

This paper was first written by James D. Kondopulos of Roper Greyell LLP, Vancouver, B.C. for a Continuing Legal Education Society of British Columbia conference, "Employment Law Conference – 2007", held on June 1, 2007.

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EMPLOYMENT LAW CONFERENCE – 2007

CAN OR DOES A HUMAN RIGHTS VIOLATION GROUND A PUNITIVE DAMAGES AWARD IN A WRONGFUL DISMISSAL CASE?¹

I. INTRODUCTION

Allegations of human rights discrimination on the basis of race, religion, physical or mental disability, sex, sexual orientation and other prohibited grounds are increasingly making their way into wrongful dismissal litigation. This paper considers the issue of whether, in a wrongful dismissal case, a punitive damages award can be grounded on conduct prohibited by human rights legislation.

II. APPLICABLE LEGISLATION

In British Columbia, the legislation that prohibits discrimination in employment is the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the "Code").

Subsection 13(1) of the Code provides as follows:

A person must not

- (a) refuse to employ or refuse to continue to employ a person, or
- (b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

Discrimination in employment is similarly prohibited in other jurisdictions across Canada.

¹ The purpose of this paper is to provide information as to developments in and the state of the law. This paper does not, in spite of the author's efforts to provide a full and accurate analysis of the law, constitute a legal opinion of the author or Roper Greyell LLP.

III. NATURE OF A PUNITIVE DAMAGES AWARD

In analyzing the nature of a punitive damages award, it is useful to start with a dictionary definition.

In H.C. Black and others, *Black's Law Dictionary*, 6th ed. (St. Paul, Minn.: West Publishing, 1990), punitive damages are defined (at p. 390) as:

... damages on an increased scale, awarded to the plaintiff ... where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff for mental anguish, laceration of his feelings, shame, degradation, or other aggravations of the original wrong, or else to punish the defendant for his evil behavior or to make an example of him ...

In the Supreme Court of Canada case of *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, Mr. Justice McIntyre – delivering the judgment of the majority of the Court – defined punitive damages in much the same way (at para. 27):

[P]unitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature. I do not suggest that I have exhausted the adjectives which could describe the conduct capable of characterizing a punitive award, but in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment ...

IV. REQUIREMENT FOR AN INDEPENDENT ACTIONABLE WRONG

Given the nature of a punitive damages award, the availability of such an award has been restricted by Canadian courts.

In *Vorvis v. Insurance Corp. of British Columbia*, *supra*, Mr. Justice McIntyre stated (at para. 25):

When then can punitive damages be awarded? It must never be forgotten that when awarded by a judge or jury, a punishment is imposed upon a person by a Court by the operation of the judicial process. What is it that is punished? It surely cannot be merely conduct of which the Court disapproves, however strongly the judge may feel. Punishment may not be imposed in a civilized community without a justification in law. *The only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong which caused the injury complained of by the plaintiff ...*
[emphasis added]

In *McKinley v. BC Tel*, [2001] S.C.J. No. 40, the Supreme Court of Canada reaffirmed the foregoing. Mr. Justice Iacobucci – delivering the judgment of a unanimous Court – stated that punitive damages “may be awarded where the defendant’s conduct constituted a separate, actionable wrong, independent of the dismissal itself” (at para. 86). In *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997]

S.C.J. No. 94, the Supreme Court of Canada described an “actionable wrong” as forming part of the “foundation for an award of punitive damages” (at para. 79).

V. HOW THE DOOR WAS OPENED ...

It is clear that, in order for a plaintiff to maintain a claim for punitive damages, he or she must establish what is widely referred to as an “independent actionable wrong”.

The range of conduct that can constitute an independent actionable wrong has yet to be fully defined: *Greenwood v. Ballard Power Systems Inc.*, [2004] B.C.J. No. 384 (S.C.) at paras. 33 and 34, and *Chikoski v. Shaw Cablesystems G.P.*, [2002] O.J. No. 3420 (S.C.J.) at para. 5.

The question is thus whether a violation of human rights legislation in the course of terminating employment can constitute an independent actionable wrong capable of supporting a claim for punitive damages. The Supreme Court of Canada addressed that question in *McKinley v. BC Tel, supra*.

The facts of *McKinley v. BC Tel, supra* were as follows. Martin McKinley, a chartered accountant, was employed by the BC Tel group of companies. In the fall of 1993, he began to experience high blood pressure as a result of hypertension. Initially, with the help of medication and some time off, Mr. McKinley was able to control his blood pressure. A few months later, his blood pressure was again on the rise. He went off work.

In mid-1994, one of Mr. McKinley’s superiors raised the question of terminating his employment. Mr. McKinley indicated that he wished to return to work, but in a position carrying less responsibility.

At the end of August 1994, Mr. McKinley attended a meeting at which he was dismissed. He rejected a severance offer that was made to him.

According to Mr. McKinley, his employment was terminated without just cause and without reasonable notice or pay in lieu of reasonable notice. He brought a wrongful dismissal action in the B.C. Supreme Court. He claimed, among other things, punitive damages.

The respondents admitted to having terminated Mr. McKinley’s employment. Their initial defence was that they offered him, at the time of dismissal, a compensation package of salary and benefits in lieu of reasonable notice.

The respondents subsequently amended their pleadings and alleged that Mr. McKinley’s medical condition frustrated the employment contract. Three days into trial, the respondents again made an amendment to their pleadings. They abandoned the defence of frustration, and instead argued that they had just cause for termination. Specifically, they alleged that Mr. McKinley had been dishonest about his medical condition and the treatments available for it.

