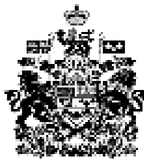

SUPREME COURT OF CANADA

CITATION: Honda Canada Inc. *v.* Keays, 2008 SCC 39

DATE: 20080627
DOCKET: 31739

BETWEEN:

Honda Canada Inc. operating as Honda of Canada Mfg.
Appellant / Respondent on cross-appeal
v.
Kevin Keays
Respondent / Appellant on cross-appeal
- and -
Canadian Human Rights Commission,
Ontario Human Rights Commission,
Manitoba Human Rights Commission,
Alliance of Manufacturers & Exporters Canada,
Human Resources Professionals Association of Ontario,
National ME/FM Action Network,
Council of Canadians with Disabilities,
Women's Legal Education and Action Fund and
Ontario Network of Injured Workers' Groups
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 80)	Bastarache J. (McLachlin C.J. and Binnie, Deschamps, Abella, Charron and Rothstein JJ. concurring)
REASONS DISSENTING IN PART : (paras. 81 to 124)	LeBel J. (Fish J. concurring)

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honda canada inc. *v.* keays

Honda Canada Inc., operating as Honda of Canada Mfg. *Appellant/Respondent on cross-appeal*

v.

Kevin Keays *Respondent/Appellant on cross-appeal*

and

Canadian Human Rights Commission, Ontario Human Rights Commission, Manitoba Human Rights Commission, Alliance of Manufacturers & Exporters Canada, Human Resources Professionals Association of Ontario, National ME/FM Action Network, Council of Canadians with Disabilities, Women's Legal Education and Action Fund and Ontario Network of Injured Workers' Groups *Interveners*

Indexed as: Honda Canada Inc. *v.* Keays

Neutral citation: 2008 SCC 39.

File No.: 31739.

2008: February 20; 2008: June 27.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for ontario

Employment law — Wrongful dismissal — Notice period — Employee terminated after 14 years of employment with same employer — Factors determining reasonable notice of termination of employment — Whether employee's position in company hierarchy relevant factor — Whether 15-month notice period reasonable.

Damages — Aggravated damages — Punitive damages — Wrongful dismissal — Employee diagnosed with chronic fatigue syndrome — Employer concerned about employee's numerous absences and about his doctor's notes to cover absences, which provided only limited information — Employee dismissed after refusing to meet with employer's doctor — Circumstances in which aggravated damages resulting from manner of dismissal should be awarded — Whether employee entitled to aggravated and punitive damages.

Civil procedure — Costs — Costs premium — Whether costs premium should be awarded — Whether costs should be awarded on substantial indemnity scale.

K had worked 11 years for the same employer, first on an assembly line and later in data entry, when, in 1997, he was diagnosed with chronic fatigue syndrome. He ceased work and received disability benefits until 1998, when his employer's insurer discontinued his benefits. K returned to work and was placed in a disability program that allows employees to take absences from work if they provide doctor's notes confirming that their absences are related to their disability. K's employer became concerned about the frequency of his absences. Moreover, the notes K offered to explain his absences changed in tone, leaving the employer to believe that the doctor did not independently evaluate whether he missed work due to disability. As such, the employer asked K to meet Dr. B, an occupational medical specialist, in

order to determine how K's disability could be accommodated. On the advice of his counsel, K refused to meet B without explanation of the purpose, methodology and parameters of the consultation. In March 28, 2000, the employer gave K a letter stating that it supported K's full return to work but that K's employment would be terminated if he refused to meet B. When K remained unwilling to meet B, the employer terminated K's employment.

K sued for wrongful dismissal. The trial judge found that K was entitled to a notice period of 15 months. He held that the employer had committed acts of discrimination, harassment and misconduct against K. He increased the notice period to 24 months to award additional damages dependent on the manner of dismissal. He also awarded punitive damages against the employer in the amount of $500,000, a costs premium, and costs on a substantial indemnity scale. The Court of Appeal reduced the costs premium and, in a majority decision, reduced the punitive damages award to $100,000. The Court of Appeal otherwise upheld the trial judge's decision.

Held (LeBel and Fish JJ. dissenting in part on the appeal): The appeal should be allowed in part and the cross-appeal should be dismissed. The award of aggravated damages for manner of dismissal and the award of punitive damages should be set aside. The cost premium should be set aside and costs should be adjusted to reflect an award on the regular scale in the lower courts. Costs are awarded to the employer at the Supreme Court level.

Per McLachlin C.J. and **Bastarache**, Binnie, Deschamps, Abella, Charron and Rothstein JJ.: K was wrongfully dismissed and the award of damages reflecting the need for 15 months' notice should be maintained. In determining what constitutes

reasonable notice of termination, courts should consider the character of the lost employment, the employee's length of service, the age of the employee, and the availability of similar employment having regard to the experience, training and qualifications of the employee. These factors can only be applied on a case-by-case basis and no one factor should be given disproportionate weight. No presumptions about the role that an employee's managerial level plays should be adopted in determining reasonable notice. The trial judge erred in alluding to the employer's flat management structure rather than examining K's actual functions; however, on the facts of this case there is no basis to interfere with the assessment of 15 months' notice. [2] [28-30] [32]

