selected to receive training on a new computer system, created for the implementation of newly designed components into Honda vehicles, after which he was expected to instruct his fellow employees in the department on using the system.

Shortly after commencing work at Honda, Mr. Keays was absent from work as a result of health problems, which culminated in a disability leave in October of 1996. Honda's business philosophy mandated a "lean" operating structure such that Mr. Keays' absences required his already busy co-workers to take on his responsibilities in addition to their own. Mr. Keays was diagnosed as suffering from chronic fatigue syndrome ("CFS") and though he returned to work in December of 1998, he did so under protest and then only upon the termination of his benefits by Honda's long-term disability insurer.

Within a month of returning to work Mr. Keays once again began to experience absences from work, and in August of 1999 received a written "coaching" report from Honda with respect to his absenteeism. This was the first step in Honda's progressive discipline process. When Mr. Keays complained that he was not able to live up to Honda's attendance expectations, he was informed of a Honda program exempting employees from attendance-related progressive discipline based on a disability. Mr. Keays' had his physician complete the necessary forms and informed Honda that he suffered from CFS and would likely miss about four days of work per month as a result.

Honda provided some accommodation for Mr. Keays' absences, but he was required to provide a doctor's note for each absence, a requirement not imposed on other employees. Following a six-day absence in October of 1999, Honda asked Mr. Keays to see the company doctor. When Mr. Keays later complained to his supervisors that the doctor had threatened to move him back to the production line, the supervisors told Mr. Keays that there was no intention to move him "at that time".

In January and February of 2000 Mr. Keays requested that the written "absenteeism" report be removed from his file and that Honda reconsider the requirement that he provide a doctor's note for each absence. Mr. Keays retained counsel and his lawyer wrote to Honda outlining Mr. Keays' concerns and extending an offer to attempt to resolve their differences. Honda had an unwritten policy discouraging third parties advocating on behalf of employees and therefore did not respond to this letter.

Instead, Honda informed Mr. Keays that it no longer accepted that he had a disability requiring him to be absent, and directed him to meet with Honda's occupational medicine specialist.

Mr. Keays informed Honda that on the advice of his lawyer, he would not meet with the occupational medicine specialist unless and until he was provided with clarification regarding the "purpose, methodology and the parameters of the assessment." Honda refused to elaborate on the purpose of the meeting and warned Mr. Keays that if he did not meet with the doctor he would be terminated.

Honda terminated Mr. Keays' employment when he did not meet with the doctor as instructed. Subsequent to his dismissal, Mr. Keays suffered from post-traumatic adjustment disorder, was unable to work, and qualified for a total disability pension.

KEAYS AT TRIAL AND APPEAL

At trial, McIsaac J criticized Honda, in pointed and indeed scathing terms, for what he viewed as its harsh treatment of Mr. Keays. Ultimately, this criticism was not sufficiently founded to justify the "non-traditional" damages awards discussed in more detail below.

McIsaac J found that Honda's direction that Mr. Keays meet with the occupational medicine specialist was unreasonable, not made in good faith and was done in order to subsequently terminate Mr. Keays' employment and avoid accommodating his disability. The trial judge determined that Mr. Keays had good reason not to comply with Honda's directives, and his refusal to see the company doctor was not a repudiation of his contract of employment justifying the termination of his employment for just cause. McIsaac J held that Honda's reaction to Mr. Keays' refusal to meet with its doctor was disproportionate. Not only did Honda not have just cause to terminate Mr. Keays, the trial judge also found that Honda had failed to fulfill its obligations to Mr. Keays under the *Code*. He described the company's conduct as "outrageous" and deserving of significant denunciation.

As a result, McIsaac J awarded punitive damages in the unprecedented amount of $500,000 for what he considered to be Honda's "outrageous and high-handed" conduct that amounted to discrimination and harassment. He also determined that the period of reasonable notice, in the circumstances, was fifteen months' salary, which he extended by nine months because of the "egregious bad faith displayed by Honda" in the manner in which Mr. Keays' employment was terminated and "the medical consequences flowing therefrom".

Honda appealed and in a split decision, the Ontario Court of Appeal set aside

the quantum of punitive damages and the cost premium awarded at trial, but otherwise left the trial judgment undisturbed.

Honda argued, in part, that the trial judgment "flew in the face of" *Seneca College of Applied Arts and Technology v. Bhadauria* ("*Bhadauria*").[2] The Court of Appeal disagreed and Goudge JA, in dissent, stated that:

> *Bhadauria* determined that a civil action could not be based directly on a breach of the *Ontario Human Rights Code*. Indeed, in this case the respondent made just such a claim, which the trial judge dismissed, albeit reluctantly, by applying both *Bhadauria* and this court's recent application of that decision in *Taylor v. Bank of Nova Scotia*.

In other words, the conduct in the context of a claim for punitive damages was not being advanced in support of a breach of the *Code* but as an "independent actionable wrong" and, on the evidence, an award of punitive damages was warranted. In terms of assessing the quantum of the punitive damage award, Goudge JA considered the following:

- The level of blameworthiness of the employer's conduct;
- The degree of vulnerability of the employee;
- The harm to the employee; and
- The need for deterrence.

