



# Torkin|Manes BULLETIN

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## FOCUS ON LABOUR RELATIONS AND EMPLOYMENT LAW

### *Most recent developments*



Lisa Corrente

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#### **Highest amount of punitive damages ever awarded for dismissing disabled employee**

Honda Canada has been ordered to pay \$500,000 in punitive damages, the highest award of its kind in Canada, for terminating the employment of a disabled employee. The award was in addition to wrongful dismissal damages of two years' salary in lieu of notice. An Ontario Superior Court judge ruled that the Company had discriminated against and harassed Kevin Keays, a former employee who suffered from Chronic Fatigue Syndrome. Honda dismissed the worker in bad faith in order to avoid complying with its duty to accommodate his disability to the point of undue hardship.

By all accounts, Keays had been a dedicated and conscientious employee since 1986. By 1996, his health had deteriorated and he went on long-

term disability benefits. The benefits were cut off in 1998 and Keays was forced to return to work.

Within a month of his return, Keays began to miss work due to illness. After four absences, he was "coached" – the first step in Honda's progressive discipline process. As a result, the employee enrolled in a Company program that exempted disabled workers from attendance-related progressive discipline. However, the program required him to provide a doctor's note to confirm every absence. When Keays was absent six times in October 1999, he was asked to see the Company doctor who expressed the view that there was no diagnosis preventing Keays from returning to the physically demanding production line.

As Keays became increasingly stressed that he was being set up to lose his job, his absences also increased. He retained a lawyer to communicate with Honda regarding his absenteeism. Honda responded by canceling Keays' access to the Company program and directed him to submit to a medical assessment by its specialist. When Keays objected because he was not told what the assessment would entail, he was

dismissed for insubordination. Keays sued Honda for wrongful dismissal.

The Court ruled that Honda's direction that Keays submit to a medical assessment was not made in good faith as it was a "lead-up" to firing him. Further, Keays had a reasonable excuse to refuse the assessment, given how Honda had mistreated him in the past. Thus, the Court held that Keays had been wrongfully dismissed.

The Court awarded Keays 15 months' salary in lieu of notice, plus an additional nine months' salary for bad faith conduct as a result of the manner of his dismissal. According to the trial judge, Honda's unilateral cancellation of Keays' access to the Company program constituted a "reprisal" under the Ontario *Human Rights Code* which justified the award of extra damages.

Further, the Court held that Honda had committed an "independent actionable wrong" by violating Keays' rights under the *Code*. The "litany of acts of discrimination and harassment" against Keays, coupled with Honda's motivation to terminate Keays in order to avoid its obligation to accommodate his disability, resulted in the highest ever award of

*(continued on reverse)*

**Most recent developments** *(cont'd.)*

punitive damages in this country – a whopping \$500,000. Honda has appealed the ruling.

**Denial of severance due to disability violates Charter**

In a decision released in May 2005, the Ontario Court of Appeal held that a provision under the *Employment Standards Act, 2000* (ESA) which discriminates against disabled employees by denying them severance pay is unconstitutional and of no force and effect: *Ontario Nurses' Association v. Mount Sinai Hospital*.

The ESA gave Ontario employers the right to refuse severance pay to employees with an illness or injury that makes it impossible for them to continue in their employment. However, the Court of Appeal held that the provision in question, violates Section 15 of the *Canadian Charter of Rights and Freedoms* by denying disabled employees equal treatment and equal compensation in employment.

According to the Court, severance pay is intended to compensate employees for past years of service. As such, the denial of severance pay for past contributions to the employer's business devalued the worth of disabled employees. Further, the Court found that the provision treated disabled individuals differently from others, based on a stereotype that they were not likely to contribute to the workforce in the future. Thus, the Court held that the legislation was discriminatory and could not be justified as a reasonable limit on an employee's right to equality.

**Childbirth: what's the emergency?**

Under the emergency leave provisions of the *Employment Standards Act, 2000* (ESA), an employee is entitled to a leave of absence without pay in the event of "an urgent matter" involving the employee's spouse, child or step-child.

Roach was a probationary employee who did not attend at work for three consecutive days because of the birth of his child. He offered no other explanation when one was requested by his employer. Elkay Canada felt that Roach's failure to report to work on the third day was an unexcused absence and the Company dismissed him.

Roach filed a complaint under the ESA, claiming that he was improperly fired for taking an emergency leave day. The Ontario Labour Relations Board disagreed. It ruled that in order to be eligible for an emergency leave of absence, the employee must advise the employer of the urgent matter as soon as possible and, if requested, provide reasonable evidence to the employer that the leave is warranted.

The Board found that Roach had not explained to his employer that he needed to have the day off in order to care for his girlfriend's two children while she was in hospital. Therefore, it was reasonable for his employer not to consider Roach to be entitled to an emergency leave day and it had reasonable grounds to terminate his probationary employment.

**Ontario Court discourages routine claims for bad faith dismissal**

The Ontario Superior Court has held that it is time to put a stop to routine

claims for bad faith dismissal: *Yanez v. Canac Kitchens*. According to the trial judge, far too many wrongful dismissal cases include claims for "Wallace" damages which cannot be supported by the facts.

In *Wallace v. United Grain Growers Ltd.*, the Supreme Court of Canada held that an award of extra damages in lieu of notice may be justified in circumstances where an employer had engaged in unfair or bad faith conduct in the course of dismissing an employee. However, the Supreme Court expressly cautioned against automatic claims for extra damages in every case of dismissal.

The trial judge expressed his disapproval for unmeritorious Wallace claims which, in his view, had the effect of seriously impeding the potential resolution of disputes, consuming large amounts of valuable court time and increasing costs for all concerned. His recommendation to the courts was to deter such claims by imposing sanctions including reduced cost awards or lower awards for dismissal claims.

*For more information about the comments contained in this bulletin, please contact any member of our Labour Relations and Employment Law Group.*

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