

EMPLOYMENT LAW CONFERENCE – 2009 KEYS V. HONDA CANADA INC. REVISITED



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1. **INTRODUCTION**

The Supreme Court of Canada decision of *Keays v. Honda Canada Inc.*¹ represents an important step towards clarifying the nature of damages recoverable upon the termination of employment. The highest court's earlier decision of *Wallace v. United Grain Growers Ltd.*² had led to considerable debate in the legal community about the appropriateness of compensating individuals for the manner in which their employment was terminated (i.e. by an extension to the period of reasonable notice that became known as "Wallace Damages"). In rendering its decision in *Keays v. Honda*, in addition to the *Wallace* decision itself, the Supreme Court of Canada had more than 10 years of jurisprudence discussing the *Wallace* principles to consider.

In *Keays v. Honda*, the Supreme Court acknowledged the debate surrounding Wallace Damages, and also addressed the key question of whether it is appropriate to award damages where the claim for such damages is grounded in a breach of human rights legislation—typically considered the realm of tribunals.

It has been almost a year since the decision of *Keays v. Honda* was released. This paper will discuss the legal principles applicable to the assessment of damages articulated in *Keays v. Honda* and how this decision has been subsequently applied by the Canadian Courts.

2. **ANALYSIS**

In *Keays v. Honda*, the Supreme Court of Canada stated an intention to make adjustments to the law of wrongful dismissal. Particularly, Bastarache J. commented at para. 5 that it was "... appropriate for [the] Court to reconsider the *Wallace* approach and make some adjustments".

In fact, one might argue that the Court went well beyond mere "adjustment" and did away with Wallace Damages altogether. The Court in *Keays v. Honda* held:

To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and

¹ *Keays v. Honda Canada Inc.* [2008] S.C.J. No. 40

² *Wallace v. United Grain Growers Ltd.* [1997] 3 S.C.R. 701

moral damages resulting from conduct in the manner of termination. *Damages attributable to conduct in the manner of dismissal are always to be awarded under the Hadley [infra] principle.* Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded *not through an arbitrary extension of the notice period*, but through an award that reflects the actual damages.³

[emphasis added]

In coming to this decision, the Court affirmed its reasoning in its 2006 judgment of *Fidler v. Sun Life Assurance Co. of Canada*⁴, in which McLachlin C.J. and Abella J. articulated a test for damages for mental distress flowing from breach of contract that included the ‘reasonable contemplation’ principle developed in the mid-nineteenth century:

Damages for breach of contract should, as far as money can do it, place the plaintiff in the same position as if the contract had been performed. However, at least since the 1854 decision of the Court of Exchequer Chamber in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, it has been the law that these damages must be “such as may fairly and reasonably be considered either arising naturally ... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties.”⁵

However, in both *Keays v. Honda* and *Fidler* the Supreme Court of Canada noted that not all mental distress flowing from breach of contract will be compensable. “The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.”⁶ Particularly, in *Keays v. Honda*, the Court declared that the starting point is asking “what did the contract promise” and that:

The contract of employment, is by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice *without regard to the ordinary psychological impact of that decision.* At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the

³ *Keays v. Honda*, para. 59

⁴ *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3

⁵ *Fidler v. Sun Life Assurance Co. of Canada*, para. 27

⁶ *Fidler v. Sun Life Assurance Co. of Canada*, para. 45

dismissal since the dismissal is a clear legal possibility. *The normal distress and hurt feelings resulting from dismissal are not compensable.*

Damages resulting from the manner of dismissal must then be available *only* if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is “unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive”.⁷

[emphasis added]

In *Keays v. Honda*, the Supreme Court of Canada did not abrogate recovery for employees in cases of bad faith or ‘*Wallace*-type’ dismissal. What it did do was take damages for bad faith dismissal out of the ambit of the notice period (which compensates for one aspect of a breach of an employment contract—failure to give reasonable notice) and place them into a free-standing head of recovery for mental distress.