At trial, Mr. Justice Paris declined to put the question of punitive damages to the jury. He did not, however, foreclose the possibility that a contravention of human rights legislation could form the basis of a claim for punitive damages. In fact, he ruled that “the appellant [Mr. McKinley] had not adduced evidence upon which to base a viable claim for punitive damages”, and “there was no evidence to

substantiate an argument that the appellant suffered discrimination on the basis of disability in the sense contemplated by [human rights] legislation” (at para. 88).

The B.C. Court of Appeal dismissed Mr. McKinley’s cross-appeal of the trial judge’s ruling. The dismissal was without reasons.

The Supreme Court of Canada did not interfere with Mr. Justice Paris’ ruling. Delivering the judgment of the Court, Mr. Justice Iacobucci held that the trial judge’s reasoning was consistent with the applicable “principles and analytical framework”, and adverted to the fact that human rights discrimination can constitute “an actionable wrong, separate and apart from the dismissal” that may give rise to a punitive damages award (at para. 89):

[T]he appellant was correct to state that his hypertension constituted a disability in law. Thus, the failure to find him another position may create a *prima facie* case of discrimination, given the employer’s duty to accommodate disabled employees to the point of undue hardship ... Moreover, *this discrimination may in turn give rise to a punitive damages award ...* [emphasis added]

Mr. Justice Iacobucci referred with approval to the B.C. Supreme Court case of *Collinson v. William E. Coutts Co. (c.o.b. Hallmark Cards, Canada)*, [1995] B.C.J. No. 2766 (S.C.). In that case, the two plaintiffs, who had been employed by the defendant for over 20 years, took the position they were wrongfully dismissed.

In their statements of claim, the plaintiffs claimed punitive damages, alleging they were subjected to employment discrimination on the basis of age. One of the plaintiffs alleged he “was ... told at the time of his immediate dismissal that it was to enable the company to rejuvenate” (at para. 3). The other plaintiff, who “was told that his position was not being refilled”, alleged that his position was “refilled, apparently within a short time, by a much younger employee” (at para. 3).

Mr. Justice Holmes denied the defendant’s application to strike portions of the plaintiffs’ statements of claim relating to the alleged discrimination on the basis of age. The chambers judge stated that he “[saw] the claims for punitive damages as a possible remedy” (at para. 8). He held (at paras. 5 to 7):

I accept the argument as put forward by counsel for the defendant that age discrimination does not give rise to a civil cause of action as correct ...

The plaintiffs, however, do no [*sic*] rely upon the averments as being a cause of action. They have a cause of action for wrongful dismissal that exists independently. Plaintiff’s counsel, however, argues that the fact of age discrimination as a reason for dismissal, if it occurred, is a proper matter for consideration by the court and the making of an award for punitive damages. In that context it is urged the matter is properly before the court until evidence permits determination as to whether the evidence supports an award for punitive damages ...

... *I am not able, however, to conclude that it would in proper circumstances, based on proper evidence, be clear, plain or obvious that the fact that age discrimination as a matter of law could never give rise to an award of punitive damages in an action*

otherwise properly founded upon a reasonable cause of action for wrongful dismissal.
[emphasis added]

VI. POST-MCKINLEY V. BC TEL CASES

Recent cases leave no doubt that, in the appropriate circumstances, human rights discrimination in the course of dismissal can constitute an independent actionable wrong that may lead to a punitive damages award.

Some of those cases are canvassed below:

- (1) *Chikoski v. Shaw Cablesystems G.P.*, *supra* involved a wrongful dismissal action. The plaintiff was seeking, among other things, punitive damages. In the statement of claim, the plaintiff alleged that “he suffer[ed] from a disability and ... he was mistreated by his employer because of his disability”, and “his physical inability to comply with unreasonable demands by his employer led to his dismissal” (at para. 1).

Madam Justice Pardu denied the defendant’s motion to strike the plaintiff’s claim for punitive damages. She stated (at paras. 2 and 4):

The essential question is whether a violation of a human rights code can be an independent wrong capable of supporting a claim for ... punitive damages in an action claiming damages for wrongful dismissal

[T]he pleadings alleging discriminatory conduct are clearly relevant to the claim for punitive damages and should not be struck. [emphasis added]

- (2) In *Gigliotti v. Masev Communications Inc.*, [2004] B.C.J. No. 94 (S.C.), the individual and corporate plaintiffs claimed punitive damages of \$50,000 in a wrongful dismissal action. The plaintiffs alleged that “the dismissal was motivated by age discrimination” (at para. 136).

Although she ultimately found no basis for an award of punitive damages, Madam Justice Gray ruled (at paras. 139 and 141):

Masev’s conduct in dismissing Mr. Gigliotti to put a new face on the company may amount to age discrimination. There is no tort of discrimination. Complaints of discrimination must be pursued under the *Human Rights Code*, R.S.B.C. 1996, c. 210. The question then arises of whether discrimination complaints are “independent actionable wrongs”?
....

In my view, breaching the Human Rights Code would constitute an “independently actionable wrong”, even though it is not “actionable” in the sense of giving rise to a claim in a lawsuit. It is “actionable” through a complaint pursuant to the Human Rights Code. In my view, although

such complaints are resolved in a different forum, they are still “actionable” for the purposes of a punitive damages analysis. [emphasis added]

- (3) *Greenwood v. Ballard Power Systems Inc.*, *supra* also involved a wrongful dismissal action. One of the paragraphs in the statement of claim read, in part, as follows: “As a further result of the said breach of contract, contravention of the *Human Rights Code* ... and wrongful dismissal, the Plaintiff is entitled to punitive damages” (at para. 3). The defendant brought an application to strike portions of the statement of claim, including the foregoing paragraph.

