Case Comment
Commentaire d'arrêt

HONDA v. KEAYS: THE SUPREME COURT REVISITS EMPLOYERS' RIGHT

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1. Introduction

Employers throughout Canada breathed a sigh of relief when the Supreme Court of Canada released its decision in *Honda Canada Inc. v. Keays* in the summer of 2008.[1] The Court overturned one of the largest punitive damage awards in a wrongful dismissal action in Canadian history. Along the way, it took the opportunity to virtually rewrite the law of aggravated and punitive damages in wrongful dismissal actions.

Keays has much to offer employers beyond relief from the specter of out-of-control damage awards. The case also offers an affirmation of a number of employer rights in the employment relationship. These rights are instrumental for employers, not only in managing the workplace, but also in complying with their obligations under human rights law.

Employers should be cautious in assuming that the affirmation of these rights represents a shift on the Court in their favour, however. When *Keays* is considered alongside the Court's other recent employment law jurisprudence, it seems that a broader change may be underway, the impact of which is difficult to predict.

The first section of this paper will consider a few of the most important issues *Keays* raises for employers, with a particular focus on three areas: attendance management; the role of the doctor in the accommodation process; and the new standards for aggravated and punitive damages in wrongful dismissal. The second section will consider how the broader themes apparent in *Keays* mesh with the Supreme Court's other recent pronouncements on employment law, in

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1 2008 SCC 39, [2008] 2 S.C.R. 362 [*Keays SCC*].

search of some evidence of an ultimate goal for the development by the Court of principles in this field.

2. Factual Background

Kevin Keays began work at Honda in 1986. After twenty months working on the production line, he transferred to the Quality Engineering Department. In the words of the trial judge, he was "a dedicated and conscientious employee of Honda who was proud to work there despite his limited formal education."[2] He received performance evaluations which were in most respects positive throughout his time with Honda.

Despite this pride in his work, Keays began suffering from health problems shortly after he began his employment with Honda, which had a gradually escalating impact on his attendance at work. His poor attendance became the blemish on his otherwise satisfactory performance record at Honda.

Keays' doctor diagnosed his health problems as Chronic Fatigue Syndrome (CFS). CFS is recognized by the American Center for Disease Control, but it cannot be detected by concrete objective tests.[3] Instead, it is identified by a "diagnosis by exclusion;" other conditions with similar symptoms are ruled out one by one until the doctor is satisfied with a diagnosis of CFS.[4]

Keays' health worsened to the point where he was forced to take more than two years off work on disability leave. He had some difficulty securing benefits for this leave, due to disputes with the insurer over whether there was "objective medical evidence" for his claim. In December 1998, the insurer terminated his long term disability (LTD) benefits, based on the results of a work capacity evaluation. After the insurer dismissed his physician's objection to the evaluation, Keays returned to work on a graduated basis under protest.

Within a month after returning to full-time status, he was experiencing regular absences; in response the employer initiated progressive discipline. The first step in this process involved non-disciplinary "coaching," through a written report which Keays received

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2 *Keays v. Honda Canada Inc.* (2005), 40 C.C.E.L. (3d) 258 (Ont. Sup.Ct.) [*Keays SupCt*].

3 Center for Disease Control, "Diagnosing CFS" online: CDC, <http://www.cdc.gov/cfs/cfsdiagnosis.htm>.

4 *Ibid.*

in August 1999. Keays reiterated his claim that he was disabled by CFS and required accommodation.

Honda offered Keays the opportunity to participate in a program wherein employees suffering from a recognized disability would be exempted from discipline for attendance problems. Keays agreed to participate in the program, which required that employees submit a doctor's note to validate each absence. Keays' inquiries with Honda about the possibility of varying this requirement were rejected.

Keays' doctor had estimated that he would likely be absent four times per month under the program. In actuality, he was absent six times one month, and fourteen times across the span of another two. Honda continued to require medical notes to validate each of these absences, and began to investigate options to validate Keays' claim of a disability.

Shortly after beginning the accommodation program, Keays was interviewed by one of Honda's own doctors; Keays claimed at trial that the doctor had threatened to move him back to the production line which would have a negative impact on the progression of his condition. Honda denied this claim.