An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Generally, damages are not available for the actual loss of a job or for pain and distress suffered as a consequence of being terminated. However, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover. This is consistent with the view expressed in *Findler* that all compensatory damages for breach of contract are assessed under one rule, i.e., what was in the reasonable contemplation of the parties (*Hadley v. Baxendale*). In the employment law context, damages resulting from the manner of dismissal will be available if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive". These damages should be awarded through an award that reflects actual damages rather than by extending the notice period. [50] [55] [57]

Aggravated damages should not have been awarded in this case. The employer's conduct in dismissing K was in no way an egregious display of bad faith justifying an award of damages for conduct in dismissal. On this issue, the trial judge made overriding and palpable errors of fact. The employer's March 28 letter to K did not misrepresent the positions of its doctors and it should not have been faulted for relying on the advice of its medical experts. There is no evidence that B took a "hard-ball" attitude towards workplace absences or that K was being set up when asked to meet B. The employer's request for a meeting between K and B was normal in the circumstances. The employer's decision to stop accepting doctor's notes was not reprisal for K's decision to retain legal counsel. Rather, the employer was simply seeking to confirm K's disability. Lastly, there is no evidence that K's disability subsequent to termination was caused by the manner of termination. [34-35] [38] [40] [43] [46-48]

Similarly, punitive damages should not have been awarded. Punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. The facts of this case demonstrate no such conduct. Courts should only resort to punitive damages in exceptional cases and the employer's conduct here was not sufficiently egregious or outrageous to warrant such damages. Even if the facts had justified an award of punitive damages, both the trial judge and the Court of Appeal should have been alert to the fact that the compensatory damages already awarded carried, under the old test, an element of deterrence and they should have questioned whether punitive damages were necessary. This failure resulted in considerable and unnecessary duplication in the award of damages. [61-62] [70]

Both the trial judge and the Court of Appeal also erred in concluding that the employer's "discriminatory conduct" amounted to an independent actionable wrong for the purposes of allocating punitive damages. The *Ontario Human Rights Code* provides a comprehensive scheme for the treatment of claims of discrimination. A breach of the Code cannot constitute an actionable wrong; therefore the legal requirement for the common law remedy of punitive damages is not met. Since there is no evidence of discrimination to support a claim of discrimination under the Code and no breach of human rights legislation serves as an actionable wrong, there is no need to deal with K's request for recognition of a distinct tort of discrimination. [55] [57] [60]

Per **LeBel** and Fish JJ. (dissenting in part on the appeal): The award of additional damages for the manner of the dismissal should stand. No overriding errors were committed by the trial judge in this respect and there is a sufficient foundation for findings of bad faith and discrimination. The punitive damages award, however, had no foundation and overlapped with the damages for manner of dismissal, and should be set aside. The costs premium also should be set aside. While a restatement of the law in respect of damages for wrongful dismissal is necessary, any reform must reflect that a contract of employment is a good faith contract informed by the values protected by the *Human Rights Acts* and the *Canadian Charter of Rights and Freedoms*, particularly in respect of discrimination. As such, it must be executed and terminated with good faith and fairness. [81-82] [114] [124]

The evidence supports the trial judge's findings that the employer was unfairly skeptical and sought to justify K's termination or to preclude him from being absent from work without discipline in reliance on his condition. It was fair to

characterize the employer's conduct as interference with K's relationship with his treating physician. B was brought in to second-guess the opinion of K's physician and to legitimize efforts to eliminate the need for accommodation. The employer did benefit from K's termination to the extent that he impeded efficiency goals and affected workplace morale. The employer's letter of March 28 was misleading and did misrepresent the opinions of its doctors. B did practise a hardball approach in general toward absences and accommodating disabilities and it was not unreasonable to conclude that K was being set-up for failure by the request that he meet with B. Nor was it a palpable and overriding error to conclude that the employer cancelled K's accommodation as reprisal for asserting his right to proper accommodation through legal counsel. [87] [89-91] [95-98] [112]

Additional or *Wallace* type damages should be available where the manner of dismissal causes mental distress that was in the contemplation of the parties. There is an obligation of good faith and fair dealing on the part of employers in dismissing employees. There is ample evidence here that the employer acted in bad faith and this is a case where the employer's failure to properly discharge its obligation made it foreseeable that K's dismissal would cause mental distress. Most notably, the letter of March 28 mischaracterized the opinions of the employer's doctors by implying that they did not believe that K's absences were medically necessary yet neither doctor recommended that K be removed from the disability program or claimed that any absences related to chronic fatigue syndrome are unjustified. A further concern is the employer's lack of candour and its own uncertainty with respect to the purpose of K's meeting with B. Its refusal to provide written clarification of the purpose is suspicious. Finally, it is reasonable to conclude that the employer's conduct and not the mere fact of K's termination alone, led to K's worsened state after he was terminated. However,

given the lack of evidence on the precise loss K suffered as a result of the employer's misconduct, the compensation the trial judge granted over and above the 15- month notice period appears reasonable and should be maintained. [114-117]

The development of tort law is informed by the prohibitions of *Human Rights Codes* and the *Charter*. Discrimination was a troubling aspect of the decision to terminate K and this impacts on the good faith of the termination. While monitoring employee absences is a valid objective, there was no assessment in this case of whether the employer's method of accommodation and of monitoring K's absences addressed K's particular disability. If variable, self-reporting conditions characterize the very nature of K's disability, then it is arguable that the employer acted in a discriminatory manner in subjecting K to the kind of scrutiny that occurred, denying him accommodation for his disability. [119-123]

Cases Cited

By Bastarache J.

