

# The HR Space

Your weekly e-bulletin on labour and employment law issues

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Fasken Martineau DuMoulin LLP

## **Keays v. Honda One Year Later**

### Have Canadian Courts Changed Their Approach to Punitive and Bad Faith Damages?

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It has been just over a year since the Supreme Court of Canada (“SCC”) issued its decision in [Keays v. Honda Canada Inc.](#) That decision mandated a change in our courts’ approach to awarding damages in employment cases. Damages for bad faith conduct by the employer (“Wallace damages”) and punitive damages were to be awarded only in exceptional circumstances.

So just what have Canadian courts been doing since? Has their approach to such damages really changed? A review of the decisions in the past year suggests they have.

#### **Keays In A Nutshell**

Keays was a long service Honda employee who was diagnosed with chronic fatigue syndrome. Honda exempted him from its attendance-related progressive discipline policy but required him to provide a medical note for each absence, which was not required of other employees. When Keays’ sporadic absences continued, Honda hired a doctor to assess him. Keays hired a lawyer, who wanted to clarify the purpose of meeting

with the doctor. Honda refused to deal with Keays’ lawyer. When Keays then failed to meet with Honda’s doctor, he was fired for insubordination.

The trial judge said there was no just cause for dismissal. He awarded Keays 15 months’ pay in lieu of notice. He also awarded *Wallace* damages equal to a further 9-months’ pay. This was based on his finding of bad faith by Honda in the manner of dismissal. Further, Keays was awarded \$500,000 in punitive damages. This was granted because Honda was found to have discriminated against and harassed Keays.

Honda appealed. While the [Ontario Court of Appeal](#) reduced the punitive damage award from \$500,000 to \$100,000, it upheld the 15-month notice period and the 9 month *Wallace* extension.

The parties appealed to the [Supreme Court of Canada](#). The Supreme Court agreed with the 15-month notice period but disagreed that Honda’s conduct was worthy of any *Wallace* damages or punitive damages. In making that decision, the Supreme Court ruled:

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- there should be an end to the practice of awarding *Wallace* damages by simply extending the notice period where the employer acts in bad faith;
- instead, damages resulting from the manner of dismissal should be fixed according to the same principles as any case involving “moral damages”;
- any award of moral damages should be limited to the employee’s actual losses resulting from the employer’s conduct; and
- as for punitive damages, they should be awarded only in exceptional cases – where the employer’s conduct is so malicious and outrageous that they deserve punishment on their own.

### Trial Courts Following Keays

With some minor exceptions, trial judges across Canada have adopted these principles. For example:

- In Saskatchewan, in [Fox v. Silver Sage Housing Corp.](#), the employer did not provide the employee with the true reasons for termination. Although the employee later suffered stress and depression, the court did not award any *Wallace* damages (or moral damages, as they may now be called) because there was no proof that the stress or depression was caused by the manner of his dismissal.
- In the Ontario case of [Desforge v. E-D Roofing Ltd.](#), the employee could not prove that he suffered mental distress because of the manner of his dismissal. No moral damages were awarded.
- In New Brunswick, in [Saulnier v. Stitch It Canada’s Taylor Inc.](#), the trial judge applied the

principles from *Keays* and said that the anguish and suffering that the employee felt from having to read her termination letter in a food court and having to turn in company property did not justify moral or punitive damages. The court noted that any dismissal involves some potential for embarrassment and humiliation, but that is not enough to warrant such damages.

- In British Columbia, in [Bru v. AGM Enterprises Inc.](#), the trial judge found that the employer acted unfairly and insensitively when it refused to respond to the employee’s statements that she had not resigned. The employee presented medical evidence that she suffered a reactive depression in response. The court concluded that the reactive depression prevented her from finding alternate employment for 6 months. So, in addition to 3 months’ pay in lieu of notice, the trial judge awarded:
  - \$5,000 in lieu of a *Wallace* extension, based on the actual damage the reactive depression caused;
  - \$12,000 for mental distress damages; and
  - no punitive damages, because while the employer’s behaviour was unfair and insensitive, it was not malicious.
- In another British Columbia case, [Marchen v. Dams Ford Lincoln Sales Ltd.](#), the trial judge awarded punitive damages but no moral damages. In that case, the employee was told that he was being dismissed because of corporate downsizing, but the trial judge found that the real reason was the employer’s unproven suspicions of criminal activity. The court awarded:
  - \$100,000 in punitive damages, because the employer had tried to cover up the real reason for the dismissal throughout the litigation, but

- no moral damages, because there was no evidence that the employee suffered debilitating emotional distress following termination.

## Appeal Courts Fall in Line

With the exception of a few cases which had been in progress when the SCC decision was issued, the appeal courts have generally adopted the *Keays* principles. For example:

- The Alberta Court of Appeal, in [Magnan v. Brandt Tractor Ltd.](#), refused to award *Wallace* damages in a case involving age discrimination. The employer had forced the employee to retire at age 65. It did not realize that its retirement policy violated age discrimination laws. The employee sued. The court award was limited to compensation in lieu of notice of termination.
- The same court, in [Pawlett v. Dominion Protection Services Inc.](#), overturned the trial judge's award of \$50,000 for punitive damages. The employee was forced to quit as a result of sexual harassment and assault by her supervisor. As a result, in addition to the normal pay in lieu of notice, the trial judge awarded the employee *Wallace* damages equal to one month of notice, plus \$25,000 in general damages for pain and suffering and \$50,000 for punitive damages. Relying on *Keays*, the appeal court reduced the \$50,000 punitive damages award to \$5,000. It did not disturb the rest of the award.

- In *Clark v. BMO Nesbitt Burns Inc.* the employee sued for reasonable notice and *Wallace* damages when he was fired after being charged with sexual assault, but well before his trial. His claim relied in part on the fact he was not given the opportunity to sell his book of business. The Ontario Court of Appeal said that because the reasonable notice period took into account the employee's lost opportunity to sell his book of business, additional damages for the lost opportunity were not warranted.

## End of the Day...

When the SCC released its decision in *Keays*, many employers celebrated. It is even more cause for celebration to see that, for the most part, trial judges and appeal courts are following the decision.

This change toward a more rigorous approach to compensatory damages may lead to fewer claims for *Wallace* or moral damages, and fewer claims for punitive damages. Only time will tell if the nature of employment litigation in Canada has really changed.

For more information on the subject of this bulletin, please contact the author.

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