



Back to the Future-*Honda Canada Inc v. Keays* and Moral Damages

In the 2008 [*Honda Canada Inc. v. Keays*](#) decision, the Supreme Court of Canada introduced moral damages as the remedy for unfair or bad faith conduct by employers. The *Keays* decision represented a move away from the extension of the notice period remedy that the Supreme Court fashioned in the 1997 [*Wallace v. United Grain Growers*](#) case.

Over the past couple of years, courts across the country have issued some generous moral damage awards in wrongful dismissal cases. We thought it would be a good idea to revisit the *Keays* case and then review the recent cases to see how moral damages have evolved over time.

a) Honda Canada Inc. v. Keays

- **The Facts**

Mr. Keays worked 14 years at Honda Canada. In 1997, he was diagnosed with chronic fatigue syndrome. He ceased work and received disability benefits until 1998, when his employer's insurer discontinued his benefits. Mr. Keays returned to work and was placed in a disability program that allows employees to take absences from work if they provide doctor's notes confirming that their absences are related to their disability. Honda Canada became concerned about the frequency of his absences. The doctor's notes submitted changed in tone, leaving the employer to believe that the doctor did not independently evaluate whether he missed work due to disability. Honda Canada asked Mr. Keays to meet with the company doctor in order to determine how Mr. Keays' disability could be accommodated. On the advice of his counsel, Mr. Keays refused to meet with the company doctor without explanation of the purpose, methodology and parameters of the consultation. On March 28, 2000, the employer gave Mr. Keays a letter stating that it supported his full return to work but that his employment would be terminated if he refused to meet with the company doctor. When Mr. Keays remained unwilling to meet the doctor, the employer terminated his employment.

- **The Trial and Court of Appeal Decisions**

The trial judge found that Mr. Keays was entitled to a notice period of 15 months. He held that the employer had committed acts of discrimination, harassment and misconduct against Mr. Keays. Specifically, he found that



Honda Canada sent a letter to Mr. Keays that was “callous and insensitive”. The letter explained to Mr. Keays why the company was requesting that he meet with the company doctor. According to the trial judge, the letter “twisted” the positions of doctors to intimidate Mr. Keays. He also concluded that Mr. Keays was being “set up” for failure because the company doctor had already made up his mind that his condition was bogus and that the company doctor took a “hardball” approach to workplace absences. The trial judge also found that the company decision to cancel Mr. Keays’ accommodation was a reprisal for Mr. Keays’ decision to retain legal counsel. Finally, he found that it was discriminatory to require Mr. Keays to provide a doctors note for all of his absences where this was not a requirement of employees who did not have a disability. He increased the notice period to 24 months to award additional damages dependent on the manner of dismissal. He also awarded punitive damages against the employer in the amount of \$500,000, a costs premium, and costs on a substantial indemnity scale.

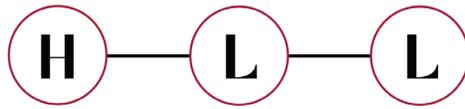
The Court of Appeal reduced the costs premium and, in a majority decision, reduced the punitive damages award to \$100,000. The Court of Appeal otherwise upheld the trial judge’s decision.

- **The Supreme Court Decision**

The Supreme Court was more sympathetic to Honda Canada’s efforts to manage Mr. Keays and his absences from work. It found that the trial judge made a number of “significant overriding and palpable factual errors that related directly to the factual matrix that justified, according to him, an award of damages for manner of dismissal (*Wallace* damages).”

The key principle from the *Keays* case is the change from the *Wallace* “extension of the notice period” to address bad faith conduct by the employer, to an award of moral damages for such conduct. Ironically, after introducing this new approach, the Supreme Court found that there was no bad faith conduct by Honda Canada so no award of moral damages was made for Mr. Keays.