Considered: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; **explained:** *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140; **applied:** *Whiten v. Pilot Insurance Co*., [2002] 1 S.C.R. 595, 2002 SCC 18; *Walker v. Ritchie*, [2006] 2 S.C.R. 428, 2006 SCC 45; **referred to:** *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38; *Minott v. O'Shanter Development Co.* (1999), 168 D.L.R. (4th) 270; *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986; *Bramble v. Medis Health and Pharmaceutical Services Inc*. (1999), 214 N.B.R. (2d) 111; *Byers v. Prince George (City) Downtown Parking Commission* (1998), 53 B.C.L.R. (3d) 345; *Fidler v. Sun Life*

Assurance Co. of Canada, [2006] 2 S.C.R. 3, 2006 SCC 30; *Addis v. Gramaphone Co.*, [1909] A.C. 488; *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673; *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085; *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4.

By LeBel J. (dissenting in part on the appeal)

Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; *St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15.

Statutes and Regulations Cited

Ontario Human Rights Code, R.S.O. 1990, c. H.19.

APPEAL and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Rosenberg, Goudge and Feldman JJ.A.) (2006), 82 O.R. (3d) 161, 274 D.L.R. (4th) 107, 216 O.A.C. 3, 52 C.C.E.L. (3d) 165, [2006] C.L.L.C. ¶230-030, [2006] O.J. No. 3891 (QL), 2006 CarswellOnt 5885, reversing in part a decision of McIsaac J. (2005), 40 C.C.E.L. (3d) 258, [2005] C.L.L.C. ¶230-013, [2005] O.J. No. 1145 (QL), 2005 CarswellOnt 1131. Appeal allowed in part, LeBel and Fish JJ. dissenting in part. Cross-appeal dismissed.

Earl A. Cherniak, *Q.C.*, *Jasmine T. Akbarali* and *Roslynn J. Kogan*, for the appellant/respondent on cross-appeal.

Hugh R. Scher, for the respondent/appellant on cross-appeal.

Philippe Dufresne, for the intervener the Canadian Human Rights Commission.

Anthony D. Griffin, for the intervener the Ontario Human Rights Commission.

Sarah Lugtig, for the intervener the Manitoba Human Rights Commission.

George Avraam and *Mark Mendl*, for the intervener the Alliance of Manufacturers & Exporters Canada.

Stuart E. Rudner and *Stephen Rotstein*, for the intervener the Human Resources Professionals Association of Ontario.

Chris G. Paliare and *Andrew K. Lokan*, for the intervener the National ME/FM Action Network.

Frances M. Kelly and *Gwen Brodsky*, for the intervener the Council of Canadians with Disabilities.

Susan Ursel and *Kim Bernhardt*, for the intervener the Women's Legal Education and Action Fund.

Debra M. McAllister and *Ivana Petricone*, for the intervener the Ontario Network of Injured Workers' Groups.

The judgment of McLachlin C.J. and Bastarache, Binnie, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

BASTARACHE J. —

1. <u>Overview</u>

[1] On March 29, 2000, after 14 years of employment, the respondent, Kevin Keays, was terminated from his employment at Honda Canada Inc. ("Honda"). Keays sued for wrongful dismissal. The trial judge found that Keays was entitled to a notice period of 15 months. He then considered additional damages dependent on the manner of dismissal (the so-called "*Wallace* damages") and increased the notice period to 24 months. In addition, the trial judge awarded punitive damages against Honda in the amount of $500,000, plus costs on a substantial indemnity scale with a 25 percent premium. The Court of Appeal unanimously upheld the finding of wrongful termination as well as the regular damages and the damages for manner of dismissal (*Wallace* damages). It also ordered that the costs premium be reduced. A majority (Goudge J.A. dissenting) ordered that the quantum of punitive damages be reduced from $500,000 to $100,000.

[2] I would allow the appeal in part. The regular damages award should be maintained. The Court of Appeal erred however in maintaining the damages for manner of dismissal (*Wallace* damages) and simply reducing the quantum of punitive damages. These awards, as well as the costs premium, must thus be set aside. I would deny the cross-appeal dealing with the reduction of the award of punitive damages.

[3] Keays started working for Honda in 1986, first on the assembly line and later in data entry. In 1997, his diagnosis of chronic fatigue syndrome ("CFS") was confirmed by a doctor from the Sleep Disorder Clinic in Toronto, Dr. Moldofsky. He ceased work and received disability insurance benefits through an independent insurance provider, London Life Insurance Co., until 1998 when his benefits were discontinued based on the insurer's evaluation that Keays could return to work full-time. Keays' appeal to the insurer on this evaluation was denied. Honda had no part in the decision to terminate Keays' benefits.

[4] Although London Life's decision was based on medical opinion that Keays could return to work without restrictions, Keays continued to absent himself. He was placed in the Honda Disability Program, which permits disabled employees to take absences without the invocation of Honda's attendance policy by confirming that the absence from work is related to the disability. However, Keays missed more work than his diagnosing physician, Dr. Morris, had predicted, and the notes he offered to explain his absences changed in tone leaving the employer to believe that the doctor did not independently evaluate whether he missed work due to disability.

