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BARRISTERS AND SOLICITORS

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Human Rights and Wrongful Dismissal - Court of Appeal Upholds Decision to Award Punitive Damages

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In the March 2006 Corporate Bulletin we canvassed the employer's duty to accommodate as required by the provisions of the Ontario Human Rights Code. This topic has gained considerable attention due to the March 17, 2005 Ontario Superior Court of Justice case, *Keays v. Honda*. The Ontario Superior Court of Justice awarded a wrongfully dismissed employee \$500,000.00 in punitive damages, reportedly the largest such award in a wrongful dismissal action in Canadian history. In a supplementary decision a further \$610,000.00 was awarded in costs against the employer. On September 26, 2006, the Ontario Court of Appeal released its much anticipated decision.

The facts may be summarized as follows: Keays was terminated by Honda Canada Inc. after 14 years of employment. Keays suffered from Chronic Fatigue Syndrome making it difficult for him to maintain regular attendance. Honda directed Keays to meet with its occupational medicine specialist. Keays declined to do so without clarification from Honda regarding the purpose of the meeting, the methodology to be used, and the parameters of the doctor's assessment. Honda refused to offer this clarification and terminated Keays for disobeying its direction. Prior to termination, Keays had been involved in Honda's disability accommodation program. Unlike other employees suffering from mainstream illnesses, Keays was required to produce a doctor's note validating each absence. Shortly before termination, Honda unilaterally cancelled Keays' accommodation.

The trial court concluded Keays had been wrongfully dismissed without cause and awarded 15 months pay in lieu of reasonable notice, which was extended by 9 months on account of the employers bad faith. Honda was also ordered to pay \$500,000.00 in punitive damages because the treatment of Keays constituted discrimination and harassment under the Ontario Human Rights Code and was both outrageous and high-handed. On Appeal, the Court upheld the lower Court's decision however it did reduce both the costs and the punitive damage award. This said, there are some very important underlying lessons of the Court of Appeal decision, which are rather sobering. While assessing an employees disability employers should:

- ◆ not disregard medical evidence submitted by employees' treating physicians without a reasonable basis and without providing the employee and his/her doctor the opportunity to address the employer concerns;
- ◆ ensure requests for medical information are reasonable and realistic;
- ◆ not insist upon medical evidence which does not exist and not simply disregard medical evidence produced because it does not rise to a level of objective scientific proof in circumstances where such objective evidence is not available because of the nature of the condition;
- ◆ be very careful not to denigrate, demean and belittle employees by characterizing their medical conditions in pejorative terms;
- ◆ strive for neutral, impartial and unbiased third party experts; and
- ◆ ascertain the nature of the medical impairment prior to implementing accommodations.

This case reinforces an employer's obligation to be proactive and act in good faith during the accommodation process. The process should be open and transparent and recognize that accommodation is a fundamental human right and not an indulgence or act of charity granted by employers. Although the legal community anticipates a further appeal to the Supreme Court of Canada, for now, the strong message to employers is that the interplay between attendance management and accommodating disabilities has reached a new level and if employers "get it wrong" they can expect to face liability.

The foregoing is provided to you for information purposes only. We caution you to obtain legal advice specific to your situation in all circumstances.

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