Goudge JA would have upheld the $500,000 in punitive damages award. Rosenberg JA, writing on behalf of himself and Feldman JA, agreed with Goudge JA in all respects save with respect to the quantum of punitive damages. The majority agreed with Gouge J.A.'s summation of the law after *Bhadauria* and, specifically, that a breach of human rights legislation could be relied upon as the actionable wrong in support of a claim for punitive damages.

That said, the majority reduced the award from $500,000 to $100,000 because the trial judge relied on findings of fact not supported by the evidence and because the award failed to accord with the fundamental principle of proportionality.

Erroneous factual findings made by and relied upon by the trial judge were the following:[3]

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2 *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181.

3 See Fitzgibbon, M. & Vachon, P., "Off the Beaten Path" Damages in Employment Law: How to Stay on the Trail (Presented at the Canadian Bar Association Conference) "Through the Frosted Glass: Practical

Honda's misconduct was "planned and deliberate and formed a protracted corporate conspiracy". The majority found that there was no evidence to support this allegation of a broad-based conspiracy.

Honda's "outrageous conduct has persisted over a period of five years without a hint of modification of their position that Mr. Keays was the one in the wrong." The majority characterized this as a "gross distortion of the circumstances and amounts to a palpable and overriding error." There was no evidence to support the trial judge's view that the "outrageous conduct" persisted over a period of five years. The majority concluded that "this case concerns a period of seven months not five years."

There was misconduct by the insurer in the decision to terminate Mr. Keays' long-term disability benefits. There was no evidence that Honda had anything to do with the insurer's decision to terminate the benefits.

Honda "clearly benefited from their misconduct because they rid themselves of an irritation that they viewed as a 'problem' associate". The majority found that there was nothing in the record to support this finding. Although Honda was skeptical of Mr. Keays' disability and was taking steps to confirm the legitimacy of the disability, there was no evidence to support the conclusion that Mr. Keays was viewed as a problem employee.

"Honda ran amok as a result of their blind insistence on production 'efficiency' at the expense of their obligation to provide a long-time employee reasonable accommodation that included his own physician's participation". The majority found that this was "a distortion of the circumstances" and that there was nothing in the record to support that Honda "ran amok". Though, relying on expert advice, some of Honda's employees in positions of responsibility "made decisions that were clearly wrong", that is not the same as "corporate malfeasance leveled at the appellant by the trial judge".

Honda's in-house counsel "breached the Rules of Professional Conduct of the Law Society of Upper Canada when she participated in the 'scrum' to attempt to persuade Mr. Keays to abandon his request for clarification of Dr. Brennan's mandate." Again, the majority found that even on Mr. Keays' evidence, counsel's attendance was mere coincidence and in any event, that if it was a breach of the Rules, which the Court provided no opinion, it was merely a technical breach, and would not serve to increase punitive damages. Indeed, it is difficult to see where the trial judge came up with this, having regard to the timeline of events.

When the erroneous findings of fact are disregarded, the quantum of punitive damages could only be supported, according to the majority of the Court of Appeal,

Advice and Trends Towards Transparency in the Law", 24 and 25 November 2006).

by the following:

- The employer's intent to intimidate and eventually terminate the employee was for the purpose of depriving him of the accommodation he had earned.

- The employer did not reveal an extremely damaging letter from the occupational medicine specialist until late in the trial.

- The employer was aware of its obligation to accommodate and must have known it was wrong to terminate the accommodation without just cause and terminate him as an act of retaliation.

- The employer knew that the employee valued his employment and that he was dependent upon it for disability benefits.

- The employer knew that the employee was a victim of particular vulnerability because of his precarious medical condition.

- The employer refused to deal with the employee's counsel, who made a reasonable request to discuss accommodation.

The Court observed that a review of other cases revealed that punitive damages awards were far more modest than awarded by the trial judge in *Keays* even in "the face of serious misconduct such as slander of the employee." The Court described these awards as falling in the "range of $15,000 to $50,000 and, rarely, up to $75,000."

In fixing the quantum, the Court highlighted a number of guiding principles gleaned from *Whiten v. Pilot Insurance Co.* ("*Whiten*")[4]:

- In considering the need for deterrence, the Court emphasized, as did Binnie, J. in Whiten, that the relative size of the corporate defendant is "a factor of limited importance" in determining the quantum of the award.

4 *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, 209 D.L.R. (4th) 257 (S.C.C.).

- In considering the proportionality of the award, regard must be had to "the totality of all other penalties including compensatory damages imposed on the defendant."

- Regard must be had to the duration of the impugned misconduct.

- Regard must be had to whether the conduct towards the victim was malicious and high-handed.

- The need for the punitive damage award must be proportional to the advantage wrongfully gained. Specifically, a "traditional function of punitive damages is to ensure that the defendant does not treat compensatory damages merely as a license to get its way irrespective of the legal or other rights of the plaintiff."

While the majority of the Court significantly reduced the punitive damages award, the underlying principles upon which the award was based remained intact. Furthermore, all other aspects of the trial judgment were upheld including *Wallace* damages.[5] It was with this background that the case came before the Supreme Court of Canada.

KEAYS AT THE SUPREME COURT OF CANADA

The Supreme Court of Canada had the opportunity to consider, expound upon and clarify a number of rudimentary employment law questions:

1. What factors can or should properly be considered in determining the period of reasonable notice of termination?

2. Is there a civil cause of action of discrimination or can a breach of human rights legislation found an actionable wrong for purposes of a claim for punitive damages?