[5] In late 1999, Honda's administrative coordinator, Susan Selby arranged for Keays to see Dr. Lester Affoo, an independent physician hired by Honda, because

of the increasing frequency of absences. In January and February 2000, Keays again experienced increased absences (14 days in total). This prompted Betty Magill, Keays' manager, to raise the issue with Selby. They met on March 3 and decided to ask Keays to meet with Dr. Brennan, an occupational medicine specialist, in order to determine how his disability could be accommodated. After this meeting, but before Honda had a chance to meet with Keays, Keays decided to retain counsel to attempt to mediate his concern that he would ultimately be terminated. On March 17, Honda received a letter from Keays' counsel outlining his concerns and offering to work towards a resolution. Honda did not respond.

[6] On March 21, Magill and Selby met with Keays to explain their concerns about the deficiencies in the doctors' notes, described as "cryptic" by Dr. Reinders, and asked him to meet with Dr. Brennan to determine what could be done to support him at his work. They also discussed the letter they had received from Keays' lawyer a few days earlier and explained that they had not responded to the lawyer because they had a practice of dealing with associates directly, not with third party advocates. At this meeting, Keays agreed to meet with Dr. Brennan. However, the next day he told Honda that, on the advice of counsel, he would not meet with Dr. Brennan without explanation of the purpose, methodology and parameters of the consultation. Keays did not come to work for a week following this incident. Upon his return to work, on March 28, 2000, Selby gave Keays a letter ("March 28 letter") which I think it is useful to reproduce in its entirety.

> As you know, Betty Magill and I met with you on March 21, 2000, to discuss your current employment situation at Honda. After you left the meeting, you returned for some clarification and we had another detailed discussion.
>
> The following is a summary of the matters we discussed:

1. You were told that we have been reviewing your absenteeism as well as the doctor's notes that you had been providing to cover those absences. We discussed your situation with Dr. Affoo who is familiar with your case. In addition, we had Dr. Brennan (a new physician) review your completed medical file. Both doctors advised us that they could find no diagnosis indicating that you are disabled from working.

2. The doctor's notes that you have been providing to cover your absences have provided limited information. The notes were merely repeating what you were telling the doctor. There was no independent diagnosis or prognosis.

3. It was our intention to meet with you following the March break, to discuss our expectations. Before we had a chance to do so, we received a letter from your lawyer dated March 17, 2000. In that letter, your lawyer was asking that you no longer be required to bring notes to support your absences.

4. When we met on March 21, 2000, we advised you that we would no longer accept that you have a disability requiring you to be absent. Dr. Brennan and Dr. Affoo both believe that you should be attending work on a regular basis. In order for Dr. Brennan to get to know you and understand completely your condition, we advised that we would arrange for Dr. Brennan to meet with you. The plan was that Dr. Brennan would then communicate directly with your doctor to effectively manage your condition.

5. Before the meeting ended, you were agreeable to meeting with Dr. Brennan and I was to proceed to schedule the appointment.

The next day, (March 22, 2000) you submitted a letter declining to meet with Dr. Brennan. You requested clarification on the "purpose, the methodology and the parameters of the assessment." Since that date, you have called in sick with return to work date unknown. You returned to work today.

Our position remains as we explained it to you on March 21, 2000. Kevin, we do not accept the need for your recent absence nor do we intend to elaborate further on the purpose of your meeting with Dr. Brennan. This was all explained to you carefully on March 21, 2000. Our position remains the same. We expect you to meet with Dr. Brennan and, we expect you to come to work.

Kevin, we sincerely hope that you will co-operate with our efforts. As you have admitted, your condition has not improved over the past three years and you would do anything to get better and come to work on a regular basis. We are committed to supporting you in a full return to work. We sincerely hope that you will co-operate with us.

Kevin, you must understand that the current situation is unacceptable. If you do not agree to meet with Dr. Brennan, we will have no alternative but to terminate your employment.

[7] Later the same day, Selby telephoned Keays to urge him to reread the letter and re-consider. Keays remained unwilling to meet Dr. Brennan. In accordance with its warning, Honda terminated his employment.

2. Decisions Below

2.1 *Ontario Superior Court of Justice* (2005), 40 C.C.E.L. (3d) 258

[8] McIsaac J. concluded that Honda bore the burden to show just cause for termination and that it had failed to carry that burden. McIsaac J. found that Honda's direction to meet with Dr. Brennan was not reasonable under the circumstances, and that Keays had a reasonable excuse for resisting that direction. The termination was not proportional to his refusal. The trial judge then concluded that Keays was entitled to 15 months' notice based on the principles of *Bardal v. Globe & Mail Ltd.* (1960), 24 D.L.R. (2d) 140 (H.C.J.). Moreover, McIsaac J. decided that, given the "egregious bad faith displayed by Honda in the manner of this termination and the medical consequences flowing therefrom", that notice period should be extended to 24 months (para. 48). Since he had increased the notice period, McIsaac J. did not consider it appropriate to offer Keays an additional award on the basis of intentional infliction of nervous shock/emotional distress.

