Keays v. Honda Canada Inc.

Between
Kevin Keays, plaintiff, and
Honda Canada Inc. operating as Honda of Canada Mfg.,
defendant

[2005] O.J. No. 1145
Court File No. 00-B1968

Ontario Superior Court of Justice
J.R. McIsaac J.

Heard: March 31, April 1-4, 7, 9-11, 16-17, 28, June 9-11, September 29-30, October 1, 3, December 15-19, 2003, April 13-16, 19, October 26, 2004.
Judgment: March 17, 2005.
(69 paras.)

Counsel:

Hugh Scher, for the plaintiff.

J. Daniel Dooley, for the respondent.

¶ 1 **J.R. McISAAC J.**:— This wrongful dismissal action brings into sharp focus the tension between the expectations of the computer-programmed workplace and the obligations of human rights legislation, in particular the requirement to accommodate employee disability to the point of undue hardship. For the reasons that follow, I have found on "clear and convincing" proof that the defendant sacrificed the latter in favour of the former and, in doing so, abused a decent and dedicated worker who has the misfortune to be afflicted with what the Centre for Disease Control ("CDC") defines as the "debilitating and complex" disorder of Chronic Fatigue Syndrome ("CFS").

BACKGROUND

¶ 2 Kevin Keays started work in 1986 with Honda shortly after it began operations in its new assembly plan in Alliston, Ontario. He spent approximately 20 months on the production line after which he joined the Quality Engineering Department ("QED") which was responsible for the implementation of newly designed components into the vehicles being manufactured at that facility. Since Honda is a worldwide operation, a new computer system was created for these implementations and the plaintiff was selected to be the principal recipient of instruction on it at the defendant's sister facility in Ohio. It was expected that he would, in time, instruct his fellow department members as to the intricacies and operation of this new global computer system which was created to implement design changes emanating from Honda headquarters in Japan.

¶ 3 It is, in my opinion, beyond debate that Kevin Keays was a dedicated and conscientious employee of Honda who was proud to work there despite his limited formal education. He was prepared to make his employment at Honda his life work and to learn to be the best "associate" he could be. Unfortunately, he began to experience health problems shortly after he began his employment. This impacted on his ability to provide sufficient attendance to satisfy the "lean" operation mandated by Honda's business philosophy. Despite receiving glowing reports for most

of his work categories, he was continually receiving negative assessments in relation to his attendance. Understandably, his absences impacted on the smooth operation of his department and, as a consequence, the smooth operation of the entire plant. Because there was no "slack" in the lean operation mandated by the defendant, the plaintiff's responsibilities fell to be undertaken by his already busy co-workers in the department. This grim history of absences is well documented in the record before me along with the negative assessments which were recorded by his superiors.

¶ 4 Mr. Keay's health situation deteriorated to the extent that he was off on disability from October 1996 until December 1998. The insurer had originally denied coverage because his claim could not be supported by "objective medical evidence". After a period on Short Term Disability benefits ("STD") he was approved for Long Term Disability benefits ("LTD") in November 1997 and these were terminated as of December 1998 following a Work Capacity Evaluation ("WCE") conducted by Assess Med on behalf of London Life. The plaintiff has described this process as a "farce". No evidence has been led to contradict this position. Accordingly, I find that he was wrongly terminated from his LTD. His attempt to appeal this determination using the advocacy of his physician, Dr. Morris who proposed the diagnosis of CFS, was summarily dismissed by the insurer.

¶ 5 The insurer defended the rejection of the appeal for two reasons: first, there was no "objective evidence of total disability" and, second, Mr. Keays had been able to return to work on a graduated and, later, full-time basis. Honda was advised of Dr. Morris' submissions to the insurer and, accordingly, was aware that the plaintiff had returned to work under protest. Dr. Morris had referred the plaintiff to Dr. Moldofsky, Director of the Sleep Disorders Clinic at the Toronto Hospital, in March 1997. He diagnosed CFS according to the criteria recognized by the CDC in Atlanta, Georgia.

¶ 6 Mr. Keays, as predicted by Dr. Morris and himself, began to experience work absences within one month after his return to full-time work. These increased to four absences in August 1999 and, as a result, he was "coached" by way of a written report. This is the first step in the Honda's progressive discipline process. When Mr. Keays repeated his complaint of being unable to live up to Honda's attendance expectations due to his illness, he was advised that there was a "special" program available that exempted qualified associates from attendance-related progressive discipline based on a disability recognized by the Ontario Human Rights Code ("OHRC"). Mr. Keays obtained this form, had it completed by Dr. Morris and returned it to Honda within a matter of days. I am satisfied that he seized this opportunity as a drowning person grabs a piece of flotsam. This conduct, in my opinion, corroborates his testimony that this was the first time he had ever heard of this "phantom" program. For this reason, I am unable to accept the evidence suggesting he had heard of it long before this date. As well, despite testimony to the effect that Honda did not accept Mr. Keay's admission into this exemption as a form of accommodation under the OHRC, I am satisfied that such was the intention of the document on its face and as interpreted by the plaintiff. It constituted a recognition of his CFS-based disability as a legal and medical excuse for his absences.

¶ 7 However, this accommodation itself created a new set of problems for the plaintiff. This related to the fact that the defendant required that any absences be "validated" by doctors' notes for each and every occurrence. First, this requirement defies the nature of CFS. Both sides have agreed that I am allowed to access the CFS web site from the CDC to better understand this condition. In their topic "What is CFS?" there are no specific diagnostic tests available to identify it. It is based on self-report of the patient. Accordingly, in my opinion, it makes little sense to require a note that "parrots" Mr. Keay's complaint that he was unable to attend work because his condition prevented it. Second, employees with "mainstream" illnesses were not obliged to obtain such notes before they could return to work. Perhaps the third irritant was the worst: because the disability had to be medically "confirmed" before his return to work, this accommodation was having the perhaps unintended effect of lengthening the plaintiff's absences from work. We know

Honda did not like the effect they were having on his department. I am satisfied that it concerned Mr. Keays significantly because he wanted to contribute at work as much as his illness would permit him.

¶ 8 When he brought his concerns forward to his superiors, he received the same "stone-walling" that he had been receiving since his return to work. I am satisfied that this frustration generated stress which aggravated his symptoms and increased his absences. Dr. Morris had predicted that Mr. Keays would be expected to experience four absences per month when he completed the OHRC Disability Form in September 1999. Unfortunately, due to the increased stress, he was absent six times that October. Since this exceeded Dr. Morris "prediction", Mr. Keays was asked to see one of Honda's medical staff and he did so in November of that year. As opposed to being a positive encounter with Dr. Affoo, it had extremely negative consequences. The plaintiff testified that Dr. Affoo threatened to move him back to the physically demanding production line which he feared would cause an extreme exacerbation of his condition. Dr. Affoo did not deny this discussion but described it as merely part of a "brainstorming" session.

¶ 9 The plaintiff immediately brought his concerns about this "threat" to the attention of his superiors who assured him that there was no intention to move him back to the production line "at that time". I am satisfied that the possibility of such removal remained a real threat in his mind given Honda's reluctance to acknowledge the validity of his disability and his need for reasonable accommodation.