3. Would the Court establish a more principled approach for awarding so-called *Wallace* damages?

Though some might disagree, the Supreme Court dealt a significant blow to more exceptional employee damage claims, while affirming a historical and principled approach to awarding damages in wrongful dismissal cases.

5 *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701.

REVISITING *BARDAL V. GLOBE AND MAIL LTD.*

In the absence of a contractual provision to the contrary an employer may terminate the employment of an employee for just cause or in the absence of just cause by providing reasonable notice or pay in lieu of reasonable notice at common law.[6] Granted that determining the period of reasonable notice is more "art than science", from the earliest times our courts have tried to provide some direction regarding the manner in which reasonable notice is to be determined.[7]

The most often cited case in this area is *Bardal,* which in some jurisdictions has "taken on a canonical status".[8] The following words of McCruer J hardly need repeating:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.[9]

The object of the damage assessment is compensatory and is intended to restore the employee to the financial position he or she would have been in had the employer provided the appropriate notice.

Determining the period of reasonable notice is an individualized exercise and there has been a general reluctance to apply a formulaic or mathematical approach to the endeavor. McCruer J's comment of nearly a half-century ago remains applicable today—there really can't be a closed catalogue of factors laid down for determining the period of reasonable notice. The amount of reasonable notice will vary from case to case having regard to the circumstances and the factors that the Court believes are important.

While courts have considered an ever-expanding and seemingly limitless number of factors when determining the notional period of reasonable notice of termination, a number of important principles have emerged:

- Since determining the period of reasonable notice is "more

6 *Machtinger v. HOJ Industries Ltd.,* [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 and, more recently, *Lloyd v. Oracle Corporation Canada Inc.*, [2004] O.J. No. 1806, [2004] O.T.C. 363.

7 *McKay v. Eaton Yale Ltd.* (1996), 31 O.R. (3d) 216, [1996] O.J. No. 3982.

8 *Bardal v. Globe and Mail Ltd.*, [1960] O.J. No. 149, 24 D.L.R. (2d) 140; B.D. Mulroney, "The Ontario Employment Law Year in Review (2007-2008)" (Paper presented to the CACE Conference, 18 September, 2008) [unpublished].

9 *Bardal, supra* note 8 at para. 21.

art than science," most wrongful dismissal cases will yield a "range of reasonableness".[10]

- A trial judge's determination of the period of reasonable notice is entitled to deference from an appellate court "unless the figure arrived at by the trial judge is outside an acceptable range or unless, in arriving at the figure, the trial judge erred in principle or made an unreasonable finding of fact. If the trial judge erred in principle, an appellate court may substitute its own figure. But it should do so sparingly if the trial judge's award is within an acceptable range despite the error in principle."[11]

- Courts have resisted any formulaic approach when resolving the period of reasonable notice such as the ever-popular (though routinely rejected) "one month per year of service" rule of thumb. Those who have studied common law termination cases closely have long concluded that this rule of thumb does not accurately reflect Canadian judicial practice. In fact, an analysis of over 1600 wrongful dismissal cases reveals that only employees with prior service between six and fifteen years receive, on average, one month of notice per year of service. Accordingly, the rule of thumb is not a useful guideline for employees with very short service (0-6 years) or for those with lengthy service (15+ years). Furthermore, and possibly most importantly, the "rule of thumb" places emphasis on one factor (length of service) while ignoring all of the others. The Ontario Superior Court of Justice in *Stone v. SDS Kerr Beavers Dental, A Division of Sybron Canada Ltd.* recently summarized the generally accepted approach: "In assessing damages for wrongful dismissal, the Court should not apply as a starting point any general principle or rule of thumb that an employee is entitled to one month's notice for every year worked, subject to adjustments upwards or downwards. Instead, the Court should undertake a careful weighing and blending of all relevant factors before arriving at a notice period."[12]

10 *McKay, supra* note 7 at para. 4.

11 *Minott v. O'Shanter Development Company Ltd.*, (1999), 42 O.R. (3d) 321 (C.A.), [1999] O.J. No. 5. at para. 62.

12 Geoffrey England, *Employment Law in Canada*, (Markham: LexisNexis Canada Inc., 2005) at para 14.107; Barry Fisher, "Measuring the Rule of Thumb in Wrongful Dismissal Cases" (1998), 31 C.C.E.L. (2d) 311; *Stone v. SDS Kerr Beavers Dental, A Division of Sybron Canada Ltd.* [2006] O.J. No. 2532, 149 A.C.W.S. (3d) 251 at para. 158.

- There has been a development of a rough upper limit on reasonable notice of twenty-four months. For example, the Ontario Court of Appeal and the British Columbia Court of Appeal have concluded that that notice periods greater than 24 months will be rare and exceptional.[13]

All this being said, McIsaac J in *Keays* reviewed and considered the *Bardal* criteria and concluded that the reasonable notice period was 15 months. In reaching this conclusion, he relied upon the traditional *Bardal* criteria as well as:

- "Honda's "flat" (i.e., egalitarian) management structure" which, he reasoned, limited the effect of Mr. Keays' lower position in Honda's hierarchy;

- Mr. Keays' specialized training which compensated for his lack of formal education; and

- The lack of comparable employment in Alliston.