Finally, and as an aside, in both *Keays v. Honda* and *Fidler*, the Supreme Court of Canada took pains to distinguish between compensation for mental distress—which was just that, compensation for harm arising out of breach of contract suffered by a plaintiff—and aggravated and punitive damages. In *Fidler*, the Court pointed out that historically, the term “aggravated damages” has been used ambiguously. Further, it stated that aggravated damages, as the term should be understood (i.e. as arising out of aggravating circumstances that give rise to a separate cause of action in tort and not the contractual breach itself), *are not* awarded under the principle of reasonable contemplation. The damages awarded under the umbrella of *Hadley v. Baxendale*⁸ flow from breach of the contract itself, and “exist independent of any aggravating circumstances and are based completely on the parties’ expectations at the time of contract formation”. As such, damages for mental distress arising from breach of an employment contract are “not true aggravated damages awards”.⁹

Furthermore, in *Keays v. Honda*, the Supreme Court of Canada held that punitive damages are not to be awarded simply because the plaintiff has experienced mental distress. “Damages for conduct in the manner of dismissal are compensatory;

⁷ *Keays v. Honda*, paras. 56-57

⁸ *Hadley v. Baxendale* (1854), 9 Ex. 341

⁹ *Fidler v. Sun Life Assurance Co. of Canada*, para. 55

punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own”.¹⁰ While punitive damages do focus on a defendant’s conduct, the courts, when considering such damages, are not looking to compensate the plaintiff, but to determine whether punitive damages are required to satisfy the tripartite goals of denunciation, deterrence and retribution. The focus is on the “defendant’s conduct, not on the plaintiff’s loss”.¹¹ Importantly, the Court noted at para. 75 that terminating an employment contract with the knowledge that all employees value and need their jobs is not enough to justify an award of punitive damages. What matters is whether the employer’s actions were such that denunciation, deterrence and retribution are brought into play.

As stated, the Supreme Court of Canada held in *Keays v. Honda* that damages for mental distress will be awarded where an employee “... can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties ...”¹² at the time the contract was entered into. However, while the focus should, ultimately, be on whether the manner of dismissal was foreseeable as causing mental distress giving rise to damages, the character of the particular acts of an employer will undoubtedly come under close scrutiny. This is particularly so as the Court stated in *Keays v. Honda* (citing *Wallace*-type criteria) that despite the operation of *Hadley* principle damages for mental distress will only be awarded where an employer’s actions can be characterized as “unfair or ... in bad faith by being, for example, untruthful, misleading or unduly insensitive”.

The question then becomes whether or not a plaintiff can show that his or her employer acted unfairly or in bad faith by arguing breach of a statute. This question finds parallels in the law of negligence, and in the seminal decision of *Canada v. Saskatchewan Wheat Pool*¹³ in which the Supreme Court of Canada held that “... where there is no duty of care at common law, breach of non-industrial penal legislation should not affect civil liability unless the statute provides for it”. That is, there is no nominate tort of breach of statute, and, unless the statute or common law provide for civil liability, the plaintiff has no claim.

¹⁰ *Keays v. Honda*, para. 62

¹¹ *Keays v. Honda*, para. 69

¹² *Keays v. Honda*, para. 59

¹³ *Canada v. Saskatchewan Wheat Pool*, [1983] S.C.J. No. 14

In the context of employment law, where, for example, a plaintiff claims breach of human rights or employment standards legislation, both the Supreme Court of Canada and the British Columbia Court of Appeal have held that the Courts are not the appropriate forum within in which to claim breaches of these statutes.

In *Seneca College of Applied Arts and Technology v. Bhadauria*¹⁴, the Supreme Court of Canada held that the Ontario *Human Rights Code* foreclosed any civil action based not only upon a breach thereof, but also "... any common law action based on an invocation of the public policy expressed in the Code". The Court held: "The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use." In *Keays v. Honda*, the Supreme Court of Canada affirmed the ratio in *Bhadauria*, Bastarache J. stating: "It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the Code cannot constitute an actionable wrong: the legal requirement is not met".¹⁵

With respect to the *Employment Standards Act*, in *Macareg v. E Care Contact Centers Ltd.*¹⁶, the British Columbia Court of Appeal held that the minimum standards provided in the *Employment Standards Act* are not implied terms of an employment contract. Therefore, an employee is *not* entitled to commence a civil action for breach of that statute, as, according to *Macareg* (similar to *Bhadauria* and *Keays v. Honda*), the Act lays-out a comprehensive scheme whereby an employee can pursue, and will receive, an appropriate remedy. In precluding the enforcement of legislative standards through a civil action, the Court utilized the following test (discussed at paras. 101-103):