Honda attempted to have Keays meet with their occupational medicine specialist, who reviewed Keays' file, and requested a meeting with Keays to "initiate an 'heuristic' assessment of his accommodation needs."[5] Keays retained counsel, who requested further information on the purpose of this assessment. Honda replied by cancelling the accommodation it had offered and ordering Keays to meet with the specialist. Keays' lawyer reiterated his demand for an explanation of the purpose and methodology of the meeting. Honda resisted, and the standoff eventually resulted in Keays' termination for insubordination, on the basis of his failure to return to work and his refusal to meet with the specialist. Keays sued for wrongful dismissal, claiming aggravated and punitive damages, as well as damages for the independent tort of intentional infliction of emotional distress.

A) At Trial

In a judgment highly critical of Honda's conduct, McIsaac J. of the Ontario Superior Court found that Keays had been wrongfully dismissed and awarded him fifteen months of notice, in light of the character of his employment, his length of service, his age, and the availability of suitable alternative employment. McIsaac J. also found that Keays was entitled to

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5 *Keays SupCt*, *supra* note 2 at 265.

nine months for Honda's "egregious bad faith" in the manner of his termination, on the basis of the test in *Wallace v. United Grain Growers Ltd*.[6] Finally, he awarded Keays $500,000 in punitive damages, one of the largest awards ever made in a wrongful dismissal action in Canada.

The judge spared no criticism or reproof for Honda's actions in dealing with Keays. He found that Honda flagrantly discriminated against and harassed Keays. He characterized Honda's actions as "nothing less than a conspiracy to insinuate [Honda's occupational medicine specialist] into the patient's long-established medical relationship with his own doctors and, hopefully, to exclude them from any participation in advocating for [their] patient's rights."[7] He suggested that the direction to attend the interview with the specialist was "about as benevolent as asking a lamb to go into a wolf's den."[8]

The trial judge found that Honda's "protracted corporate conspiracy" against Keays had made him a "totally unemployable and dependent recluse."[9] For more than five years, Honda "ran amok as a result of their blinded insistence on production 'efficiency' at the expense of their obligation to provide a long-time employee reasonable accommodation that included his own physician's participation."[10] He found that Honda had engaged in this conduct for more than five years.

The trial judge's award of *Wallace* damages was based on four findings of fact in particular which bear note, as they were later dismissed by the Supreme Court:

- The trial judge found that Honda had deliberately misrepresented the views of its doctors as to Keays' medical condition.[11]
- He concluded that the meeting with the specialist was a set-up, resulting from a decision to play "hardball" with Keays.[12]
- He found that Keays' condition worsened after he was terminated, and that this had lasting consequences for his ability to work.[13]

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6 *Wallace v. United Grain Growers Ltd*., [1997] 3 S.C.R. 701 [*Wallace*].
7 *Keays SupCt, supra* note 2 at 284.
8 *Ibid*. at 278.
9 *Ibid*. at 285.
10 *Ibid*. at 285.
11 *Ibid*. at 266.
12 *Ibid*. at 277.
13 *Ibid*.

- Finally, he found that Honda's cancellation of its accommodation of Keays and its requirement that Keays meet with the specialist was retaliation for Keays having retained counsel.[14]

The trial judge also awarded punitive damages on the basis of these findings. He concluded that Honda had flagrantly breached Keays' rights under the Ontario *Human Rights Code*.[15] He justified the size of the punitive damages award by reference to the power imbalance between Honda and Keays. As a worldwide corporation, Honda was a "Leviathan" next to the "minnow" Keays.[16] Honda needed a "large whack" to wake it up to its human rights responsibilities.[17]

B) On Appeal

The Ontario Court of Appeal unanimously upheld the trial judge's award, while a majority of two judges reduced the quantum of the punitive damage award, on the basis that it was not proportionate to Honda's actions.[18] In reducing the award, the Court of Appeal criticized some of the trial judge's findings as lacking a basis in evidence. In particular, the Court rejected the trial judge's holding that Honda engaged in a "corporate conspiracy."

Despite these flaws in the trial judge's reasoning, the Court of Appeal still awarded punitive damages in the significant sum of $100,000. The Court emphasized Keays' vulnerability, his dependence on his employment, Honda's breach of its duty to accommodate Keays, and its refusal to deal with Keays' counsel in justifying the award of punitive damages.

C) At the Supreme Court

On further appeal, the Supreme Court upheld the basic award of a reasonable notice period of fifteen months, but struck down the awards of aggravated and punitive damages. The Court took the opportunity to highlight and clarify a number of aspects of the law of damages in employment, pointing to some confusion on this issue on the part of the trial judge.

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14 *Ibid*. at 282.