¶ 10 In January and February 2000 his absences totaled 14, which significantly surpassed the prediction of Dr. Morris. Mr. Keays was getting nowhere with his request to have Honda re-visit the issue of the need to obtain medical notes for each of his absences. I agree that these were not only discriminating in that they imposed a burden or barrier that was not faced by the "mainstream" employee population, they were creating longer absences than mandated by his condition. I agree as well that Mr. Keays followed the "open-door" policy suggested in the Honda employee handbook but continued to meet with insensitive "stone-walling" on the part of management.

¶ 11 At about this same time, Honda had engaged the services of an occupational medicine specialist, Dr. Brennan, who was asked to review the plaintiff's medical file to consider if his absences were justified. For some reason that escapes explanation, Mr. Keays medical file did not contain any detailed reports as to CFS, in particular Dr. Moldofsky's diagnosis in 1997, which had been provided to the LTD insurer. The medical file did refer to CFS as a possible diagnosis and that his disability benefits were approved following this reference. I find it extremely curious that Dr. Brennan claims that Dr. Morris' September, 1999 reference to CFS was not in the plaintiff's medical file when clearly it was: see Exhibit 34, Tab 50. Even more curious, Dr. Brennan testified concerning his approach to addressing his mandate from Honda by suggesting he, in effect, deals with the person, not the condition. He did, however, find significant "gaps" in the medical file and, for that reason, wanted to meet with the plaintiff to initiate an "heuristic" assessment of his accommodation needs.

¶ 12 In the meantime, due to the frustration and stress that was being generated by the "stone-walling" on the part of the Honda management hierarchy, Mr. Keays decided to retain legal counsel to attempt to mediate his concerns. I am satisfied that he did this as a last resort because he legitimately felt that his disability would result in his termination, disqualifying him from the LTD which has been wrongly cancelled due to the "bogus" WCE conducted by Assess Med. This retainer of counsel also had another impact in that it was contrary to the unwritten policy of Honda discouraging the participation of any third-party advocates on behalf of "associates". As I understand it, the theory is that, because all employees are part of Honda, they do not need anyone to represent their interests. Their interests are Honda's interests and all issues will be resolved "in-house". Based on this theory, Honda has been able to resist any attempt at unionization. This approach obviously suits the vast majority of their employees but it did not

serve the plaintiff well at all. All of his grievances were falling on deaf ears and his symptoms were deteriorating. He had been "coached" and was heading up the ladder of progressive discipline towards termination. He had spent his entire adult life at Honda and felt that his world was coming down on his head. He was absolutely alone and without resources. The deck was stacked against him and he was only a minnow compared to the Leviathan that Honda represented. Recent headlines in the popular media present the drastic measures undertaken by frustrated employees. Mr. Keays opted for the civilized choice; he retained counsel who wrote to Honda on March 16, 2000 outlining his concerns along with an offer to work toward an appropriate resolution of their outstanding differences. I find the letter to be conciliatory in the extreme. It is far from confrontational. Honda chose to ignore it and responded with its own volley five days later, unilaterally canceling the OHRC accommodation and dictating that the plaintiff meet with Dr. Brennan because Honda no longer accepted the legitimacy of his absences. As stated in a letter dated March 28, 2000, the reason for this unilateral decision was because "Dr. Brennan and Dr. Affoo both believe that you should be attending work on a regular basis". I find that this grossly misrepresented the advice of both of these physicians. At best, their opinion was that the Honda medical file contained no formal diagnosis of CFS. In my view, this was a slender reed upon which to construct a thinly veiled accusation that Kevin Keays' claimed disability was a fraud and he was a malingerer. That correspondence concludes with the ultimatum that he meet with Dr. Brennan or be fired. The stated purpose of this attendance was to permit Dr. Brennan to "get to know you and to understand completely your condition" so that he could "communicate directly with your doctor to effectively manage your condition". Since Honda refused to communicate with his lawyer, Mr. Keays advised that he declined such a meeting "pending clarification of the purpose, methodology and the parameters of the assessment".

¶ 13 Honda defended their refusal to provide this "clarification" on the basis that the plaintiff was told repeatedly to his face that the meeting with Dr. Brennan was only a "getting-to-know-you" session. If it was so simple and straightforward, I see no reason why it could not be confirmed in writing. Dr. Brennan testified that this demand for clarification made no sense to him and could not be given in light of his "heuristic" approach to the accommodation process. My best understanding of this term is that it is some form of medical "stream-of-consciousness" technique. However, as a result of the discovery process in this litigation, he did provide a detailed response to both the methodology and parameters that would have been applied with the plaintiff: see Exhibit 35. The purpose of such meeting is also clearly articulated in the material filed through Dr. Brennan: see Exhibit 28 and 29. It would have been critical for the plaintiff to know that Dr. Brennan was of the belief that CFS is not a source of permanent disability as "most patients are significantly improved within three years of diagnosis". This is not consistent with the data from the CDC to which I have been permitted access. It reports the following:

> The clinical course of CFS varies considerably among persons who have the disorder; the actual percentage of patients who recover is unknown, and even the definition of what should be considered recovery is subject to debate. (My emphasis added.)
> : See http://www.cdc.gov/ncidod/diseases/cfs/ demographics.htm.

¶ 14 Exhibit 35 also makes clear that Dr. Brennan is of the opinion that the CFS patient should resist fatigue by exercise and attendance at work because they are therapeutic. He obviously minimizes any need for absences. For this reason, he is of the opinion that the occupation-health specialist should be the "driver" on the accommodation "bus". He filed material supporting this approach from the Ontario and Canadian Medical Associations. However, none of this material suggests that the patient/employee's treating physician should be excluded from the process. In my opinion, this "philosophy" of the virtual exclusion of Dr. Morris in the accommodation process forms a fundamental part of the parameters that Dr. Brennan would be applying in his involvement with the plaintiff.

¶ 15 The "stand-off" between the parties did not resolve and Mr. Keays was terminated formally on March 29, 2000 for insubordination in failing to meet with Dr. Brennan. According to Dr. Morris, he suffered a three or four month period of post-traumatic disorder as a result and he qualified for a total CPP disability pension for his CFS, retroactive to his termination date. That continues to the present.

ISSUES

1. Has Honda established just cause for the plaintiff's termination?
2. If not, what is the appropriate notice period?
3. Is the plaintiff entitled to an increase of the notice period based on "Wallace" factors?
4. Is the plaintiff entitled to damages for the intentional infliction of nervous shock/emotional distress?
5. Is the plaintiff entitled to damages for discrimination/harassment on the basis of his disability and the failure of the defendant to accommodate it?
6. Is the plaintiff entitled to damages for lost disability benefits?
7. Is the plaintiff entitled to punitive damages?

ANALYSIS

I -- JUST CAUSE

¶ 16 Honda bears the onus of establishing just cause on a balance of probabilities. As I see it, there are three components of just cause that require addressing in this litigation:

i) Was the direction to attend upon Dr. Brennan a reasonable order in all the circumstances?
ii) If so, did Mr. Keays have a reasonable excuse for resisting the direction?
iii) If not, was the termination an appropriate, that is, proportional, response to the refusal to attend on Dr. Brennan?