[D]id the legislators intend that conferred rights should be enforced by civil action? The answer to the question requires consideration of the legislation as a whole. If it affords effective enforcement of the rights, the general proposition, that the statutorily-conferred rights are to be enforced not by court action, but by a statutory mechanism, applies. If the legislation does not afford effective enforcement, the exception to the general rule applies and the rights can be enforced in civil action. The civil action will be based on recognized causes of action. In the case of rights conferred on employees through employment standards

¹⁴ *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181

¹⁵ *Keays v. Honda*, para. 64

¹⁶ *Macareg v. E Care Contact Centers Ltd.*, [2008] B.C.J. no. 765

legislation, the rights will be implied terms of the employment contract and enforced through an action for breach of contract.

When a statute provides an adequate administrative scheme for conferring and enforcing rights, in the absence of providing for a right of enforcement through civil action expressly or as necessarily incidental to the legislation, there is a presumption that enforcement is through the statutory regime and no civil action is available.

In this case, the ESA provides a complete and effective administrative structure for granting and enforcing rights to employees. There is no intention that such rights could be enforced in a civil action.

Ultimately, as Chiasson J.A. held that as the Act “provides a comprehensive administrative scheme for the granting and enforcement of employee rights”¹⁷, the only appropriate forum for the enforcement of rights conferred under the Act was the scheme outlined within the Act itself. The application for leave to appeal *Macareg* to the Supreme Court of Canada was dismissed.

In sum, these decisions of the Supreme Court of Canada and British Columbia Court of Appeal confirm that it is not appropriate to argue the breach of a human rights or employment standards legislation where there is a designated expert and legislatively-mandated forum within which to pursue remedies for a breach of that legislation. However, while these decisions may foreclose a claim for breach of human rights and employment standards legislation in the Courts, it is not clear whether these ratios equally bar use of the evidence of such breaches to support a claim for damages for mental distress.

In *Wheat Pool*, the Supreme Court of Canada did indicate that a breach of statute, while not giving rise to civil liability in and of its self, could be *evidence* of such liability—otherwise grounded in an acknowledged common law cause of action—provided that the statutory breach “caused the damage of which the plaintiff complains”. In other words, the Court held that where the violation of the statute caused the damage to the plaintiff, “the violation of the statute should be evidence of negligence on the part of the defendant”. All this said, in *Wheat Pool* the Court did not address to the same extent the jurisdictional questions addressed by the Courts in *Bhadoria*, *Keays v. Honda* and *Macareg*. Furthermore, in *Wheat Pool* it was arguably clear that the defendant had

¹⁷ *Macareg v. E Care Contact Centers Ltd.*, para.86

breached the statute in question: section 86(c) of the *Canada Grain Act*¹⁸ (as it then existed) prohibited delivery of infested grain out of a terminal elevator, which was clearly what had happened. Accordingly, it may be that the outcome in *Wheat Pool* can be distinguished from a situation where the breach is not proven (for example, where a Plaintiff has not made a complaint to either the Human Rights Tribunal or the Director of Employment Standards).

Additionally, and again, the Supreme Court of Canada in *Wheat Pool*, clearly stated that to use breach of a statute as evidence of the wrong, that breach must have “caused the damage to the plaintiff”—i.e. it must have caused the mental distress. Arguably, this statement puts an onus on the Plaintiff to show that the mental distress was caused by the alleged statutory breaches, and not on a defendant to show otherwise. Note that in *McKinley v. BC Tel*¹⁹, the Supreme Court of Canada held that, with respect to mental distress it is not “any evidence, even a mere scintilla thereof, [that] would suffice to put the matter [to a jury]”.²⁰ Admittedly, the Supreme Court, was, in that case, discussing aggravated damages awarded for mental distress flowing from wrongful dismissal. And, given the Court’s comments five years later in *Fidler*—that damages from mental distress are compensatory and not “true aggravated damages”—that Court’s treatment in *McKinley* might no longer be good law. This being said, it may be possible to argue that while the articulation of damages by the Supreme Court of Canada for mental distress has been refined since *McKinley*, the statement as to evidentiary threshold should still apply.

