

## **EMPLOYMENT NOTES AND NEWS**

### **LOTTERY SIZED DAMAGE AWARD FOR WRONGFULLY DISMISSED EMPLOYEE**

*PUNITIVE DAMAGES OF \$500,000.00, PLUS TWENTY-FOUR MONTHS  
NOTICE PERIOD FOR A THIRTY-FIVE YEAR OLD AUTO PRODUCTION  
EMPLOYEE WITH FOURTEEN YEARS SERVICE.*

Last March in a stunning decision the Honourable Mr. Justice McIsaac of the Ontario Superior Court awarded plaintiff Kevin Keays half a million dollars in punitive damages, plus extended notice of twenty-four months against Honda Canada Inc. (“Honda”).

How did this happen? From my review of the reasons for judgment, a number of factors led to this result. After analysis of the reasons for judgment, some further “lessons to be learned” are discussed.

#### **Factual background & analysis of the Reasons for Judgment:**

Keays became employed with Honda in 1986 on the production line in Alliston, Ontario. After less than two years he joined the Quality Engineering department in the Alliston facility. He was age thirty-five when his employment was terminated in 2000.

Shortly after Keays began employment with Honda, he suffered from health problems that led to ongoing absences from work. Keays ultimately was diagnosed with “Chronic Fatigue Syndrome” (“CFS”), a controversial condition for which there is no generally accepted treatment, nor any objective method to measure the resulting degree of disablement.

Keays was off work from October 1996 through to December 1998. He initially qualified for short term disability benefits and was later approved for long term disability benefits in November 1997 until December 1998.

What led to the termination of LTD benefits in December 1998? A Work Capacity Evaluation conducted on behalf of the outside LTD insurance carrier concluded that Keays did not have to miss time or be absent from work because of CFS.

At trial Keays testified that the Work Capacity Evaluation process was “a farce”. The Judge, after observing that there had been no evidence led to contradict this position, concluded despite, presumably, the Work Capacity Evaluation report being before the Court, that Keays had been wrongly terminated from his LTD benefits. Yet, there was no action against the LTD carrier either by Keays, or brought by Honda by way of

third party claim. Accordingly, the finding that the LTD benefits were wrongfully terminated only impacted Honda.

Keays returned to work in late summer 1999 despite his CFS condition. He again experienced increased absences each month. Ultimately, these absences, plus the lack of objective medical support for same as contrasted with ongoing subjective validation from the family physician, and Keays' refusal to see an occupational medicine specialist engaged by Honda, led to his dismissal for insubordination in 2000.

Mr. Justice McIsaac stated in his reasons that both counsel for Honda and the plaintiff agreed that he could, on his own, access the website of the Centre for Disease Control ("CDC"), which American organization is based in Georgia. Accordingly, Mr. Justice McIsaac, without the benefit of counsels' specific real-time submissions, relied almost entirely on the contents of the CDC website in coming to his conclusions with respect to CFS and the impact of this condition. Mr. Justice McIsaac essentially rejected Honda's evidence presented at trial with respect to CFS, which evidence was put forward by its medical expert, an occupational medicine specialist.

The language used by Mr. Justice McIsaac in his reasons is quite strong. The Judge pulled no punches when he concluded that Honda was unmistakably the villain and that Keays was a poor, beleaguered employee. Mr. Justice McIsaac uses the analogy of a "minnow" up against a corporate "Leviathan" when describing Keays as an individual similar to David, against Honda standing in for Goliath. The Judge's sense of outrage at the treatment of Keays at the hands of Honda is palpable throughout his reasons.

For example, Mr. Justice McIsaac observes that Honda has "been able to resist any attempted unionization" and indicates that "the deck was stacked" against Keays, given he was a "minnow" compared to the "Leviathan" that Honda represented. While Honda's medical expert testified specifically that CFS is not a source of permanent disability, Mr. Justice McIsaac summarily rejected this medical evidence and preferred what he read on his own from the CDC website. Yet, other medical evidence that could—and should—have been led by Honda may well have shown that CFS is not necessarily so disabling as to prevent someone from attending work on a regular, scheduled basis.

