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## Out of proportion: Appeal court trims punitive damages awarded to terminated chronic fatigue sufferer

In a decision issued on September 9, 2006, a majority of the Ontario Court of Appeal has reduced by \$400,000 the punitive damages awarded against an employer in a case of wrongful dismissal. *Keays v. Honda Canada Inc.* involved an employee suffering from Chronic Fatigue Syndrome (CFS). The employer first offered, and then refused accommodation measures to the employee, Keays. He was eventually terminated after refusing to meet with the employer's occupational health specialist (for full details of the case, see ["The "Large Whack": Honda hit with record damages for "corporate conspiracy" in dismissal of employee with Chronic Fatigue Syndrome"](#) on our Publications page).

The trial judge held that Keays had been wrongfully dismissed. Keays was awarded 15 months' notice, plus nine months in "*Wallace*" damages for the callous and bad faith manner in which Keays had been terminated and the resulting harmful effect on Keays' mental health (see ["Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules"](#) on our Publications page). It is worth mentioning that the trial judge's award of \$500,000 in punitive damages, was due to what he termed Honda's "protracted corporate conspiracy" to turn Keays into a "totally unemployable and dependent recluse". The employer appealed against all of these awards.

The Court of Appeal judges unanimously upheld the award of wrongful dismissal, together with the *Wallace* and punitive damages. Two of the three judges held that the amount of punitive damages should be drastically reduced to \$100,000. Reasoning that the trial judge's conclusions supporting such a large award were not supported by evidence, and because the amount of the award "failed to accord with the fundamental principle of proportionality" in determining the appropriate amount of punitive damages, the majority of the panel stated the amount of the award should be reduced.

### FINDINGS NOT SUPPORTED BY EVIDENCE

The Court noted evidence was lacking in following conclusions drawn by the trial judge:

- *A corporate conspiracy to displace Keays' physicians with Dr. Brennan, Honda's occupational health specialist.* The Court held that although it was possible that Honda's request Keays visit Dr. Brennan was made in bad faith, there was no evidence to support the existence of a conspiracy. A 'conspiracy' conclusion was inconsistent with the trial judge's other finding. At point, if Honda had determined to terminate Keays, there would have been no need to take the trouble to "insinuate" Dr. Brennan between Keays and his physicians if the decision to terminate Keays already been made.
- *Honda's "outrageous conduct" persisted over five years.* The Court termed this finding a "palpable and overriding error" and expressed the view that Honda's misconduct had lasted only seven months, beginning with Honda's request that Keays produce doctor's notes for each of his absences and ending with his termination. Moreover, although Honda required a physician's note for each absence (a requirement not imposed on other employees with "mainstream" illnesses), it initially accepted those notes without question and accommodated the absences. It was only when Keays' absences became more frequent and obtaining the notes became extremely difficult that matters began to spiral out of control between Keays and the employer.

- *Honda had “clearly benefited” from its misconduct.* In the Court’s view, while there was no question that Honda was sceptical about Keays’ disability, there was no evidence that Keays was viewed as a problem employee that Honda wished to make an example of him.
- *Honda “ran amok” in its blind insistence on production ‘efficiency’ at the expense of its obligation to accommodate Keays.* Some Honda supervisory employees had made decisions that were clearly wrong, but there was no evidence of the grave allegation of corporate malfeasance levelled by the trial judge.

The Court went on to state that after setting aside these erroneous conclusions, only the following factual findings could be used in calculating the amount of punitive damages awarded against Honda:

- Honda hid a piece of damaging evidence until late in the trial.
- Honda was aware of its obligation to accommodate and must have known it was wrong to terminate the accommodation without just cause and terminate Keays as an act of retaliation.
- Honda knew that Keays valued his employment and that he was dependent upon it for disability benefits.
- Honda knew that Keays was particularly vulnerable because of his precarious medical condition.
- Honda’s refusal to deal with Keays’ counsel, who made a reasonable request to discuss accommodation of Keays’ disability.

