ROPER GREYELL LLP
800 PARK PLACE, 666 BURRARD STREET, VANCOUVER, BC, CANADA, V6C 3P3
TELEPHONE **604.806.0922** FACSIMILE **604.806.0933** *ropergreyell.com*

ROPERGREYELL EMPLOYMENT + LABOUR LAWYERS

TO: CLIENTS AND OTHER INTERESTED PARTIES

RE: ROPER GREYELL NEWSLETTER – SEPTEMBER / OCTOBER 2006

DEALING WITH AND ACCOMMODATING EMPLOYEE DISABILITIES

Introduction

This newsletter focuses on the recent decision of the Ontario Court of Appeal in *Keays* v. *Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, [2006] O.J. No. 3891 (C.A.).[1] The Court of Appeal varied the March 17, 2005 trial judgment and February 8, 2006 supplementary reasons of Mr. Justice McIsaac of the Ontario Superior Court of Justice.

We focus on *Keays* v. *Honda Canada Inc. (c.o.b. Honda of Canada MFG)* for a number of reasons. Firstly, the case has significant educational value because it engages a complex and rapidly evolving area of the law – dealing with and accommodating employee disabilities. This was made clear by Mr. Justice Goudge of the Court of Appeal when he stated, "[T]he … require[ment] of employers to accommodate employee disabilities is the backdrop for many of the issues raised in this appeal."[2] Secondly, over the last year and a half, the case garnered much attention in the legal community and, in particular, in employment and labour law circles. Lastly, while *Keays* v. *Honda Canada Inc. (c.o.b. Honda of Canada MFG)* was decided in another province, it was decided by an appellate court. The case is accordingly persuasive authority in British Columbia, and should be given serious consideration in cases involving a similar fact pattern.

[1] The judgment of the Court of Appeal was issued on September 29, 2006.
[2] Mr. Justice Goudge dissented in part in *Keays* v. *Honda Canada Inc. (c.o.b. Honda of Canada MFG).* Unlike the majority of the Court of Appeal, the dissenting judge was of the view that Mr. Justice McIsaac's $500,000 punitive damages award ought to be upheld. While Mr. Justice Goudge "would not have awarded that sum", he could not "conclude that $500,000 in punitive damages … exceed[ed] what [was] rationally required to punish".

***Keays* v. *Honda Canada Inc. (c.o.b. Honda of Canada MFG)*, [2006] O.J. No. 3891 (C.A.)**

Facts

Kevin Keays (the "Employee") was employed by Honda Canada Inc. (the "Employer") for around 14 years. He was without a doubt a dedicated and conscientious employee. On March 29, 2000, the Employee was dismissed from the position of team leader in the Employer's Quality Engineering Department.

By way of background, shortly after he commenced employment with the Employer, the Employee began to experience health problems. His health problems caused him to be absent from work on an intermittent basis. His absences caused problems for the Employer's lean staffing model.

In October 1996, the Employee went on disability leave. He remained on leave until December 1998. At that time, the Employer's long-term disability insurer performed an evaluation of the Employee's ability to return to work, determined him to be able to return to work and terminated his benefits.[3] This was in spite of the fact that, in March 1997, the Employee was diagnosed with chronic fatigue syndrome ("CFS").

In January 1999, the Employee returned to work "under the protests of both himself and his treating physician that he was still too sick to do so". Soon after returning to work, the Employee again began to experience absences from work. His absences resulted in him being "coached" in August 1999. "Coaching" was the first step in the Employer's progressive discipline process.

The Employee continued to express "concern about the difficulty he was having in maintaining regular attendance because of his illness". In response, the Employer advised him of its workplace accommodation program. In September 1999, the Employee had his physician complete a form required for entry into the program. On the form, it was "made … clear that the [Employee] suffered from CFS and would likely have to continue to miss about four days of work a month".

For almost one year, pursuant to the program, some accommodation was provided to the Employee in respect of his intermittent absences. This constituted recognition "at least at th[at] point … [of] his CFS disability as a legal and medical excuse". However, the Employer "also instituted a requirement at that time that the [Employee] had to get a doctor's note validating each absence before he could return to work". At this juncture, we note that employees with "mainstream" illnesses did not face such a requirement.

In October 1999, the Employee 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 [the Employee] … to the physically demanding production line". The

---

[3] Parenthetically, we note that Mr. Justice McIsaac found the Employer's insurer wrongly terminated the Employee's long-term disability benefits, and characterized the insurer's evaluation of the Employee's ability to return to work as a "farce". In spite of the trial judge's finding and characterization, the majority of the Court of Appeal said that any wrongdoing or misconduct on the part of the insurer could not "be laid at the feet of the [Employer]".

production line is where the Employee worked when he first commenced employment with the Employer. When the Employee 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, the Employee 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 the Employee's requests.

