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This case concerns an employee with an invisible disability, Kevin Keays, who sued his employer, Honda Canada, for wrongful dismissal on the basis of that disability. Mr. Keays alleged that his dismissal violated his human rights. While Mr. Keays was awarded salary in lieu of notice of termination, the Supreme Court of Canada determined that he should not receive damages for the way his employer dealt with him at the time of his dismissal. This holding was contrary to that of the trial judge and Ontario Court of Appeal, which held that damages should be available to Mr. Keays because the manner in which he was dismissed constituted discrimination based on his disability. What follows is a summary of this important case, in which the Legal Education and Action Fund intervened.

1. The Facts

Kevin Keays worked for Honda Canada for eleven years in a variety of positions, including on the assembly line and in data entry. In 1997, Mr. Keays was diagnosed with chronic fatigue syndrome which affected his ability to attend work. He stopped working at Honda and received disability benefits until 1998, when Honda’s insurer discontinued his benefits. Mr. Keays returned to work; Honda put him in a disability program that allows employees to take absences from work if they provide a doctor’s note confirming that their absences relate to their disability.

Honda became concerned about the frequency of Mr. Keays’ absences; it also felt that the medical notes Mr. Keays provided did not satisfactorily explain them. This led Honda to believe that Mr. Keays’ doctor did not independently evaluate whether he missed work due to disability. Consequently, Honda asked Mr. Keays to meet its occupational medical specialist, “B” in order to determine how his disability could be accommodated at work. After consulting with his lawyer Mr. Keays refused to meet with “B” unless Honda provided him with an explanation of the purpose, method, and limits of the consultation. In March 28, 2000, Honda gave Mr. Keays a letter stating that it supported his full return to work but that his employment would be terminated if he refused to meet B. Mr. Keays remained unwilling to meet B; Honda subsequently terminated his employment.

Mr. Keays sued Honda for wrongful dismissal. Wrongful dismissal claims are based on an employer’s implied duty to provide employees with a reasonable period of notice where there is otherwise no ‘just cause’ ending the employment relationship.

At court, the trial judge found that Mr. Keays was entitled to 15 months’ notice. The court held that Honda committed acts of discrimination and harassment. In fact, because of the way in which Honda dismissed Mr. Keays the trial judge increased the notice period to 24 months. The judge also awarded punitive damages against Honda in the amount of \$500,000, and required it to pay the legal costs of the court proceedings.

Typically, the courts say that damages are not available for the actual loss of a job or for pain and distress suffered which result from being terminated. The exception is where the court

believes that the circumstances of a termination would cause the plaintiff (employee) mental distress. In situations relating to employment law, damages arising from the way in which employers dismiss employees will be available if they result from circumstances where the employer engages in conduct that is unjust or is in bad faith, for example, being dishonest, misleading or unnecessarily insensitive. However, the courts have held that these types of damages should be reflected in an award of actual damages rather than by extending the notice period (as the trial judge did here).

Honda appealed the trial judge's decision to the Ontario Court of Appeal. The Court of Appeal reduced the costs premium; and lowered the punitive damages from \$500,000 to \$100,000. It otherwise upheld the lower court decision.

Honda and Mr. Keays each appealed the Ontario Court of Appeal's decision to the Supreme Court of Canada. The Supreme Court held that the aggravated and punitive damages should not have been awarded. (They were set aside.) It also determined that the costs should be adjusted to mirror the regular scale that is used at the trial court level; however, Honda was granted costs at the Supreme Court level.

2. The Issues

LEAF intervened in this case because of its importance for victims of harassment and discrimination. Additionally, we thought that the case was particularly important for women who experience sexual harassment and sex discrimination in the workplace.

The issue of jurisdiction relates to, among other things, employees having to choose where to file a complaint relating to harassment and/or discrimination experienced at work. In its intervention LEAF noted that at present, the choice is made in a two-tier system comprising a human rights tribunal or a court. Each forum provides employees with certain advantages. On one hand, if employees suspect that they were wrongfully dismissed from their employment as a result of discrimination, they can take their case to a human rights tribunal; however, if no discrimination is established then whatever harassment they experienced goes without remedy.

On the other hand, if harassed employees choose to take their claim to court, the courts cannot deal with the human rights aspects of the wrongful dismissal claim. As a result, neither the tribunal nor the courts offer employees "complete jurisdiction" and neither can provide employees with a full range of remedies for discrimination they may have experienced. Furthermore, this lack of jurisdiction forces employees either to choose a forum; or to go through both processes if they can afford it (and most cannot). This two-tier system hampers employees' access to justice: it encourages higher legal costs, duplication of work, and greater legal and procedural complexity.

Discrimination cuts to the core of a person's sense of self-worth, dignity, personal security, and peace of mind. It is wrong that discrimination is not yet recognized in the courts as a form of harm for which the courts may award damages to employees.

LEAF advocated that access to justice for employees includes recognizing that human rights are an implied term of employment contracts (i.e. a term which is recognized and understood by the parties to the contract). Doing so would, among other things, provide employees access to the remedies provided in civil courts such as damages for loss of and harm to one's dignity. Put simply, when employers discriminate against their employees, employees should be able to seek a remedy in court. This, LEAF argued, would advance equality for women and others in the justice system.

LEAF also asserted that mental distress is a significant form of harm that women often suffer from sexual harassment and discrimination on the job. Compensation for this type of mental distress recognizes the right to be free from harassment and discrimination; and to respond to victimization through an damages award for injury to one's dignity, self-respect and human rights. Had LEAF's arguments been accepted, a breach of this implied term of non-discrimination would have provided a important avenue for women and others who suffer from discrimination and harassment on the job.

3. The Implications

LEAF believes that the Court's acknowledgment of mental distress damages is an important step towards fully compensating women and other equality-seeking groups for the harms of workplace harassment and discrimination, because it broadens the concept of implied terms and obligations in a way which helps employees. Still we are disappointed that the majority did not recognize discrimination as a type of legal wrongdoing for which punitive damages could and should be available in court.

Honda v. Keays, maintains the two-tier system for employees with human rights claims which, as discussed earlier, forces people to choose between the human rights tribunals and the courts. By denying courts full jurisdiction over claims of workplace harassment and discrimination, the system impairs employees' ability to receive true access to justice. Moreover, the division of human rights violations from other kinds of wrongs means that remedies are not fully available for the different kinds of harm that employees experience. As Supreme Court Justice Louis LeBel noted in his dissent, the *Charter* and human rights principles should inform this type of civil law action and it is "not necessary for this Court to preclude all common law actions based on all forms of discriminatory conduct." LEAF agrees.