15 R.S.O. 1990, c. H-19.

16 *Keays SupCt, supra* note 2 at 285.

17 *Ibid*.

18 *Keays v. Honda Canada Inc.* (2006), 82 O.R. (3d) 161 (Ont. C.A.) [*Keays CA*].

3. The Impact of Keays

A) Keays and Attendance Management Policies

This year has brought a new recognition on the part of the Supreme Court of employers' right to have their employees attend regularly at work. In *Keays*, the Court offered a powerful affirmation of the right to monitor absences and control attendance. Meanwhile, in *Hydro-Québec v. Syndicat des employé-e-s de techniques professionelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, the Court held that the duty to accommodate ends where the employee remains unable to work for the foreseeable future despite the employer's efforts at accommodation.[19]

In *Keays*, the trial judge criticized Honda's requirement that employees participating in its disability management program provide a doctor's note for each absence, describing this requirement as discriminatory in and of itself.[20] The Supreme Court reversed this finding, accepting

> that the 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.[21]

This holding can be viewed as a victory for the Human Resources Professionals Association of Ontario, which intervened at the Supreme Court on the question of the employer's right to monitor absenteeism through doctors' notes.

While affirming the legitimacy of attendance management programs, the Court adopted the limits set out in 2007 in *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*.[22] The issue in *McGill* was whether a provision in the collective agreement which provided for the automatic termination of an employee upon the expiry of a stipulated maximum period of illness-related absence (automatic termination clause) was valid, or whether the employer had a further duty to seek reasonable accommodation for a disabled employee after the expiry of that period.[23]

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19 2008 SCC 43, [2008] 2 S.C.R. 561 [*Hydro-Québec*].

20 *Keays SupCt*, *supra* note 2 at 280.

21 *Keays SCC*, *supra* note 1 at 398.

22 1007 SCC 4, [2007] 1 S.C.R. 161 [*McGill*].

23 *Ibid*. at 170.

The clause at issue in *McGill* provided for termination after thirty-six months of absence.

The Court in *McGill* stated that "[i]nsofar as the operation of an enterprise relies on its workforce, there is no doubt that an employer may establish *bona fide* measures to ensure employees' regular attendance."[24] It held that a maximum period of absence was a legitimate negotiated form of accommodation from the requirement of regular attendance, and was therefore relevant to the question of whether the employer had satisfied the duty to accommodate.

The Court held, however, that the duty to accommodate did not end with the text of the collective agreement. The parties to a collective bargaining relationship cannot opt out of the employees' rights under human rights law, and therefore the accommodation afforded to a disabled employee must be individually determined.[25] While the automatic termination clause offered a useful reference point for the parties' intentions as to accommodation, it did not offer the final answer on the issue.[26]

McGill offers a helpful interpretive lens for the comments of the Court in *Keays*. While the Court affirmed the right of employers to manage the attendance of their employees through the requirement of doctors' notes, that right remains limited by the employer's duty to accommodate employees with mental or physical disabilities. An attendance management policy must not violate the human rights protections to which all employees are entitled.

For this reason, while automatic termination clauses are valid, an attendance management policy which stipulates disciplinary consequences for its breach will not be. Similarly, even an individualized attendance management scheme which provides for automatic discharge in the event that it is breached will probably not be upheld by arbitrators or the courts. In all cases, the question must be whether the individual employee has been accommodated to the point of undue hardship.

It is apparent from *Keays* that an employer is still required to maintain a clear separation between policies to address culpable absenteeism and those targeted at non-culpable, illness-related absenteeism. The trial judge criticized Honda for "coaching" *Keays* in

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24 *Ibid*. at 171.

25 *Ibid*. at 172-73.

26 *Ibid*. at 175.

response to his absences.[27] While the Supreme Court disagreed with the finding that this coaching was disciplinary, they did not object to the conclusion that disciplining an employee for an illness-related absence would be wholly inappropriate.[28] Employers should be very clear about the nature of their attendance policies, and should restrict the use of discipline to policies intended to address culpable or unexcused absences.