[9] McIsaac J. determined that the court was without jurisdiction to consider a tort based on whether Honda breached his rights under the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. He accepted, however, that such complaints could constitute "independent actionable wrongs" such as to trigger an award of punitive damages, assuming they also merit punishment (para. 50).

[10] McIsaac J. denied Keays' claim for compensation based on "lost" disability benefits that would have been available from the insurer based on his total disability caused by the wrongful termination. Such relief was unavailable, the trial judge explained, because Keays did not plead aggravated damages. I take it that the trial judge meant by this that Keays had not argued that there was an independent cause of action to support his further claim for true aggravated damages as defined in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[11] McIsaac J. noted that punitive damages are exceptional but he had "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" (para. 57). McIsaac J. attributed to Honda 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" (para. 60). In light of all the circumstances, the trial judge awarded $500,000 in punitive damages.

[12] McIsaac J. awarded costs to Keays on a substantial indemnity basis adding a 25 percent premium which together totalled $610,000.

2.2 *Court of Appeal for Ontario (Rosenberg, Feldman and Goudge (dissenting in part) JJ.A.)* (2006), 82 O.R. (3d) 161

[13] The Ontario Court of Appeal dismissed the appeal. Goudge J.A., writing for the court, except with respect to the quantum of punitive damages, noted that heavily fact-laden conclusions by the trial judge were entitled to substantial deference. In particular, Goudge J.A. perceived no reason to interfere with the trial judge's

conclusions that the order to see Dr. Brennan was unreasonable, that Keays had a reasonable excuse for not complying with the order, and that the dismissal of Keays was a disproportionate response to his alleged insubordination and therefore was done without just cause. Goudge J.A. also upheld the trial judge's conclusions regarding the appropriate notice period required.

[14] Goudge J.A. wrote for the court regarding the availability of punitive damages. He cited *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, 2001 SCC 38, for the proposition that acts of discrimination in breach of human rights legislation may serve as a separate actionable wrong so as to give rise to a punitive damages award in a wrongful dismissal case. Goudge J.A. rejected Honda's argument that the Ontario *Human Rights Code* offers a complete remedial scheme that permits punitive damages only in the event of prosecution with the written consent of the Attorney General and only to a maximum fine of $25,000. Goudge J.A. thus upheld the trial judge's finding of an independent actionable wrong. Given Honda's conduct, an award of punitive damages was a rational response on the part of the trial judge.

[15] With respect to the quantum of punitive damages, Goudge J.A. wrote for himself alone. He noted that an appellate court should review the quantum awarded by asking whether the amount was rationally required in all the circumstances to punish the defendant's misconduct. Goudge J.A. concluded that $500,000 in punitive damages did not exceed what was rationally required to punish Honda.

[16] Once again writing for the court, Goudge J.A. discussed Honda's argument that the trial judge created a reasonable apprehension of bias, requiring a new trial. He

acknowledged that the trial judge used "several colourful metaphors" but rejected allegations that this reflected a want of fairness or impartiality (para. 75).

[17] With regard to costs, Goudge J.A. noted that he would reduce the premium to $77,500 from $155,000. He dismissed the cross-appeal.

[18] Rosenberg J.A. wrote for the majority on the question of the quantum of punitive damages, which he reduced to $100,000. He did so because he believed that the trial judge had relied on findings of fact not supported by the evidence and because the award failed to accord with the fundamental principle of proportionality. In particular, Rosenberg J.A. found no evidence of a protracted corporate conspiracy. The trial judge also referred to "five years" of outrageous conduct whereas the case involved a mere seven-month period. According to Rosenberg J.A., a punitive damage award on the scale imposed by the trial judge in this case could be justified only by extraordinary circumstances. He used *Whiten v. Pilot Insurance Co*., [2002] 1 S.C.R. 595, 2002 SCC 18, as a comparison and noted (at para. 110) that a comment from that case regarding the fact that "it takes a large whack to wake up a wealthy and powerful defendant to its responsibilities" had been taken by the trial judge out of context. Bearing in mind the trial judge's findings that were supported by the evidence, and especially evidence pointing to conduct by Honda suggesting planned and deliberate attempts to intimidate and then dismiss a vulnerable employee, Rosenberg J.A. concluded that an award in excess of those awarded in other wrongful dismissal cases was appropriate. He saw an award of no more than $100,000 as justified. He reduced the punitive damages award accordingly. In all other respects, Rosenberg J.A. concurred with Goudge J.A.

3. Analysis

[19] This appeal raises a number of important issues related to the proper allocation of damages in wrongful dismissal cases. Before assessing the validity of the separate heads of damages awarded by the trial judge and the Court of Appeal, it is essential to point out, as will be later demonstrated, that the trial judge made a number of palpable and overriding errors, some of which are mentioned by Rosenberg J.A. Two errors in particular have, in my view, coloured the trial judge's judgment, making other findings and inferences suspect. The trial judge first found that Honda's "misconduct" was "planned and deliberate and formed a protracted corporate conspiracy" (para. 60). As concluded by the Court of Appeal, and as will be further discussed below, there is simply no evidence to support the trial judge's allegation of a conspiracy. Secondly, the trial judge insisted that the "outrageous conduct" had continued for five years when in fact the problem period was no more than seven months. He therefore was considering the wrong period when dealing with Keays' conduct; this error was seemingly attributable to the fact that he considered the cancellation of Keays' long-term benefits by London Life to be a relevant factor in assessing the conduct of Honda, while all evidence points to the fact that the decision was entirely independent of Honda.