In denying the defendant’s application, Mr. Justice Melvin stated (at para. 34):

In my opinion, as a result of a review of the authorities, punitive ... damages, although rare, are not precluded in breach of contract cases. If a separate actionable wrong may be necessary, it is clear that this expression is not yet fully defined. *It may include a breach of statute that has its own separate procedures and remedies when the conduct designed to be governed by those statutes is combined with actions for wrongful dismissal.* [emphasis added]

- (4) In *Rinaldo v. Royal Ontario Museum*, [2004] O.J. No. 5068 (S.C.J.), the plaintiff sued his former employer for wrongful dismissal. He claimed, among other things, punitive damages. The plaintiff alleged that he had been subjected to “a hostile working environment that permitted and fostered discriminatory treatment on the basis of his sexual orientation” (at para. 1).

Madam Justice Garton agreed with the reasoning of Mr. Justice Melvin in *Greenwood v. Ballard Power Systems Inc.*, *supra*. She stated, “A separate actionable wrong may include a breach of a provincial human rights code” (at para. 152).

VII. QUANTUM OF PUNITIVE DAMAGES WHERE HUMAN RIGHTS LEGISLATION HAS BEEN CONTRAVENED

At this juncture, the author turns to the decisions of the Ontario Superior Court of Justice and Court of Appeal in *Keays v. Honda Canada Inc.*, [2005] O.J. No. 1145 (S.C.J.) and *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, [2006] O.J. No. 3891 (C.A.).

It is worth turning to the above-noted decisions for two reasons. Firstly, they confirm the availability of punitive damages where an employer violates human rights legislation in the course of dismissing an employee: *Keays v. Honda Canada Inc.*, *supra* at para. 58, and *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, *supra* at paras. 46 and 47.

But, perhaps more importantly, the decisions are illustrative of the fact that when punitive damages are sought – be it for contravention of human rights legislation or otherwise – controversy may arise with respect to the appropriate quantum.

That controversy, incidentally, was recognized by Mr. Justice Binnie in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595. The judge – when delivering the judgment of the majority of the Supreme Court of Canada – spoke of “[s]ubstantial awards [being] occasionally assessed at figures seemingly plucked out of the air”, and stated that quantum is a “major aspect of the controversy surrounding punitive damages” (at para. 39).

The factual background to *Keays v. Honda Canada Inc.*, *supra* and *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)* was as follows. Kevin Keays, a dedicated and conscientious employee with around 14 years of service, was dismissed from his position as team leader in one of the employer’s departments.

Mr. Keays had a history of health problems throughout the course of his employment. Those problems caused him to be absent from work on an intermittent basis, and created difficulties for the employer’s lean staffing model.

In October 1996, Mr. Keays went on disability leave. He remained on leave until December 1998. At that time, the employer’s long-term disability insurer determined Mr. Keays to be able to return to work and terminated his benefits. This was in spite of the fact that, in March 1997, Mr. Keays was diagnosed with chronic fatigue syndrome (“CFS”).

In January 1999, Mr. Keays returned to work “under the protests of both himself and his treating physician that he was still too sick to do so” (at para. 6 in *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, *supra*). Soon after returning to work, he again began to experience absences due to his medical condition. Mr. Keays’ absences resulted in him being “coached” in August 1999. “Coaching” was the first step in the employer’s progressive discipline process.

Mr. Keays continued to express concern about the difficulty he was having in maintaining regular attendance. In response, the employer advised him of its workplace accommodation program. In September 1999, Mr. Keays had his physician complete a form required for entry into the program. On the form, it was “made ... clear that [Mr. Keays] suffered from CFS and would likely have to continue to miss about four days of work a month” (at para. 7 in *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, *supra*).

For almost one year, pursuant to the workplace accommodation program, some accommodation was provided to Mr. Keays in respect of his intermittent absences. That said, the employer required Mr. Keays to get a doctor’s note validating each absence before he could return to work. Importantly, employees with “mainstream” illnesses did not face such a requirement.

In October 1999, Mr. Keays was absent from work for six days. He was asked to see the company doctor. This was “not a positive encounter” and ended with the company doctor “threaten[ing] to move [Mr. Keays] ... to the physically demanding production line” (at para. 9 in *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, *supra*). The production line was where Mr. Keays worked when he first commenced employment. When Mr. Keays complained to the employer about the threatened move, he was merely told there was no intention to move him at that time.

During January and February 2000, Mr. Keays repeatedly requested the employer to remove the “coaching” from his employment record, and reconsider the requirement that he provide a doctor’s note in support of each absence. The employer did not comply with his requests.

In March 2000, a lawyer retained by Mr. Keays wrote a letter to the employer in an attempt to address Mr. Keays’ concerns. The letter was conciliatory in tone. The employer did not respond to the lawyer’s letter.

Instead, the employer asked Mr. Keays to meet with its occupational medicine specialist “who employed a hardball approach to employee absence” (at para. 55 in *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG), supra*). Mr. Keays, acting on the advice of his lawyer, declined to do so “without clarification from Honda as to the purpose of the meeting, the methodology to be used, and the parameters of [any] assessment” (at para. 1 in *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG), supra*).

The employer refused to provide Mr. Keays with the clarification he was seeking, and dismissed him for what it alleged was an act of insubordination. Mr. Keays learned of the termination of his employment through a co-worker.

As a result of being dismissed, Mr. Keays suffered a three or four-month period of post-traumatic adjustment disorder. He was rendered completely disabled, and qualified for a total disability pension under the Canada Pension Plan.

