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Employment Law Newsletter

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Employees Beware: Refusing an Offer to Return to Work for Your Former Employer May Constitute a Failure to Mitigate.

by *Scott MacDonald*

It doesn't happen very often so when the Supreme Court of Canada releases a decision on employment law, all employers and employees should sit up and take notice. A recent decision from our highest court, in *Evans v. Teamsters Local Union No. 31*, 2008 S.C.C. 20, is an important decision for all employers and employees in wrongful dismissal cases.

What Happened in the *Evans* Case?

Mr. Evans worked as an employee at the union's branch office in Whitehorse for more than 23 years. When a new union executive was elected, Mr. Evans' employment was terminated without notice, and without cause. The union continued to pay Mr. Evans his salary and benefits while he stayed home. More than four months after he was let go, the union asked him to return

to his employment to serve out the balance of a 24 month notice period. The union told Mr. Evans that if he refused to work, it would treat that refusal as just cause and formally terminate his employment without notice. Mr. Evans refused to return to work, the union stopped paying his salary and benefits, and Mr. Evans sued.

What is the Employer's Obligation When Dismissing an Employee Without Cause?

Unless an employer has "just cause" entitling it to terminate employment without notice or pay instead of notice, the employer is obligated to give reasonable notice and a specific date on which the employee's job will come to an end. If the employer fails to give reasonable notice, then it has to compensate the employee for the amount he would have received had he been given the opportunity to work out the notice period. The amount of notice which is considered "reasonable" varies from case to case and has a rough upper limit of 24 months. Notice is assessed by reference to a number of factors including the nature of the job,

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- *Thursday, November 6, 2008:*

Employment Law Breakfast Seminar at Terminal City Club. Seating is limited. Please contact Doris Chin, Marketing Coordinator at 604.661.9231 or dchin@rbs.ca to register.

the status and skill level of the employee, the length of service, the age of the employee, the availability of similar employment and any customs of the particular industry.

What is the Employee's Duty to Mitigate?

In all breach of contract cases, the non breaching party has a duty to minimize or limit the financial loss and damages he would otherwise sustain as a result of the breaching party's actions. In wrongful dismissal cases, an employer who fails to give reasonable notice or compensation instead of notice, is usually found to be in breach of the notice obligation under the employment contract. Damages are measured by what the employee could have earned during the notice period, had he been given proper notice of termination. The employee, however, has a duty to avoid or limit as much of the financial loss and damages as is reasonable. If an employer wants to reduce the amount of damages payable then it has the onus of proving both that an employee failed to make reasonable efforts to find replacement work and that work could have been found. Usually, the employee is looking for work with new employers but occasionally, this duty might require a dismissed employee to consider returning to work for the same employer. In the *Evans* case, there was no evidence of employment opportunities other than the offer to return-to-work temporarily for the union.

When Must a Dismissed Employee Mitigate Damages by Returning to Work for the Same Employer?

Keeping in mind that damages in wrongful dismissal cases are meant to compensate an employee for lack of notice, and not to penalize the employer for the dismissal itself, the Supreme Court of Canada noted that there is no reason in theory why an employee shouldn't be required to mitigate his loss, in some circumstances, by taking temporary work with the dismissing employer. The key question which has to be asked is whether a reasonable person would accept such a return to work opportunity.

The Supreme Court of Canada has said that a reasonable person will be expected to accept a return to work opportunity from his former employer when:

- the salary being offered is the same;
- the working conditions are not substantially different and the work is not demeaning; and
- the personal relationships are not acrimonious or hostile.

In addition, other relevant factors that a court will review include:

- the history and nature of the employment;
- whether or not the employee has commenced litigation; and
- whether the offer of re-employment was made while the employee was still working for the employer or only after he or she had already left.

An employee who has been dismissed without proper notice would never be obliged to return to work with his former employer, in an atmosphere of hostility, embarrassment or humiliation. For that reason, the court will always pay attention to the work atmosphere and any stigma or loss of dignity associated with a return to work. If the termination was handled sensitively, with dignity and respect, then the employee needs to carefully consider any return-to-work opportunity with his former employer.

BC *Employment Standards Act* Update — Employers Breathe Easy After Court of Appeal Refuses to Give Contractual Status to Statutory Overtime Pay

by Peter Lightbody

Statutory Claims For Overtime Pay

The BC *Employment Standards Act (ESA)* requires employers to pay overtime. There are exceptions to this, for example employees performing upper management or executive duties. But in general, when an employee has worked a certain number



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of hours in a specified period, the employee's right to greater pay is triggered.

When employers do not pay overtime as required by the *ESA*, remedies are available to employees under the *ESA*. This is a user friendly process for employees. The Employment Standards Branch investigates the claim, and liaises with the employer in search of a resolution. If the matter cannot be settled, the case is prepared for a hearing. Jurisdiction for these sorts of claims falls exclusively to the decision-making powers of the Employment Standards Branch and Tribunal, and the procedure is set out in the *ESA*. Our courts are not involved.

