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Employment Notes

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"The decision in Keays v. Honda has rid employers of the wild unpredictability of Wallace damages."

KEAYS v. HONDA: THE NEXT CHAPTER IN WALLACE DAMAGES

David Greenwood

It has been a few months since the Supreme Court of Canada handed down its decision in *Keays v. Honda Canada Inc*. The case involved a 14 year employee of Honda who developed chronic fatigue syndrome. After a two year disability leave, Keays returned to Honda only to miss numerous days of work. Honda initially accommodated Keays' absenteeism but later requested that he meet with its doctors for an assessment of his condition. Various disputes arose between Keays and Honda and ultimately Honda gave him an ultimatum: attend the assessment or be terminated. Keays did not attend the assessment and his employment was terminated.

At trial Keays was awarded 15 months' notice, an additional 9 months' notice in *Wallace* damages, punitive damages in the amount of $500,000 and costs in the amount of $610,000. Honda appealed.

On appeal, the Ontario Court of Appeal split 2:1, with the majority largely upholding the trial decision. The Court of Appeal reduced the costs payable by Honda and slashed the award of punitive damages to $100,000. Both parties appealed.

The Supreme Court of Canada, in a 7:2 split decision, reversed the Court of Appeal on several points and struck the awards of *Wallace* and punitive damages. Only the 15 month notice period survived untouched.

Clearly this was a significant victory for Honda. Beyond that, the decision represents a significant triumph for employers because, quite unexpectedly, the Supreme Court virtually eliminated *Wallace* damages.

The Death of Wallace Damages

Since the Supreme Court of Canada's 1997 decision in *Wallace v. United Grain Growers Ltd.* employers have had to consider the possibility that dismissed employees may receive *Wallace* damages which were designed to compensate employees for misconduct by the employer at or around the time of termination. *Wallace* damages were typically expressed as an extension of the notice period. Given their discretionary nature and dependency on the facts of each case, it was very hard to predict when a court might award *Wallace* damages and how much would be awarded. The decision in *Keays v. Honda* has rid employers of the wild unpredictability of *Wallace* damages. In its stead, the court opined that the proper way to compensate employees for employer misconduct at or around the time of termination is to award damages for mental distress.

"...in getting rid of Wallace damages the court may have opened the door to a more lax approach to awarding damages for mental distress or unintentionally increased an employer's exposure to larger mental distress awards."

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Damages for mental distress have been available for years. The problem is that they are no less difficult to predict than *Wallace* damages. Moreover, in getting rid of *Wallace* damages the court may have opened the door to a more lax approach to awarding damages for mental distress or unintentionally increased an employer's exposure to larger mental distress awards. The old model of *Wallace* damages usually produced modest awards that were proportionately related to the notice period itself. Mental distress damages are not measurable in the same way and theoretically only ought to be awarded where the employer's conduct has had a measurable effect on the dismissed employee. As we all know, mental distress can have a significant impact causing long term conditions or rendering dismissed employees unemployable for lengthy periods of time. In this regard, it is possible that the damages awarded for mental distress may exceed what was previously awarded as *Wallace* damages.

That being said, there is no need for employers to worry that the Supreme Court has laid a proverbial golden egg for dismissed employees. Practically speaking, damages for mental distress in employment cases have been difficult to obtain. The real question is, will damages for mental distress be more readily awarded by judges who are looking to fill the void left by the death of *Wallace* damages?

While *Keays v. Honda* is undoubtedly a major victory for employers, the potential substitution of more easily available damages for mental distress in place of *Wallace* damages may end up being a case of "better the devil you know". ■

NAVIGATING THE UNCHARTED WATERS OF NON-CULPABLE ABSENTEEISM: THE SUPREME COURT OFFERS SOME GUIDING LIGHT ON DISABILITY AND ACCOMMODATION

John-Edward Hyde

It has been estimated that non-culpable absenteeism costs Canadian employers in excess of $16 billion of lost revenue every year. Non-culpable absenteeism, often characterized by a lengthy absence from work due to illness, is difficult to manage and the appropriate employer response even more difficult to address.

Most employers know that long-term employee illness is a disability, which must be accommodated short of undue hardship. Pinpointing answers to the appropriate accommodation and threshold of undue hardship is a difficult exercise even for the most experienced of human resources practitioners. Frequently, questions arise such as: How long must I keep a job open for an absent employee? To what extent must I change the job duties and/or work schedules? When can I hire a new employee to fill the vacant position?

In the case of *Hydro-Québec v. Syndicat des employées de techniques professionnelles et de bureau d'Hydro Québec, section locale 2000*, ("*Hydro-Québec*") the Supreme Court of Canada offered employers some critically needed insight into the limits of employer accommodation for employees who are chronically absent from work.