(i) Reasonable Order

¶ 17 Honda suggests that the decision to have Mr. Keays attend on Dr. Brennan was appropriate given the fact that the "arrangement" reflected in the OHRC Disability Form completed by Dr. Morris on September 1, 1999 was not working out as the plaintiff's absences were exceeding the four days per month predicted on a "difficult to say" basis. As everyone including Mr. Keays knew, this situation was having a negative impact on his department given the "lean" philosophy of Honda. The defendant suggests that the next step was some form of inter-face between Dr. Brennan, their occupational medicine specialist, and Mr. Keays' attending physician. In furtherance of that process, Dr. Brennan was asked to review the plaintiff's medical file to see if anything supported the absences which were taking place: see Exhibit 34. There is some suggestion in the evidence that the OHRC Disability Form did not form part of this medical file. However, it does form part of the file: see Tab 50. In any event, Dr. Brennan testified that it would not have assisted him in obtaining "clarity" as to the plaintiff's condition because it contained no detailed diagnosis of CFS pursuant to the CDC criteria.

¶ 18 Despite the vigorous submissions to the contrary, Honda has failed to satisfy me that a "face-to-face" meeting between Mr. Keays and Dr. Brennan was the appropriate and logical next step in attempting to resolve the plaintiff's attendance defaults. Having reviewed his medical file as did Dr. Brennan, it is obvious to me that the first "gap" that required filling was to determine if there had been, at any time, any form of legitimate diagnosis for the claim of CFS. That file is

replete with numerous references to CFS being the basis for the lengthy period of disability experienced by him in the more than two-year period ending December 31, 1998. Coupled with that fact was the evidence therein that Mr. Keays had readily complied with several requests for releases of his medical information. Given this background, I see no need for him to meet with Dr. Brennan to obtain all of this information. It is for this reason that the two cases relied upon by Honda are distinguishable from the instant case: see Lever Brothers Ltd, (Re) [1992] O.E.S.A.D. No. 143; L.B. (Committee of) v. Newfoundland (Human Rights Commission) [2002] N.J. No. 187 (C.A.). It is not that the plaintiff was refusing to comply with his obligation to participate in the accommodation of his disability, he was only "balking" at the accommodation avenue that Honda was attempting to impose through the agency of Dr. Brennan: see Grant v. St. John's (City) Regional Health and Community Services Board (2003) 227 D.L.R. (4th) 508 (Nfld. C.A.). The defendant has failed to satisfy me that it was reasonable for the company to refuse to "clarify" Mr. Keay's request as to the three points in Dr. Brennan's assessment. More importantly, neither of these cases involve wrongful dismissal claims pursuant to common law principles: see (Minott v. O'Shanter Development Co. 1999) 168 D.L.R. (4th) 270 (O.C.A.) at pp. 279-82.

¶ 19 In any event, for reasons to be advanced later in this judgment, it has become apparent to me that the direction was not made in good faith for legitimate corporate purposes but was made as a prelude to terminating Mr. Keays' employment at Honda: see MacKinnon v. Lewis Energy Management Inc. (1999) 45 C.C.E.L. (2d) 211 (O.C.A.) at para. 8.

(ii) Reasonable Excuse

¶ 20 Assuming wilful disobedience of a reasonable order of an employer, such conduct can be "forgiven" in circumstances of a reasonable excuse: see MacKinnon v. Lewis Energy Management Inc., supra. See as well Doyle v. London Life Insurance Company (1985) 23 D.L.R. (4th) 443 (B.C.C.A.). In Doyle, the plaintiff, an insurance salesman had refused to comply with his superior's directive to co-operate with an investigation into some of his transactions because there had been a failure to follow the company policy of openness as well as a breach of procedural fairness. The finding that this amounted to a reasonable excuse was affirmed on appeal.

¶ 21 In the case at bar, the plaintiff had a history of mistreatment in relation to his CFS disability before he was directed to meet with Dr. Brennan. He had been wrongly terminated from his LTD benefits in December 1998. He had been "hounded" over his absences despite having a perfectly legitimate reason for them. Once "accommodated" by means of the OHRC Disability Program in September 1999, this concession itself was problematic due to the discriminatory and impractical imposition of medical certification before being allowed to return to work. Most importantly, he had been subject to a unilateral withdrawal of this accommodation without benefit of any warning or input. In my opinion, this conduct by Honda not only displayed a gross absence of procedural fairness, it also breached the "Open Communication" policy of Honda articulated at page c1 of the Associate Handbook: see Exhibit 1, Tab 6. Given this constellation of abusive circumstances, I am satisfied that the plaintiff had a significant reasonable basis to believe that Dr. Brennan would continue the refusal to recognize the legitimacy of his disability. I have no difficulty in accepting that the plaintiff has established a reasonable excuse for not attending on this newly-engaged expert in the absence of a written explanation of the "purpose, methodology and parameters" of his involvement. As it turns out, the plaintiff had good reason to suspect where Dr. Brennan was "coming from" given his narrow acceptance of CFS and his reluctance to recognize absences from work as a reasonable response to the condition: see Exhibit 35. Any meeting which took place between them would, in my opinion, deteriorate quickly into a confrontation as the meeting with Dr. Affoo had the previous November when he "brain-stormed" about Mr. Keays returning to the more physically demanding production line. I do not accept Honda's position that the verbal explanation of the meeting by Mr. Keays' superiors was an adequate response to what was really a medical question.

¶ 22 The plaintiff had just cause for his failure to follow his employer's direction.

(iii) Proportionality

¶ 23 In the scenario of a case involving an allegation of employee dishonesty, the Supreme Court of Canada held that conduct must be assessed in context before it can amount to just cause for termination: see McKinley v. BC Tel [2001] 2 S.C.R. 161. This case affirmed the need for proportionality between the "bad" conduct and the draconian consequence of termination. Such "capital" punishment is only justified when the misconduct fundamentally subverts the employment relationship. Subsequent cases have held that this principle of proportionality is not limited to cases of dishonesty but applies to all forms of employee misconduct: see Henry v. Foxco Ltd. (c.o.b. Fox Ford) (2004) 31 C.C.E.L. (3d) 72 (N.B.C.A.) at para. 13. See as well Bonneville v. Unisource Canada Inc. (2002), 18 C.C.E.L. (3d) 174 (Sask. Q.B.) at para. 35. I agree with Barclay, J. in Bonneville that the McKinley analysis applies to the misconduct alleged in the case at bar and I am required to assess it in light of all the circumstances, including Mr. Keays' length of service, his employment record and the seriousness of his alleged misconduct including the reasons that motivated it.

¶ 24 The plaintiff had dedicated almost his entire adult life to Honda. He was one of the original employees at the Alliston plan and participated in the production of the first vehicle to roll off the line on November 3, 1986. His contribution to the company was first class when his CFS allowed him to contribute. Unfortunately, the onset of this condition took place shortly after he started work at Honda and he began to suffer absences due to it. I am satisfied that he did his best to resist those absences and to discover what the condition was so that it would be treated and he could attend work as the company expected and he wanted. He spent more than a decade of extreme frustration before Dr. Moldofsky was able to accurately diagnose his illness as CFS. When he returned to work in December 1998 after being wrongfully terminated from his benefits, he co-operated with his re-integration into his department. He tried his best but the absences returned as of February 1999. He was falling asleep at his workstation. He was "coached" at the end of August of that same year and he entered the disability program a few days later fully expecting to have this black mark removed from his work record. It was not, despite his attempts to do so by following the "Associates' Concerns" process mandated by the defendant's Handbook.

