MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employer Counsel

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Court Awards Wrongfully Dismissed Employee $500,000 in Punitive Damages

In the controversial decision of *Keays v. Honda Canada Inc.* the Ontario Court of Justice awarded the highest ever punitive damages award in a Canadian employment law case. The Court awarded 24 months' pay in lieu of notice for wrongful dismissal plus an additional $500,000 in punitive damages to a disabled employee who had been terminated by his employer for alleged insubordination.

THE FACTS

When he was terminated in March 2002, Kevin Keays had worked at Honda for 14 years as a "team leader" in the Quality Engineering Department.

Shortly after he began employment Mr. Keays experienced health problems and was frequently absent from work. Eventually, he was diagnosed with Chronic Fatigue Syndrome and was off work on short-term and then long-term disability for a period of two years. Mr. Keays returned to work when his disability benefits were terminated by the insurer.

Following his return to the workplace, Mr. Keays continued to experience absences as a result of his disability. As such, he was placed in Honda's progressive discipline program.

When it was clear that Mr. Keays was unable to meet Honda's attendance expectations he was exempted from the progressive discipline program but was required to substantiate his absences with a medical certificate. Mr. Keays complied. His treating physician provided a note which indicated that Mr. Keays would be absent approximately 4 times per month.

In the month preceding his termination, Mr. Keays was absent 14 times. He was then asked to meet with the company doctor whose diagnosis indicated that Mr. Keays did not suffer from any condition that prevented him from regularly attending at work. The doctor recommended that it might actually be beneficial to move Mr. Keays back to the physically demanding assembly line.

Eventually, Mr. Keays sought the assistance of legal counsel who attempted to mediate the issues with Honda. In response, Honda advised Mr. Keays that it no longer considered his absences to be legitimate and that Mr. Keays was required to meet with an occupational specialist hired by Honda. Mr. Keays refused and, as a result, was terminated by Honda for insubordination.

continued inside...

June 2005 Vol. IV No. 3

$500,000 continued from p.1

Mr. Keays commenced an action against Honda for wrongful dismissal.

THE DECISION

The Court found that Mr. Keays had been wrongfully dismissed and awarded him 15 months' pay in lieu of notice.

The Court then extended the notice period by an additional 9 months on account of what the Court found to be the bad faith manner of dismissal - namely, Honda's alleged pattern of callous and insensitive conduct aimed at thwarting the accommodation process, including overt skepticism regarding the *bona fides* of Mr. Keays' condition:

> *....as a result of the insensitive manner of this termination, Mr. Keays suffered significantly. All that he was seeking from Honda was a reasonable accommodation for his disability and, in the result, he was terminated. ....He has experienced a substantial loss of self-esteem due to this termination because his job gave him not only a purpose in life, it also permitted him financial independence which is now gone. He suspected that when Honda ordered him to see their physician, Dr. Brennan, he was being "set up for failure" because this individual had already made up his mind that his condition was "bogus".*
>
> *... [Honda's actions] ignores 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.*

The Court also found that the maximum penalty of $10,000 under the Ontario *Human Rights Code* was grossly insufficient given the outrageous and high-handed conduct engaged in by Honda. In the circumstances, the Court awarded an additional $500,000 in punitive damages.

Honda has announced its intention to appeal the decision.

LESSONS FROM HONDA

Although the final chapter in this very interesting case will ultimately be written by the Ontario Court of Appeal and perhaps the Supreme Court of Canada, the decision is a reminder to employers that the termination of a disabled employee poses significant risks of litigation and exposure.

The failure to accommodate - or worse, the intentional thwarting of the process of accommodation - may result not only in considerable financial liability for the employer but also invite an award of punitive or aggravated damages and the ensuing negative and damaging publicity.

When managing an employee with a disability an employer should seek and receive sufficient, objective medical evidence. This will create for the employer the best opportunity to understand the scope of the employee's limitations and the employer's ability to accommodate.

The lawyers at ***Sherrard Kuzz LLP*** *have considerable experience assisting clients to obtain and access medical evidence about employees, strategically and effectively manage disabled employees and navigate the duty to accommodate in a wide and varied range of circumstances. To discuss this further, contact any member of our legal team.*

DID YOU KNOW?

On June 7, 2005, the Liberal Government of Ontario took an important first step toward fulfilling a commitment to end mandatory retirement, when "*An Act to amend the Human Rights Code and certain other Acts to end mandatory retirement*", received first reading in the Legislature.

If enacted, the *Human Rights Code* would be amended to change the definition of "age" to enable an employee, required to retire at age 65, to file a human rights complaint alleging age discrimination. An exception will apply to jobs where mandatory retirement can be justified as a "bona fide occupational requirement".

The legislation will become effective one (1) year after it receives Royal Assent. To receive a copy of Bill 211, or information regarding how this legislation may affect your workplace, contact any member of Sherrard Kuzz LLP.