[20] The remaining analysis will reveal more palpable and overriding errors of fact. However, the above examples alone would suffice to question carefully the factual basis for the trial judge's conclusions. I am therefore compelled to review the record in some detail in my analysis.

[21] Beyond creating the need to address the many overriding and palpable errors of the trial judge, this appeal presents the Court with the opportunity to clarify and redefine some aspects of the law of damages in the context of employment.

[22] First, I would like to clarify what factors should be considered when allocating compensatory damages in lieu of notice for wrongful dismissal.

[23] Second, a review of the basis for and calculation of damages for conduct in dismissal must be undertaken.

[24] Third, in considering the allocation of punitive damages in this case, I conclude that it is not necessary to reconsider whether breaches of the Ontario *Human Rights Code* are independent actionable wrongs for the purposes of punitive damages. I will however discuss the need to avoid overlap of damages for conduct in dismissal and punitive damage awards.

3.1 *General Damages: The 15-Month Notice Period*

[25] After finding that Keays had been wrongfully dismissed, the trial judge determined that he was entitled to an award of damages reflecting the need for 15 months' notice. In doing so, he followed *Bardal* and *Minott v. O'Shanter Development Co.* (1999), 168 D.L.R. (4th) 270 (Ont. C.A.), at p. 293, wherein it was held that an appropriate notice period is to be determined in consideration of factors including, but not limited to, the character of the employment, length of service, the age of the employee and the availability of other employment. In arriving at 15 months, McIssac J. pointed to: Honda's "flat" (i.e., egalitarian) management structure as limiting the

effect of Keays' lower position in Honda's hierarchy; the fact that Keays had specialized training to compensate for his lack of formal education; his long service; and the lack of comparable employment in Alliston. The Court of Appeal agreed with this assessment.

[26] On appeal before this Court, Honda did not contest the finding of wrongful dismissal. However, Honda argued that the 15-month notice period allocated by the trial judge was excessive because he failed to conduct a proper analysis of Keays' job functions. Specifically, Honda claimed that an analysis of Keays' job functions shows that his responsibilities were minimal and that he spent a large percentage of his time on data entry. According to Honda, in view of Keays' 14 years of service, his little formal education and the character of his employment, 8 to 10 months would have been appropriate. The fact that Keays' had no management function was crucial.

[27] It is true that Honda's "flat management structure" did not truly illuminate the character of Keays' employment and that this label should not matter: what matters is experience, qualifications and other factors mentioned in *Bardal*.

[28] In determining what constitutes reasonable notice of termination, the courts have generally applied the principles articulated by McRuer C.J.H.C. in *Bardal*, at p. 145:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant.

[29] These four factors were adopted by this Court in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986. They can only be determined on a case-by-case basis.

[30] It is true that there has been some suggestion that a person's position in the hierarchy should be irrelevant to assessing damages for wrongful dismissal (see *Bramble v. Medis Health and Pharmaceutical Services Inc.* (1999), 214 N.B.R. (2d) 111 (C.A.), and *Byers v. Prince George (City) Downtown Parking Commission* (1998), 53 B.C.L.R. (3d) 345 (C.A.). The traditional assumptions about the relevance of a person's position in the hierarchy was not directly challenged in this case. It will therefore suffice to say here that Honda's management structure has no part to play in determining reasonable notice in this case. The "flat management structure" said nothing of Keays' employment. It does not describe the responsibilities and skills of that worker, nor the character of the lost employment. The particular circumstances of the individual should be the concern of the courts in determining the appropriate period of reasonable notice. Traditional presumptions about the role that managerial level plays in reasonable notice can always be rebutted by evidence.

[31] This position is consistent with the original formulation of the *Bardal* test where McRuer C.J.H.C. stated:

> There can be no catalogue laid down as to what is reasonable notice in particular classes of cases. [Emphasis added; p. 145.]

[32] No one *Bardal* factor should be given disproportionate weight. In the present case, the trial judge erred in applying one of the factors, alluding to the flat management structure, rather than examining the actual functions of Keays. Despite

this error, the 15- month notice period is entitled to deference since, on the entirety of the circumstances here, there is no basis to interfere with the conclusions of the trial judge. Keays was one of the first employees hired at Honda's plant. He spent his entire adult working life with Honda. He did not have any formal education and suffered from an illness which greatly incapacitated him. All these factors will substantially reduce his chances of re-employment and justify an assessment of 15 months' notice.

3.2 *Damages for Conduct in Dismissal*

[33] In applying *Wallace*, the trial judge concluded that Honda's manner of dismissing Keays was an egregious display of bad faith that warranted an extension of the notice period to 24 months. He made the following findings of fact in support of his award:

- In the letter dated March 28, Honda deliberately misrepresented the views of its doctors.
- Keays was being "set up" when asked to see Dr. Brennan.
- Keays' condition worsened after the dismissal: he became depressed, developed an adjustment disorder for 3-4 months, and has been unable to work since then.
- Honda's decision to cancel the "accommodation" was a form of reprisal for Keays' retaining legal counsel.

