

Considerations for Employee Terminations Involving a History of Illness or Disability

As any experienced employment lawyer can attest, one of the most difficult issues facing employers is the ending of the employment relationship for performance or other operational reasons where there has also been a history of illness or disability. Two recent decisions serve to remind employers that it is necessary to tread extremely carefully when considering the termination of employees who may be suffering from an illness or disability.

In *Toivanen v. Electronic Arts (Canada) Inc.*, the British Columbia Human Rights Tribunal (the "Tribunal") ordered compensation of nearly \$150,000 to an employee who had been terminated immediately after providing a medical note from her family doctor advising that she should take stress leave.

At the time the employee presented her medical note and asked for stress leave, the employer, for performance reasons, had already made the decision to terminate her employment and was in fact set to deliver notice of termination. The Tribunal found that the employee's work performance and work relationships with co-workers had deteriorated over the final months of her employment following generally positive evaluations during her career. However, the Tribunal found that many of the difficulties which the employee was experiencing were, at least partly, the result of the employer having imposed an overwhelming workload on the employee.

Immediately prior to the hearing before the Tribunal, the employer conceded that it had in fact violated the B.C. *Human Rights Code* in failing to make any attempt to investigate the employee's medical condition which led to her requesting stress leave, and in failing to make any attempt to accommodate her medical circumstances. Instead of taking such steps, the employer simply proceeded with its plan to terminate the employee. The Tribunal noted that the effect of doing so on the employee was devastating.

When Ms. Toivanen was terminated, she felt like she had been thrown away. She thought that EA was a company that prided itself on looking after employees. Instead of investing any time and energy in bringing her back, healthy, to her work place, it fired her. This is not a case where Ms. Toivanen found herself "worked to death" by EA, but it is about the fact that EA did nothing to investigate why she needed a leave of absence and did nothing to accommodate her. It was a situation where she required time off, requested it of EA, and it fired her at a most vulnerable time.... To this day she is unable to work; however, her goal is to believe that she will one day return to work. ¹

The failure to take the necessary steps to investigate the employee's request for stress leave or to accommodate her medical condition proved very expensive to the employer in this case. The Tribunal ordered compensation of nearly \$150,000 to the employee, including \$20,000 for injury to dignity, feelings and self respect, approximately

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\$20,000 to compensate for lost severance pay, and U.S. \$69,000 to compensate for the lost value of stock options.

The clear lesson for employers from the Tribunal's reasons is that where it is apparent that an employee is or may be suffering from an illness or disability at the time an employer is intending to terminate for performance or other occupational reasons, it is critical that the employer fully investigate the medical circumstances and consider possible accommodation before proceeding with termination.

Also of significance for employers is a recent decision of the Ontario Court of Appeal in *Keays v. Honda Canada Inc.*² After working for Honda Canada for approximately eleven years, Mr. Keays, following extensive absences from work, was diagnosed with chronic fatigue syndrome. For a period of time, the employer accommodated Mr. Keays by permitting him to work on a part-time basis. Subsequently, Honda Canada directed the employee to be examined by a company physician. After meeting with the company physician, the employee refused to attend on him for further examinations without receiving clarification from Honda Canada as to the purpose of meeting with the company physician and the parameters of his medical assessment. Honda Canada refused to provide any such clarification and terminated Mr. Keays for disobeying its direction to attend upon the company physician for further examination.

At trial, the court found that the direction to the employee to attend upon the company physician was not made in good faith but rather was part of a plan to intimidate the employee and to eventually terminate him for the purpose of avoiding its obligation to accommodate his chronic fatigue syndrome disability.

The trial judge found that Honda Canada's course of conduct constituted discrimination and harassment, which contravened his rights under the Ontario *Human Rights Code* and awarded an unprecedented \$500,000 in punitive damages. In addition to awarding a reasonable notice period of 15 months, the court also increased the notice period by nine months to 24 months because of the bad faith displayed by Honda Canada in the manner in which it terminated the employee. In extending the notice period, the court relied on *Wallace v. United Grain Growers*.

The Ontario Court of Appeal (the "Court of Appeal") upheld the decision of the trial judge but reduced the punitive damage award from \$500,000 to \$100,000. Notably, the Court of Appeal was unanimous in dismissing the appeal but divided on the issue of reducing the award. Although the majority elected to reduce the punitive damages against Honda Canada, Goudge J.A. held that the original award was appropriate given the deliberate nature of the mistreatment, the vulnerability of the employee and the degree of resulting harm. While clearly a significant reduction, the \$100,000 award remains the highest award for punitive damages in the employment context in Canada. Previous awards have consistently been well below the \$100,000 mark. If followed, the punitive damages awarded in *Keays* could prove crippling to small businesses involved in similar litigation. The potential effect could be greater still if future decisions fall in line with the reasoning set out in Goudge J.A.'s partially dissenting view.

Accordingly, employers should take away a very clear message from the Ontario Court of Appeal in *Keays* that, in addition to facing extended notice periods based on *Wallace*, where an employer's course of conduct also contravenes the applicable human rights legislation, a

significant punitive damage award may be a consequence.

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1 *Toivanen v. Electronic Arts (Canada) Inc.*, [2006] B.C.H.R.T.D. No. 396
2 *Keays v. Honda Canada Inc.* (c.o.b. Honda of Canada MFG), [2006] O.J. No. 3891