

The "Large Whack": Honda hit with record damages for "corporate conspiracy" in dismissal of employee with Chronic Fatigue Syndrome

In a ruling that has raised eyebrows in the legal and human resources world, a judge of the Ontario Superior Court of Justice has awarded a dismissed employee 24 months' notice and \$500,000 in punitive damages. The damages won by the plaintiff employee may be the largest sum ever awarded in a Canadian wrongful dismissal action.

The employee in *Keays v. Honda Canada* (March 17, 2005) was a team leader in the employer's Quality Engineering Department and had 14 years of service at the time of his dismissal for insubordination. The Court described Kevin Keays as a "dedicated and conscientious" employee. However, he suffered from Chronic Fatigue Syndrome (CFS), which resulted in his receiving negative attendance assessments and, eventually, in his being absent from work on disability leave for two years. The insurer then terminated the leave on the basis that there was no objective evidence of total disability. Yet Keays' physician had referred him to the Sleep Disorders Clinic at Toronto Hospital where he had been diagnosed with CFS; and both the insurer and Honda were aware of this diagnosis.

ACCOMMODATION OFFERED, THEN WITHDRAWN

After Keays returned to work, his attendance continued to be an issue. The employer then offered him a special program exempting him from attendance requirements because he suffered from a disability recognized under the Ontario *Human Rights Code*. However, under the terms of the program, Keays had to produce physician's notes for each absence – a requirement that the Court criticized as being discriminatory, as other ill employees were not required to produce such notes. As well, the Court found that the requirement to produce notes made little sense as there were no specific diagnostic tests to identify CFS, and that the notes had the unintended effect of lengthening Keays' absences from work.

Keays raised the issue of the requirement for notes with the employer, but the latter refused to modify this aspect of the program. The Court found that this refusal aggravated Keays' condition and led to a worsening of his absenteeism. The Court also found that, when Keays expressed his concerns, the employer threatened to return him to a more physically demanding position on the production line.

Keays' absenteeism continued to worsen and he decided to hire legal counsel, who wrote a letter to the employer outlining his concerns over the requirements of the program and offering to work towards a solution. The Court found the letter to be "conciliatory in the extreme", yet the result was a response from the employer five days later cancelling the accommodation program and requiring Keays to meet with Dr. Brennan, the employer's occupational health specialist. The employer indicated in its letter that it no longer accepted the legitimacy of Keays' absences and that refusal to accede to this request would result in termination. The employer refused to communicate with Keays' counsel.

Keays asked for a clarification of the purpose of the meeting, which the employer refused to provide. The standoff continued, and Keays was eventually terminated for insubordination for not attending the meeting with Dr. Brennan.

COURT: NO JUST CAUSE

The Court held first that Keays' termination had been without just cause. It found that the direction to meet with Dr. Brennan was unreasonable, as Keays' medical file clearly indicated that he had been diagnosed with CFS. Moreover, the Court stated, the direction to meet with the physician was not made in good faith but was a prelude to Keays' termination. Further, Keays was justified in not attending the meeting due to what the Court referred to as a "constellation of abusive circumstances", including the wrongful termination of Keays' disability benefits, the discriminatory requirement for medical certification of his absences under the accommodation program and, most importantly, the unilateral withdrawal of the accommodation program. Finally, the Court held that dismissal was a disproportionate response to the alleged insubordination for the following reasons:

- Keays had been a dedicated employee for almost 14 years;
- His "default" did not involve any morally blameworthy conduct;
- His conduct was motivated by a legitimate concern that his human rights were being continually violated;
- He was neither insolent nor disrespectful;
- Honda had available alternative means of discipline up to and including suspension before it was required to resort to termination;
- There was no evidence that Keays' refusal to see Dr. Brennan had a disruptive effect on the production of vehicles.

WALLACE DAMAGES AWARDED

The Court awarded 15 months' notice but then considered whether the manner of Keays' dismissal justified an extension of the notice period under the approach articulated by the Supreme Court of Canada in *Wallace v. United Grain Growers Ltd.* (see ["Fairly, reasonably and decently": Employers obliged to deal in good faith with dismissed employees, Supreme Court rules](#)). The Court expressed the view that the letter ordering Keays to meet with Dr. Brennan was a callous and insensitive misrepresentation of the medical information available to the employer at the time, because of the implication that Keays was able to work. As a result of this treatment, the Court stated, Keays became depressed and was unable to work from the time of his termination.