Bastarache J, on behalf of the majority of the Supreme Court, was critical of the trial judge's consideration of these "other factors" especially where they provided no insight into what Mr. Keays actually did for Honda. Bastarache J observed that at least two provincial appellate courts had questioned the relevance of an employee's position in the hierarchy in assessing damages for wrongful dismissal but then went on to note that the "traditional assumptions about the relevance of a person's position in the hierarchy was not directly challenged in this case."[14] However, the majority of the Court concluded that:

> The "flat management structure" said nothing of Keays' employment. It does not describe the responsibilities and skills of that worker, nor the character of the lost employment. *The particular circumstances of the individual should be the concern of the courts in determining the appropriate period of reasonable notice.* Traditional presumptions about the role that managerial level plays in reasonable notice can always be rebutted by evidence. [Emphasis added]

Accordingly, Honda's management structure had "no part to play in determining reasonable notice in this case." This finding may be especially telling as organiza-

13 *Lowndes v. Summit Ford Sales Limited*, [2006] O.J. No. 13, 206 O.A.C. 55; *Clendenning v. Lowndes Lambert (B.C.) Ltd.*, [2000] B.C.C.A. 644, 82 B.C.L.R. (3d) 239. In *Burry v. Unitel Communications Inc.*, [1996] B.C.J. No. 1816, 65 A.C.W.S. (3d) 46 The British Columbia Court of Appeal concluded that 24 months was a rough upper limit on reasonable notice.

14 *Bramble v. Medis Health and Pharmaceutical Service Inc.*, [1999] N.B.J. No. 307, 214 N.B.R. (2d) 111 (C.A.) and *Byers v. Prince George (City) Downtown Parking Commission*, (1998), 53 B.C.L.R. (3d) 435 (C.A.).

tions restructure their operations in the context of the current economic circumstances.

The Court affirmed that no single *Bardal* factor should be given "disproportionate weight" over the others and, in the circumstances of the *Keays* case, the Court held that the "trial judge erred in applying one of the factors, alluding to the flat management structure, rather than examining the actual functions of Keays." In reality, the Court accepted Honda's argument on appeal, that it was Mr. Keays' actual job functions that had to be considered in assessing the extent of his entitlement to reasonable notice.

In endorsing *Bardal* as the proper approach for determining reasonable notice, and in spite of the identified errors committed at trial, the Court nonetheless refused to reduce the 15-month period of reasonable notice. In doing so, and despite the comment that no single *Bardal* factor should be given "disproportionate weight", the Supreme Court of Canada went on to consider the following:

- Keays was one of the first employees hired at Honda's plant;
- Keays spent his entire adult working life with Honda;
- Keays did not have any formal education; and
- Keays suffered from an illness that greatly incapacitated him.

The Court found that "all these factors will substantially reduce his chances of re-employment" and were relevant to the manner of determining the period of reasonable notice. Interestingly, as will be discussed below, this was the approach endorsed by the dissenting justices in *Wallace*.[1520]

ACTIONABLE WRONGS, THE TORT OF DISCRIMINATION AND PUNITIVE DAMAGES

Where aggravated damages are designed to compensate, punitive damages are designed to punish. The conduct must be, in the words of the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, "so malicious, oppressive and high-handed that it offends the court's sense of decency... It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant."[16] Not only must the

15 *Wallace, supra* note 5, McLachlin, J, dissenting.
16 *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64.

conduct meet this lofty standard, but it must also amount to an "actionable wrong." Furthermore, punitive damages will not be awarded unless they serve a rational purpose such as where the other damages awarded are sufficient to achieve the purpose of, for example, deterrence.

As a threshold matter, an award of punitive damages will only be justified where there is conduct on the part of the defendant that, in itself, gives rise, to an "actionable wrong." [17] Binnie J in *Whiten v. Pilot Insurance Co.* reviewed this in a comprehensive fashion and concluded that an actionable wrong did not require a finding that an "independent tort" had been committed, as some had argued.Instead, an actionable wrong could be found where there has been a breach of the contractual duty of good faith, a breach of a separate and distinct contractual provision or "other duty such as a fiduciary obligation."[18]

The Court in *Whiten* also clarified the appropriate approach for awarding punitive damages:

> ...the incantation of the time-honoured pejoratives ('high-handed', 'oppressive', 'vindictive', etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount.... A more principled and less exhortatory approach is desirable. ...all jurisdictions seek to promote *rationality*... the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would further one or other of the objectives of the law, and what is the *lowest award* that would serve the purpose, i.e., because *any higher award would be irrational.* ...the governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objective for which the punitive damages are awarded... [emphasis added]

"Rationality" applies to both the question of whether an award of punitive damages should be made at all, and to the question of its quantum. The majority held:

> If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so 'inordinately large' that it exceeds what is 'rationally' required to punish the defendant, it will be reduced or set aside on appeal. Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose.

17 *Vorvis v. Insurance Bureau of British Columbia,* [1989] 1 S.C.R. 1085, [1989] S.C.J. No. 46.
18 *Whiten, supra* note 4.

In *Keays*, the trial judge and the Court of Appeal reasoned that Honda's "discriminatory conduct" amounted to an independent actionable wrong for the purposes of awarding punitive damages. This conclusion appeared to depart from the long established principles enunciated by the Supreme Court in *Seneca College of Applied Arts and Technology v. Bhadauria* ("*Bhadauria*"), where the Court held that a plaintiff was precluded from pursuing a common law remedy for discrimination when human rights legislation contained a comprehensive enforcement scheme for violations of its terms.[19]

In considering the issue of the independent civil cause of action of discrimination and the principles applicable when awarding punitive damages, the Supreme Court of Canada in *Keays* considered three interdependent issues:

1. whether a breach of human rights legislation amounted to an independent actionable wrong for the purposes of awarding punitive damages;

2. the circumstances in which punitive damages should be awarded; and

3. whether punitive damages were justified in this case.

