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RECENT ONTARIO COURT OF APPEAL CASE IN *KEYS V. HONDA CANADA INC.* HAS BIG IMPLICATIONS FOR EMPLOYMENT PRACTICES LIABILITY INSURERS



The Ontario Court of Appeal recently increased the stakes for Employment Practices Liability ("EPL") insurers in its decision in *Keys v. Honda Canada Inc.* (2006), 52 C.C.E.L. (3d) 165.

FACTS AND BACKGROUND

Kevin Keys began working for Honda Canada Inc. ("Honda") in 1986 and over the years was promoted to a management position. Not long after commencing employment, he began to suffer from health problems which resulted in periods of absence from work. In 1997 he was diagnosed with chronic fatigue syndrome.

Mr. Keys' absences were initially accommodated by his employer. However, Honda instituted a number of measures that essentially amounted to progressive discipline for his absences and were discriminatory in comparison to employee absences due to "main stream" illnesses. When Mr. Keys retained counsel in an attempt to resolve the difficulties at work, the employer ordered him to meet with the company's occupational medicine specialist, who reportedly believed that Mr. Keys should be attending work on a regular basis. When Mr. Keys refused to meet with this physician without further clarification of the purpose of the meeting, Honda terminated his employment.

The trial judge determined that Honda had wrongfully terminated Mr. Keys' employment and awarded him 15 months' salary in lieu of notice. The trial judge also found that Honda had acted in bad faith in the manner in which it terminated him and awarded an extended notice period of nine months as "Wallace damages"¹. Lastly, the trial judge concluded that Honda's conduct amounted to a campaign of discrimination against, and harassment of, a disabled employee and was sufficiently high-handed and outrageous to justify a \$500,000 award for punitive damages.

THE RULING

The Ontario Court of Appeal unanimously upheld both the finding that Mr. Keys had been wrongfully dismissed and the award of an extended notice period for the manner in which he was dismissed. It decided that there was ample evidence to support the conclusion that Honda's order to Mr. Keys to meet with the company occupational medicine specialist was essentially for the purpose

¹ From the decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.)

of setting him up for termination and therefore Mr. Keays' refusal to attend was reasonable and justified. Accordingly, the employer did not have just cause to terminate Mr. Keays.

With respect to the award for punitive damages, the majority of the Court upheld the trial judge's conclusion that Honda knew its conduct was against a particularly vulnerable employee and was carried out in order to avoid its duty to accommodate. However, it reduced the amount for punitive damages to \$100,000 on the basis that an award of \$500,000 was not rationally connected to the severity of Honda's conduct.

One dissenting judge would have upheld the \$500,000 awarded by the trial judge.

IMPLICATIONS FOR EPL INSURERS

EPL policies provide coverage for "Loss" arising from a "Wrongful Employment Practice", which typically includes wrongful dismissal, discrimination and harassment. However, damages in lieu of reasonable notice, the usual basis upon which damages are assessed in a wrongful dismissal law suit, are not covered Loss under these policies. In the *Keays* decision, this would mean that an insurer would have no indemnity obligation for the award of 15 months' salary in lieu of reasonable notice.

However, Loss under an EPL policy does include an extended notice period awarded because of the bad faith conduct of the employer in the manner of dismissal. Loss also typically includes awards of punitive damages. Accordingly, an EPL insurer would be obligated to indemnify an insured for the nine months' extended notice period, awarded as "Wallace damages", and the \$100,000 awarded as punitive damages.

The decision in *Keays v. Honda Canada Inc.* has opened the door to significantly higher punitive damages awards in wrongful dismissal law suits. In light of the fact that punitive damages awards are frequently subject to a capped sub-limit of liability, it would be prudent in the future for insurers to consider offering, and for brokers to consider recommending, that insureds purchase higher sub-limits of liability for punitive damages. After *Keays*, there is now a real risk of punitive damages awards exceeding the usual compensation of damages in lieu of reasonable notice in a wrongful dismissal law suit.

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