Time Limits For Bringing In A Claim

A significant feature of the *ESA*'s statutory scheme relates to time limits, and here the *ESA* is less friendly to employees. Under s.74 of the *ESA*, the employee must file his or her written complaint within six months of an alleged contravention (or if a termination of employment has occurred, within six months of the termination). This effectively limits employees from seeking unpaid overtime and other statutory pay that dates back more than six months.

Contrast this statutory limitation period with that which applies where an employee and employer have entered into their own agreement that expressly provides for overtime pay. A breach of such an agreement by the employer will trigger a civil remedy for the employee which can be pursued in the courts, under the law of contract. The limitation period for breach of contract is typically six years, so the employee can wait for six years and look back for a longer period when quantifying the unpaid overtime.

Can Unpaid Overtime Also Be Recovered In Court?

In a 2008 case called *Macaraeg v. E Care Contact Centres Ltd.* (*Macaraeg*), our BC Court of Appeal was asked to review the issue of whether the statutory obligation to pay overtime should be implied as a term of employment contracts which are otherwise silent on the issue of overtime pay. If the answer is yes, as held by the trial judge in *Macaraeg*, then the consequence is quite profound: employers are exposed to contract actions in the courts for unpaid overtime pay dating back up to six years.

This consequence would apply not only to sophisticated written employment agreements, but to the most informal employment relationships as well, so long as the employee could prove the overtime was worked.

BC Court Of Appeal Says “No”

Rejecting the reasoning of the trial judge, our Court of Appeal found no basis to incorporate the statutory obligation to pay overtime into employment contracts. The Court worked from the general rule that, at common law, there is no cause of action to pursue statutorily conferred rights. An exception is where the statutory scheme is somehow inadequate, which the Court found not to be case here.

The Court of Appeal did nothing radical in this case. Rather, it was the BC Legislature that set the stage for this case a few years ago, by reducing the limitation period in the *ESA* for these sorts of statutory claims, from 2 years to six months. The trial judge in *Macaraeg* then answered in kind, on behalf of employees, by departing from a long line of cases holding that benefits provided for in the *ESA* are not to be implied into employment contracts. The Court of Appeal in *Macaraeg* confirmed this line of cases remains good law, and the status quo was restored.

Is This The Last Word On The Issue?

For employees and employers dealing with claims for unpaid overtime (or other statutorily imposed payment obligations), the starting point of the analysis is whether the entitlement arises solely from the *ESA*, or exists also in an agreement between the parties—in other words, is the entitlement a term of a contract? Employers should be aware, however, that the decision in *Macaraeg* is not the end of the analysis. When the employee can prove, for example, that there has been a certain “course of dealing” between the parties regarding overtime pay, the obligation to pay overtime may rise to the level of contractual status, triggering a right to seek a remedy back six years. It is reasonable to expect that—in the spirit of the lower court's decision in *Macaraeg*—the trial courts will be receptive to such arguments.

Redefining “Wrongful” in a Wrongful Dismissal — The *Honda v. Keays* Decision

by Nicole Mangan

The recent Supreme Court of Canada decision in *Honda Canada Inc. v. Keays*, 2008 SCC 39 (“*Keays*”) has reshaped wrongful dismissal damage awards. Since the 1997 Supreme Court of Canada decision in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, “*Wallace*” or “aggravated” damages have often been awarded in wrongful dismissal actions on top of the financial loss suffered when an employer fails to give payment for reasonable notice of termination. *Keays* is very important and is particularly relevant if the employee involved in a wrongful dismissal claim suffers from a disability.

What Happened in the *Keays* Case?

Mr. Keays was employed with Honda for 14 years performing assembly line work and data entry. During this time, he was diagnosed with chronic fatigue syndrome. After his initial diagnosis, he was off work and received disability benefits. When his benefits were terminated by his insurer, Mr. Keays returned to work with Honda in a program that allowed time off for disabled employees as long as they had a doctor’s note. Over time, Mr. Keays’ absences increased and Honda became concerned because the nature of Mr. Keays’ doctor’s notes also changed. In the employer’s opinion the new notes lacked a diagnosis or assessment, and failed to clarify why time off was required. Honda scheduled a meeting for Mr. Keays with a medical specialist to assess a work program that would continue to accommodate his illness. Mr. Keays, after obtaining legal advice, refused to participate in such a meeting unless Honda explained the meeting’s “purpose, methodology and parameters”. Ultimately, Honda wrote to Mr. Keays explaining that if he refused to attend with the medical specialist his employment would be terminated. Mr. Keays again refused and he was terminated by Honda.

Decisions in the Lower Courts

At trial, Mr. Keays was awarded 15 months pay in lieu of reasonable notice for his service with Honda. Mr. Keays also claimed “*Wallace*” or “aggravated” damages which can be

awarded for inappropriate treatment of an employee by an employer at the time of dismissal. The conduct required to warrant these damages must show unfairness by the employer or “bad faith by being, for example, untruthful, misleading or unduly insensitive”. The trial judge increased the notice period from 15 months to 24 months on this basis. The trial judge then awarded an additional \$500,000 in punitive damages to punish Honda for its conduct. The trial judge determined Honda had embarked on a campaign of harassment and discrimination and had deliberately attempted to intimidate and then dismiss a vulnerable employee.