The Court identified that there was some confusion in the law as to damages in wrongful dismissal to address bad employer behaviour. This confusion resulted in overlap in the damages awarded. Going forward, the Supreme Court provided the following guidance:



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- Damages for reasonable notice should continue to be determined by the *Bardal* factors (age, length of service, character of employment, availability of alternative employment) with no one factor being given disproportionate weight.
- The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice. The normal distress and hurt feelings resulting from dismissal are not compensable.
- Damages resulting from the manner of dismissal are 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”.
- There is an expectation that, in the course of dismissal, employers be “candid, reasonable, honest and forthright with their employees”. Failure to do so can lead to foreseeable, compensable damages.
- 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.
- Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own.

In the judgment, the Supreme Court dismissed the trial judge’s awards of *Wallace* damages (the 9-month extension of the notice period) and the award of punitive damages. It also made the following noteworthy observations regarding disability management:

- Requesting further information, or a consult with the company doctor, is not bad faith where the request is based on expert advice that medical information provided by the employee is inconclusive.
- Seeking to confirm an employee’s disability and need for accommodation in a professional manner is not bad faith. Where the medical note provided is “cryptic”, an employer can address that.
- Requiring disabled employees to provide doctor’s notes to confirm that an absence is related to their disability is not discriminatory where employees with “mainstream” illnesses are not required to provide a



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note. Where the purpose of identifying that an absence is related to disability is to exclude the absence from disciplinary consequences. That is a form of accommodation, not discrimination.

- “[T]he need to monitor the absences of employees who are regularly absent from work is a bona fide work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.”
- It is erroneous to attribute an insurer’s decision to deny disability benefits to the employer.
- An employer cannot be held accountable after the fact where an employee does not share information about the seriousness of their medical condition.
- There is no legal obligation on the part of any party to deal with an employee’s counsel while he or she continues with his or her employer. Parties are always entitled to deal with each other directly.
- Telling an employee that hiring outside counsel is a mistake and that it would make things worse is egregious.

The *Keays* decision has been referred to in over 800 court and tribunal decisions since it was published in 2008. In the next section of this article, we summarize some of the more recent decisions from across Canada.

b) Recent Moral Damages Cases

- ***Zaranski v JR Canada Restaurant Group Ltd.* [2020 BCPC 49](#)**

In this case, the employer’s termination letter was misleading as it provided baseless reasons for termination, such as the plaintiff employee’s alleged dishonesty when expensing mileage claims. The baseless nature of the employer’s claim was highlighted by the fact that the argument was eventually dropped during the trial. The employee was able to establish the necessary requirements for moral damages: that her employer had acted in bad faith during her termination and that she suffered mental distress as a result of how she was dismissed. Zaranski was awarded \$5,000. No punitive damages were awarded.

- ***Younesi v Kaz Minerals Projects B.V.* [2021 BCSC 614](#)**

During the termination meeting, management commented that the reasons for the plaintiff employee’s termination did not matter but when pressed by the plaintiff, management stated that he was not a good manager or engineer



and that he was embarrassing the company. This was determined to be unduly harsh and amounted to an attack on the plaintiff's competence. In determining the amount of the moral damages award, the Court considered factors such as the job market, as they influenced the plaintiff's mental health. The employee was awarded moral damages in the amount of \$12,500 as a result of the prolonged and substantial mental distress he experienced from his unduly harsh termination. There were no punitive damages awarded.

- ***Porcupine Opportunities Program Inc. v. Cooper* [2020 SKCA 33](#)**

This was an appeal decision to uphold an award of moral damages in the amount of \$20,000. After 30 plus years of service, the plaintiff employee was given eight (8) weeks of pay in lieu of notice. At the time of dismissal, he was 53 years old with a grade seven (7) education. After his termination, the employer alleged that the plaintiff employee engaged in theft and threatened staff members. However, the employer could not support its allegations. The employer also claimed that the employee's position was eliminated but then proceeded to promote within the company to fill the position. The employee was awarded \$20,000 in moral damages based on the false allegations waged against him and the employer lying about his position being eliminated.