Background

The *Hydro-Québec* case originally arose from a union grievance, where the grievor claimed an unlawful discharge. Over a period of seven and a half years prior to the termination of her

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employment, the grievor was absent for 960 work days due to a number of mental and physical conditions. Throughout those years, Hydro-Québec undertook numerous efforts to accommodate the grievor by adjusting her working conditions, providing her with "work-hardening" or return to work programs, and tolerating prolonged absences. At the time of the grievor's dismissal, she had been absent from work on a continuous basis for four months. The grievor's doctor advised that she should stop working for an indefinite period, and her psychiatric assessment considered her unable to work on a regular and continuous basis without absenteeism problems. Given the foregoing, the arbitrator dismissed the grievance on the basis that, at the time the employee was discharged, she was unable to work steadily and regularly as anticipated under the collective agreement.

The Québec Superior Court dismissed the motion for judicial review of the arbitrator's decision; however the Québec Court of Appeal determined otherwise, finding that the company had to prove that it was impossible to accommodate the grievor's characteristics as of the date of termination. In other words, the Québec Court of Appeal advised employers that they should not consider the history of accommodation, but only the relevant circumstances which existed at the time the decision was made to discharge the employee; in effect, requiring employers to prove it was impossible to accommodate a complainant's characteristics. Particularly troubling for employers, the Québec Court of Appeal made it almost impossible to terminate the employment of an employee with long standing non-culpable absences.

Before the Supreme Court of Canada

Essential to this case was the Court's application of the "*Meiorian* test", as originally set out by the Supreme Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*. Under the *Meiorian* test, a job requirement or characteristic which is on its face discriminatory, may still be upheld provided that on a balance of probabilities:

(i) the employer adopted the standard for a purpose rationally connected to the performance of the job;

(ii) the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(iii) the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

In *Hydro-Québec*, the Supreme Court of Canada found that the Court Appeal misconstrued the *Meiorian* test, and the duty to accommodate does not completely alter the essence of the contract of employment but rather, is simply to prevent discrimination. As the Court noted:

> The test is not whether it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the

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employee's workplace or duties to enable the employee to do his or her work.

Thus, the Supreme Court held that in a case involving chronic absenteeism, if the company shows that despite measures taken to accommodate the employee, the employee is unable to resume his or her work in the foreseeable future, the Company will have discharged its burden of proof and established undue hardship. Accordingly, the employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future. The duty to accommodate is not assessed as at the time the employee was denied the additional measure and/or was terminated. Rather, in determining if the test for undue hardship has been met, the courts will consider whether the proper operation of the employer's business is hampered excessively or, if an employee with remains unable to work for the reasonably foreseeable future (even though the employer has tried to accommodate).

Practical Analysis

(i) A disabled employee is entitled to accommodation short of undue hardship, provided that with such accommodation he or she can still undertake the essential elements of the job function. Accommodation may require moving an employee to a different job however it does not require the creation of a new job specifically tailored to that employee;

(ii) Before terminating a chronically absent employee, efforts must be made at accommodation;

(iii) If after accommodation measures have been put in place, it is determined that the chronically absent employee is unlikely able to work for the reasonably foreseeable future, the discharge from employment may be an appropriate option;

(iv) Finally, this case involved excessive absenteeism, and as each case turns on its own facts, it is important for companies to carefully consider their options and response to non-culpable absenteeism with their Human Resource Professionals and a Labour and Employment lawyer. ■

THE CON-DRAIN DECISION: WILL IT INCREASE DEFENCE COSTS IN OHSA CASES?

Mark Geiger

Whenever an accident occurs on a construction site or other establishment, it is common for the Occupational Health and Safety branch of the Ministry of Labour to charge the employer for a violation of the *Occupational Health and Safety Act*. Often, the violation relates to the employer allegedly not meeting its obligations under particular sections of the *Act* or regulations or, to an alleged failure on the part of the employer to "take every precaution reasonable in the circumstances for the protection of a worker.

Supervisors and workers also have duties under the *Act* and it is not uncommon for supervisors or workers to be separately charged in addition to the employer in appropriate cases. In these cases it has been common practice for one lawyer to act on behalf of both the company and the supervisor or worker, except in a case where there is likely to be an issue of responsibility between the supervisor and the employer.

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"…it is imperative that companies charged under the Occupational Health and Safety Act consider whether it is appropriate to have a worker or supervisor also charged under the Act represented by the same firm representing the company."

A recent decision of the courts has called into question whether or not a lawyer can represent both a supervisor or worker *and* the employer when both are charged with an offence under the Act arising from the same fact situation, and could mean significantly increased legal costs to employers.