¶ 25 He agreed with Honda's request that he meet with Dr. Affoo in November 1999 and did so only to be "submarined" with the suggestion that Honda intended to rectify his absences by moving him back to the production line. In a subsequent meeting with his supervisors who admit that he appeared extremely upset, he was advised that that was not the plan for him "at that time". I am satisfied that it was deliberately left by Honda as a "sword of Damocles" over his head if he did not "shape up". It was around this time that he spoke to counsel concerning the attitude of Honda and potential breaches of the OHRC such as discrimination and workplace harassment. I am satisfied that these concerns were not only genuine but were also well founded.

¶ 26 January 2000 was about the worst month ever for Mr. Keays. He suffered eight absences in the last two weeks alone. There were six more in February and he knew that Honda's "lean" policy was having a drastic effect on his Quality Engineering Department. The efficiency demands of Honda would not tolerate his absences and this was having a negative impact on co-workers' morale. I accept that he was the target of the taunts and ridicule of some of his co-workers, including a cruel cartoon that made a joke of his disability: see Exhibit 2, Tab 45. Knowing that the situation was deteriorating between himself and Honda, he took the initiative to have counsel advocate for him as a last resort. He knew that this was diametrically opposed to Honda's unwritten policy of no third party employee advocates such as trade unions. In this letter counsel was asked to address the following issues with Honda:

i) a review of Mr. Keays' work history including time on STD and LTD;

ii) a description of his CFS as a disability under the OHRC, it's symptoms, his many treatments without improvement and the need for the accommodation endorsed by Dr. Morris;
iii) the lengthened absences caused by the medical certification requirement; and,
iv) counsel's offer to mediate the differences between Honda and Mr. Keays.

¶ 27 As I have stated earlier in these reasons, this letter was the model of reasonable conciliation. Honda did not even have the decency to respond to counsel. They chose not to engage in any conversations with him, mediation or otherwise. More troubling is the fact that, despite his having retained counsel, in-house counsel for Honda participated in a meeting with Mr. Keays on March 21, 2000 wherein company supervisors had attempted to persuade him to reject the advice given by his own lawyer. This is a blatant breach of R. 6.03(7) of the Rules of Professional Conduct of the Law Society of Upper Canada. This contact was made in the face of a direct reference in counsel's letter that Mr. Keays found it stressful dealing with these issues directly with Honda management and that future discussions were to be had with counsel, not Mr. Keays.

¶ 28 Honda ignored this communication from counsel retained by the plaintiff and insisted on dealing directly with him pursuant to their unwritten policy. On March 21, 2000 he was told the following:

i) both Dr. Affoo and Dr. Brennan agreed that they could find no diagnosis indicating that he was disabled from working;
ii) his medical notes contained no independent diagnosis or prognosis and merely "parroted" his complaints that he was unable to attend work because of his "condition";
iii) his lawyer had written Honda requesting that the requirement for medical notes be waived;
iv) Honda no longer accepted that he had a disability that required absences from work;
v) both of Honda's doctors believed that he should be attending work on a regular basis;
vi) Dr. Brennan wanted to meet him to "get to know [him] and understand completely [his] condition" so that he could then communicate with Dr. Morris to effectively manage [his] condition".

¶ 29 The direction to meet with Dr. Brennan was first given on this date at the same time the OHRC accommodation was withdrawn. This direction was repeated in a letter dated March 28, 2000 wherein Honda stated that they were "committed to supporting [him] in a full return to work". I interpret this to mean an absence-free return, that is, one that refused to acknowledge any need for any accommodation. This letter closed with the threat that his position of almost 14 years at Honda would be terminated if he continued to refuse to meet with Dr. Brennan.

¶ 30 His counsel responded the same day and addressed each of Honda's concerns including a clarification of Mr. Keays' position that he should not be required to provide a medical note before he returned from work as a result of a CFS-generated absence. He repeated his client's willingness to meet with Dr. Brennan if the "purpose, methodology and parameters of the assessment" were provided. The standoff continued and Mr. Keays was terminated the following day, March 29, 2000.

¶ 31 In McKinley, supra, the court referred favorably to the judgment of the Alberta Queen's Bench in Hill v. Dow Chemical Canada Inc. (1993) 11 Alta. L.R. (3d) 66 in its acceptance of the contextual approach in assessing employee misconduct. In that case, the employee, a 48-year-old superintendent of fire and security with seven years in place supervising 40 employees and a

multimillion-dollar budget, was fired for donating bandages and ice packs to a local hockey team contrary to company policy. This reaction was found to be totally unwarranted given the "pure" motives of the plaintiff and a less draconian penalty would have sufficed. Similarly, the McKinley court referred favorably to a ruling of the New Brunswick Court of Appeal in MacNaughton v. Sears Canada Inc. (1997) 144 D.L.R. (4th) 47 where a store clerk had given a "double discount" to a customer contrary to company policy without malicious intent. The appeal court reversed the finding of just cause because this conduct had not destroyed the core relationship with the employer.

¶ 32 Applying these authorities to the case at bar, I find that Honda's termination of Mr. Keays was totally disproportional to the alleged insubordination for the following reasons:

i) he had been a dedicated employee doing important work for Honda for almost 14 years;
ii) his "default" did not involve any conduct displaying moral turpitude nor did it reflect any deficiency in his character;
iii) it was motivated by a legitimate concern that his rights as guaranteed by the OHRC were being continually violated;
iv) it was not accompanied by any act of insolence nor was it disrespectful;
v) Honda had available alternative means of discipline up to and including suspension before it was required to use the "capital punishment" of employee law, that is, termination;
vi) there is no evidence that his refusal to see Dr. Brennan disrupted or threatened to disrupt production of vehicles which was the aim of Honda.

¶ 33 Briefly put, the defendant has failed to satisfy me that the reaction to the plaintiff's alleged insubordination was proportional. There is nothing in the record before me to suggest that Mr. Keays was in any way repudiating his contract of employment with Honda. When medically able he wanted to make his important contribution to the production of their automobiles. He was prepared to make a lifetime career at that facility so long as his human rights were respected. He wanted nothing more than to have that relationship maintained with an appropriate accommodation of his disability. He wanted so much to be a part of the Honda "team" but the company's fixation on "efficiency" prevented that wish from being realized: see "Legal Rights for Persons with Disabilities in Canada: Can The Impasse Be Resolved?", Ian B. McKenna, (1997-1998) Ottawa L. Rev. 153.

¶ 34 For all of these reasons, I find that the defendant's claim of just cause fails.

II -- NOTICE

¶ 35 The plaintiff submits that he is entitled to an award reflecting 14-18 months of notice and the defendant suggests six to ten months. In Minott, supra, the court stated, at page 292:

> "Determining the period of reasonable notice is an art not a science. In each case trial judges must weigh and balance a category of relevant factors. No two cases are identical, and, obviously, there is no "right" figure for reasonable notice. Instead, most cases yield a range of reasonableness".

¶ 36 The same case goes on to state that there is no "rule-of-thumb" starting point of one month per year of service nor that there is an upper limit of 12 months notice for non-management employees: see pp. 294-6. What is required is an assessment of all of the circumstances, including the character of the employment, the length of service, the age of the employee and the availability of other employment. This catalogue is not exhaustive: see page 293. It is far from a "cookie-cutter" exercise.