Mr. Keays brought an action for wrongful dismissal in the Superior Court of Justice. In advancing a claim for punitive damages, he complained that “he was the victim of discrimination and harassment at the hands of Honda both at the time of his termination and in the several months leading up to it” (at para. 53 in *Keays v. Honda Canada Inc., supra*).

At trial, Mr. Justice McIsaac, after describing the employer’s conduct as “outrageous and high-handed”, awarded, among other things², punitive damages in the amount of \$500,000³ (at paras. 64 to 65 in *Keays v. Honda Canada Inc., supra*).

Mr. Justice McIsaac saw justification for the groundbreaking punitive damages award. He said that “Honda’s misconduct was planned and deliberate and formed a protracted corporate conspiracy against Mr. Keays” (at para. 60 in *Keays v. Honda Canada Inc., supra*), and that “Honda ran amok as a result of [its] blinded insistence on production ‘efficiency’” (at para. 62 in *Keays v. Honda Canada Inc., supra*). In Mr. Justice McIsaac’s view, the conduct in which “everyone associated with Honda” engaged “should

² After finding that there was no just cause for termination, Mr. Justice McIsaac determined 15 months to be the period of notice to which Mr. Keays was entitled, and awarded damages on that basis. Relying on *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press), supra*, the trial judge extended the 15-month notice period to 24 months, citing “the egregious bad faith displayed by Honda in the manner of th[e] termination and the medical consequences flowing therefrom” (at para. 48). In a separate ruling on costs, Mr. Justice McIsaac also awarded costs on a “substantial indemnity” basis and a costs premium of 25 percent: *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada Mfg.)*, [2006] O.J. No. 560 (S.C.J.).

³ This award garnered much attention in the legal community and, in particular, in employment and labour law circles because it represented the largest punitive damages award in a wrongful dismissal action in Canadian legal history.

make the blood ... of any right-thinking individual [boil]" (at para. 60 in *Keays v. Honda Canada Inc., supra*).

Making reference to the Supreme Court of Canada case of *Whiten v. Pilot Insurance Co., supra*, Mr. Justice McIsaac asserted that "an award of punitive damages [was] a 'rational' and necessary response to Honda's outrageous mistreatment of [its] long-time employee" (at para. 59 in *Keays v. Honda Canada Inc., supra*). The trial judge underscored that the employer is a "worldwide corporation", and proceeded to liken the employer to a "leviathan" and Mr. Keays to a "minnow" (at para. 62 in *Keays v. Honda Canada Inc., supra*).

It is clear that the special nature of human rights legislation loomed large in Mr. Justice McIsaac's thinking. The trial judge spoke of the "quasi-constitutional" nature of the rights guaranteed by the Ontario *Human Rights Code* (at para. 50 in *Keays v. Honda Canada Inc., supra*).

Mr. Justice McIsaac also spoke of "the fundamental principle of human rights law that accommodation is a right, not an indulgence granted by one's employer or, worse yet, an act of charity" (at para. 53 in *Keays v. Honda Canada Inc., supra*). He viewed the conduct to which Mr. Keays was subjected as "an assault on his personal dignity" (at para. 53 in *Keays v. Honda Canada Inc., supra*).

On appeal, the Court of Appeal varied the trial judgment. The Court of Appeal split on the issue of whether or not to reduce the punitive damages award.⁴

The dissenting judge, Mr. Justice Goudge, was of the view that the \$500,000 punitive damages award ought to be upheld. He could not "conclude that \$500,000 in punitive damages ... exceed[ed] what [was] rationally required to punish" (at para. 66). That said, Mr. Justice Goudge was clear that he "would not have awarded that sum" (at para. 66).

The majority of the Court of Appeal – consisting of Mr. Justice Rosenberg and Madam Justice Feldman – reduced the punitive damages award from \$500,000 to \$100,000. The majority took issue with certain findings of fact of Mr. Justice McIsaac. According to the majority, there was no evidence to support the trial judge's finding that the employer's mistreatment of Mr. Keays "formed a protracted corporate conspiracy" (at para. 91). Moreover, in the view of the majority, the trial judge distorted the circumstances by finding that the employer "ran amok as a result of [its] blinded insistence on production 'efficiency'". The majority saw "nothing in th[e] trial record to show that [the employer] 'ran amok'" (at para. 99).

Most importantly, the majority of the Court of Appeal took issue with the manner in which Mr. Justice McIsaac applied *Whiten v. Pilot Insurance Co., supra*. The majority held that the trial judge's punitive damages award failed to accord with the fundamental principle of proportionality espoused in that decision.

In passing, the author recalls the words of Mr. Justice Binnie in *Whiten v. Pilot Insurance Co., supra* to the effect that "the governing rule for quantum is proportionality" and the "overall award, that is to say compensatory damages plus punitive damages plus any other punishment related to the same misconduct,

⁴ The Court of Appeal was unanimous, however, in its decision to reduce the costs premium from 25 percent to 12.5 percent.

should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation)” (at para. 74).

The majority ruled that the circumstances were not extraordinary enough to justify punitive damages in the amount awarded by the trial judge. The majority said that the employer’s misconduct could not “fairly be described as malicious” (at para. 108). Moreover, the misconduct took place over a period of seven months and did not involve a multi-year period of escalating conduct.

The majority’s view was that the “case [was not] like other cases of wrongful dismissal leading to punitive damage awards where, after the wrongful dismissal, the employer embark[ed] on a course of conduct, such as slander, to injure the employee” (at para. 96). The majority noted that, in other wrongful dismissal cases where punitive damages were awarded, the “[p]unitive damage awards ... [were] far more modest even in the face of serious misconduct such as slander of the employee”, and the “awards ... [were] in the range of \$15,000 to \$50,000 and, rarely, up to \$75,000” (at para. 104).