In other words, while it may, after the imposition of progressive discipline, be reasonable to terminate an employee for just cause in response to a history of culpable absenteeism, it is never acceptable to terminate an employee for cause on the basis of persistent disability-related absences. Employees with disability-related attendance problems may only be terminated on the basis described in *Hydro-Québec* that the employer has accommodated them to the point of undue hardship and yet the employee remains unable "to fulfill the basic obligations associated with the employment relationship for the foreseeable future."[29]

B) Keays and the Role of the Doctor in Accommodation

The importance of the doctor in the accommodation process played a key role in the decisions of both of the lower courts and that of the Supreme Court. At the Superior Court, the trial judge castigated the employer for attempting to "insinuate [the specialist] into the plaintiff's long-established medical relationship with his own doctors."[30] The Supreme Court, on the other hand, emphasized Honda's right to rely on its own expert medical advice, and to require independent confirmation of an employee's disability as part of the accommodation process.[31]

The Supreme Court found that "[t]he trial judge made an overriding and palpable error in faulting Honda for relying on the advice of its medical experts."[32] Later, the Court concluded that "[e]ven if one were to conclude that [the specialist] was taking a somewhat 'hardball' approach to workplace absences, Honda cannot be faulted for accepting his expert advice unless a conspiracy exists."[33] In the absence of express evidence of malfeasance or bad faith on the part of the employer or its doctors, there is no reason to interfere with the employer's legitimate interest in learning as much as they can about an employee's disability.

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27 *Keays SupCt*, *supra* note 2 at 281.
28 *Keays SCC*, *supra* note 1 at 398.
29 *Hydro-Québec*, *supra* note19 at 571.
30 *Keays SupCt*, *supra* note 2 at 284.
31 See *Keays SCC*, *supra* note 1 at 386.
32 *Ibid*. at 384.
33 *Ibid*. at 385.

Employers need this information in order to fashion the most appropriate form of reasonable accommodation possible.

It is clear after *Keays* that there is a role for the employer's own medical experts in the accommodation process. It is well-established that an employee has a duty to cooperate in seeking reasonable accommodation for his or her disability.[34] That duty may include cooperating with independent medical exams carried out by doctors selected by the employer, where more information is needed to structure a reasonable accommodation scheme. Absent evidence of incompetence or bad faith, the employer is entitled to rely on the observations and conclusions of its medical experts in making accommodation decisions.

Furthermore, the Supreme Court rejected the claim that Honda had retaliated against Keays for involving his lawyer in their relationship. Instead, it found that Honda was entitled to stop accepting the notes from Keays' doctor, and to seek independent confirmation of his disability by virtue of their concerns with the increasingly "cryptic" character of those notes.[35]

An employer is therefore entitled not only to require doctors' notes for absences as part of its attendance management policy, but also to seek verification of an employee's disability where it has concerns about the legitimacy or precise nature of the disability. Both the Court of Appeal and the Supreme Court affirmed this reasoning. The Supreme Court in particular held that Honda was justified in seeking more information about his condition through an independent exam, where "Keays would not facilitate an exchange of information about it."[36]

Where an employee refuses to provide the information necessary to address the disability, or where the employee refuses to cooperate with the employer in searching for accommodation, the employer's ability to offer appropriate accommodation will be limited. For an employer, independent medical examinations offer a reasonable source of expanded information about the nature and extent of an employee's disability, and a means of developing an appropriate form of individualized accommodation, as required by *McGill*.[37] The recognition in *Keays* of the

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34 See e.g. *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; and *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970.

35 *Keays SCC*, *supra* note 1 at 386.

36 *Ibid*. at 399.

37 *McGill*, *supra* note 22 at 173.

important role of medical experts, both on the side of the employee and on that of the employer, is welcome.

C) Keays and the Distinction between Aggravated and Punitive Damages

The plaintiff in virtually every wrongful dismissal action claims *Wallace* damages and/or punitive damages on the basis of their employer's conduct in the course of the termination. In *Keays*, the trial judge awarded both heads of damages, extending the period of reasonable notice by nine months while also awarding $500,000 in punitive damages.

The Supreme Court restated the law of aggravated and punitive damages in wrongful dismissal actions in response to the trial judge's awards, neither of which the Court found to be supported by the facts of the case. The Court pointed to significant duplication in the grounds offered for each award as evidence of the fundamental confusion surrounding the precise circumstances under which each head of damages will be available to plaintiffs. The Court also emphasized the special nature of these damages, and limited the circumstances in which each will be available.

1) Aggravated Damages

The Court's efforts to rationalize the award of aggravated damages in wrongful dismissal cases may represent the most significant shift in the law arising from the case. The Court abandoned as "arbitrary" the approach, originally set out in *Wallace*, of extending the period of reasonable notice by a number of months to compensate the employee for bad faith in the manner of termination.[38] Instead, the Court in *Keays* returned to the *Hadley v. Baxendale* principles to calculate aggravated damages in wrongful dismissal cases.[39]

Hadley v. Baxendale extended the principle that only those damages arising naturally from the breach were compensable, holding that all damages are compensable

> which 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, at the time they made the contract, as the probable result from the breach of it.[40]

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38 *Keays SCC*, *supra* note 1 at 391; *Wallace*, *supra* note 6.

