

An Outraged Court: Employer Liable for \$500K in Punitive Damages

By Genny Na, Borden Ladner Gervais LLP

When the decision of *Keays v. Honda Canada Inc.*, [2005] O.J. No. 1145 was released, an audible gasp could be heard by employment law lawyers across the country. Record punitive damages in an employment case were awarded by the Ontario Superior Court. As formerly reported in *The Lawyers Weekly*, the court held that Kevin Keays was wrongfully dismissed and awarded \$500,000 in punitive damages, in addition to 15 months' salary in lieu of notice and 9 months' salary on account of the employer's bad faith. Whether one agreed with the decision or not, it was undeniable that such an award was unprecedented.

The court clearly set out the facts on which the award for punitive damages was based in its decision. Keays was diagnosed with chronic fatigue syndrome. The company had committed a litany of acts of discrimination and harassment in relation to Keays' attempts to resolve his accommodation difficulties. The company terminated Keays, thereby avoiding its duty to accommodate his disability. The court described the company's conduct as "outrageous" and deserving of significant denunciation.

The company has advised that it is appealing the decision. This comes as no surprise, if not expected, and is likely a relief to many questioning the quantum of the punitive damages. To put this in context, although there have been awards upwards to \$200,000, Keays' lawyer, Hugh Scher, commented to the *Globe and Mail* that punitive damages are rare in employment cases and seldom top \$25,000.

It is important note the purpose of punitive damages and how they are typically awarded. Where aggravated damages are designed to compensate, punitive damages are designed to punish. The conduct must be, in the words of the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, "so malicious, oppressive and high-handed that it offends the court's sense of decency... It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant." In addition to the requirement of an independent actionable wrong to award these damages, punitive damages will not be awarded unless they serve a rational purpose.

In *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, the Supreme Court clarified the rules governing whether an award of punitive damages should be made and the fair amount of such an award. The majority held:

"...the incantation of the time-honoured pejoratives ('high-handed', 'oppressive', 'vindictive', etc.) provides insufficient guidance (or discipline) to the judge or jury setting the amount.... A more principled and less exhortatory approach is desirable.

...all jurisdictions seek to promote *rationality*... the court should relate the facts of the particular case to the underlying purposes of punitive damages and ask itself how, in particular, an award would

further one or other of the objectives of the law, and what is the *lowest award* that would serve the purpose, i.e., because *any higher award would be irrational*.

...the governing rule for quantum is *proportionality*. The overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objective for which the punitive damages are awarded..." (paras. 70 to 74) [emphasis added]

The Supreme Court has held that appellate courts have an obligation to ensure that the punitive damages award is the product of reason and rationality. "Rationality" applies to both the question of whether an award of punitive damages should be made at all, and to the question of quantum. The majority held:

"If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so 'inordinately large' that it exceeds what is 'rationally' required to punish the defendant, it will be reduced or set aside on appeal.

Retribution, denunciation and deterrence are the recognized justification for punitive damages, and the means must be rationally proportionate to the end sought to be achieved. A disproportionate award overshoots its purpose and becomes irrational. A less than proportionate award fails to achieve its purpose." (paras. 109 & 111)

The court in *Keays* examined the factors considered by the Supreme Court in *Whiten, supra* in determining the level of the company's blameworthiness. The court found that an award of punitive damages was a "rational" and necessary response to the company's "outrageous mistreatment of their long-time employee". Although the award of punitive damages may be rational with respect to whether the award ought to have been made, it remains to be seen as to whether the award was rational with respect to the quantum. What is clear is that the court has expressed its outrage, or rather extreme outrage, at the egregious conduct of the company. Stay tuned into this case as the Ontario Court of Appeal may have the final say as to whether the extent to which the court punished the defendant was justifiable in the circumstances.

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