The Judge also concluded that Keays did not have to attend before Honda's medical expert because, other than stating that the physician would attempt to deal with the "whole person" to see what difficulties Keays was experiencing, Honda at the time refused to clarify in writing the specific purpose for Keays to attend before its physician. Ultimately, the Judge concluded that Honda was not acting in good faith when it proposed sending Keays to meet with its physician. It was also

concluded that Honda “hounded” Keays, that there was in this matter a “history of mistreatment” and that Honda left hanging over the plaintiff a “sword of Damocles”.

Mr. Justice McIsaac was also highly critical of Honda’s in-house counsel, concluding that in-house counsel breached the Rules of Professional Conduct, which Rules govern Ontario lawyers. It was further found that Honda “twisted” the facts and acted in a “callous and insensitive” manner. The Court found that the “egregious bad faith” displayed by Honda in the manner of termination led to the notice period being extended from fifteen months notice, based on fourteen years of service for a thirty-five year old non-managerial employee (already very generous), to twenty-four months notice.

Furthermore, the Judge concluded that Honda failed to accommodate Keays (despite the fact the Keays began manifesting symptoms of disability shortly after being hired in 1986 and was only terminated in 2000—14 years later). The Judge concluded that Honda acted in a tortious fashion, committing an “independent actionable wrong” against Keays. The wrong was the breach of his human rights as well as “a litany of acts of discrimination and harassment in relation to his attempt to resolve his accommodation difficulties”. The Judge concluded that Honda then ultimately imposed “the most drastic form of harassment possible; they terminated him.”

The Court concluded that this “outrageous conduct” was planned, deliberate and “formed a protracted corporate conspiracy” against Keays. Finding that Keays was a victim of “particular vulnerability” because of his “precarious medical condition, and Honda knew this”, Mr. Justice McIsaac whacked the Leviathan of Honda with what he described as an award for conduct “deserving of significant denunciation” in the amount of \$500,000.00, in addition to the twenty-four months notice.

Honda brought a motion seeking a mistrial, which motion was brought after the trial was concluded but before the release of the reasons. The grounds for the motion were a “reasonable apprehension of judicial bias”. In his reasons Mr. Justice McIsaac concluded that Honda failed to abide by certain procedural requirements for such a motion. Accordingly, the Judge “found it unnecessary” to address the merits of the motion.

**Comments:**

The Judgment is under appeal by Honda, but I suggest that Honda begins well behind the proverbial eight-ball. The Court of Appeal may reduce the damages awarded and, if Honda succeeds completely, conclude that there must be a new trial. But, neither of those results is certain.

The Judge's failure to address the merits of a motion alleging judicial bias might cause the Court of Appeal some concern. Moreover, from the tone and language of the unusually blunt reasons, it could be concluded that the Judge had a pre-existing view that a big, bad corporate Leviathan like Honda was out to get poor minnow Mr. Keys, who was merely one of many workers for this giant, unfeeling and unsympathetic organization. The overall tone of the reasons reflects that viewpoint, in my opinion.

It also appears that Honda may well have been inflexible or rigid in its approach to Keys. What the *Human Rights Code* should have made clear by now is that "one size does not fit all". Rather, employees must be treated as individuals, with accommodation assessed and determined for these individuals as objectively necessary.

### **Honda's Trial Strategies:**

Without being critical of Honda's trial counsel as it is easy to be a "Monday morning quarter-back", a few additional comments must be made regarding Honda's trial strategies:

- 1) The medical expert necessary in a matter involving CFS, Fibromyalgia, or similar illnesses is not necessarily an occupational medicine consultant, although no doubt such an expert would be helpful. Rather, a rheumatologist, with expertise in the particular condition, to comment knowledgeably on just how genuinely disabling it is, would be the best medical expert. Yet, there is no sign in the reasons that Honda engaged a rheumatologist or other such medical expert.
- 2) Had I been trial counsel, I would not have consented to the Judge going off on a web-surfing frolic. Evidence is best led by counsel and presented to the Court. I would have presented medical evidence by way of oral testimony. Based on guidance received from my medical expert, I could have cross-examined the expert for the plaintiff, and the Judge would then have been able to appreciate the strengths, weaknesses and gaps in medical knowledge on each side. Medical certainties, after all, are rare. That is why it is called the *practice* (not the "perfect") of medicine.
- 3) By allowing the Court to go off and review evidence on a website, no matter how potentially reliable, both counsel lost control of what evidence was put before the Court. Yet, with respect, that is the job of trial counsel.
- 4) It appears that the LTD insurer was deeply involved in this matter. If Keys had not sued the insurer then, as counsel, I would have brought the insurer into the action. It may be that Honda would

also have had a claim against them for some of the damages, if Honda relied upon its insurer.