Although Mr. Keays and others argued that the time was right for the Court to reconsider its conclusion in *Bhadauria*, Bastarache J refused to do so and, indeed, reaffirmed the principles established in the earlier case:

> It is my view that the *Code* provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the *Code* cannot constitute an actionable wrong; the legal requirement is not met.

Further, in considering that the underlying purpose of the *Code* was to remedy the effects of discrimination, it was reasoned that if a breach to the *Code* was actionable in common law courts, it would encourage litigants to use the *Code* to punish employers who discriminate against employees and that this was in conflict with what the legislature intended.

With respect to the second issue noted above, Bastarache J explained that courts should only resort to punitive damages in exceptional cases, where the wrongful conduct was so malicious and outrageous as to be deserving of punishment and judicial censure on its own. Quoting *Vorvis,* Bastarache J observed that "conduct meriting

19 *Bhadauria, supra* note 2.

punitive damages awards must be "harsh, vindictive, reprehensible and malicious," as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment."

As with aggravated damages, the Court was unanimous in the view that there was no basis for the claim for punitive damages on the facts of this case and that these did not, in any way, demonstrate such malicious or outrageous conduct which warranted an award of punitive damages. Further, even if the facts justified an award of punitive damages, Mr. Keays received compensatory damages and this should have been considered in determining whether punitive damages were necessary. In other words, the damage award as a whole must be considered when deciding whether to award punitive damages (even where the underpinnings of this claim have been established).

On the specific facts of *Keays,* Bastarache J was of the view that there was no stereotyping or arbitrariness in the requirement that medical notes be produced to establish that absences were in fact related to the disability. He also accepted that the need to monitor absences of employees who are regularly absent from work is a *bona fide* work requirement. This latter finding is significant support for attendance management programs that are implemented and reasonably administered.

Bastarache J further affirmed that the insurer's decision to cut off Mr. Keays' long-term disability benefits had nothing to do with Honda and Honda could not be held responsible for it. As such, the trial judge's attribution of the insurer's decision to Honda and decision to allow punitive damages on this basis was wrong. Finally, while Honda's statement to Mr. Keays that hiring outside counsel was a mistake and would make things worse was ill advised and unnecessarily harsh, it did not justify an award of punitive damages.

The dissenting judgment in *Keays*, written by Lebel J on behalf of himself and Fish J, must not be overlooked in this discussion. While agreeing that a reconsideration of *Bhadauria* was not necessary, the dissenting justices were nonetheless of the view that Chief Justice Laskin in *Bhadauria* "went further than was strictly necessary" and that:

> The main thrust of the decision was that Ms. Bhadauria did not have a legally protected interest at common law that had been harmed by the defendant's allegedly discriminatory conduct (pp. 191-92). However, rather than stop there, Laskin C.J. went on to hold that *The Ontario Human Rights Code* "foreclose[s] any civil action based directly upon a breach thereof [and] also excludes any common law action based on an invocation of the public policy expressed in the Code" (p. 195). These conclusions imply (and have been interpreted to mean) that any allegations resembling the type of conduct that is prohibited by the Code cannot be litigated at common law. The *Code* covers a broad range of conduct in

> promoting the goal of equality. Yet the conduct at issue in *Bhadauria* was limited to the facts of that case. It would have been sufficient to simply conclude that the interest advanced by Ms. Bhadauria was not protected at common law. It was not necessary for this Court to preclude all common law actions based on all forms of discriminatory conduct.

The dissenting judges posited that the "development of tort law ought not to be frozen forever on the basis of this *obiter dictum*. The legal landscape has changed. The strong prohibitions of human rights codes and of the *Charter* have informed many aspects of the development of the common law."

RESTATEMENT OF *WALLACE* DAMAGES

The Court took up the mantle handed them in the appeal in *Keays* to, in effect, revisit *Wallace* damages. In so doing, the Court dealt a significant blow to plaintiffs who purport to advance these claims in future employment cases. The Court believed that this was necessary in light of its recent decision in *Fidler v. Sun Life Assurance Co. of Canada* ("*Fidler*").[20] Clarification of *Wallace* was certainly welcome given the manner in which lower courts had applied the *Wallace* principles which, with respect, was far from satisfactory and largely inconsistent with damage principles in other areas.

By way of background, *Wallace* established that the contract of employment included an implied duty of good faith and fair dealing in the manner of dismissal and that an employer breaching this duty was liable for "additional damages." Where it was found that the employer acted in bad faith, courts in common law provinces extended the period of notice by some indeterminate, unscientific and, arguably, random amount (this extension of the notice period became known as the "*Wallace* bump").