¶ 37 I begin my consideration of this issue by describing the management model of Honda as developed in the evidence before me. First, Honda sees itself as a relatively "flat" structure with an egalitarian approach where there is no apparent distinction between the president and the people on the production line. Everyone wears the same white coat with his or her first name proudly embossed on the front. There is no "pecking order" in the parking lot where managers' spots are visibly segregated from their inferiors. Most importantly, everyone is referred to as an "associate" so as to intentionally erase any distinction based on hierarchical principles. The concept, as I understood it, is that everyone is a partner in the achievement of "The Three Joys": producing, selling and purchasing Honda vehicles. I am satisfied that the plaintiff had bought into this management concept and when he was terminated by Honda, it had the same impact on him as it would have on a member of senior management, up to and including the president. Accordingly, I find that, based on the unique circumstances of this case, this management structure imposed and encouraged by Honda should tend to lengthen the notice period despite the plaintiff's relatively modest status in the "chain of command": see Exhibit 5.

¶ 38 Mr. Keays had little formal education before he began work at Honda in 1986. He had one year of community college following his graduation from high school. He was extensively trained by the company once he joined the Q.E.D. in 1988. He was sent to the Ohio plant to be trained on the new global computer system to become the "lead" instructor back in Canada. He was not only expected to instruct the other members of his department but also to liaise with other departments to ensure the efficient incorporation of design changes. Honda submitted that these responsibilities involved mainly data entry. This suggests that anyone could be quickly taught to perform this task. If this were so, then I question why Honda was so insistent on his regular attendance unless this was another indication of their self-imposed mandate to run an efficient, that is, "lean" operation. I accept that he was the "guru" of the department, the "go-to" guy when the computer system created a "glitch". Although receiving the same salary as the other associates in the Q.E.D., he was the "Team Leader" in more than name.

¶ 39 Given his almost 14 years of service to Honda, I find that he is entitled to 15 months notice based on "Bardal" principles: see Bardal v. The Globe & Mail Ltd., [1960] O.W.N. 253 (H.C.J.). It would not appear that his specialized training in an auto production plant would be readily portable to any other facility in the vicinity of Alliston. I have reserved the issue of his alleged unemployability as a result of this wrongful dismissal at the age of 35 for consideration of the "Wallace" factors.

III -- "WALLACE" FACTORS

¶ 40 The plaintiff suggests that he was the victim of a "bad faith" discharge relying on allegations of deceit and insensitively to his disability practiced by Honda. The Supreme Court of Canada refused to recognize this separate tort in Wallace v. United Grain Growers Ltd. [1997] 3 S.C.R. 701. However, the court did allow for such conduct to be factored into wrongful dismissal law by way of an increase in the notice period. Because of the inherent power imbalance between the employer and the employee and the special vulnerability that operates on the employee at the time of termination, the law demanded both good faith and fair dealing. At page 743, Iacobucci, J. attempted to provide a parameter for this concept:

> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.

In rejecting the proposition that this acceleration should be limited to cases where the conduct can be linked to the employee's future employment prospects, Iacobucci J. accepted a much wider basis for this type of award, at page 745:

> However, where an employee can establish that an employer engaged in bad faith conduct or unfair dealing in the course of dismissal, injuries such as humiliation, embarrassment and damage to one's sense of self-worth and self-esteem might all be worthy of compensation depending upon the circumstances of the use. In these situations, compensation does not flow from the fact of dismissal itself, but rather from the manner in which the dismissal was effected by the employer.

"Bad faith conduct" that does affect employment prospects may attract "considerably more compensation" than cases that are limited to intangible injuries: see page 746. In rejecting the argument that this result may place an unwarranted duty on employers, Iacobucci J. concluded his analysis as follows, at page 747:

> I would respond simply by saying that I fail to see how it can be onerous to treat people fairly, reasonably, and decently at a time of trauma and despair. In my view, the reasonable person would expect such treatment. So should the law.

¶ 41 The issue of "bad faith discharge" was recently addressed in the Ontario Court of Appeal judgment in Gismondi v. Toronto (City) (2003) 64 O.R. (3d) 688. The first holding of that case was that "Wallace" damages were not limited to acts of the employer that took place at the very moment of termination but could involve pre- and post-termination circumstances so long as they formed a "component" of the manner of dismissal: see page 695. The second holding was that, in order to attract the acceleration of notice, the conduct must be "akin to intent, malice, or blatant disregard for the employee"; "callous and insensitive treatment"; "playing hardball" or being "malevolent"; see page 698. "Sloppiness" does not suffice. Accordingly, the award of increased notice imposed by the trial judge was overturned on appeal as the conduct was merely "shoddy".

¶ 42 In the case at bar, in his pleadings, Mr. Keays alleges that Honda's manner of dismissing him was "hurtful, embarrassing, discriminatory and offensive", reflecting a "bad faith termination": see para. 72 of the Statement of Claim. In the trial, he focused on the letter from Honda to the plaintiff dated March 28, 2000, which reflected a "meeting" between the parties that had taken place seven days earlier and which, according to his submission, was false and misleading. It confirms that he was told that both of Honda's physicians, Dr. Affou and Dr. Brennan, had advised that they could find no diagnosis justifying his absences from work and that they both believed he should be attending work on a regular basis. It is his position that Honda deliberately misrepresented the positions of both physicians for the purpose of intimidation and forcing him to meet with Dr. Brennan without providing the "purpose, parameters and methodology" clarification he had asked for in writing.

¶ 43 I agree with the plaintiff's submission that the clear implication of this communication was that his condition was "bogus" and that he was able to attend work without absences. Although parts of the letter may have been accurate in isolation, when considered in its entirety, it presented a "twisted" view of his condition. Dr. Brennan testified that his review of the plaintiff's medical file did not reveal a CDC-sanctioned diagnosis which constituted a significant "gap" in assessing the situation presented. He testified that he never told Honda that Mr. Keays did not have a disability, only that he was unable to "verify" one. When Dr. Affoo testified, he agreed with the plaintiff's suggestion that absences of four per month was in the "ball-park" for an individual who suffered CFS. He too, made no suggestion that Mr. Keays was a malinger, which is the thrust of this letter. Interestingly, both of Honda's physicians agreed with portions of the letter in a literal sense. However, I believe the entire document must be considered, not a selective parsing of it: see R. v. Allen [1993] O.J. No. 2255 at para. 6. For these reasons, I am satisfied that this letter is a "callous and insensitive" misrepresentation of the medical information available to Honda at the time this letter was composed.

¶ 44 There is uncontradicted evidence that, 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 had attempted to resolve the impasse by retaining counsel who had an expertise in these matters but Honda refused to reciprocate. His lawyer attempted to negotiate a reasonable resolution of the differences between the parties but Honda continued to threaten him with termination from the job he loved unless he agreed unconditionally to meet with Dr. Brennan. His condition worsened as a result and he became depressed. He stayed in bed up to sixteen hours per day. He was eventually granted a C.P.P. pension for total disability, retroactive to the date of his termination. He has been unable to work since the date of his termination. 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".