While the Judge seemed to endorse the family doctor's conclusions, subjective although these were, in reality, objective medical evidence is to be preferred, and must be led, in similar cases. Surely, if there had been reliable, objective evidence led at trial, it would have made it harder for the Judge to simply endorse what was on the CDC website (which unilateral web surfing should not have been allowed to happen in the first place), and would also now better allow Honda to prepare for an appeal.

**FURTHER LESSONS TO BE LEARNED:**

Some lessons emerge from the foregoing, but a few further points can be summarized:

- If an employee seeks accommodation for medical reasons, these reasons must be investigated by the employer if the disability insurance carrier will not do so.
- Evidence of workplace assessments performed by qualified professionals usually should be presented as evidence, preferably with the professionals who conducted the tests as witnesses. Such witnesses could testify why it was concluded that the employee could have worked with no need for absences or regular tardiness.
- Specific medical accommodation, if necessary, must be provided to enable the employee to work within individual recognized medical limits.
- The right medical expert must be retained, through counsel, and the right questions must be posed to the medical expert.
- Evidence of attempts to accommodate an employee must be preserved, including the employee's response (a refusal to work or other response). In-house counsel, if applicable, must adhere to the limits imposed upon them by the Rules of Professional Conduct. If necessary, in-house counsel should defer to the human resources executive or manager, who is able to meet with an employee after the employee has retained legal counsel without fear of sanction.
- This decision does not mean that employers have no options. Rather, the decision highlights that reasonable employers, acting reasonably, and attempting to provide individualized accommodation, will likely have a better evidentiary basis upon which to go to trial or before Human Rights Boards, if necessary.

- If an employer is unsure of the strength of its position, then by all means review the matter with an additional medical or legal expert before becoming “locked in”. With the perfect vision of hindsight, if Honda had provided Keays with fourteen months pay in lieu of notice or likely even less, it is quite possible that the case would have settled before trial. Considering the legal and business costs, as well as damage to reputation, that has resulted from this matter, one must wonder if this matter might have been better settled.



## II

### **SMILE, YOU'RE ON CANDID [EMPLOYER] CAMERA!**

#### VIDEO SURVEILLANCE EVIDENCE MUST AT LEAST BE “RELEVANT”, AND PERHAPS “REASONABLE” TO BE ADMITTED

Cash that keeps disappearing from the register? An employee who takes long breaks only to return smelling of alcohol? A supposedly disabled worker who plays full contact hockey on the weekends?

For employers and employees, these questions raise the important issue: inside and out of the workplace, how far should an employer go to investigate an employee’s activities with video surveillance?

Privacy rights in the workplace is still a murky topic. Simply put, no “right to privacy” *per se* exists in the Province of Ontario. Both Alberta and British Columbia have laws (*The Privacy Act*), allowing an individual to sue when his or her privacy is invaded. In Ontario, the law isn’t so clear.

In Ontario, decisions on employees’ rights to privacy versus an employer’s rights to either hire private investigators to trail that employee or post surveillance cameras have been hashed out in front of either labour arbitrators or the Ontario *Labour Relations Board*. These decisions have involved unionized employees.

One such arbitration decision was *Prestressed Systems Inc., and Labourers’ International Union of North America, Local 625* (2005), 137 L.A.C. (4<sup>th</sup>) before Arbitrator Lynk. In that case a general labourer had suffered an alleged back injury. During the second month of absence the employer became suspicious of the severity of the injury and hired a private investigator to videotape the employee. The private investigator recorded the employee bending over and picking up a barbeque and playing two games of hockey. Based on this the employee was dismissed.

In rendering his decision Arbitrator Lynk acknowledged that there was no “right to privacy” in Ontario. The Arbitrator ultimately ruled, however, in favour of the employee, stating that the employer had not been “reasonable” in its decision to start surveillance without attempting to even verify the injury with the employee’s chiropractor. The Arbitrator also found that there was an unwritten “right to privacy” for unionized employees in Ontario.