Boeing Corp. Termination Evidences Brave New World in Corporate Governance

The forced resignation in early March of Boeing Company's CEO, Harry Stonecipher, offers further evidence that the conduct of employees - whether at work or at play, including senior management - will not be immune from corporate scrutiny.

Once the subject of water-cooler whispers and backroom acquiescence, employers are now demanding of their employees that their personal conduct not have the potential to negatively impact the organization's public reputation and credibility. Particularly in the aftermath of the collapse of Enron and the enactment in the United States of the *Sarbanes-Oxley Act*[1], businesses throughout North America have begun to focus in earnest on the creation, implementation and enforcement of comprehensive Codes of Employee Conduct.

In the case of Boeing, Mr. Stonecipher's resignation at the request of Boeing's Board of Directors resulted from a violation of the company's code of conduct which prohibits ***"conduct or activity that may raise questions as to the company's honesty, impartiality, reputation or otherwise cause embarrassment to the company"***. According to public accounts, Mr. Stonecipher violated Boeing's code of conduct when he engaged in an extramarital affair with a female executive of the company. Ironically, Stonecipher had been brought into Boeing to restore its reputation amid a Pentagon procurement scandal that led to the jailing of two former Boeing executives. One of Stonecipher's first orders of business was to require Boeing's 150,000 employees to sign a code of ethical conduct, the very code the Boeing Board found Stonecipher to have violated by his actions.

> "Employers are now demanding of their employees that their personal conduct not have the potential to negatively impact the organization's public reputation and credibility. "

1 U.S. federal legislation enacted to restore public confidence in and integrity to the capital markets in the wake of serious corporate malfeasance.

THE TREND

Codes of Employee Conduct are now considered so important that, in a growing number of workplaces, they form part of the employment contract itself, requiring specific execution at the time of hire. Some organizations even require employees to periodically reaffirm their adherence to the Code by executing an annual certificate. In all cases, employees are being asked to acknowledge that a violation of the Code will expose the employee to disciplinary action up to and including termination of employment.

In terms of content, Codes of Employee Conduct vary in breadth from simple value statements to veritable "catch-basins" of actual or perceived corporate sins, such as conflicts of interest, sexual harassment, nepotism, workplace violence, substance abuse, financial controls and reporting, business expenses, gift-giving/receiving, and, dealings with government officials.

PROCEED WITH CAUTION

In Canada, employers need to proceed cautiously when developing and implementing Codes of Employee Conduct. There are a number of reasons for this:

1. Whereas in the United States, legislation such as the *Sarbanes-Oxley Act* applies uniformly throughout the country, in Canada employment law is generally provincially regulated (in workplaces other than federal undertakings). As such, applicable law may vary from province to province.

2. In Canada, an employer risks legal challenge if it unilaterally changes a fundamental term or condition of employment without providing the employee adequate consideration for the change - a new term of employment cannot be imposed without providing the employee with something of value in exchange. As such, if an employer unilaterally and without consideration attempts to introduce a Code of Employee Conduct that contains provisions that could be regarded as new or amended fundamental terms or conditions of employment, the provisions may not be enforceable.

3. In a unionized workplace, the provisions of a Code of Employee Conduct may not be enforceable if they exist outside of, or are in conflict with, the terms of the collective agreement.

4. In a unionized workplace, a Code of Employee Conduct may have to satisfy the test applied to all company rules, often referred to as the *KVP* test - that is, are the terms of the Code: consistent with the provisions of the collective agreement, reasonable, clear and unequivocal, brought to the attention of affected employees, described by the employer as a potential basis

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Boeing Corp. continued from p.3

for a discipline or discharge, and consistently enforced?

The lawyers at Sherrard Kuzz LLP have considerable experience assisting employers to develop and implement workplace rules and codes of conduct that comply with applicable legal requirements as well as the practical realities of the workplace. For more information, contact any member of our legal team.

BREAKFAST SEMINAR

Next in our series of employment and labour law updates:

HReview Seminar Series

TOPIC: Recent amendments to the Ontario *Labour Relations Act*:

- The extent to which, and under what circumstances, the Labour Relations Board will exercise its power to automatically certify a union where an unfair labour practice has been proven.
- The effect of card-based certification on the construction industry.
- The extent to which, and under what circumstances, the Labour Relations Board will exercise its interim powers including ordering the reinstatement of an employee even prior to a full hearing into the propriety of the employer's actions.

DATE: Thursday, Sept. 15, 2005, 7:30 a.m. — 9:00 a.m. (program to start at 8:00 a.m.; breakfast provided)

VENUE: Wyndham Bristol Place (Toronto Airport), 950 Dixon Road, Toronto, ON

Please RSVP by Aug. 15, 2005 to T. 416.603.0700, F. 416.603.6035 or E. emarcelino@sherrardkuzz.com

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Providing management with practical strategies that address workplace issues in proactive and innovative ways.