To summarize, the Courts, and particularly the Supreme Court of Canada, have been clear that there is no free-standing tort of discrimination at common law²¹. As a result, an employee does not have a civil claim against its employer for acts of discrimination, but has a claim pursuant to the statutory regime set in place to deal with acts prohibited by human rights and other legislation. On this point the Courts are fairly clear.

¹⁸ SC 1970-71-72, c. 7

¹⁹ *McKinkley v. BC Tel*, [2001] S.C.J. No. 40

²⁰ *McKinkley v. BC Tel*, para. 81

²¹ see, e.g. *Keays v. Honda* at paras. 65 to 71

Where the Courts have not provided significant guidance however—at least beyond the now twenty-five year old decision in *Wheat Pool*, which, arguably did not involve the same involved jurisdictional discussion as found in *Bhadauria*, *Macareg* and *Keays v. Honda*—is with respect to the question of whether the fact that a plaintiff is precluded from seeking redress for breach of human rights or employment standards legislation in the courts also precludes a plaintiff from colouring the actions of a defendant by reference to those same statutory prohibitions. Where a defendant is not civilly liable for particular conduct *per se*, is that conduct to be disregarded by a Court in determining whether a plaintiff has suffered harm (i.e. mental distress) for which the defendant may be liable at common law?

In *Bhadauria*, the Court made the following observations regarding the difficulty of extending the *Wheat Pool*-type of analysis beyond the confines of negligence:

There is, in my view, a narrow line between founding a civil cause of action directly upon a breach of a statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute. The cases that have dealt with situations of this kind have been in the field of negligence, with the legislation viewed as establishing standards of behaviour, and deviation, unless excused, amounting to a species of strict liability. ...

...

... It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation—one in no sense analogous to a duty of care in the law of negligence—to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection, and solely on the basis of a breach of a statute which itself provides comprehensively for remedies for its breach.

If the characterization of the conduct cannot be divorced from the statutory prohibition, it could follow that such a characterization should not be relevant to a Court without jurisdiction to decide such matters. That said, this may be a difficult pill to swallow for plaintiffs and the Courts may be prepared to hear the evidence relating to the alleged breach of legislation.

Given the jurisdictional decisions discussed, a plaintiff may be able to introduce evidence pertaining to a statutory breach to bolster a claim actionable at common law. *Wheat Pool*, as far as it is applicable, indicates that evidence of a statutory breach goes to the characterization of an action (“The notion of a nominate tort of statutory breach giving rise to recovery merely on proof of breach and damages should be rejected, as should the view that an unexcused breach constitutes negligence *per se* giving rise to absolute liability.”).

However, where the focus is not on the character of the act itself (e.g. was it negligent or not) but on whether it was foreseen to have caused a particular loss in the context of a contractual breach, whether the act was right, wrong, or on the line of proper conduct, arguably becomes irrelevant, and thus, the decision in *Wheat Pool* may be distinguishable. Moreover, *Keays v. Honda* is strong authority in support of a bar to the introduction of evidence that does not relate to a recognized cause of action.

In *Hadley v. Baxendale* the Court of Exchequer Chamber held:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Arguably then, it is not a question of how the breach occurred, but whether the breach would give rise to damages that were “reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”. Accordingly, under this test repeatedly endorsed by the Supreme Court of Canada (damages for mental distress arising from the method of termination of employment exist independently “... of any aggravating circumstances and ... based completely on the parties’ expectations at the time of contract formation”²²), whether or not the method chosen to breach a contract of employment was discriminatory or otherwise contrary to a statute is arguably neither here nor there.