¶ 45 I must admit that I harboured the same suspicions when Dr. Brennan began his trial testimony. However, it became obvious to me that Mr. Keays was being "set up" when asked to go into Dr. Brennan's office. It was only when I read the lately delivered note from him to Honda on December 3, 2000, that my suspicions crystallized: see Exhibit 35. He referenced the fact that the diagnosis of CFS carries "considerable controversy" and that "many physicians" do not believe it should be taken as a "stand alone" diagnosis. He himself was of the view that it "may well be a bona fide medical condition", but only in certain "very limited circumstances". As if the door for the accommodation achieved by Dr. Morris in September 1999 had not been already narrowed enough, Dr. Brennan was of the view that "regular attendance at work" was "therapeutic" for CFS patients. Most importantly, in his Exhibit 28, "A Summary of the Role of the Occupational and Environmental Physician in the Timely Return-to-Work Process" published in the November 1994 Ontario Medical Review, there is the following footnote: "Sick-leave abuse is managed through attendance programs, not medical certification." In my opinion, the record establishes beyond any debate that Dr. Brennan is of the "hardball" approach to workplace absences associated with illnesses or injuries. It is clear as well, that he views Dr. Morris as one of those physicians who is prepared to certify an absence at the "drop of a hat". Honda suggests that the direction to attend upon Dr. Brennan was benevolent and motivated by a wish to see Mr. Keays "full" return to work. In my view, this was about as benevolent as asking a lamb to go into the wolf's den.

¶ 46 I agree with both counsel that the purpose of this litigation is not to resolve the debate between Dr. Brennan and Dr. Morris as to the proper accommodation of CFS. I have neither the time nor competence to do so. However, I agree with the plaintiff that, in the absence of the clarification that he sought concerning Dr. Brennan, his attendance would have been one done in the absence of an informed consent. The material filed from Dr. Brennan not only calls into serious question the good faith of the request that Mr. Keays see him, but it also validates his concerns why he was being asked to go to his office. Obviously, an honest and complete answer would have revealed the oblique motivations of Honda: see MacKinnon, supra, at para. 9.

¶ 47 The devastating impact of the termination on Mr. Keays was confirmed by his life partner, Mr. Crews, as well as his physician, Dr. Morris, who almost immediately diagnosed an adjustment disorder with depressive symptoms. He experienced a sense of loss for co-workers he would not be seeing again. This lasted for three or four months. By September 2000, Dr. Morris felt that the plaintiff was totally disabled from any employment. Accordingly, the process for C.P.P. was begun and qualification continues to the present. Dr. Brennan saw no reason to question the opinion from the plaintiff's attending physician in relation to the adjustment disorder, but disagreed with the diagnosis that Mr. Keays had become totally disabled due to an aggravation of his CFS: see Exhibit 36. On the latter point, he places significant emphasis on the fact that, as with the diagnosis of the condition, its worsening cannot be verified by any objective tests. I do not have the same difficulties accepting the evidence suggesting that the plaintiff has been totally disabled

since his termination date. Accordingly, I am prepared to factor in this circumstance along with the adjustment disorder in assessing the "Wallace" increase. I am also prepared to factor in the unilateral cancellation by Honda of the OHRC accommodation which had been in effect since September of the previous year. I am satisfied that Honda did this in reprisal for Mr. Keays' counsel's letter the week before: See OHRC, s. 8. That provision states:

> Every person has a right to claim and enforce his or her rights under this Act, to institute and participate in proceedings under this Act and refuse to infringe a right of another person under this Act, without reprisal or threat of reprisal for so doing. (My emphasis added.)

This reprisal was, no doubt, a "component" of the manner of dismissal.

¶ 48 Given the egregious bad faith displayed by Honda in the manner of this termination and the medical consequences flowing therefrom, I agree with the plaintiff that the notice period should be extended to 24 months.

IV -- INTENTIONAL INFLICTION OF NERVOUS SHOCK/EMOTIONAL DISTRESS

¶ 49 Since the plaintiff has received a "Wallace" increase of the notice period by nine months, it would be inappropriate to give him an additional award on this alternate basis: see Prinzo v. Baycrest Centre for Geriatric Care (2002) 60 O.R. (3d) 474 (C.A.) at page 496.

V -- DISCRIMINATION/HARASSMENT

¶ 50 The plaintiff has asked me to find that Honda victimized him by breaching his rights under the OHRC. He seeks a recognition of this tort and he has asked me to find that the legitimacy of Seneca College of Applied Arts and Technology v. Bhadauria [1981] 2 S.C.R. 181 has been exhausted because of the ascendancy of human rights in the jurisprudence, especially equality rights including protection from discrimination. In Bhadauria, the Supreme Court of Canada ruled that a claim of a breach of any guarantee in the OHRC could only be addressed by the tribunal created by that legislation. No resort to the regular courts could be taken. Mr. Keays' submission that this authority has been "exhausted" is not without significant support: see Cadieux v. Montreal (Communauté Urbaine) [2002] J.Q. No. 363 (C.A.) at para. 78. The Supreme Court of Canada is prepared to reverse itself in favour of Charter rights: see Brooks v. Canada Safeway Ltd. [1989] 1 S.C.R. 1219. I see no reason why it would not do so in the context of quasi-constitutional rights as guaranteed by the OHRC. However, that is not the view of the Ontario Court of Appeal which very recently affirmed the authority of Bhadauria in Taylor v. Bank of Nova Scotia [2005] O.J. No. 838. Accordingly, with significant reluctance, I am forced to find that this court is without jurisdiction to consider this basis of relief. However, these complaints could constitute "independent actionable wrongs" such as to trigger an award of punitive damages, assuming they also merit punishment: see McKinley, supra, at page 205.

VI -- LOST DISABILITY BENEFITS

¶ 51 In closing submissions, the plaintiff sought compensation for "lost" disability benefits that would have been available from the LTD insurer based on his total disability caused by this wrongful termination. Once terminated, he no longer could look to the insurer. Accordingly, he was looking to Honda: see Prince v. T. Eaton Co. (1992) 91 D.L.R. (4th) 509 (B.C.C.A.). Although originally framed in his pleading as "Special damages in an amount as yet to be determined" [see para. 1(e)], the basis for the claim evolved as one framed as "aggravated damages". However, I agree with Honda that such relief is not available because aggravated damages were not pleaded by him. Accordingly, this part of Mr. Keays' claim must fail.

VII -- PUNITIVE DAMAGES

¶ 52 As I understand the jurisprudence, punitive damages are exceptional and are only available if there is an "independent actionable wrong" and if the conduct of Honda was so egregious that it merits punishment. Even then, if the compensatory damages have, by themselves, meted out sufficient punishment to Honda, then the "rationality" or need for punitive damages would have evaporated.