- ***Klassen v Rosenort Cooperative Limited* [2020 MBQB 116](#)**

The plaintiff employee, Klassen, was a senior employee at Rosenort and, because of his position, was prominent and well-known in the community. An employee under the plaintiff's supervision was involved in a fraudulent matter. Despite Klassen assisting to investigate the fraud and evidence to the contrary, Rosenort considered him to be involved. The trial judge found that the investigation was not objective. There was evidence of emails attributing disloyal motive immediately. Further, a vague text message about a meeting fell short of an opportunity to respond. The Court also found that the company inferring a lack of cooperation from a request to consult legal counsel was unfair. The Court found it was unfair that Klassen was suspended without reasons and that the company sent his belongings to him by way of his daughter-in-law before the investigation concluded. Finally, when Klassen's employment was terminated, the notification of his departure was the same notification that was sent regarding the employee who did engage in fraud. This strongly suggested that Klassen had engaged in fraud as well. The employer was determined to have violated its duty of good faith/fair dealing which caused the employee mental distress. Klassen was granted



“aggravated” damages in the amount of \$10,000 (the Court notes at paragraph 84 that the Supreme Court of Canada has described aggravated damages as “moral damages”). The inability of the employer to be objective, and the malicious attitude and comments towards Klassen, constitute an award for punitive damages totalling \$8,000.

- ***Canadian Broadcasting Corporation v. Association of Professionals and Supervisors*, [2020 ONSC 6531 \(CanLII\)](#)**

In a judicial review of arbitration awards related to the termination of a grievor’s employment, the Court determined that \$10,000 was an appropriate amount of moral damages given the manner in which the grievor was informed of her termination. On her arrival to work, the grievor was directed by the employer (without warning or notice to the union) into an isolated room and was abruptly informed that she no longer had a job. The employer told the grievor that she was prohibited from speaking to anyone, her cellphone was wiped, and she was escorted out of the building. The grievor testified that she was shocked and humiliated by this treatment.

- ***Gascon v. Newmont Goldcorp*, [2022 ONSC 2511 \(CanLII\)](#)**

The plaintiff employee, William Gascon (“Mr. Gascon”), was employed as the General Manager of the Red Lake Mine. The employer, Newmont Goldcorp, entered into an agreement to sell the Red Lake Mine and indicated to Mr. Gascon that the purchaser would likely be making him an offer of employment (which did not happen). What the employer did not make clear to Mr. Gascon was their intention regarding his future with their company if the purchaser did not retain Mr. Gascon. For a period of four (4) months, the employer did not tell Mr. Gascon that he would not have a job with the company if the purchaser did not hire him. Despite not being able to provide Mr. Gascon with any guarantees, the duty of honest performance (parties must not knowingly mislead their counterpart about matters directly linked to the performance of the contract) required the employer to tell Mr. Gascon the truth as it was known to them and as the sale transaction proceeded. Mr. Gascon was left to speculate and draw his own conclusions about his future employment.

The Court found that in the four (4) months prior to Mr. Gascon’s without cause termination, the employer engaged in untruthful, misleading, and unduly insensitive conduct. The Court awarded \$50,000 in moral or exemplary damages in favour of Mr. Gascon in a wrongful dismissal action against the employer. Punitive damages were not requested.



- ***McGraw v. Southgate (Township)*, [2021 ONSC 7000 \(CanLII\)](#)**

The plaintiff employee was awarded \$75,000 in moral damages to compensate for mental distress arising from the manner of termination. The Court found that the employer engaged in conduct “during the course of dismissal” that was unfair and in bad faith. The employer acted on unfounded, sexist allegations, such as rumours of the plaintiff sending photos of herself to colleagues, without properly ascertaining the truth and without asking the plaintiff employee about the allegations. They conflated gossip with facts and failed to recognize the patent gender-based discrimination (in a male-dominated environment) directed at the plaintiff employee. Because of this bad faith misconduct, the plaintiff employee suffered significant mental anguish.