²² *Fidler v. Sun Life Assurance Co. of Canada*, para. 55

To conclude this section, given the Supreme Court of Canada's longstanding refusal to acknowledge a nominate tort of breach of statute, any plaintiff who wishes to introduce evidence of a breach of the statutory prohibitions found in the *Human Rights Code* or the *Employment Standards Act* to bolster a claim for mental distress arising out of breach of an employment contract will likely be walking a fine line between what is, and is not, admissible. In light of the jurisprudence canvassed above, a Court should not allow a plaintiff to do indirectly what they are precluded from doing directly—a plaintiff should not be allowed to effectively claim compensation for breach of a statute under the guise of a claim for damages for mental distress flowing from breach of contract. Furthermore, to the extent that a plaintiff may be permitted to lead evidence relating an alleged statutory breach (subject to the limitations discussed in the preceding paragraphs), a Plaintiff will have to show that the breach caused the damage complained of in accordance with the ratios in *Wheat Pool* and *McKinley*.

All this said, however, the question of the characterization of a particular defendant's actions might be avoided entirely by a strict focus on the *Hadley v. Baxendale* principle. The question is not how 'bad' the defendant's actions were in the eyes of the court, but whether the defendant's actions in breaching the contract would, at the time of contracting, and in the minds of the parties, lead to foreseeable loss.

Finally, regardless of how liability for damages for mental distress is assessed, the implications of the Supreme Court of Canada's re-articulation of Wallace Damages are arguably most pronounced in the area of quantum. Under the *Wallace* test, an employee could be compensated for an employer's bad faith in the manner of dismissal by an extension of the notice period (which was traditionally held to be subject to an upper-limit of 24 months). Now that post-*Keays v. Honda*, damages are not awarded by an "arbitrary extension" of the notice period, there are arguably no 'natural boundaries' or stated limits on the awards that may be made.²³

²³ *Jalan v. Institute of Indigenous Government*, [2005] B.C.J. No. 929 (BCSC), the conceptual challenges presented by the *Wallace* decision are evident. The *Jalan* case involved the *Public Sector Employers Act* which limits the notice or payment in lieu of notice recoverable for employees in the public sector. The Court considered whether the Legislature contemplated damages for the matter of termination of employment (i.e. mental distress) when limiting the amount of notice owed to public sector employees. In *Jalan*, the Court held that Wallace Damages were not a common-law "... head of damages separate and apart from damages for the reasonable notice period".

Since Wallace damages are part of the overall award for reasonable notice at common law, the effect of the Public Sector Employers Act is to limit the total notice period, including any Wallace award, to a maximum of 18 months. To accept the plaintiff's

3. RECENT CASES

ALBERTA

Although the decision of the Alberta Queen's Bench in *Ahmed v. Edmonton Public School Board*²⁴ did not arise in the employment context, the Court did consider whether discrimination is an independent actionable wrong. The Court in that case was faced with an application to set aside a decision of the Alberta Human Rights and Citizenship Commission. The applicant's daughter had been denied admission to a school, and there were allegations of religious discrimination. The Alberta Human Rights and Citizenship Commission investigated the complaint and found no religious bias on the part of the school. The applicant sought an order to overturn the Commission's decision, but, relying on the discussion in *Keays v. Honda*, the Court held that it had no jurisdiction to hear the matter because religious discrimination was in the exclusive jurisdiction of the Commission.

In *Pawlett v. Dominion Protection Services Ltd.*²⁵, the Court considered the *Keays v. Honda* decision when determining whether damages were recoverable in connection with the circumstances surrounding the termination of an individual's employment. The employee in question sued for damages in connection with sexual harassment and assault by her workplace supervisor, and she had reported being

position on the interpretation of the Regulation would require the court to read in exceptions and qualifications to the express language used by the legislature.

See also the decision of Madam Justice Saunders in *Clendenning v. Lowndes Lambert (B.C.) Ltd.* (2000), 82 B.C.L.R. (3d) 239

However, post *Keays v. Honda* it may be that this limit on the recovery of damages relating to the manner of termination no longer exists. In *Keays v. Honda* damages for mental distress are a separate head of damages. That said, in *Jalan*, Mr. Justice Kelleher came to his conclusion through an analysis of *Wallace*, and did not engage in a particularly detailed discussion of the policy behind the *Public Sector Employers Act*. Accordingly, it is not entirely clear whether the Legislature intended to limit damages for mental distress for the employees of public sector employers. With respect to public sector employers, it is not clear whether damages for mental distress are recoverable in light of the express limits on the notice and payment in lieu of notice recoverable.