On March 17, 2000, a lawyer retained by the Employee wrote a letter to the Employer in "extremely conciliatory terms" in an attempt to address concerns of the Employee. The Employer did not respond to the lawyer's letter.

Instead, the Employer asked the Employee to meet with its occupational medicine specialist who "employed a hardball approach to employee absence". The Employee, 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 [the occupational medicine specialist's] assessment".

The Employer refused to provide the Employee with the clarification he was seeking, and terminated his employment for disobeying its direction. The Employee learned of his termination through "a co-worker who phoned him at home to tell him that his dismissal had been announced to the department".

As a result of being dismissed, the Employee 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.

The Employee brought an action in the Superior Court of Justice for wrongful dismissal.

Ontario Superior Court of Justice

After a 29-day trial, Mr. Justice McIsaac reached the conclusion that the Employee was dismissed without just cause. The trial judge determined 15 months to be the period of notice to which the Employee would have been entitled, and awarded damages on that basis.

Relying on the decision of the Supreme Court of Canada in *Wallace* v. *United Grain Growers Ltd.* (1997), 152 D.L.R. (4th) 1 (S.C.C.)[4], Mr. Justice McIsaac extended the 15-month notice period to 24 months "because of the egregious bad faith displayed by the [Employer] in the manner of terminating the [Employee] and the medical consequences he suffered as a result".

The trial judge also ordered $500,000 in punitive damages because he found that "Honda's treatment of Keays constituted discrimination and harassment, was contrary to Ontario human rights legislation, and was both outrageous and high-handed".

[4] In *Wallace* v. *United Grain Growers Ltd.*, the Court made it clear that bad faith conduct or unfair dealing on the part of an employer at or around the time of dismissal can ground an extension to the notice period to which an employee is entitled – or, to put it more simply, can increase the amount of damages for which the employer is liable.

Finally, Mr. Justice McIsaac awarded the Employee costs on a "substantial indemnity" basis[5]. The costs of the proceeding, incidentally, amounted to $610,000. In addition, the trial judge awarded a 25 percent costs premium, in the amount of $155,000, to the Employee's lawyer in recognition of the fact that the lawyer had handled the case without any certainty of ever being paid.

Not surprisingly, the Employer appealed the trial judge's award to the Court of Appeal.

Ontario Court of Appeal

The majority of the Court of Appeal – consisting of Mr. Justice Rosenberg and Madam Justice Feldman – upheld most of the trial judge's award. The award was, however, varied as follows:

- the punitive damages award was reduced from $500,000 to $100,000; and
- the costs premium awarded to the Employee's lawyer was halved.

With regard to the just cause issue, the Court of Appeal made reference to the Supreme Court of Canada case of *McKinley* v. *B.C. Tel* (2001), 200 D.L.R. (4th) 385 (S.C.C.). The Court of Appeal stated the following:

> "In *McKinley* v. *B.C. Tel* … the Supreme Court of Canada made it clear that an employer's response to employee misconduct must reflect the principle of proportionality. Just cause for the most serious sanction, namely dismissal, requires the most serious misconduct. The Court describes this degree of employee misconduct in a number of different ways: conduct that gives rise to a breakdown in the employment relationship; conduct that is fundamentally or directly inconsistent with the employee's obligations; or conduct that violates an essential condition of the employment contract. In a broad sense, the question is whether the employee misconduct is irreconcilable with his or her continued employment."

The Court of Appeal did not interfere with Mr. Justice McIsaac's finding that the Employee was dismissed without just cause. The Court of Appeal highlighted the trial judge's findings that:

- the Employee "had done nothing to suggest that he was in any way repudiating his contract of employment with the [Employer]";
- the Employee "had been a dedicated employee for fourteen years who continued to want to contribute when medically able to do so"; and
- the refusal of the Employee to meet with the occupational medicine specialist "was not absolute, but subject only to receiving clarification of the basis for the meeting".

The Court of Appeal declined to interfere with the trial judge's assessment that 15 months was the period of notice to which the Employee would have been entitled. According to the Court of Appeal, the assessment was "reasonable, in all the circumstances" and, particularly, in light of

[5] An award of costs on a "substantial indemnity" basis means that costs of the proceeding are fully rather than partially covered.

the Employee's "almost fourteen years of service, and his important team leader role in the Quality Engineering Department".