39 *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 Eng. Rep. 145.

40 *Ibid*. cited to Eng. Rep. at 151.

Keays applied this principle to the employment contract, noting that because it is a contract terminable on notice by either party, aggravated damages for harm arising from the fact of the dismissal itself must not be compensable.[41]

Keays noted, however, that at least since the decision in *Wallace*, there has been an "expectation by both parties to the contract" that the employer will act in good faith in bringing the contract of employment to an end.[42] As a consequence of this expectation, the Court in *Keays* held that damages arising from behaviour on the part of the employer which fails to live up to this good faith standard will be compensable under *Hadley v. Baxendale* principles.[43] *Keays* adopted the *Wallace* definition of conduct which would breach the "good faith" standard: conduct which is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive."[44]

Wallace offered some examples of conduct which would meet the test outlined above, examples which the Court in *Keays* subsequently adopted:

- Wrongful accusations of theft or other misconduct;
- Informing an employee that another position would be found for them when in fact the employer had decided to terminate the employee;
- Firing an employee immediately upon return from disability leave;
- Laying off an employee and advertising for his replacement at a lower rate, without informing him that he was to be terminated.[45]

Keays expanded on *Wallace* with further examples:

> attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant to deprive the employee of a pension benefit or other right, permanent status for instance.[46]

The Supreme Court rejected the allegations of bad faith which the trial judge and the Court of Appeal had accepted.[47] One issue remained

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41 *Keays SCC*, *supra* note 1 at 390.
42 *Ibid*. at 391.
43 *Ibid*. at 390.
44 *Wallace*, *supra* note 6 at 743, quoted in *Keays SCC*, *ibid.* at 390.
45 *Wallace*, *ibid.* at 743-44.
46 *Keays SCC*, *supra* note 1 at 391.
47 *Ibid*. at 392.

unresolved, however. Honda argued at trial that it had just cause for dismissing Keays, on the basis that his refusal to meet with the specialist was insubordinate. The trial judge and the Court of Appeal found that Honda did not have cause to dismiss Keays, and Honda abandoned this line of argument at the Supreme Court. This suggests an important question which did not arise on the facts of *Keays*: Where an employer alleges just cause for dismissal and then withdraws the allegation prior to trial, will this justify an award of aggravated damages on the basis that they have acted in bad faith?

A case from the Ontario Court of Appeal released earlier this year suggests the contrary.[48] In *Mulvihill v. Ottawa (City)*, the employer alleged just cause for termination on the grounds of insubordination after the employee wrote a number of emails to senior City officials complaining about harassment by her superiors, outside of the established complaint and appeal process.[49] At trial, the judge found that the "unwarranted" allegations of cause entitled the plaintiff to aggravated damages.[50] The Court of Appeal reversed this finding, holding that:

> [s]o long as an employer has a reasonable basis on which to believe it can dismiss an employee for cause, the employer has the right to take that position without fear that failure to succeed on that point will automatically expose it to a finding of bad faith.[51]

Employers should feel free to adopt the position that they are dismissing an employee for cause, *where there are reasonable grounds to do so*, and yet remain able to abandon the allegation as they gather information about the plaintiff's case in discovery and settlement discussions. Only allegations made without a reasonable basis will attract a finding of bad faith.

After *Keays*, it seems the trigger for aggravated damages remains essentially the same as the triggers for an extension of the notice period under *Wallace*. Where the assessment of the appropriate extension of the notice period rested entirely on the trial judge's evaluation of the severity of the employer's bad faith, however, the quantum of aggravated damages under *Keays* rests instead on an objective assessment of the actual damages suffered. This hurdle is likely to make it more difficult for plaintiffs to claim aggravated damages as a matter of course in wrongful dismissal cases.

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48 (2008), 90 O.R. (3d) 285 (Ont. C.A.)[*Mulvihill*].

49 *Ibid.* at 287.

50 *Ibid.* at 297.

51 *Ibid.* at 297-98.