While that decision seemed to provide a high level of protection, another arbitration case seemed to give employers almost unlimited rights to engage in covert surveillance. In *Hotel-Dieu Grace Hospital and Canadian Auto Workers, Local 2458* (2004), 134 L.A.C. (4<sup>th</sup>) before Arbitrator Snow, it was held that as long as video surveillance evidence is “relevant” to an issue in the dismissal of an employee, it can be used in upholding the dismissal on arbitration.

In that case, an employee had taken many absences for “medical reasons”. Soon, the employer grew suspicious and placed her under video surveillance outside of the workplace. The video showed the employee working in a family-run business during her absences. Her dismissal from employment was upheld on the grounds that the video surveillance was “relevant”.

It would appear that the “relevancy” standard seems to, for now, trump “reasonableness”. If evidence is relevant then, arguably, unless the prejudicial impact outweighs the relevancy of it, it is also “reasonable” that such evidence be admitted.

Although not an employment case, in *Ferenczy v. MCI Medical Clinics*, 2004 CanLII 12555 (ON S.C), the decision of the Ontario Superior Court of Justice appears to infer that video surveillance of a person by another party is permitted if the two are involved in litigation. In that case the plaintiff was suing a doctor for medical malpractice. The defendant hired a private investigator to videotape the plaintiff. The videotape showed the plaintiff holding a coffee mug in her left hand, despite testifying that she could not hold anything in her left hand since the operation. The video was permitted to be introduced as evidence, because it was relevant and probative.

Ontario cases are inconclusive, but suggest that should an employee launch a lawsuit (i.e. wrongful dismissal), file a grievance, or commence an arbitration against an employer, the defendant employer may be able to admit highly damaging video surveillance evidence to protect itself, so long as the evidence is relevant to the particular issue before the decision-making body.

Yet, employees in Ontario are able to turn to the protection of the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”),

which applies to private business in the Province. Under PIPEDA, if a person feels that their personal information is being collected wrongfully and without their consent, they can file a complaint with the Federal Privacy Commissioner. Decisions of the Federal Privacy Commissioner have no binding effect, but attempt to exert persuasive change.

Two examples of decisions made by the Federal Privacy Commissioner under PIPEDA were *PIPEDA Case Summary #279* and *PIPEDA Case Summary #290*. In #269, a former employee of an internet service provider complained after the company had installed web cameras to monitor sales/marketing and technical staff. The company argued it was for “security” reasons and to monitor productivity. The Commissioner decided that the complaint was “well-founded” as the company had no *bona fide* security concerns, and it already supervised telephone calls, monitored email, and had progressive discipline to address issues of productivity. Using video surveillance in addition was deemed to be “stifling” by the Commissioner.

In #290, a Canadian Food Inspection Agency employee working at a meat processing plant complained that the company was collecting personal information by way of video camera. The company argued that the video camera was necessary for “food safety”; however, the Commissioner questioned its necessity by posing the following four questions:

- Is the camera demonstrably necessary to meet the specific need?
- Is it likely to be effective in meeting that need?
- Is the loss of privacy proportional to the benefit gained?
- Is there a less privacy-invasive way of achieving the same end?

The Commissioner found that the cameras were not necessary – they did not show a clear picture of the animals being processed and there was already sufficient supervision of employees to ensure correct processing. As such, the complaint was considered to be “well-founded”.

### **LESSONS TO BE LEARNED:**

While the cases provide no direct guidance as to what steps an employer should take when considering the installation of video cameras, or ordering video surveillance, a few lessons can be preliminarily learned:

- Video surveillance is highly invasive, and should be the last option after trying to collect information by alternative and less intrusive methods.
- Video surveillance must be for truly pressing reasons (security or health), and usually not just to generally monitor employees, unless there is good reason to do so.

- Employees should be informed of the video surveillance whenever possible.
- The launching of an adversarial process (lawsuit or arbitration) by an employee against an employer may inherently permit an employer to engage in video surveillance in order to address the specific issues arising out of the adversarial process.
- While arguably the “relevancy test” ought to apply, arbitral case-law is still not settled. Some arbitrators may adopt the “reasonable test” – so keep that in mind when deciding whether or not video surveillance is appropriate in the particular circumstance.

[\*Research for this article was provided by Kent Glowinski, articling student].



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