With regard to the nine-month notice period extension arising out of bad faith conduct or unfair dealing on the part of the Employer, the Court of Appeal stated that "what might seem to be a very generous extension must be seen in the circumstances of th[e] Employee". It also stated that the Employee "not only shared the vulnerability of any employee at the time of termination but had the added vulnerability of his disability, a condition of which the [Employer] was aware although reluctant to accept".

As outlined above, the majority of the Court of Appeal reduced Mr. Justice McIsaac's $500,000 punitive damages award by $400,000. The majority took issue with certain findings of fact of the trial judge. According to the majority:

- there was no evidence to support Mr. Justice McIsaac's finding that the Employer's misconduct "formed a protracted corporate conspiracy".
- it was a "gross distortion of the circumstances" for the trial judge to have found that the Employer's "outrageous conduct ha[d] persisted over a period of five years". The majority said that the case concerned a "period of seven months [and] not five years".
- Mr. Justice McIsaac's finding that the Employee was "viewed as a problem associate" could not be supported on the evidence.
- the trial judge distorted the circumstances by finding that the Employer "ran amok as a result of [its] blind insistence on production 'efficiency' at the expense of [its] obligation to provide a long-time employee reasonable accommodation". The majority saw nothing in the trial record to indicate that the Employer "ran amok".

In addition, the majority of the Court of Appeal held that the trial judge's punitive damages award failed to accord with the fundamental principle of proportionality. The majority's view was that "this 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". 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".

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". Moreover, the misconduct took place over a period of seven months and did not involve a multi-year period of escalating conduct up to the trial.

As stated by the majority of the Court of Appeal, there were "no circumstances from which it could rationally be concluded that a lesser award [of punitive damages] would fail to achieve deterrence". The majority took into consideration "the totality of all other penalties including

compensatory damages[6] imposed on the defendant", and noted that the notice period had been extended by nine months "for essentially the same conduct that attracted the punitive damage award".

With respect to the award of costs, the Court of Appeal stated that "[a]warding costs is a paradigmatic exercise of judicial discretion". It ruled that – in light of the Employer's "bad faith and outrageous conduct" – there was no error in Mr. Justice McIsaac's "choice of the substantial indemnity scale". In the Court of Appeal's view, this was "not a duplication of the award of damages, but rather … [compensation] for the legal costs [the Employee] incurred".

The Court of Appeal agreed with Mr. Justice McIsaac that a costs premium was justified. There was recognition of the risk of "non-payment of significant fees and disbursements" undertaken by the Employee's lawyer, and the "very significant success" achieved by the Employee. However, as noted above, the Court of Appeal did not agree with the trial judge that the costs premium should be in the amount of 25 percent. The Court of Appeal halved the amount of the costs premium to $77,500.

Conclusion

As mentioned at the outset of this newsletter, the requirement of employers to accommodate employee disabilities formed the backdrop to *Keays* v. *Honda Canada Inc. (c.o.b. Honda of Canada MFG)*.

With regard to the question of accommodation, the views expressed in the dissenting judgment of Mr. Justice Goudge are particularly instructive to employers. Those views include the following:

- 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".

- "It is important that the accommodation process display more open-mindedness and less prejudgment if disabled employees are to be accorded the dignity and equality to which they are entitled."

- An employer "must engage in [the accommodation] process reasonably and in good faith", and "[w]here [an employer] proceeds in bad faith and seeks to evade its legal obligation to accommodate those rendered vulnerable through disability by wrongfully terminating them, compensation and punishment are both justified".

- "The need for [a] large employer, and indeed all employers, to take seriously their responsibilities in accommodating employees with disabilities is very important."

---

[6] Compensatory damages are damages intended to compensate an injured party for injury sustained and to restore him or her to the position in which he or she was prior to the injury. Such damages are not intended to be punitive in nature.

- "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."

Please do not hesitate to contact any member of our firm if you have questions in respect of *Keays* v. *Honda Canada Inc. (c.o.b. Honda of Canada MFG)* and dealing with or accommodating employee disabilities, or if you wish to have information on any other employment or labour law issue.

Lawyer contact information can be obtained by telephoning us at (604) 806-0922 or visiting our website at www.ropergreyell.com.

****

* Every effort has been made to ensure accuracy in respect of this newsletter. The comments, however, are necessarily of a general nature. Clients and other interested parties are urged to seek specific advice on matters of concern and not to rely solely on the text of this newsletter. *