In the view of the majority of the Court of Appeal, there were “no circumstances from which it could rationally be concluded that a lesser award would fail to achieve deterrence” (at para. 111). The majority took into consideration “the totality of all other penalties including compensatory damages imposed on the defendant”, and noted that those penalties had been imposed “for essentially the same conduct that attracted the punitive damages award” (at para. 112).

VIII. *WHITEN V. PILOT INSURANCE CO.* ANALYTICAL FRAMEWORK

It is clear from the foregoing that, in *Whiten v. Pilot Insurance Co.*, *supra*, Mr. Justice Binnie set out guidelines to assist in ascertaining the appropriate quantum of punitive damages.

Mr. Justice Binnie “clarif[ied] ... the rules governing ... the assessment of a quantum that is fair to all parties” (at para. 45) as follows:

- (1) “[P]unitive damages should be resorted to only in exceptional cases and with restraint” (at para. 69).
- (2) “[T]he court should relate the facts of the particular case to the underlying purpose 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 ...” (at para. 71).
- (3) “[I]t is rational to use punitive damages to relieve a wrongdoer of its profit where compensatory damages would amount to nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others” (at para. 72).
- (4) “The proper focus is not on the plaintiff’s loss but on the defendant’s misconduct” (at para. 73).
- (5) “The governing rule for quantum is proportionality” (at para. 74).

- (6) “[P]unitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant ... having regard to any other fines or penalties suffered by the defendant for the misconduct in question” (at para. 94).
- (7) The purpose of punitive damages “is not to compensate the plaintiff, but ... to give a defendant his or her just desert [*sic*] (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community’s collective condemnation (denunciation) of what has happened” (at para. 94).
- (8) “The need for denunciation is aggravated where ... the conduct is persisted in over a lengthy period of time ... without any rational justification, and despite the defendant’s awareness of the hardship it knew it was inflicting” (at para. 112).
- (9) “The theory is that it takes a large whack to wake up a wealthy and powerful defendant to its responsibilities” (at para. 118). This, incidentally, was described by Mr. Justice Binnie as “a factor of limited importance” (at para. 118).

IX. DID *FIDLER V. SUN LIFE ASSURANCE CO. OF CANADA* CHANGE THE APPROACH TO AWARDING PUNITIVE DAMAGES?

The Supreme Court of Canada’s decision in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] S.C.J. No. 30 has obvious ramifications to the extent awards of compensatory damages for mental distress are concerned. The question is whether the decision has any effect on the existing approach to awarding punitive damages. The author submits that it does not.

The facts of *Fidler v. Sun Life Assurance Co. of Canada*, *supra* can be briefly stated as follows. For more than five years, Connie Fidler was denied by Sun Life Assurance Company of Canada the long-term disability benefits to which she was entitled.

At trial, Mr. Justice Ralph of the B.C. Supreme Court held that the denial caused Ms. Fidler significant mental distress. He found the defendant insurer liable to pay Ms. Fidler \$20,000 in damages for mental distress arising out of breach of contract. The trial judge declined to make an award of punitive damages, citing the fact there had been no bad faith on the part of the defendant.

The B.C. Court of Appeal upheld the trial judgment. The majority of the Court of Appeal, however, found that Mr. Justice Ralph made a palpable and overriding error when he concluded there was no bad faith on the part of the defendant. The majority awarded \$100,000 in punitive damages to Ms. Fidler.

The Supreme Court of Canada set aside the Court of Appeal’s punitive damages award and restored the judgment of Mr. Justice Ralph. The Court was of the view that, while “Sun Life’s conduct was troubling”, it was “not sufficiently [troubling] so as to justify interfering with the trial judge’s conclusion that there was no bad faith” (at para. 75). The Court was not prepared, in the absence of bad faith, to uphold the punitive damages award against the defendant.

Delivering the judgment of a unanimous Court, Chief Justice McLachlin and Madam Justice Abella in no uncertain terms reaffirmed the existing approach to awarding punitive damages.

Referring to *Whiten v. Pilot Insurance Co.*, *supra*, Chief Justice McLachlin and Madam Justice Abella reiterated that “punitive damages are designed to address the purposes of retribution, deterrence and denunciation” (at para. 61). The judges were clear that “punitive damages [must] be resorted to only in exceptional cases, and with restraint” (at para. 62).

Chief Justice McLachlin and Madam Justice Abella spoke of the type of conduct that attracts punitive damages awards. That conduct must “depart markedly from ordinary standards of decency”, and be “the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court’s sense of decency” (at para. 62).

Chief Justice McLachlin and Madam Justice Abella, again making reference to *Whiten v. Pilot Insurance Co.*, *supra*, stated that, in order to give rise to a punitive damages award, the impugned conduct “in addition to the requirement that [it] constitute a marked departure from ordinary standards of decency ... must be independently actionable” (at para. 63).

As far as punitive damages awards are concerned, the following statement in *Fidler v. Sun Life Assurance Co. of Canada*, *supra* is especially noteworthy (at para. 75):

The award of punitive damages, of course, does not depend exclusively on the existence of an actionable wrong. In Whiten, the Court clearly established the relevant factors to consider in determining whether or not an award of punitive damages is warranted. [emphasis added]

This is a good reminder that the fact an independent actionable wrong may have occurred is not the end of the analysis. The independent actionable wrong in question must rise to a level of conduct sufficient to ground an award of punitive damages – a level of conduct that is especially egregious.