(i) Independent Actionable Wrong

¶ 53 The plaintiff submits that he was the victim of discrimination and harassment at the hands of Honda both at the time of his termination and in the several months leading up to it. In addition, he suggests that this wrongful conduct was aggravated by their bad faith and deceit practiced once he complained about Honda's treatment of him. I am greatly assisted in my consideration of this issue as a result of the judgment of the Supreme Court of Canada in Nova Scotia (Workers' Compensation Board) v. Martin [2003] 2 S.C.R. 504, which was handed down during the course of this trial. The case involved a challenge to certain provisions of that province's Workers' Compensation Act and regulations which mandated a four-week functional restoration program beyond which no further benefits were available for persons disabled by chronic pain. The provisions were struck down as contrary to the equality guarantees of section 15(1) of the Charter of Rights and Freedoms in that they deprived such disabled persons of the continuing benefits that were available to "mainstream" recipients. This case is important because it highlights the problems faced by persons disabled by "invisible" impairments such as chronic pain and chronic fatigue. These include "persistent suspicions of malingering on the part of employers, compensation officials and even physicians": see p. 514. Just because Mr. Keays did not carry a white cane, use a hearing aid, or get around in a wheelchair, did not make him any less deserving of workplace recognition of his debilitating condition. Despite his many years of affliction, he continually had to "earn" any accommodation reluctantly granted by Honda. This 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. He had to "earn" the accommodation represented in the OHRC Disability Program. He had to "earn" each dispensation from being "coached" for any absences by presenting a "note" from his doctor like some child who is suspected of "playing hooky" from school. This was not only an assault on his personal dignity, it was not a "burden" that was placed on associates with "mainstream" medical problems. He felt the accommodation itself was discriminatory. Worse yet, it had the practical effect of lengthening his absences which was the last of his intentions and should also have been Honda's given their fixation on running an "efficient" operation. When he followed the company protocol by filing an "Associate Concern", he was met with the usual "stone wall". It appears that doctors' notes were intended to act as a "deterrent" to "chronic absenteeism" according to one of Honda's former senior managers who testified. I agree with Mr. Keays that it makes little sense to have the OHRC Disability Program and, at the same time, "deter" its use by requiring notes for each absence. I have already given my reasons for preferring the evidence of Mr. Keays over that of Honda's witnesses in relation to when he first learned of the existence of the OHRC Disability Form. One matter is manifest: there is absolutely no reference to it in the Associate Handbook. I question why Honda would want to keep secret a program intended to implement the right to accommodation guaranteed under the OHRC when it advocated that philosophy in their Employee Handbook as a company policy.

¶ 54 I agree as well with the plaintiff's complaint that the refusal to remove the "coach" of August 27, 1999 was an act of discrimination and that he was within his rights to demand its removal from his record of employment. Honda takes the position that this first step in the Associate Counselling Procedure was not discriminatory because of the authority of the majority of the arbitration board in Oshawa (City) and C.U.P.E., Loc. 250 (Connor), Re (1996) 56 L.A.C. (4th) 335. However, I find more persuasive the dissent of K. McDonald who found that the decision of the Divisional Court in Ontario (Human Rights Commission) v. Gaines Pet Foods Corp. (1993) 16

O.R. (3d) 290 to be controlling. In that case, a procedure similar to the "coach" in the case at bar was found to be discriminatory because it was triggered by a "handicap", that is, the employee's cancer. Applying that analysis to the instant case, I have no difficulty in finding that the "coach" was both a "burden" and a "disadvantage" creating a discrimination in law. Accordingly, Mr. Keays was wronged by this "coach" under the OHRC and justified in insisting that it be removed from his work record. Honda eventually upheld the "coach" because it was alleged that he had failed to promptly request the OHRC Disability Form when his absences recurred after his more than two years off work on STD and LTD. In effect, they "punished" him by refusing to remove a discriminatory counselling . The former Senior Manager of Human Resources was not even aware of the program that related to the OHRC Disability Form. He testified that an associate was either to come to work "every day" or be off work on either STD or LTD. He was not familiar with the accommodation program or the qualifying form that had been available since at least October 1995.

¶ 55 Having found the requirement of presentation of notes confirming disability and the refusal to remove the "coach" from his employment record as qualifying as acts of discrimination, I turn now to a consideration of Mr. Keays' complaint concerning his attendance on Dr. Affoo in November 1999. Because his absences were mounting up and compromising the efficiency of his department, Honda asked him to see the company doctor. He was a dedicated associate who wanted to contribute to Honda as much as his condition would permit. He didn't prefer to "stay home and polish his boat" as suggested by Honda's counsel during this trial. Having gone to Dr. Affoo's office in good faith, what did he receive in return? He was totally "submarined" by Dr. Affoo who "floated" the suggestion that he be returned to the production line. I find this to have been an act of gross insensitivity bordering on the unprofessional. Dr. Affoo's explanation that it was merely "brainstorming" is weak and unconvincing. I have no difficulty in finding that it belittled Mr. Keays' disability and amounted to outright harassment. I am satisfied that this exchange, by itself, was sufficient for Mr. Keays to insist upon the "clarification" of Dr. Brennan's involvement four months later. He lodged an immediate complaint with Honda concerning this development and was assured that there was no plan, "at that time", to move him to the production line. I am satisfied that he would not have been able to tolerate the physical exertion associated with such a move because of his CFS without a significant increase in his absences or worse. As well, it could have constituted constructive dismissal.

¶ 56 Given the deterioration of the circumstances, I agree that the plaintiff had no option but to retain counsel to attempt to stop this "runaway bus" associated with his "accommodation". There were eight absences in January 2000 and six more in February. He was now pleading for his employment life and Honda chose to ignore his plea as communicated by counsel. Instead, they chose to unilaterally cancel his accommodation and advise him that his absences would no longer be tolerated because they rejected his claim of disability. Honda suggests that this decision had nothing to do with the letter from Mr. Keays' lawyer. Given the timing of these events, I am convinced it had everything to do with this letter. I find that Honda's reaction, including the order to see Dr. Brennan, was retaliation for daring to challenge their authority and accusing them of breaching his human rights: See OHRC, s.8. When he refused to be "bullied" into seeing Dr. Brennan without an assurance that he would not be abused as he was recently by Dr. Affoo, he was summarily terminated.

¶ 57 I have no difficulty in finding that the plaintiff has proved that Honda committed a litany of acts of discrimination and harassment in relation to his attempts to resolve his accommodation difficulties. When he began to push them on his concerns by having his lawyer attempt to advocate for him, they imposed the most drastic form of harassment possible: they terminated him.

¶ 58 Before closing my consideration of this issue, I want to make it clear that the only "independent actionable wrongs" I have found that apply in law to attract punitive damages are discrimination and harassment. In the context of wrongful dismissal, bad faith is not available for

that purpose: see Giglotti v. Masev Communications Inc. [2004] B.C.J. No. 94 (S.C.) at para. 138. I find that principle somewhat incongruous when there was a significant "peace of mind" component to Mr. Keays' continued employment with Honda. He only qualified for his "safety-net" of STD and LTD so long as that status continued. In that sense, the defendant controlled the plaintiff's "peace of mind". That is why I held that Honda's bad faith could influence or aggravate their discriminatory conduct although it could not qualify as a separate "independent actionable wrong". The anomaly, of course, does not apply when the employer funds its own disability program: see Gerber v. Telus Corp. [2003] 10 W.W.R. 82 (Alta. Q.B.).