Honda appealed the trial decision. The Ontario Court of Appeal reduced the punitive damages award to \$100,000 but otherwise upheld the award of the trial judge. Honda appealed again to the Supreme Court of Canada (the “Court”).

The Decision of the Supreme Court of Canada

The Court eliminated both the punitive damages and the *Wallace* damages, leaving Mr. Keays only the notice award of 15 months. The Court concluded there was no evidence of a “conspiracy” with respect to Mr. Keays’ dismissal and, in fact, noted that Honda had acknowledged there was a disability and acted on the advice of experts to try and accommodate it. The Court’s reasons for eliminating the *Wallace* and punitive damage awards have brought clarifications important to employment law.

Wallace Damages

A general principle of employment law permits either the employer or the employee to terminate the relationship. Each party also accepts that the other expects reasonable notice when a decision to terminate the relationship is made. It is not generally expected by either party that the other will suffer psychological harm when they receive notice that the relationship is being terminated. The Court confirmed that *Wallace* damages can still be awarded when an employer acts unfairly or in bad faith when terminating employment, however, three additional factors have now been added to this criteria.

First, an employee must actually experience some kind of pain and suffering because of the way they were terminated before

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any damages will be awarded. Previously, an employee did not have to show he suffered any illness or physical or mental distress as a result of the treatment he experienced.

Second, an employee will need to show that an employer knew or should have known that its actions would cause illness or pain and suffering. If, for example, the employer knew an employee suffered from a medical condition that was aggravated by stress and then terminated the employment in a particularly stressful way, then an argument could be made that the employer could have foreseen the effect its actions would have. If, however, an employer had no knowledge of this condition and terminated the employment in a very usual and acceptable way but the termination caused a worsening of the employee's condition then there would be an argument that the employer did not anticipate and could not have anticipated such a reaction.

Third, the value of *Wallace* damages is no longer measured by awarding an extension to the period of reasonable notice. Instead, courts must assess the amount of harm a person actually suffers and then provide compensation for the harm that actually occurred. An employee will need to show evidence of their suffering to meet these criteria.

Punitive Damages

The Court emphasized in *Keays* that conduct should be malicious and outrageous before punitive damages are awarded. To award punitive damages there must also be an "independent actionable wrong". This means that, in addition to bad behaviour, the conduct must amount to something the employee could sue for separately. This is not new law.

Mr. Keays argued that the employer's conduct was discriminatory which would allow a complaint to be brought before a Human Rights Tribunal. Such a human rights violation, it was argued, was an "independent actionable wrong". The Court concluded that claims under a Human Rights Code are limited to the proper tribunals and are not "independent actionable wrongs" that can be assessed by the courts. The effect of this decision is that an employee is not able to try and obtain additional damages under a wrongful dismissal action in a court setting based on an argument that an employer has also breached a

Human Rights Code. If the employee wishes to argue a human rights violation exists then he must file a complaint with the appropriate tribunal.

Next the Court stressed that a trial judge must look at all other damage awards being made to see if the value of those awards are sufficient to deter future bad behaviour before allocating damages under this category. This, again, was not new law but provides a warning that these damages should not be awarded without a thorough consideration of all the appropriate factors.

A Comment on Dealing with Disabled Employees

Human rights law establishes that an employer must not discriminate against an employee on the basis of a disability. Also, if an employer has certain requirements for a particular job then it must show the requirement is a "bona fide occupational requirement" (known as a "BFOR"). This law was also unchanged by *Keays*, but interestingly, the Court noted: "I accept the need to monitor the absences of employees who are regularly absent from work is a bona fide work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce".

Conclusion

Keays provides a new understanding of awards in claims where wrongful dismissal and employment discrimination overlap. The Court has also limited *Wallace* and punitive damage claims and has emphasized that such claims should involve facts that go beyond the general understanding between an employer and an employee. If *Wallace* claims are appropriate then some proof of suffering is now required and damages should only be awarded on the basis of the suffering actually involved. This law should help ensure that wrongful dismissal claims remain focussed on reasonable notice but also that those who are truly treated unfairly will be compensated for what has occurred.

Employment Practice Group Members



H. Scott MacDonald
Tel. 604.661.9217
email: smacdonald@rbs.ca



Georg D. Reuter
Tel. 604.661.9208
email: greuter@rbs.ca



Peter W. Lightbody
Tel. 604.661.9284
email: plightbody@rbs.ca



C. Nicole Mangan
Tel. 604.661.9257
email: nmangan@rbs.ca



richards buell sutton LLP
Barristers and Solicitors

Tel: 604.682.3664
Fax: 604.688.3830
info@rbs.ca
www.rbs.ca

700 - 401 West Georgia Street
Vancouver, BC. Canada. V6B 5A1

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