²⁴ *Ahmed v. Edmonton Public School Board* [2008] A.J. No. 809

²⁵ *Pawlett v. Dominion Protection Services Ltd.* [2008] A.J. No. 1191 (C.A.)

subjected to unwanted physical contact. The trial judge awarded the employee \$88,091.55, including amounts for damages in lieu of notice, Wallace Damages, punitive damages and general damages for the tort of sexual battery against both her supervisor and employer who were found to be jointly liable. Both the supervisor and the employer appealed the decision.

The Alberta Court of Appeal allowed the appeal in part, and reduced the damages awarded to the Plaintiff. Relying on the *Keays v. Honda* analysis, the Court of Appeal, while affirming the lower court's decision on liability, stated that punitive damages should only be resorted to in exceptional cases. The Court accordingly reduced the award for punitive damages from \$50,000 to \$5,000 to avoid a duplication in damages for the same conduct.

BRITISH COLUMBIA

The case of *Bru v. AGM Enterprises Inc.*²⁶ involved a thorough examination of *Keays v. Honda* with respect to the dismissal of an employee at the Defendant's deli market in Kelowna, British Columbia. The Plaintiff had been a deli clerk for two and a half years prior to her dismissal. The substance of the Plaintiff's complaint was that she had been harassed by her co-workers, and had been forced to leave her employment for a number of days as a result. The Plaintiff's supervisor testified that at the time of her absence, the Plaintiff called to say she was quitting without notice, but that she had called the following day to see if she still had a job. At that time, the Plaintiff was told that she had quit and had been replaced.

In coming to a decision, the trial judge stated that *Keays v. Honda* had rejected the proposition that damages could be awarded if the manner of the dismissal were itself an independent actionable wrong. Instead, the Court could only award damages for mental distress based on breach of contract and foreseeability (i.e. the *Hadley v. Baxendale* principle). The trial judge further held that *Keays v. Honda* stated that good

²⁶ *Bru v. AGM Enterprises Inc.* [2008] B.C.J. No. 2380

faith conduct by the employer in the event of a dismissal is deemed to be contemplated at the time of the formation of the contract.

Applying the foregoing to that case, in *Bru*, the Court held that the principles of *Keays v. Honda* regarding the obligations of employers in a dismissal would also apply to employers receiving statements of resignation. This means that employers can not always take at face value an expressed intention to leave employment without considering the context and the surrounding circumstances. The trial judge found that the Plaintiff had not clearly and unequivocally resigned from her position and that the Defendant had wrongfully dismissed her.

The Court did not award punitive damages or find that the tort of intentional infliction of mental suffering had been proven. With respect to non-pecuniary damages, the Court found that the Defendant had failed in its obligation to act fairly and sensitively to the Plaintiff, and breached its good faith obligations to the Plaintiff in the manner of dismissal.

In *Marchen v. Dams Ford Lincoln Sales Ltd.*²⁷, the Plaintiff, an apprentice repairman, was dismissed from the Defendant's auto body shop before the end of his four-year apprenticeship agreement. The Defendant submitted that the termination was due to a lack of work in the auto body shop. The trial judge found that the Plaintiff was terminated on the Defendant's unfounded suspicion that he was involved in criminal activity with his brother, who had a drug dependency problem and also worked at the defendant's auto body shop.

On the issue of "moral damages", the trial judge cited *Keays v. Honda* for the proposition that normal distress and hurt feelings resulting from dismissal are not compensable and that the evidence in this case did not show the Plaintiff had suffered excessive emotional distress. On punitive damages, however, the trial judge found that the defendant's attempt to cover the true reasons for the termination merited an award of

²⁷ *Marchen v. Dams Ford Lincoln Sales Ltd.* [2009] B.C.J. No. 585 (a Notice of Appeal has been filed)

punitive damages in that case. The Court relied on *Keays v. Honda* to say that punitive damages will only be resorted to in exceptional cases. The trial judge found that the Defendant's conduct was planned and deliberate and was intended to mislead the court. As a result, the Court awarded punitive damages of \$100,000.

ONTARIO

In *McNevan v. AmeriCredit Corp.*²⁸, the Ontario Court of Appeal heard the appeal before *Keays v. Honda* was handed down, but requested counsel to provide further written submissions on that decision after it was released by the Supreme Court of Canada, and accordingly took the decision into consideration.