The Con-drain Decision

In *Con-drain*, both the company and a worker were charged with violations of the *Act* arising from a fatal accident involving a reversing crane on March 2, 2005. In this case, the law firm acting on behalf of Con-Drain also represented the worker who had been charged. On July 30, 2007, the lawyer brought an application on behalf of both Con-Drain and the worker to stay the charges for unreasonable delay contrary to Section 11 (b) of the *Charter*. The court granted the application staying the charge against worker, but not against Con-Drain. As a result of the fact that the charges against the co-worker had been stayed, he became a compellable witness and the Crown stated that they intended to compel him as a Crown witness to give evidence against his employer. The Crown also successfully moved to have the lawyer who had acted on behalf of Con-Drain and the worker removed from the case due to the possibility of a conflict of interest.

The court determined:

> It is also my opinion that it would not be in the public interest in the fair administration of Justice of professional propriety to permit [him] to continue to act for Con-drain in this case…in my opinion it would be unfair and unseemly to permit [him] to continue to represent Con-drain and thus be in a position to cross-examine an elderly, unsophisticated and vulnerable witness, in the same proceeding in which he formally represented him.

While the worker in question had been given the opportunity to obtain independent legal advice before being represented by the lawyer in question, the Court was critical of the independent advice he had received, and this may have been a factor in the final decision.

This result may be particular to these facts, however there is potential for problems in every case because it is impossible to know who will be charged when an accident first occurs and counsel first retained.

Practical Considerations

As a result of this decision it is imperative that companies charged under the *Occupational Health and Safety Act* consider whether it is appropriate to have a worker or supervisor also charged under the *Act* represented by the same firm representing the company. At the very least, if the company decides to have the lawyer represent both parties, the lawyer should raise this issue with the Crown at the first opportunity to determine if the Crown has any objection to the lawyer's retainer.

Furthermore, in light of these circumstances, it is important to get all the facts as quickly as possible after an accident occurs. This is particularly the case because the current practice of the Ministry is to wait until the end of the one year limitation period to charge under the *Act*. The lawyer needs to be careful to not seek confidential information from any worker or supervisor who may be charged, and to make it clear to such individuals that they are acting for the Company and not for any individual. Once the charges are actually laid, a further review of

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potential liability should be undertaken before formally representing employees or supervisors who are also charged. If the Crown indicates that they will or do object in any particular case, the safest course is to have the employee or supervisor represented by a different law firm. That of course potentially doubles the cost of the defence.

Whether or not these precautions will be sufficient to survive a challenge based on based on *Con-Drain* remains to be seen. In order to avoid the possibility of a lawyer being removed from a case just before it goes to trial, the safest course will always be to have a worker or supervisor who is also charged represented by a different law firm.

The Position of the Crown

In cases which we now have before the courts, we have asked the Crown whether or not they intend to object to having the same lawyer or firm act on behalf of both the company and a supervisor or worker as the case may be. We have yet to receive a formal response. It is our understanding that the Ministry is looking at this issue and may decide in every case to attempt to insist on separate representation where a co-worker or supervisor is charged along with the employer. Stay posted. ■

WAGE EARNER PROTECTION PLAN AND CERTAIN INSOLVENCY LAW AMENDMENTS - NOW IN FORCE

Deborah Grieve

Recent past Chair of the Canadian Bar Association Bankruptcy and Insolvency Section, Deborah oversaw the submissions of the CBA to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology with respect to Bill C-55, and testified as one of the few witnesses before that Committee.

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On November 25, 2005, Bill C-55, "An act to establish the *Wage Earner Protection Program Act*, to amend the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* and to make consequential amendments to other Acts" received Royal Assent, after having been fast-tracked through the legislative system. Bill C-55 became Chapter 47 of the Statutes of Canada 2005 ("**2005 Amendments**"). Further amendments were introduced in Parliament as part of Bill C-12, which received Royal Assent on December 14, 2007 and became Chapter 36 of the Statutes of Canada, 2007 ("**2007 Amendments**"). Pursuant to Order in Council, the *Wage Earner Protection Program Act* ("**WEPPA**"), as well as certain changes to the *Bankruptcy and Insolvency Act* ("**BIA**") pursuant to the 2005 and the 2007 Amendments, came into force on Monday, July 7, 2008.

The following is a brief summary of the highlights of the WEPPA and the BIA amendments which are now in force and will apply to bankruptcies and receiverships occurring after July 7, 2008.