This is a positive development in the law, and not only for employers. The *Wallace* approach provided enormous latitude for a trial judge to hide a sort of "punitive damages lite" behind the arbitrary extension of the notice period. It allowed the trial judge to blur the line between compensating the employee for harm from the bad faith, and punishing the employer for its insensitivity. While the assessment of psychological harm and mental distress beyond "the normal distress and hurt feelings resulting from dismissal" will no doubt be difficult for trial judges, the challenge is worthwhile. It lends clarity to the analysis of aggravated damages which has been lacking for over a decade.

The necessary corollary to the Court's redefinition of aggravated damages is that punitive damages must be available in the right circumstances to deter truly egregious behaviour.

2) Punitive Damages

The Supreme Court introduced no material changes to the circumstances under which punitive damages will be awarded to a plaintiff in a wrongful dismissal action. The Court's restatement of the law, however, emphasized the principle that punitive damages should be available only in the clearest cases of conduct that is "harsh, vindictive, reprehensible and malicious."[52]

The trial judge had no difficulty finding that Honda's conduct met this test. As the Supreme Court noted, however, not only did he rely on essentially the same evidence which he used to justify his award of aggravated damages, there was also no evidence which could possibly have met the standard described above.[53] Employers nervous at the prospect of enormous liability, imposed merely because they sought to validate their employees' claims for accommodation, can breathe more freely.

Considering the similarity between the conditions for aggravated and punitive damages, trial judges could perhaps be forgiven for occasionally confusing the two. *Keays* attempts to eliminate the confusion by emphasizing that the most important task for the courts is to avoid double recovery.[54] Aggravated damages are to be assessed based on the harm to

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[52] *Keays SCC*, *supra* note 1 at 396, quoting *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at 1108 [*Vorvis*].

[53] *Keays SCC*, *ibid*. at 395-96.

[54] *Ibid*. at 392.

the plaintiff which requires compensation.[55] Punitive damages, on the other hand, are to be measured on the basis of the blameworthiness of the employer's conduct.[56] As noted above, by requiring evidence and an assessment of actual harm to found a claim for aggravated damages, the Court in *Keays* has limited the possibility of punishment through the back door, under the cover of an arbitrary extension of the notice period.

In addition to requiring evidence of truly blameworthy conduct, however, the Court affirmed the requirement that the plaintiff point to an "independent actionable wrong" to justify a claim for punitive damages.[57] In the lower courts, *Keays* had claimed that the "independent actionable wrong" in his case was the employer's discriminatory treatment of his disability.[58] The Supreme Court rejected this holding, confirming the statement in *Seneca College of Applied Arts and Technology v. Bhadauria* that the established code of human rights law in every province constitutes a "comprehensive" scheme which displaces any and all actionable wrongs on the basis of discriminatory conduct.[59]

The Court justified this holding in part on the basis of the remedial, compensatory focus of human rights legislation:

> …the purpose of the Ontario Human Rights Code is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend – namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself.[60]

The Court was wise to reject Keays' request that it overturn *Bhadauria* and find an independent actionable wrong in a breach of the Code. To borrow an old metaphor, human rights legislation is a shield, not a sword. To allow it to be interpreted through a punitive lens might have significant unintended consequences for the operation of the statutory scheme.

Interestingly, the Court leaves open an alternative foundation for punitive damages. The Court quotes the judgment of Binnie J. in *Whiten v. Pilot Insurance*, in which he suggested that an "independent actionable

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55 *Ibid*. at 391.
56 *Ibid*. at 396-97.
57 *Ibid*. at 392, citing *Vorvis, supra* note 52.
58 [1981] 2 S.C.R. 81 [*Bhadauria*], cited in *Keays SCC, ibid*. at 393.
59 *Ibid*. at 394.
60 *Ibid*. at 393.

wrong" might be found in a breach of a contractual duty of good faith.[61] While *Whiten* found punitive damages justified on a breach of the contractual duty of good faith owed by an insurer to the insured, the same principle could be applied to the breach of the duty of good faith owed by the employer on termination.

The Court found in *Whiten* that the insurer was under a duty to deal in good faith with the insured which arose "independent of and in addition to the breach of the contractual duty to pay the loss."[62] As can be seen from the discussion above of the lingering impact of *Wallace*, there is a strong argument to be made that employers are under a similar duty arising independent of and in addition to their other duties under the contract of employment.