To put the matter otherwise, an independent actionable wrong does not inexorably lead to a punitive damages award. Only a fraction of conduct that qualifies as an independent actionable wrong will rise to the level that attracts punitive damages.⁵

X. PRACTICAL AND STRATEGIC CONSIDERATIONS

Counsel should be alive to a panoply of practical and strategic considerations when dealing, in the context of wrongful dismissal litigation, with claims for punitive damages based on contraventions of human rights legislation. Some of those considerations are outlined below.

⁵ A similar reminder can be found in the recent Newfoundland Court of Appeal case of *Cornhill Insurance plc v. Bay Bulls Sea Products Ltd.*, [2006] N.J. No. 279 (C.A.), where the Court of Appeal stated the following: “[W]hile a breach of the duty of good faith (i.e. the actionable wrong) had to be established by Sea Products to ground a claim for punitive damages, not every breach of the duty results in an award of punitive damages” (at para. 180).

A. Rights guaranteed by human rights legislation are “quasi-constitutional” in nature

It has been stated many times that the rights guaranteed by human rights legislation are “quasi-constitutional” in nature. The special nature and laudable goals of human rights legislation are well recognized in the jurisprudence. For example:

- (1) In the Supreme Court of Canada case of *Robichaud v. Canada (Treasury Board)*, [1987] 2 S.C.R. 84, the Court described “certain basic goals of our society” as being “incorporate[d]” into human rights legislation (at para. 8), and spoke of “the ‘almost constitutional’ nature of the rights protected” under such legislation (at para. 13).
- (2) In *Keays v. Honda Canada Inc.*, *supra*, Mr. Justice McIsaac referred to the “quasi-constitutional” nature of the rights guaranteed by the Ontario *Human Rights Code* (at para. 50).
- (3) Mr. Justice Goudge, the dissenting judge in *Keays v. Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, alluded to the purpose of human rights legislation (at paras. 22, 28 and 65):
 - (a) The “employer’s obligation to accommodate an employee’s disability ... [is] a process fundamental to the dignity and equality of persons with disabilities in our society”.
 - (b) “It is important that the accommodation process display more open-mindedness and less prejudice if disabled employees are to be accorded the dignity and equality to which they are entitled.”
 - (c) “The accommodation process must be approached in good faith, openly, and sensitively if the dignity and equality of disabled employees is to be respected as required by the law and morality.”

While Mr. Justice Goudge’s statements were made in the context of employment discrimination on the basis of disability, they nicely capture the purpose of human rights legislation: the protection of, and fostering of respect for, the dignity and equality of individual employees and other members of society.

The foregoing is no doubt of assistance to a wrongful dismissal plaintiff who seeks to advance a punitive damages claim in respect of human rights discrimination that occurred when his or her employment was terminated. For one thing, it is that much easier for the plaintiff to establish the independent actionable wrong – namely, the breach of human rights legislation – rose to the level of conduct sufficient to attract punitive damages.

For another thing, it is easier for the plaintiff to argue for a higher quantum of punitive damages. As confirmed by Mr. Justice Binnie in *Whiten v. Pilot Insurance Co.*, *supra*, where misconduct adversely affects an “interest ... known to be deeply personal to the plaintiff” or “a thing that [is] irreplaceable” (at para. 113), a higher punitive damages award may well be justified.

B. Is it desirable from a plaintiff's point of view to add a human rights element to a wrongful dismissal action?

An obvious question that arises is whether, from the point of view of a plaintiff, it is desirable to add a human rights element to a wrongful dismissal action. In other words, is it in a plaintiff's best interests to allege he or she was subjected to discrimination at or around the time his or her employment was terminated?

The author submits the following for consideration. Litigation with a human rights element often involves serious allegations, complicated pleadings and, if it can be so put, "high stakes" (monetary, reputational and otherwise). Moreover, such litigation generally turns on witness credibility and accordingly requires substantial *viva voce* evidence. These factors almost certainly translate into proceedings that are lengthier and costlier in monetary and other terms.

In light of the above, it is suggested that a plaintiff in a wrongful dismissal action may want to think twice before advancing a claim for punitive damages on the basis that he or she was subjected to human rights discrimination in the course of dismissal.

C. Allegation of discrimination should not be lightly made in a wrongful dismissal case

In the wrongful dismissal context, an allegation of human rights discrimination in the course of dismissal should not be lightly made. Such an allegation is serious by its very nature and, it is suggested, should not be levelled against a defendant in the absence of a solid evidentiary foundation.

In that regard, it is instructive to turn to the recent decision of the Ontario Superior Court of Justice in *Ata-Ayi v. Pepsi Bottling Group (Canada), Co.*, [2006] O.J. No. 4440 (S.C.J.).

The plaintiff, Harold Ata-Ayi, took the position that he was constructively dismissed from his employment. He argued that "as a result of alleged racism said to have occurred in the workplace, a poisoned work environment existed which compelled [him] to end the employment relationship" (at para. 18). Mr. Ata-Ayi advanced, among other things, a claim for punitive damages.

At the outset of the decision, Mr. Justice Echlin underscored the importance of identifying and eradicating racism in the workplace. He said it "must be uncovered and addressed immediately" and "must be dealt with seriously, strictly and in a timely fashion whenever it is found to exist" (at para. 22).

The trial judge ultimately dismissed the action. He was not persuaded that Mr. Ata-Ayi "was a victim of racism" or that "a poisoned work environment existed at Pepsi" (at para. 42). To the contrary, he found that the defendant had "fulfilled its duty as Mr. Ata-Ayi's employer", and was "a responsible corporate citizen with proper human resource policies and procedures in place administered by a qualified, credible and conscientious Human Resources Department" (at paras. 41 and 44).