### DISPROPORTIONATE DAMAGES

In light of this reasoning, the Court accepted that Honda’s conduct had been sufficiently outrageous to warrant an award of punitive damages, but held that the amount of damages had to be reconsidered. It pointed out that damages of \$500,000 were on the same scale as those awarded in the Supreme Court of Canada’s landmark decision on punitive damages in a contractual relationship, *Whiten v. Pilot Insurance Company*. *Whiten* involved particularly bad faith and egregious conduct by an insurer against a family whose home had been destroyed by fire. After providing the family with rent for a small winterized cottage for six months, the insurer ceased making payments. The insurer alleged the house had been torched, against the opinion of the local fire chief and its own expert investigator. The plaintiff in *Whiten* spent \$320,000 pursuing a \$345,000 claim. In that case, the jury’s award of \$1,000,000 in punitive damages was held to be justifiable.

Comparing the facts of the two situations, the Court held that the extraordinary factors justifying the amount of punitive damages in *Whiten* did not exist in this case. The Court then considered the following factors set out in *Whiten* as a guide for determining the amount of damages:

- *Length of the defendant’s misconduct.* At seven months, Honda’s misconduct was not on the same scale as the insurer in *Whiten*, where the misconduct endured for two years.
- *Malicious or high-handed conduct.* Despite the gravity of some of the findings of misconduct the trial judge made against Honda, its conduct could not fairly be described as malicious.
- *Deterrence and the relative strength of the parties.* The trial judge, citing *Whiten*, stated that “it takes a large whack to wake up a wealthy and powerful defendant to its responsibilities”, but the Court in *Whiten* indicated that the size and power of a corporate defendant was a factor of limited relevance in determining whether a large award was

necessary to deter the misconduct. In this case, the Court of Appeal stated, there were no circumstances from which it could rationally be concluded that a lesser award would fail to achieve deterrence.

- *Whether compensatory damages had also been awarded.* In this case, the trial judge should have considered the fact he had already awarded substantial wrongful dismissal and *Wallace* damages to Keays.
- *Whether the damages are proportional to the advantage wrongfully gained by the defendant.* The Court in *Whiten* stated that punitive damages are intended to ensure that the defendant does not treat compensatory damages as the price of getting its way irrespective of the legal rights of the plaintiff. In this case, the Court of Appeal held that there was nothing to indicate that Honda viewed wrongful dismissal damages as an acceptable price to pay for getting rid of Keays.

Bearing in mind these comparisons, the Court concluded that the factors justifying an award on the scale of *Whiten* were not present in this case:

“Two factors stand out when comparing the two cases. First, in *Whiten* there was a two-year period of escalating misconduct up to the trial. Here the misconduct was for no more than seven months [...] Second, in *Whiten*, the defendant persisted in its course of conduct, based on a theory that the plaintiff deliberately set the fire, in the face of repeated findings from its own experts and advisors that the fire was accidental. [The Supreme Court of Canada] described the defendant’s attitude to the plaintiffs [...] as “harsh and unreasoning opposition” and an attempt to “exploit a family in crisis”. That is not the case here. [Honda] had advice, albeit wrong and based on incomplete information, that caused it to question [Keays’] disability and it had, for almost a year, accommodated his absences.”

Accordingly, the Court held that while damages in excess of those awarded in other wrongful dismissal cases were appropriate, punitive damages of no more than \$100,000 could be justified, given the relatively short duration of the misconduct, the compensatory damages awarded by the trial judge and the fact that there were no special factors requiring deterrence, such as a pattern of abuse or the kind of conduct found in *Whiten*.

### **In Our View**

The Appeal judge that disagreed with the reduction in punitive damages expressed the view that it was reasonable for the trial judge to see the need for deterrence as significant in this case, particularly given that the disability at issue was CFS, which some employers may not be inclined to take as seriously as they would with more mainstream illnesses. This judge would have upheld the \$500,000 award.

Despite the dissenting judges’ opinion on the punitive damages, the amount ultimately awarded to the plaintiff, \$100, 000, is still large in terms of punitive damage awards generally awarded in Canadian employment law cases. This award evidences that courts will award substantial punitive damages against employers that treat disabled employees in a callous or disrespectful manner. Therefore, the reduction in punitive damages should not be construed by employers as an indication that courts will not scrutinize the treatment of disabled employees very carefully.

This decision emphasizes the need for particular care in terminating employees with medical conditions, and how employers respond to claims of disability due to controversial illnesses. In Keays’ case, he had been diagnosed with CFS by a clinic at the Toronto Hospital well before Honda began to demand notes for each of his absences. Employers should be especially concerned with third party interpretation of attendance management programs. A fine balance must be struck between ensuing employee attendance and flexibility for those employees with

disabilities. Finally, it is clear that employees can't be precluded from communicating through legal counsel.

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