Priority over lenders for employee amounts

First Priority Charge for Unpaid Wages – The claims of workers who are owed wages (salaries, commissions or compensation) for the six month period immediately prior to the date of bankruptcy or receivership are secured to the extent of $2,000 (and expenses of up to $1,000 for each travelling salesperson) against *current* assets of an employer. These claims rank above all other claims, except statutory deemed trust claims which survive bankruptcy and "thirty-day goods" claims of unpaid suppliers. The claims include vacation pay, but not severance or termination pay. Under the old law, only vacation pay ranked as a priority over corporate assets, in the absence of bankruptcy.

"The passage of Bill C-40...means job protection for members of the Reserve Force who are employed in federally regulated industries and in the federal public services."

Employers might now expect their lenders to reduce borrowing availability to take into account this new super-priority.

Charge for Pension Contributions – Next in line, as a prior charge over *all* assets of an employer, is the amount of unremitted employee pension contributions, unpaid employer contributions for defined contribution plans, and unpaid normal costs for defined benefit plans. Under the old law, deemed trusts under the *Pension Benefits Act* had priority over accounts and inventory only. Unfunded pension deficiencies will not be subject to this new priority charge.

Wage Earner Protection Plan

The WEPPA provides for payment to individuals in respect of wages owed to them by employers who become bankrupt or the subject of a receivership, earned during the six months immediately prior to the date of bankruptcy or receivership, amounting to up to four times insurable earnings under the *Employment Insurance Act* (which is currently about $3,000). "Wages" include salary and vacation pay, but not severance or termination pay. Employees employed three months or less, officers, directors, managers and controlling owners are not eligible to receive payment under the WEPP. The WEPP will be funded from the Consolidated Revenue Fund.

RRSPs now exempt

Property of the bankrupt in an RRSP or RRIF (or a deferred profit sharing plan as defined by s.147 of the *Income Tax Act*, as set out in the amended BIA rules) will not be available for distribution among creditors, except for contributions made within one year prior to bankruptcy, or such longer period as the court may order.

More amendments to come...

Further legislative amendments have been passed but not yet proclaimed in force. Stay tuned for our next update, or call us if you have any specific inquiries. ■

FEDERAL RESERVIST LEAVE PROTECTION

Goli Garakani

The passage of Bill C-40 on April 17, 2008, which came into force on April 18, 2008, means job protection for members of the Reserve Force who are employed in federally regulated industries and in the federal public services. Amendments to Part III of the *Canada Labour Code* (the "Code"), allow reservists to take a leave of absence without pay to participate in annual training for up to 15 days or to volunteer for designated domestic or international operations, for an indefinite period of time.

Bill C-40 also amended the *Public Service Employment Act* ("PSEA"). The PSEA now contains a right to reinstatement for public service employees who take a leave of absence for any of the activities or operations for which reservists' leave may be taken under the Code. This leave is also available to reservists who are required to train or to report for duty under the *National Defence Act*.

To qualify for reservist leave, reservists must have been employed continuously for six months with their employer. They must also provide their employer with four weeks' notice, unless there is a valid reason for not doing so, in which case the employer must be notified of the leave as soon as practicable. In addition, the

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employee must advise the employer of the duration of the leave. Notice must be given in writing, unless there is a valid reason to provide notice through other means. In addition, if the employer requests proof that the reservist is entitled to the leave, the reservist must provide the employer with a document approved by the Chief of the Defence Staff, or if no such document exists, a document from the reservist's commanding officer. Such proof must be provided within three weeks after leave starts, unless there is a valid reason why this cannot be done.

An employee can be exempt from the right to take reservist leave if the Minister of Labour decides that such leave would adversely affect public health or safety, or would cause undue hardship on the employer. Also, it is worth mentioning, that the employer is not required to make contributions to the employee's pension or benefit plans during the leave period, however, the accumulation of seniority of the employee continues during the absence. ■

For additional articles, including a review of the new **Violence Prevention in the Workplace Regulations under Canada's Occupational Health and Safety Regulations**, please visit our website at www.blaney.com.

Blaney McMurtry LLP is pleased to announce

David E. Greenwood
has recently joined the firm's Labour and Employment Group, where he will continue his practice in employment law and commercial litigation. David was called to the Bar of Ontario in 2002.

John-Edward C. Hyde,
B.A., M.A., LL.B., J.D.
has also joined the firm's Labour and Employment Group. John advises management on all aspects of employment and labour law matters including representation before administrative tribunals, collective agreement negotiation, arbitrations and human rights. He also assists clients in providing strategic legal and human resources advice. John was called to the Bar of Ontario in 1993.

Christopher McClelland
has joined the firm following his call to the Bar of Ontario in 2008, and is the newest member of our Labour and Employment Group.

EXPECT THE BEST

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