Mr. Justice Echlin said "[t]here was no evidence of bad faith on the part of Pepsi" (at para. 60) and, on that basis, ruled there was no room for an award of punitive damages. In that regard, he cited *Fidler v. Sun Life Assurance Co. of Canada, supra*.

The crux of *Ata-Ayi v. Pepsi Bottling Group (Canada), Co.* is that Mr. Justice Echlin was critical of the allegations of racism levelled by Mr. Ata-Ayi, and rebuked the approach of counsel for Mr. Ata-Ayi.

Mr. Justice Echlin spoke of Mr. Ata-Ayi's "misguided and erroneous beliefs" (at para. 61). He characterized the plaintiff's views as being "out of touch with an objective assessment of the actual state of affairs" (at para. 42), and his allegations of racism as "unfortunate, inappropriate and unfounded" and "not supported on the evidence" (at para. 61).

Mr. Justice Echlin said that the approach taken by counsel for Mr. Ata-Ayi "was cavalier, reckless, and in certain circumstances, outrageous" (at para. 41). He found that the "vigorous allegations of racism advanced by [plaintiff's counsel] were vague, unsubstantiated, and without foundation" (at para. 56).

The trial judge – who was clearly moved by the weighty allegations against the defendant – stated he was "troubled by the serious allegations made in th[e] action, apparently without foundation" (at para. 41). He said that "Pepsi and its employees [did] not deserve to be called racist" (at para. 41) and that the defendant was "not deserving of the ill-founded attack launched upon it in th[e] lawsuit" (at para. 44).

Mr. Justice Echlin's decision makes it clear that allegations of discrimination on the basis of race should not be lightly made in the context of wrongful dismissal litigation. In the author's submission, the lesson to be taken from *Ata-Ayi v. Pepsi Bottling Group (Canada), Co.* applies with equal force to any scenario involving an allegation of human rights discrimination in the course of dismissal – regardless of the specific ground of discrimination.

D. Discrimination cannot, by itself, form the basis of a civil action

Counsel for defendant employers routinely argue that *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria* (1981), 124 D.L.R. (3d) 193 (S.C.C.) precludes any civil claim for damages arising out of alleged human rights violations.

In *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria, supra*, the Supreme Court of Canada held that the plaintiff – who alleged she was refused employment because of her ethnic origin – could not maintain a civil action against the person who refused her employment, either on the basis of a common law tort of discrimination or on the basis of an action flowing directly from a breach of the *Ontario Human Rights Code*.

The Court held as follows (at pp. 2 and 8 Q.L.):

[T]he attempt of [Ms. Bhadauria] to hold the judgment in her favour on the ground that a right of action springs directly from a breach of the *Ontario Human Rights Code* cannot succeed. The reason lies in the comprehensiveness of the Code in its administrative and adjudicative features, the latter including a wide right of appeal to the Courts on both fact and law

[N]ot only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy

expressed in the Code. The Code itself has laid out the procedures for vindication of that public policy, procedures which [Ms. Bhadauria] did not see fit to use.

Notwithstanding the foregoing, as has been illustrated in this paper, acts of human rights discrimination may well give rise to a punitive damages award in an action for wrongful dismissal. The key is really how the statement of claim is framed – the cause of action should not be founded on the alleged breach of human rights legislation *per se*.

The following statements of Mr. Justice Drost in the B.C. Supreme Court case of *McKinley v. BC Tel*, [1996] B.C.J. No. 982 (S.C.) provide some guidance (at paras. 50, 51 and 54):

The Amended Statement of Claim advances a claim for wrongful dismissal based on an alleged wilful and flagrant breach of the plaintiff's contract of employment. It also contains allegations of the intentional infliction of mental suffering, the denial of long-term disability benefits and the loss of future pension benefits, all stemming from the alleged wrongful dismissal. These claims may be sustained if the dismissal is proved to be wrongful, regardless of what the wrongful acts might be. *That the conduct of the defendants may also amount to a breach of the [Canadian Human Rights] Act is incidental to the contractual action.*

Granted, there is an overlap in these circumstances between the civil action and the human rights complaint because discrimination on the basis of disability is an integral part of the claims based on wrongful dismissal. However, in my view the allegations of breach of contract and wrongful dismissal are independent of any claim under the Act

[A]lthough an allegation of discrimination could not, by itself, form the basis of a civil action, or permit an award for compensatory damages within such an action, acts of discrimination might well give rise to an award of punitive damages in an action for wrongful dismissal [emphasis added]

E. What are the chances of a civil action being stayed pending disposition of a human rights complaint?

Suppose a former employee commences a wrongful dismissal action, in which he or she claims punitive damages on account of alleged human rights discrimination in the course of dismissal. Also suppose that, at or around the same time, the same individual files a human rights complaint with the B.C. Human Rights Tribunal (the "Tribunal"). What are the chances of the civil action being stayed pending disposition of the complaint by the Tribunal?

The chances of such a stay being granted are not very high. The author says this for the reasons enumerated by Mr. Justice Lederman in the Ontario Superior Court of Justice case of *Farris v. Staubach Ontario Inc.*, [2004] O.J. No. 1227 (S.C.J.).

In that case, the defendants brought a motion seeking an order that the civil action in question be stayed pending disposition of a human rights complaint that the plaintiff had filed with the Ontario Human Rights Commission.⁶

By way of background, in the statement of claim, the plaintiff had alleged wrongful dismissal, breach of the duty of good faith, breach of the employment contract, harassment and intimidation, misrepresentation, interference with contractual relations, intentional and/or negligent infliction of mental suffering and breach of the “equal pay for equal work” provisions of the Ontario *Employment Standards Act*. She was seeking, among other things, punitive damages.