The dissenting judgment in *Wallace*, written by McLachlin J (as she then was) on behalf of herself, La Forest J and L'Heureux-Dubé J, must not be overlooked in this discussion as it was, in a number of important respects, adopted by the majority in *Keays* (at which time, it will be observed, McLachlin was Chief Justice of the Court and was in the majority). It should also be noted that the dissenting *Wallace* judgment has, with few exceptions, found support in Quebec where "moral" damages are awarded, on well established compensatory principles rather than through an extension of the period of reasonable notice.[21] McLachlin J in *Wallace* differed from the majority, written by Iacobucci J, in a number of respects:

> My colleague, Iacobucci J., holds that the manner of dismissal may be considered generally in defining the notice period for wrongful dismissal. *An alternative view is that the manner of dismissal should only be considered in defining the notice period where the manner*

20 *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, [2006] S.C.J. No. 30.
21 Fitzgibbon and Vachon, *supra* note 3.

> *of dismissal impacts on the difficulty of finding replacement employment, and that absent this connection, damages for the manner of termination must be based on some other cause of action.*
>
> I prefer the second approach for the following reasons. First, this solution seems to me more consistent with the nature of the action for wrongful dismissal. Second, this approach, unlike the alternative, honours the principle that damages must be grounded in a cause of action. Third, this approach seems to me more consistent with the authorities, notably *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, per McIntyre J. Fourth, this approach will better aid certainty and predictability in the law governing damages for termination of employment. Finally, there are other equally effective ways to remedy wrongs related to the manner of dismissal, which do not affect the prospect of finding replacement work. I will discuss in turn each of these reasons for preferring the second alternative. [Emphasis added]

With that background, we return to *Keays*. In analyzing *Wallace* damages, the Court considered the 1854 case of *Hadley v. Baxendale* , where it was held that damages are recoverable for a contractual breach if the damages are "such as may fairly and reasonably be considered either arising naturally ... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties."[22]

The first question is: what did the parties contemplate at the time of the formation of the contract? The Court held that:

> 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.

The Court then affirmed that in the employment law context, damages resulting from the manner of dismissal will be available 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."

In other words, it would have been in the contemplation of the parties at the time the contract was formed for damages to result when the circumstances described in *Wallace* are present. It would be both foreseeable and compensable.

Since the release of *Wallace* in 1997, common law judges have compensated

22 *Hadley v. Baxendale*, [1854] C.C.S. NO. 11.

employees for bad faith conduct of the employer through an extension of the period of reasonable notice. In *Keays,* the Court determined that this approach was incorrect. Bastarache J held:

> ...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.

In other words, courts will have to come up with an actual number reflecting the damages that the employee suffered, if any, by reason of the "bad faith" conduct of the employer. Accordingly, courts should apply normally accepted damage principles, a methodology with which they of course have ample experience.

The approach taken by the lower courts in awarding both *Wallace* damages and punitive damages exemplified the confusion between damages for conduct in dismissal (i.e. *Wallace* damages) and punitive damages. By awarding both types of damages, courts were, effectively, awarding "double compensation" to the employee and "double punishment" for the employer.

The Supreme Court's methodology will likely significantly limit the circumstances in which the damages formerly known as *Wallace* damages will be awarded. This will provide a measure of comfort to practitioners when advising their clients not only about the types of conduct that might give rise to such exceptional claims, but also about the potential damages flowing from such a finding and the evidentiary requirements on the plaintiff associated with proving his or her claim.

This is welcome, as *Wallace* claims have, since 1997, been the "hobby-horse" for many plaintiffs and their lawyers, even when such claims had little or no chance of success. Indeed, a number of judges began to lose patience with plaintiffs advancing specious *Wallace* claims and, one hopes, the more restrictive approach endorsed in *Keays* will ensure that only meritorious claims are brought to trial.[23]

23 See, for example, *Yanez v. Canac Kitchens* (2004), at para. 40, 45 C.C.E.L. (3d) 7 (Ont. SCJ) where the Court observed "The time has now come to express the Court's disapproval of routine assertions of "Wallace damage" claims which are not justified on the facts.... Such claims seriously impede the potential consensual resolution of disputes which could otherwise be settled well short of trial. Additionally, the assertion and defence of specious "Wallace claims" can consume large amounts of valuable court time; can increase the costs to all concerned; and can generally drive the parties apart....

Unmeritorious "Wallace claims" for bad faith firings ought not to be an apparently automatic inclusion for every plaintiff's prayer for relief."

The Court, after reviewing the "major overriding and palpable errors" at trial, determined that no breach had occurred in the manner of dismissal and thus no damages followed.

RECENT JUDICIAL CONSIDERATION OF *KEAYS*

A handful of judgments have considered and applied *Keays* and, though these are early days, the cases suggest that courts are using a restrictive approach to awarding damages and a more restrained approach when assessing the independent actionable wrong upon which a claim for punitive damages is founded.

In *Ahmed v. Edmonton Public School Board* the Acting Chief Commissioner of the Alberta Human Rights and Citizenship Commission dismissed Mr. Ahmed's appeal of the finding of an Investigative Officer who concluded that there was no direct evidence of religious bias in a school's rejection of Mr. Ahmed's daughters' application.[24] The Officer considered circumstantial evidence in reaching his decision and the Acting Chief Commissioner concluded there was ample support for the view that there had been no religious bias in this case. Mr. Ahmed sought to overturn this decision and asked that the Court decide the issue of religious bias itself rather than remit the matter back to the adjudicator for determination.