The Court also had harsh words for Dr. Brennan, finding that the meeting that Keays was directed to attend was a "set up" because Dr. Brennan had, in effect, determined that Keays was malingering and that the cure for his condition was regular attendance at work. In the Court's view, this attitude by the specialist called into question whether the order to meet with him had been made in good faith. The Court also faulted the employer for unilateral cancellation of the accommodation program, characterizing it as a reprisal, in violation of the *Human Rights Code*, for Keays having retained counsel.

Given the "egregious bad faith" in the manner of the termination, and the medical consequences to Keays that ensued, the Court extended the notice period to 24 months.

"MINNOW" WINS PUNITIVE DAMAGES FROM "LEVIATHAN"

In considering whether to award Keays punitive damages, the Court had to determine whether the employer's conduct had amounted to an independent actionable wrong and whether the

conduct was so egregious that it merited punishment. The Court held that both tests had been met.

The wrongs inflicted on Keays, the Court held, were discrimination and harassment. Even the accommodation extended to Keays was discriminatory, the Court stated:

"Just because Mr. Keays did not carry a white cane, use a hearing aid, or get around in a wheelchair, did not make him any less deserving of workplace recognition of his debilitating condition. Despite his many years of affliction, he continually had to "earn" any accommodation reluctantly granted by Honda. This ignores the fundamental principle of human rights law that accommodation is a right, not an indulgence granted by one's employer or, worse yet, an act of charity. He had to "earn" the accommodation represented in the [Ontario *Human Rights Code*] Disability Program. He had to "earn" each dispensation from being "coached" for any absences by presenting a "note" from his doctor like some child who is suspected of "playing hooky" from school. This was not only an assault on his personal dignity, it was not a "burden" that was placed on associates with "mainstream" medical problems."

The Court then held that the employer had harassed Keays when one of its representatives suggested that he return to production line work, and that the order to meet with Dr. Brennan amounted to retaliation for having hired a lawyer. The final act of harassment was his termination. Having found that the employer had committed actionable wrongs against Keays, the Court then held that the conduct merited punishment. From the time Keays had been forced to return to work until the employer sent the letter demanding that he meet with Dr. Brennan, the employer had received a "virtual monsoon of information" documenting Keays' condition and the diagnosis of his condition by an expert in CFS. Faced with this evidence, the Court stated, the employer was determined to impose its will on Keays:

"It now becomes clear why Honda wanted to have the plaintiff see Dr. Brennan. Mr. Keays' physicians were the problem because they would "certify" his absences like Sidney Crosby signs autographs after a hockey game. They were the villains because they perpetuated the myth that the plaintiff was required, by his illness, to be absent from work. He just hadn't been "hardened" enough and Honda was the one to do it with the able assistance of their advocate of employers' anti-absenteeism rights, Dr. Brennan. The subterfuge practiced by everyone associated with Honda in attempting to intimidate him to seeing their occupational medicine specialist should make the blood boil of any right-thinking individual. This scheme was nothing less than a conspiracy to insinuate Dr. Brennan into the plaintiff's long-established medical relationship with his own doctors and, hopefully, to exclude them from any participation in advocating for his patient's rights."

The employer's "protracted corporate conspiracy" against Keays had turned him into a "totally unemployable and dependent recluse". The employer had "run amok" in its "blinded insistence" on production efficiency at the expense of its obligation to accommodate Keays with the participation of his own physician. As a worldwide corporation, a "Leviathan" next to the "minnow" that was Keays, the employer was in need of a "large whack" to wake it up to its responsibilities. Accordingly, the Court awarded punitive damages to Keays of \$500,000.

In Our View

This case is significant not only because of the size of the award against the employer, but also because it is another judicial endorsement of CFS as a physical ailment (see "[Alberta court rules that chronic fatigue syndrome is a physical illness](#)"). Both the insurer and the employer's occupational health physician doubted that CFS was the type of disability that required time off work. While there is still controversy over the nature of CFS, cases of this nature should be

handled with great caution, particularly when, as here, there has been a diagnosis of CFS by a specialist.

Another interesting aspect of the case is the fact that the Court considered Honda's "flat" non-hierarchical structure as a factor that went towards lengthening Keays' notice period. The Court stated that Keays had "bought in" to the notion that he was on an equal footing with senior management and that the notice period should reflect this fact. In general, the Court did not appear to be overly impressed with Honda's management style, at one point stating that "[Keays'] condition was incompatible with the "lean" and efficient operation demanded by Honda's corporate policy. The computer-managed workplace "trumped" his human rights."

Given the tone of the decision, it is not surprising that the employer moved for a mistrial on the basis that there was a reasonable apprehension of judicial bias. Nor is it surprising that the employer has filed for leave to appeal the decision. We will advise readers of developments in the case.

For further information, please contact [Jennifer Birrell](#) at (613) 940-2740.

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