[34] The Court of Appeal concluded that given the factual nature of determining whether Honda acted in bad faith, Honda had to demonstrate that the trial judge committed a palpable and overriding error. It concluded that Honda had failed to demonstrate this and that the trial judge's decision was sufficiently supported in the

evidence. I cannot agree with this conclusion. A proper reading of the record shows that Honda's conduct in dismissing Keays was in no way an egregious display of bad faith justifying an award of damages for conduct in dismissal.

[35] As earlier mentioned, it is my view that the trial judge made a number of significant overriding and palpable factual errors that relate directly to the factual matrix that justified, according to him, an award of damages for manner of dismissal (*Wallace* damages). For that reason alone, the decision cannot stand. I will elaborate on this. I note, however, that this case sheds light on the legal problems associated with the allocation of these damages. It is therefore appropriate for this Court to reconsider the *Wallace* approach and make some adjustments.

3.2.1 <u>The Factual Analysis</u>

[36] None of the four foundations accepted by the trial judge for his "*Wallace* award" of damages is valid. I will examine them individually.

3.2.1.1 *The March 28 Letter*

[37] In its submissions to this Court, Honda points out that the trial judge had no basis for concluding that the March 28 letter (set out in para. 6 above) was callous and insensitive. In reviewing the facts and reading the letter, it is clear that Honda was relying on expert advice and simply conveying the information obtained from experts to Keays. The following two paragraphs were the most "contentious" of the letter:

> 1. You were told that we have been reviewing your absenteeism as well as the doctor's notes that you had been providing to cover those

> absences. We discussed your situation with Dr. Affoo who is familiar with your case. In addition, we had Dr. Brennan (a new physician) review your complete medical file. Both doctors advised us that they could find no diagnosis indicating that you are disabled from working.
>
> . . .
>
> 4. When we met on March 21, 2000, we advised you that we would no longer accept that you have a disability requiring you to be absent. Dr. Brennan and Dr. Affoo both believe that you should be attending work on a regular basis. In order for Dr. Brennan to get to know you and understand completely your condition, we advised that we would arrange for Dr. Brennan to meet with you. The plan was that Dr. Brennan would then communicate directly with your doctor to effectively manage your condition. [Emphasis added.]

[38] The trial judge accepted Keays' submission that Honda deliberately misrepresented the positions of both physicians for the purpose of intimidation, excluding his own doctors, and forcing him to meet with Dr. Brennan. The evidence contradicts this finding.

[39] First, Dr. Affoo concluded that Keays was able to work and should try to work as much as possible. He communicated this information to Selby. Dr. Affoo's testimony is clear on this point:

> Q. ... did you have any conversation with anyone at Honda about Mr. Keays?
>
> A. Subsequently I reported back to Associate Services, Susan Selby, as to our meeting. I explained to her that Mr. Keays had been diagnosed with a diagnosis of chronic fatigue syndrome, as he assured me he had. We talked about him missing a lot of time off work, and I explained to her that from Mr. Keays' point of view he didn't feel that - - he felt that, that he was doing his best and that we could expect him to be off work as he has been in the past.
>
> Q. Any other conversation that you recall?
>
> A. Probably within those terms.
>
> Q. Do you recall if you made any suggestion as to whether or not Mr. Keays' condition, as you understood it, warranted absenteeism?

> A. Well, I felt that he was coping quite well at Honda. You know, I discussed - - I told her the fact that, that he was at a desk and so on and so forth, and he seemed to be coping quite well at his work place. I felt that, that in my experience with chronic fatigue one, you know, one wants him to come to work, and , and we would try and get him to work as, as, as much as we can. And certainly, I didn't think he needed to be off work the kind of pattern he had in the past. I felt that, you know, that he could be off - - I felt that he probably would be off work maybe three or four times a month, possibly, from his condition, but with a regimented lifestyle, and you know, with the things that he's being, that he's being treated with my his own physician, that he should be able to do well. [Emphasis added.]

[40] Second, Dr. Brennan communicated to Honda that he was *unable* to diagnose Keays with CFS without meeting with him first. During his examination, Dr. Brennan stated the following:

> I did not accept the diagnosis of chronic fatigue syndrome, largely because I didn't feel that I had all the information. [Emphasis added.]

There is nothing misleading or false with Honda's assertion that both doctors advised that they could find no diagnosis that would bar Keays from working. Dr. Affoo clearly stated that he thought it would be good for Keays to work, and Dr. Brennan clearly could find no diagnosis of CFS without first meeting Keays. Honda was simply relaying the information it received from its experts to Keays. Given this evidence, I do not see how the trial judge could have concluded that Honda was trying to intimidate Keays by twisting the positions of the physicians. The physicians' positions were clear, and Honda had no reason not to accept the expert advice it was receiving. The trial judge made an overriding and palpable error in faulting Honda for relying on the advice of its medical experts.

[41] The trial judge stated, at para. 43 of his decision:

> Although parts of the letter may have been accurate in isolation, when considered in its entirety, it presented a "twisted" view of his condition.

[42] The trial judge gave no reason to explain why, in its "entirety", the letter presents such a view. For a written document to have a certain flavour or sense "in its entirety", there must be indicators that create such a flavour within that document. In this case, the letter contains no such clues. "[I]n its entirety", the March 28 letter simply conveyed to Keays that Honda wanted him to meet with Dr. Brennan because their experts had advised them that his condition did not preclude him from working. The whole context is one in which Honda recognizes that Keays has a disability and that it has to be dealt with; this is an important consideration in determining good faith on the part of Honda.