The Court denied the request and, in so doing, relied upon *Keays* for the proposition that "courts have no jurisdiction in matters of discrimination within the exclusive domain of human rights commissions" and that "discrimination is not an independent actionable wrong". *Keays'* affirmation of *Bhadauria* was relied upon by the Court in *Ahmed* to make short work of the direct claim being advanced in that case.[25]

Pawlett v. Dominion Protection Services Ltd. was an appeal of a trial decision in which Ms. Pawlett was found to have been constructively dismissed as a result of sexual harassment and assault by her supervisor.[26] She was awarded damages for wrongful dismissal, *Wallace* damages and punitive damages for the manner of dismissal as well as general damages for the tort of sexual battery. The employer and supervisor appealed.

The Court of Appeal observed that the trial judge did not have the benefit of *Keays* and emphasized, as did the Supreme Court of Canada that "punitive damages should only be resorted to in exceptional cases". The Court specifically commented on the caution of double compensation and double punishment discussed in *Keays*:

24 (2008), ABQB 351 (QB).

25 The court commented in a direct application of Bhadauria at paragraph 30 that "... it is not this Court but the Alberta Human Rights and Citizenship Commission which has the legal authority to deal with claims of discrimination of the type raised by Mr. Ahmed."

26 2008 ABCA 369, [2008] A.J. No. 1191.

> With respect, the trial judge fell into the same error in this case as did the lower courts in *Keays*. The same conduct underlays the award of *Wallace* damages for conduct in dismissal, the award of general damages for the tort, and the punitive damages.

The Court went on to state that the general damages award was denunciatory rather than compensatory and thus was outside of the damage principles emphasized in *Keays*. The purpose of the damages award is all-important.

The Court concluded that, in the circumstances, an award of punitive damages was justified. The Court reduced the punitive damages significantly from the $50,000 awarded at trial to $5,000 and, in doing so, was mindful of the comment in *Keays* to the effect that the entire damages awarded must be assessed in deciding whether these other damages were sufficient for the purpose of denunciation, deterrence and retribution. The court reasoned in *Pawlett* that the conduct was reprehensible and "cries out for deterrence" but that the damage award, as a whole, did not justify the $50,000 in punitive damages awarded by the trial judge.

The Ontario Court of Appeal in *McNevan v. AmeriCredit Corp.* overturned a trial judgment that, among other things, awarded an employee a six-month notice period plus a *Wallace* extension of six months.[27] This is an important case because although it was heard prior to the release of *Keays,* it follows the approach taken by the Supreme Court of Canada in that case.[28]

The Court in *McNevan* was critical of the trial judge's consideration of "extended" *Bardal* factors in arriving at the applicable period of reasonable notice.

The Court emphasized that it was generally reluctant to interfere with the trial judge's assessment of the period of reasonable notice, relying on *Minnott v. O'Shanter Development Co.* where the court noted that determining the period of reasonable notice was "more art than science".[29] However, an appellate court will intervene to overturn a trial judgment where, in its judgment, the assessment of the period of reasonable notice lies outside an acceptable range or where the trial judge erred in principle or made an unreasonable finding of fact.

In this case, the trial judge, in arriving at a six-month notice period, relied on the company's purported failure to warn the employee about dissatisfaction with his job performance. The Court of Appeal said that by doing so the trial judge had relied upon irrelevant criteria. Of interest is that this general approach is consistent with that of Bastarache J in *Keays,* where he was critical of the trial

27 [2008] O.J. No. 5081, 2008 ONCA 846.

28 The Court asked for submissions from counsel following the release of Keays, though it was not necessary for the Court to consider these in light of the conclusions that it reached on the record.

29 *Minott, supra* note 11 at para. 62.

judge's consideration of Honda's "flat management structure" and Keays' place in the hierarchy in determining the notice period. What is relevant is what the employee does, not extraneous factors that do not inform specifically upon that.

While finding that this was not a proper consideration, the Court of Appeal nonetheless upheld the trial judge's assessment of the period of reasonable notice, which was generous but not outside the reasonable range.

With respect to the *Wallace* extension granted by the trial judge, the Court found that the trial judge's consideration of the employer's failure to warn the employee of performance issues in extending the notice period on the basis of *Wallace* was not appropriate. The Court also found that the following were not proper factors upon which to find bad faith:

> ... the failure to provide a reference letter; the failure to offer assistance in a job search; and the offer of three months' salary in lieu of notice which was conditional on the signing of a release.

The Court had the following to say:

> This court has recognized that an employer is under no legal obligation to provide a letter of reference: see *Titus v. William F. Cooke Enterprises Inc.* 2007 ONCA 573 (CanLII), (2007), 284 D.L.R. (4th) 734 (Ont. C.A.), at para. 42. Moreover, McNevan never asked for a letter of reference, or for assistance in finding another job. Further, in the circumstances, I do not regard AmeriCredit's request for McNevan to sign a general release before receiving a severance package as high-handed or in bad faith: see *Wilson v. Goodyear Canada Inc.* 2007 BCCA 136 (CanLII), (2007), 66 B.C.L.R. (4th) 99 (C.A.). Rather, an offer of severance conditional on the execution of a release is not only standard, but also wise corporate practice.

The trial judge also relied on the employer's post-employment conduct in relation to the employee's personal property, some delays in dealing with payment of vacation pay, the delivery of his T4 and Record of Employment and the refund of deductions on the employee's paycheque in extending the notice period under *Wallace*. [30] The Court of Appeal held that "there is no evidence that the company was unduly insensitive in the manner in which it dealt with" these matters and overturned the *Wallace* damages.