(ii) Conduct Deserving Punishment

¶ 59 In his pleadings, Mr. Keays particularized his basis for the claim for punitive damages as Honda's termination of his employment in order to avoid their obligation to accommodate his disability: see para. 64 of the Statement of Claim. For the reasons already discussed, I am satisfied that this was Honda's motivation for terminating Mr. Keays. His condition was incompatible with the "lean" and efficient operation demanded by Honda's corporate policy. The computer-managed workplace "trumped" his human rights. Turning to the considerations canvassed by the Supreme Court of Canada in Whiten v. Pilot Insurance Co. [2002] 1 S.C.R. 595, I am satisfied that an award of punitive damages is a "rational" and necessary response to Honda's outrageous mistreatment of their long-time employee. I am satisfied that Honda engaged in far more than "wilful tunnel vision" in dealing with Mr. Keays' medical condition. He returned to work in December 1998 after a more than two-year absence under the protest of both himself and his treating physician that he was still too sick to do so. Between that time and the delivery of Mr. Keays' lawyer's letter on March 17, 2000, there is a virtual monsoon of information documenting and explaining his absences and that all of this was as a result of a diagnosis of CFS by a specialist. For example, there is a Honda medical note dated September 27, 1999 by "S. Drummond" indicating that because of an absence the previous week when he was feeling "very ill", he was trying to get an appointment "to see the initial specialist who diagnosed the CFS". When he originally went to see Dr. Affoo about his problems shortly after he returned to work and complained about fatigue while traveling to and from work and falling asleep at his work-station, he was told that this was "no great problem". He complained about his co-workers having to do his work when he fell asleep in front of them. Most importantly, Honda was in possession of a Consent to Access to the Medical Records of Dr. Morris signed by Mr. Keays on September 20, 1996, along with a note from the same doctor dated April 15, 1996 indicating that he suffered from a sleep disorder resulting in "sever daytime sleepiness" and that he was being followed by him at the Sleep Disorders Clinic at the Toronto Hospital.

¶ 60 It now becomes clear why Honda wanted to have the plaintiff see Dr. Brennan. Mr. Keays' physicians were the problem because they would "certify" his absences like Sidney Crosby signs autographs after a hockey game. They were the villains because they perpetuated the myth that the plaintiff was required, by his illness, to be absent from work. He just hadn't been "hardened" enough and Honda was the one to do it with the able assistance of their advocate of employers' anti-absenteeism rights, Dr. Brennan. The subterfuge practiced by everyone associated with Honda in attempting to intimidate him to seeing their occupational medicine specialist should make the blood boil of any right-thinking individual. This scheme was nothing less than a conspiracy to insinuate Dr. Brennan into the plaintiff's long-established medical relationship with his own doctors and, hopefully, to exclude them from any participation in advocating for his patient's rights. Returning to the catalogue of considerations provided in Whiten, supra, at para. 113, I make the following findings:

a) Honda's misconduct was planned and deliberate and formed a protracted corporate conspiracy against Mr. Keays;
b) Honda's intent in intimidating him and eventually terminating him was to deprive him of the accommodation he had already earned based on the information from Dr. Morris that Honda requested and accepted;

c) Honda's outrageous conduct has persisted over a period of five years without a hint of modification of their position that Mr. Keays was the one in the wrong;

d) Honda did not reveal the extremely damaging letter from Dr. Brennan dated December 3, 2000 (Exhibit 35) until the twenty-second day of trial;

e) Honda was aware of its obligation to accommodate the plaintiff's illness and, accordingly, must have known that it was wrong to firstly, terminate that accommodation without just cause and secondly, to terminate him as an act of retaliation for attempting to assert his rights;

f) Honda has clearly benefited from their misconduct because they have rid themselves of an irritation that they viewed as a "problem" associate;

g) Honda knew that Mr. Keays valued his employment with them as one of the main definitions of his life and they knew that he was also dependent upon that employment for his disability benefits if he could no longer remain employed.

¶ 61 I am satisfied that Mr. Keays was a victim of particular vulnerability because of his precarious medical condition and Honda knew this. The record is replete with his pleas that he was still sick and that he had done everything possible to address his illness. Even Dr. Brennan admitted in cross-examination that there is a "sub-group" of CFS sufferers who never get better. Honda has given me absolutely no reason why the plaintiff was never considered by them to be one of that group which he obviously was. This wrongful termination did turn him from an individual who could function at work with the accommodation predicted by Dr. Morris to a totally unemployable and dependent recluse. The fact that his condition was difficult to assess should not be permitted to open the door to oppressive conduct on the part of a superior. On the contrary, such circumstances should "increase the need to proceed openly, fairly and cautiously": see Fidler v. Sun Life Assurance Co. of Canada (2004) 239 D.L.R. (4th) 547 (B.C.C.A.) at p.567.

¶ 62 Despite the evidence that was called by the plaintiff in "reply", he has failed to satisfy me that Honda's misconduct with him forms part of a pattern of abuse of other associates. For some reason that escapes me, he seems to have been targeted despite being an ideal employee except for his CFS-related absenteeism and who was otherwise valued by Honda and other workers. It would appear to me that Honda ran amok as a result of their blinded insistence on production "efficiency" at the expense of their obligation to provide a long-time employee reasonable accommodation that included his own physician's participation. It goes without saying that Honda is a worldwide corporation, a "Leviathan" compared to the "minnow" that Mr. Keays represents. As Binnie, J. stated in Whiten, supra, a "large whack" is required to "wake up a wealthy and powerful defendant to its responsibilities" (see para 118).

¶ 63 I am also taking account the fact that this large corporation can easily afford to hire its own medical and legal advocates and insinuate them into established patient and client relationships without impunity as to professional and ethical concerns. Honda's in-house counsel breached the Rules of Professional Conduct of the Law Society of Upper Canada when she participated in the "scrum" to attempt to persuade Mr. Keay's to abandon his request for clarification of Dr. Brennan's mandate: see rule 4.03(2).

¶ 64 I am not satisfied that the maximum penalty under the OHRC, $10,000, comes even close to an appropriate deterrence and denunciation of the outrageous and high-handed conduct of this defendant: see s.41(1)(b).

iii) Quantum

¶ 65 Taking into account all of the circumstances, including the compensatory awards already made, and having been persuaded that the conduct herein is deserving of significant denunciation, I award the plaintiff punitive damages in the amount of $500,000.

VIII -- MISTRIAL APPLICATION

¶ 66 Submissions by counsel concluded on April 19, 2004. Honda lodged a motion for mistrial dated June 17, 2004 alleging a reasonable apprehension of judicial bias. The motion was not argued until October 26, 2004, more than six months after the trial concluded but still while it was under reserve. Of course, I was required to suspend my consideration of judgment once I was advised of the motion shortly after it was filed. I dismissed the motion for mistrial on the return date with formal reasons to follow. These are those reasons.

¶ 67 In Authorson (Litigation Guardian of) v. Canada (Attorney General) (2002) 32 C.P.C. (5th) 357, the Divisional Court stated, at paragraph 20:

> We are of the opinion that that absent unusual circumstances a disqualification notice of motion should be brought within a month of the discovery of the alleged bias or the formation of the perception of bias. This allows ample time for counsel to have sober reflection, to seek outside advice to bolster their courage and to prepare material. In the normal course of events we would think that it would be good practice to put the judge and the other side on notice at the earliest reasonable opportunity. (My emphasis added.)

¶ 68 Honda failed to abide by any of those requirements or suggestions. Accordingly, I found it unnecessary to address the merits of the motion which was dismissed.

CONCLUSION

¶ 69 Judgment will go in terms of these reasons. If necessary, I am prepared to consider counsel's written submissions as to costs, those of the plaintiff within fifteen days of their release and those of the defendant 15 days thereafter. All submissions are to be sent to my Chambers at Barrie.

J.R. McISAAC J.

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