In the human rights complaint, the plaintiff had alleged that the defendants had violated her “rights to equality of treatment in employment, and freedom from harassment, discrimination and reprisals” (at para. 4).

Mr. Justice Lederman declined to order a stay of the civil action pending disposition of the human rights complaint. He stated that human rights legislation “occupies a uniquely protected sphere of law” and “exists independent of and in addition to rights of citizens to enforce their common law rights to sue for breach of contract and tortious conduct” (at para. 11).

Quoting from another case, Mr. Justice Lederman pointed out that human rights legislation is of a “remedial” nature, and “could not ... have been intended to curtail the complainant’s right to sue” (at para. 12).

The motions judge, referring with approval to Mr. Justice Drost’s decision in *McKinley v. BC Tel, supra*, held that “in general, courts have ‘declined to prevent plaintiffs from proceeding with litigation which contained claims independent of the provisions of the ... Code, even though there was some overlap ...’” (at para. 13).

Dealing with the defendants’ argument that “the allegations contained in the statement of claim [were] duplicated and subsumed in the complaint” (at para. 7), Mr. Justice Lederman said the following (at paras. 14 and 27):

Where both a civil action and a complaint arise from an employer-employee relationship, some similarities in evidence and allegations are inevitable. However, given the important remedial purpose of human rights legislation, where the legislation contains some claims independent of the provisions in the Code, mere similarities should not impair the pursuit of a civil remedy. A plaintiff should not be put to the choice: proceed in the courts but only if the human rights process is halted. The threat of a stay in a civil action where a plaintiff has also brought a complaint under the Code would be a disincentive for future plaintiffs to use human rights legislation, and could result in fewer complaints being brought forward

⁶ Alternatively, the defendants were seeking an order that the plaintiff’s human rights complaint be stayed pending disposition of the civil action. The defendants conceded, at the hearing of the motion, “that th[e] Court was without jurisdiction to grant [that] Order ...” (at para. 2).

The courts should not be quick to stay a civil action out of desire to avoid multiplicity of proceedings, particularly when regard is had for the quasi-constitutional nature of the rights protected by the Code ...

Mr. Justice Lederman noted that a “stay of proceedings should only be ordered in the clearest of cases” (at para. 15). He quoted from another case in which the following was stated: “[a] stay of proceedings is never granted as a matter of course”, “[t]he power to stay should be exercised sparingly” and “a stay will only be ordered in the clearest cases” (at para. 15).

The motions judge gave short thrift to the suggestion that the wrongful dismissal litigation and simultaneous human rights proceedings constituted an attempt to improperly pressure the defendants and accordingly an abuse of process. After noting that “[t]here was no ... evidence ... of any impropriety or pressure tactic by the plaintiff”, Mr. Justice Lederman stated (at para. 26):

In any event, it cannot be said that a citizen who exercises her quasi-constitutional right to vindicate an alleged human rights violation and at the same time pursues an alleged civil breach of her employment relationship is attempting to improperly pressure her employer and is thereby abusing the process. The mere filing of two claims by an employee, one in furtherance of her human rights and one in relation to independent employment issues, cannot, without more, be the basis of a finding of inappropriate conduct or an abuse of process.

To the reasons enumerated by Mr. Justice Lederman in *Farris v. Staubach Ontario Inc.*, *supra*, the author adds another reason why a stay of proceedings is unlikely to be granted in the above circumstances.

In a wrongful dismissal case, a punitive damages award for a violation of human rights legislation is intended, as stated in *Whiten v. Pilot Insurance Co.*, *supra*, “to give a defendant his or her just desert [*sic*] (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community’s collective condemnation (denunciation) of what has happened”. As discussed previously, a punitive damages award is not compensatory in nature.

That is to be contrasted with relief available through the Tribunal. As was made clear by the Court in *Robichaud v. Canada (Treasury Board)*, *supra*, the remedies provided through human rights legislation are remedial, not punitive, in nature.⁷ They are intended to restore a complainant to the position he or she would have been in had the discriminatory conduct not occurred.

The foregoing is confirmed by the statement of Mr. Justice Holmes in *Collinson v. William E. Coutts Co. (c.o.b. Hallmark Cards, Canada)*, *supra* to the effect that a punitive damages award “is not compensatory and therefore not duplicitous of a compensatory award that might be obtained from the Human Rights Commission” (at para. 8).

⁷ The author recognizes that some Canadian jurisdictions have legislation giving human rights tribunals express jurisdiction to award punitive damages in addition to compensatory damages.

XI. WHAT THE FUTURE HOLDS ...

There remains no doubt that:

- (1) a plaintiff, in a wrongful dismissal case, can advance a claim for punitive damages on the basis that he or she was subjected to human rights discrimination in the course of dismissal; and
- (2) a court, in the appropriate circumstances, can make a punitive damages award (sometimes in a significant amount) in respect of such discrimination.

It is predicted that plaintiffs will continue to make allegations of human rights discrimination in the context of wrongful dismissal litigation, and that such allegations will be made on a more frequent basis.

In the author's submission, in the future, one area in particular will see a flurry of activity – employment discrimination on the basis of age. On April 5, 2007, the B.C. government, as expected, introduced a bill in the Legislature that would effectively put an end to mandatory retirement in this province.

If passed as introduced, the *Human Rights Code (Mandatory Retirement Elimination) Amendment Act, 2007* (which is also known as Bill 31) will, as of January 1, 2008, extend protection from age discrimination to employees aged 65 or older. Employers will be prohibited from forcing such employees to retire simply on account of their age.