The employee in *McNevan* worked in a management position for the Defendant for thirteen months before he was dismissed without a reason or notice and was offered three months' salary in lieu of notice, which he rejected. The trial judge awarded the Plaintiff damages of twelve months' salary in lieu of notice (including a six month extension for Wallace Damages) as well as damages for other pecuniary loss.

The Court of Appeal allowed the Defendant's appeal in part. It upheld the six month notice award, although it noted that the trial judge had erred in his determination by considering an irrelevant factor—the failure of the defendant, in the Court's view, to warn the plaintiff about its dissatisfaction with the plaintiff's job performance. Because the Plaintiff had been dismissed without cause, the Court of Appeal considered that lack of a warning was not a relevant factor in the determination.

On the question of Wallace Damages, the Court of Appeal found that the record did not support the conclusion that the employer had acted in bad faith, and therefore the lower court had erred in its determination. The Court said that when taking bad faith conduct into consideration in a wrongful dismissal action, the nature of the alleged bad faith should be considered as a whole, along with its overall impact upon the

²⁸ *McNevan v. AmeriCredit Corp.* [2008] O.J. No. 5081 (C.A.)

employee. The Court concluded that there can be no justification for an extended notice period under *Wallace*, or a separate damage award for mental distress under *Keays v. Honda*, without a finding of bad faith. However, the Court did not undertake an extensive consideration of the implications of *Keays v. Honda*, particularly as regards Wallace Damages, ostensibly because of its conclusion that the Defendant had not acted in bad faith.

The Court of Appeal also reduced the Plaintiff's award for other pecuniary loss.

4. Conclusions

The decision of the Supreme Court of Canada in *Keays v. Honda* has arguably simplified the approach to be taken in determining claims for damages for mental distress. No longer an "arbitrary extension" to the notice period, damages arising from the nature of the dismissal now stand alone.

Moreover, it is clear that damages for mental distress are not subject to mitigation. Prior to *Keays v. Honda*, the extension of the notice period in accordance with the *Wallace* decision meant that an employee who successfully mitigated would not have a claim to damages for mental distress arising from the manner of the dismissal. That is, an employee who successfully mitigates—i.e. suffers no loss as a result of the termination of their employment without cause and without reasonable notice—is arguably not entitled to an award of damages in lieu of reasonable notice. Where no damages in lieu of reasonable notice are awarded, there can be no extension to that period to compensate for the manner of dismissal.

However, under the approach advocated in *Keays v. Honda*, an award of a nominal amount as damages for mental distress is the appropriate way to compensate an individual for mental distress arising from termination of employment—so long as the mental distress fits within the *Hadley v. Baxendale* framework: at the time of entering in into the contract of employment, the mental distress alleged would have been in the contemplation of the parties.

The challenge, however, will be to maintain consistency in how questions relating to mental distress are determined by the Courts in the future. Although Mr. Keays did

not recover damages associated with the manner of the termination of his employment nor punitive damages, the Supreme Court of Canada has emphasized the availability of damages for mental distress where the evidence is consistent with the *Hadley v. Baxendale* principle and punitive damages where the conduct is reprehensible and deterrence is a factor.

Keays v. Honda does not by any means mark the end of awards of damages arising from the manner of dismissal. However, it is a marked departure from a decade of jurisprudence that left employers with considerable uncertainty, and accordingly, risk, in terms of both how a court would perceive the manner of dismissal and in terms of how the manner of dismissal would translate into an increased notice award to a plaintiff.

While *Keays v. Honda* may not have entirely resolved the uncertainty regarding the evidentiary issues relating to a claim of mental distress, and may have left employers exposed to significant awards on this ground, it has certainly created a much more workable framework in which to determine liability in the first place. From a plaintiff's perspective, it now allows recovery for mental distress proven within the *Hadley* principle even where the plaintiff has suffered no loss arising out of its summary dismissal.

Overall, despite the areas of uncertainty that remain, the Supreme Court of Canada's moves in *Keays v. Honda* towards simplifying the law of summary dismissal should be considered a positive step for both employers and employees alike.



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