Keays applied the *Whiten* analysis of the standard for punitive damages, but failed to expressly adopt or reject the argument that bad faith in termination might in itself constitute an independent actionable wrong.[63] It remains to be seen how this argument will be treated in future cases, but it certainly seems promising. It offers an elegant path to punitive damages for truly repugnant demonstrations of bad faith on the part of the employer, while still being limited by the *Vorvis v. Insurance Co. of British Columbia* requirement that the conduct in question be "'harsh, vindictive, reprehensible and malicious,' as well as 'extreme in its nature such that by any reasonable standard it is deserving of full condemnation and punishment.'"[64]

Thus, despite the emphasis of the Court on avoiding overlap between aggravated and punitive damages, employers can follow the same approach to avoid attracting awards under either head. Employers should allege cause only where they have a reasonable basis to do so, and should give careful consideration to whether the reasonable basis is likely to be sustainable in court. Employers should also consider whether the employee might be in need of accommodation. Furthermore, they should consider whether they have enough information about the employee's circumstances to make that determination.

Employers should be straightforward about the reason for the dismissal, and realistic about the chances for reinstatement in the same position or another. Above all, employers and their human resources

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61 *Ibid*. at 392, quoting *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 [*Whiten*].

62 *Whiten*, *ibid*. at 639.

63 *Keays SCC*, *supra* note 1 at 68.

64 *Ibid*. at 396, quoting *Vorvis*, *supra* note 52.

professionals should adopt a respectful and even-handed approach to employees even during difficult dismissals. If employers follow this basic guiding principle, they are unlikely to be faced with awards of either aggravated or punitive damages.

4. Keays in Context: Trends in Employment Law at the Supreme Court

Keays might be viewed as one element in a 2008 employment law tetralogy from the Supreme Court, which includes *Evans v. Teamsters Local Union No. 31, RBC Dominion Securities v. Merrill Lynch Canada Ltd.* and *Hydro-Québec*.[65] These cases all bear the hallmarks of a similar view of employment to that set out in *Keays*. These similarities in many cases involve a reaffirmation that the law affords rights *and* responsibilities to both employees and employers. It may be that the Court is in search of a more practical model of employment law, workable for both parties to the employment relationship.

It is beyond the scope of this paper to offer a comprehensive analysis of the year's developments in employment law, but two broad trends are apparent. On the one hand, the Court continues to adopt soft but strong language in describing the rights associated with the employment relationship.[66] On the other, the Court demonstrates increasing pragmatism in the application of that language to the management of the workplace.

The first trend is apparent in *Keays* in the continued emphasis on the *Wallace* tests for bad faith in the manner of dismissal. The Court continues to be committed to ensuring that an employee who is treated with insensitivity is adequately compensated for any losses they suffer as a consequence. The Court recognizes that there is a real value for employees in fair and sensitive treatment, which respects their dignity at a time of significant disruption in their lives. The Court even takes steps to quantify that value.

From a practical perspective, however, the Court is forced to recognize and address the potential for error in an approach which values

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65 This might be described as a trilogy composed of *Evans v. Teamsters Local Union No. 31*, 2008 SCC 20,[2008] 1 S.C.R. 661 [*Evans*]; *Keays SCC*, *supra* note 1; and *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, 2008 SCC 54, (2008), 298 D.L.R. (4th) 1 [*RBC*]. I would argue that this should in fact be considered a tetralogy, also incorporating the Court's decision in *Hydro-Québec*, *supra* note19.

66 I do not intend "soft" to be understood to mean "weak;" I refer instead to concepts which are "soft," in the sense of being malleable and open-textured, even while frequently integral to our legal system and even to our *Charter*.

an employee's dignity on the basis of a judge's objective assessment of the employer's misbehaviour. It has recoiled from the theme in some of the post-*Wallace* case law which would have seen employers punished for simply mishandling the termination of employment, in the name of compensating the employee for his or her loss.[67]

Evans involved a former business agent who was dismissed upon a change in leadership in the Teamsters Union. After negotiations over the appropriate period of notice, the Union offered to reinstate Evans for two years, as a form of working notice. Evans refused, and the union alleged that he had failed to mitigate his losses. The Supreme Court agreed.