To similar effect, aggravated or moral damages were refused in *Colwell v. Cornerstone Properties Inc.* in a constructive dismissal case where an allegation of

30 The employer had packed up the personal property and shipped them to the employee. Unfortunately, "in the process, a glass candy jar broke and an ice tea can punctured, causing damage to some photographs."

breach of privacy was advanced.[31]

The impact of *Keays* on *Wallace* damages was also considered in *Fox v. Silver Sage Housing Corporation* where the court noted:

> In *Wallace*, damages were awarded by extending the period of notice. *Keays* altered the method of calculating damages. The court stated that the award of damages is meant to be compensatory. Therefore, it must reflect the damages actually suffered.[32]

The Court refused to award any damages even though it found that the employer's conduct was not candid, reasonable or in good faith since the plaintiff was unable to prove that he suffered actual damages as a result of the manner of dismissal as opposed to the dismissal itself.[33]

To a similar effect was *Desforge v. E-D Roofing Limited,* where the court noted that although the dismissal of the employee might have been carried out differently, it lacked the "necessary degree of malice, blatant disregard for the employee, callous and insensitive treatment, or 'playing hardball' that would justify *Wallace*-type damages."[34] Furthermore, and in any event, the plaintiff was unable to prove, on a balance of probabilities, that any mental distress he suffered was a result of the manner of dismissal, rather than the dismissal itself. No medical evidence was advanced, though it was available and, once again, the normal hurt feelings associated with being terminated are not compensable.

While this handful of cases is insufficient to establish a trend, what seems to be emerging is a more exacting standard for establishing what are admittedly exceptional damages. *Keays* will likely continue to have this impact with moral and punitive damages being rarely awarded in employment cases.

CONCLUSION

As with any case of significance, the impact of *Keays* will only be fully seen in its application by lower courts. However, the following principles seem apparent:

- The *Bardal* factors remain the most important when determining the period of reasonable notice. Though other factors will be considered, the emphasis here is on the particular circumstances of the employee and on the actual

31 *Colwell v. Cornerstone Properties Inc.,* [2008] O.J. No. 5092, CanLII 66139 (ON S.C.).
32 *Fox v. Silver Sage Housing Corp.*, [2008] S.J. No. 477, 2008 SKQB 321 (CanLII).
33 The court commented "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."
34 *Desforge v. E-D Roofing Ltd.*, [2008] O.J. No. 3720, 69 C.C.E.L. (3d) 115.

work of the employee.

- Subject to the amendments to the *Ontario Human Rights Code*, employers should not be litigating human rights claims as many pundits feared following the release of the Court of Appeal's decision in *Keays*. The fact is that the Supreme Court affirmed *Bhadauria*.

- Punitive damage claims in employment law cases should be rare and awarded only in circumstances where other damages do not adequately address the wrong.

- *Wallace* damages should also be exceptional. Though the Court acknowledged that it would be in the contemplation of the parties at the time of the formation of the employment contract that an employee would suffer damages if the employer acted in bad faith, it also emphasized that the Court was now required to quantify the damages in the usual way rather than through arbitrarily extension of the notice period.

- Courts must be vigilant to avoid the pitfalls of "double compensation" and "double punishment" in their damage awards.

- The subtext of *Keays* is that employers can, and indeed should, manage absenteeism and disability issues in their workplace. An employer will not be found to have acted in a "hardball" or offensive manner merely because it managed absenteeism in a proactive way. As Bastarache J noted, "I accept 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." While these comments are of assistance to employers, they should not be taken as a judicial green light to manage absenteeism in a manner that is not, objectively, fair and sensitive.

While courts are quick to emphasize that employment law cases are "different" from, for example, commercial disputes, the Supreme Court ultimately concluded that those differences were insufficient to justify, in broad terms, departing from his-

torical damages principles.[35]

Keays also demonstrates that the Supreme Court of Canada is prepared to intervene and "right a ship" that it believes has drifted off course. In *Keays*, the Court took the occasion to enforce generally accepted damages principles, and clarify both *Bhadauria* and *Wallace*. This approach was more recently seen in *Hydro Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000,* where the Court felt the need to clarify the confusion created by its earlier decision in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance)* dealing with the duty to accommodate.[36]

Some may view these decisions as signaling the advent of a more interventionist Supreme Court which will find a way to substitute its views for those of lower courts where they merely disagree with their decisions. A careful reading of *Keays* and *Hydro Québec* may suggest otherwise. In both cases, the Court tried to restrict the manner in which lower courts applied principles developed by the Supreme Court in earlier cases.

In any event, the impact of *Keays* cannot be understated and will be felt for some time as lower courts come to grips with its significance, meaning and application. *Keays* signals a return to a simpler damages regime grounded in well-established damages principles. Certainly, the impact of *Keays* is that plaintiffs will face some further evidentiary hurdles when trying to prove so-called "exceptional" damages claims.

35 *Reference Re Public Service Employee Relations Act (Alta.),* 1987 CanLII 88 (S.C.C.), [1987] 1 S.C.R. 313 where it was observed that "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." and, more recently, Wallace where Iacobucci, J. observed that "The contract of employment has many characteristics that set it apart from the ordinary commercial contract" and then went on to describe those differences.

36 *Keays, supra* note 1; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance),* [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46.