The Court also awarded the plaintiff employee an amount of \$60,000 in punitive damages. The classic test for punitive damages is “high handed and malicious conduct”, which the Court found the defendants, the employer and their Chief Administrative Officer, to have engaged in by way of gender-based discriminatory conduct. For example, the defendants embellished or fabricated comments regarding the plaintiff employee exchanging “sex for grades”, and improperly inflated rumours to justify their termination of her employment. Not only did the defendants attack the plaintiff employee’s integrity, but the allegations were not proven – this was a further aggravating factor in the assessment of punitive damages.

- ***Menezes v. Sterling Renovations & Development Corp*, [2021 ONSC 2396 \(CanLII\)](#)**

The plaintiff employee was awarded \$10,000 in moral damages associated with the manner of their dismissal. Although the Court does not provide specifics regarding the manner of dismissal, they note that the employer sent harassing email messages and publicly accused the plaintiff of serious misconduct.

- ***Nagpal v. IBM Canada Ltd.*, [2021 ONSC 6853 \(CanLII\)](#)**

The plaintiff employee, Vinay Nagpal (“Mr. Nagpal”), sought an award of moral or aggravated damages for the way he was treated by the employer leading up to his dismissal, and to reflect the stress, anxiety, and psychological toll that it took on him. Prior to his dismissal, Mr. Nagpal was suffering from psychological distress and went on leave. His short-term disability benefits were eventually terminated, and the employer reached out to advise him that he had the option of either returning to work or appealing the decision. They



also advised him that if he did not appeal the decision by a certain date, he would be required to return to work or he would be considered to have voluntarily resigned from his employment. However, Mr. Nagpal could not return to work due to his illness, and the employer was informed of this yet did nothing to support him. In fact, Mr. Nagpal's depression and mental health challenges continued for several years after his wrongful dismissal.

The Court found that the employer ought to have done more to address Mr. Nagpal's situation leading up to his dismissal. Having regard to the insensitivity shown to Mr. Nagpal and its impact upon him, the Court awarded him \$40,000 in aggravated damages.

Mr. Nagpal also sought punitive damages to send a message to the employer that its conduct was wrong. The Court did not award punitive damages as it found that the award of aggravated damages achieved this goal to some extent.

- ***P. T. c. Mohammad Naqeeb*** [2021 QCCS 1378](#)

The employee, a live-in domestic helper, sought moral damages against her employer. She alleged that her employer abused her vulnerability which included economic servitude, excessive hours of work, possessing her passport, withholding wages, and degrading and humiliating treatment. Given the jurisprudence, the trial judge determined that the employee was entitled to \$50,000 in moral damages. The employer and his wife were also ordered to pay \$100,000 in punitive damages.

c) Conclusion

To be entitled to moral damages, an employee must establish that the employer breached its duty of good faith/fair dealing leading up to or during the termination process. After the breach has been established the employee must prove that the breach caused them mental distress. Mental distress is not regular upset feelings around being terminated or the normal difficulties when finding employment. Rather, to cross the threshold, mental distress needs to be greater. Further, to be successful, an employee must establish a connection between the employer's breach of its duty and the mental distress they experienced.



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There is no set equation for determining the monetary amount to be awarded. The cases tend to be fact specific. From the cases above, it is apparent that courts are willing to award significant amounts of moral damages in appropriate cases. The following conduct by employers can be an appropriate case for an award of moral damages and, in some cases, punitive damages as well:

- Allegations of wrongdoing that are not substantiated;
- Failure to conduct an unbiased and complete investigation into allegations of wrongdoing;
- Misrepresenting the reasons for termination;
- Failing to correct (or contributing to) misinformation regarding the employee that is insensitive and/or impacts their reputation;
- Insensitivity to an employee's mental health;
- Abuse of a vulnerable employee; and
- Conducting the termination in a humiliating manner.

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