The most significant development in *Evans* is the conclusion that an employee may, in the right circumstances, be forced to mitigate the losses arising from the termination of his or her contract of employment by resuming employment with the employer who terminated the contract.[68] The Court cautioned, however, that an employee will not be required to return to employment where he or she will be subject to humiliation, embarrassment or abuse – in other words that an employee need not return where the relationship with the employer is irreparably damaged or particularly acrimonious.[69]

Evans affirmed the Court's commitment to the value of the "intangible elements" of the employment relationship – dignity, respect, and the right of employees to work in an atmosphere free from stigma and hostility. These elements have underpinned the Court's approach to human rights legislation and to the *Charter*.[70] The Court noted, however, that the question of whether or not these principles would be violated by forcing an employee to return to work is to be determined on an objective basis.[71] The Court attempted to blend the objective "reasonable person" assessment (in these circumstances the only practical way to impose a duty to mitigate) with an emphasis on the value of the soft concepts outlined above.[72]

The facts in *RBC* involved the defection of the manager and virtually the entire staff of an investment house to a competitor. The manager

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67 A theme which is apparent in the reasoning of the trial judge in *Keays SupCt*, *supra* note 2.

68 *Evans*, *supra* note 65 at 676.

69 *Ibid*. at 677-78.

70 *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, enacted as Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 [*Charter*].

71 *Evans*, *supra* note 65 at 678.

72 Whether it was wholly successful in doing so is arguable, but this is a question for another paper.

orchestrated the departure, and the employees took client information with them when they departed, which they used to attract their former employer's clients to their new employer. In a brief decision, the Supreme Court confirmed that the employees, the manager, and the competitor liable for their actions under a variety of heads of damages.[73]

RBC, like *Keays*, emphasized the implied duty of good faith in the employment relationship. In *RBC*, the Court confirmed, however, that the duty of good faith is not only owed by employers in terminating the contract of employment, but also by employees in carrying out their duties under the contract.[74] If employers are to be held to a standard of good faith in dealing with their employees during termination, then employees will be required to act in good faith in fulfilling their duties under the contract of employment.

Hydro-Québec involved a situation similar in many ways to that in *Keays*. The employee involved had had a lengthy history of absenteeism, and was off work indefinitely at the time of her termination. A medical evaluation concluded that it was unlikely that she would be able to return to work on a regular and continuous basis, and as a consequence, the employer terminated her employment.

The Supreme Court reaffirmed the importance of the employer's duty to accommodate employees with disabilities, but also stressed that the duty is subject to two "general labour law rules… the rule that employers must respect employees' fundamental rights and the rule that employees must do their work."[75] It is surprising to see the latter rule recognized and applied in the Supreme Court, particularly in the context of a case involving the duty to accommodate.

A far more thorough analysis than is possible here would be required to make an accurate prediction about the Supreme Court's future directions in employment law. From the above review of recent jurisprudence, however, it seems that something is changing, a tidal shift of sorts in the Court's approach to employment. While many of the above cases have been well-received by employers and their counsel, it is likely an over-simplification to describe the move underway in the Court as a shift in favour of employers. Something larger is at work behind the walls of the Court.

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73 Summarized in *RBC*, *supra* note 65 at 6.

74 *Ibid*. at 11.

75 *Hydro-Québec*, *supra* note 19 at 571.

The elements of the change seem to involve the following:

- A continued focus on the importance to employees of "intangible" elements of employment including dignity, respect, and sensitivity, among others;
- An acknowledgement of the rights of the employer to manage the workplace;
- A recognition of the obligations of employees to fulfill their duties under the contract of employment; and
- A concern for the practical realities of implementation which act to temper otherwise broad statements of principle.

Whether this change will continue, and where it will take the Court in the future remains to be seen. In *Keays*, however, these broader forces have driven the Court to a decision which is both correct in principle and practically workable.

5. Conclusion

There is no question that *Keays* represents a significant shift in the law of wrongful dismissal. The prospect of a heightened burden on plaintiffs claiming aggravated damages for the manner of their termination will be a relief for many employers. *Keays* may be more important, however, for its affirmation of a number of key employer rights, including:

- The right to manage employees' attendance, and to require that medical absences be validated with notes;

- The right to require that employees submit to examination by the employer's medical experts, where there are grounds to doubt the veracity or severity of the employee's claim to a disability; and,

- The right to rely, in part, on the employer's own medical experts in determining precisely what accommodation is appropriate for an employee with a disability.

All of these rights are vital not only to the employer's ability to manage the workplace, but also to its capacity to design and implement reasonable and effective accommodation for disabled employees, and thus to fulfill its obligations under the applicable human rights legislation.

It would not be accurate, however, to say that the recognition of these rights is evidence of a shift in the Court in favour of employers. Instead, a broader shift to a more pragmatic approach to employment law may be underway. Regardless of the motivation behind the shift, however, for employers and their counsel *Keays* will be seen as a welcome development in the law.