3.2.1.2 *No "Set-Up"; No "Hardball"*

[43] The trial judge concluded, at para. 45 of his judgment, that Keays was being "set up" for failure because Dr. Brennan had already made up his mind that his condition was bogus. First, I think it is important to note that there is no evidence that Dr. Brennan took on a "hardball" attitude. A careful analysis of the record reveals that Dr. Brennan simply could not, with the information that was provided to him, accept a diagnosis of CFS without first meeting Keays.

[44] The trial judge stated, at para. 45, that a note written by Dr. Brennan to Honda on December 3, 2000 reveals that Dr. Brennan "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" and that "[h]e himself was of the view that it 'may well be a bona fide medical condition', but only in certain 'very limited circumstances'". These assertions alone should not lead one to believe that Dr. Brennan was taking a "hardball" approach to workplace absences. But there is more

that has to be taken into account here. After stating that he believed that chronic fatigue syndrome is a *bona fide* medical condition under very limited circumstances, he continued to say:

> Those circumstances are those as outlined by the Centre for Disease Control (CDC) in Atlanta. The CDC has developed some strict diagnostic criteria for Chronic Fatigue Syndrome (CFS) to aid in its diagnosis and differentiation from depression, fatigue of chronic illness, malingering, multiple rheumatic diseases etc.

[45] Dr. Brennan was thus simply espousing the prevalent approach adopted by the CDC. I do not see how this can be qualified as "hardball", as he was reiterating the information at his disposal. However, even if one were to conclude that Dr. Brennan was taking a somewhat "hardball" approach to workplace absences, Honda cannot be faulted for accepting his expert advice unless a conspiracy exists. As concluded by the Court of Appeal, there simply was no conspiracy to terminate Keays. Rosenberg J.A. correctly stated at paras. 91 and 93 of his reasons that:

> There is no evidence to support the finding of a protracted corporate conspiracy. The appellant accommodated the respondent's increasingly more serious disability over several years. The fact that the company ran a lean operation in which it was difficult to accommodate prolonged absences was not proof of a conspiracy.
>
> . . .
>
> ... There is no evidence to support this conspiracy to interfere with the respondent's relationship with his own physician. In fact, the trial judge's finding on this issue is inconsistent with his broad finding that the appellant intended to dismiss the respondent. There would be no need to "insinuate" Dr. Brennan into the relationship if the company's intent all along was to terminate the employment.

[46] As such, it was not open to the Court of Appeal to accept the trial judge's finding that Keays was being set up when asked to meet with Dr. Brennan. Honda was merely listening to expert advice that can hardly be qualified as "hardball". There is no rational way to justify the conclusion that the request for a meeting between Keays and Dr. Brennan was not perfectly normal in the circumstances.

3.2.1.3 *No Reprisal*

[47] The trial judge committed another overriding and palpable error in concluding that Honda's decision to cancel its accommodation was a form of reprisal for Keays' decision to retain legal counsel. The decision to stop accepting doctors' notes was not reprisal for Keays seeking legal counsel. Rather, as concluded by Rosenberg J.A. in Court of Appeal, at para. 98, Honda was simply seeking to confirm Keays' disability. Here again, it is important to note that Honda does not deny that there is a problem that has to be dealt with in a professional and fair way. As earlier mentioned, the notes had changed in character and were "cryptic" (para. 6 above). Moreover, as stated in para. 5 above, Shelby and Magill met to address the deficiencies in Keays' doctors notes and Keays' absences well before Keays' lawyer sent his letter.

3.2.1.4 *Keays' Condition Worsened*

[48] The trial judge committed an overriding and palpable error in considering Keays' disability subsequent to termination; this was not compensable under the *Wallace* umbrella because there was no evidence that the disability was caused by the manner of termination.

3.2.2 The Legal Analysis

[49] The trial judge's decision in this case highlights the problems we face in dealing with damages for conduct in the context of termination of employment. In particular, it raises questions about the propriety of damages for manner of dismissal, whereby damages are awarded by extending the notice period (*Wallace* damages). This re-evaluation is mandated particularly by this Court's recent decision in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3, 2006 SCC 30.

3.2.2.1 *Current State of the Law*

[50] An action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship in the absence of just cause. Thus, if an employer fails to provide reasonable notice of termination, the employee can bring an action for breach of the implied term (*Wallace*, at para. 115). The general rule, which stems from the British case of *Addis v. Gramaphone Co.*, [1909] A.C. 488 (H.L.), is that damages allocated in such actions are confined to the loss suffered as a result of the employer's failure to give proper notice and that no damages are available to the employee for the actual loss of his of her job and/or pain and distress that may have been suffered as a consequence of being terminated. This Court affirmed this rule in *Peso Silver Mines Ltd. (N.P.L.) v. Cropper*, [1966] S.C.R. 673, at p. 684:

> [T]he damages cannot be increased by reason of the circumstances of dismissal whether in respect of the [employee's] wounded feelings or the prejudicial effect upon his reputation and chances of finding other employment.

[51] Later in *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085, McIntyre J. stated at p. 1103:

> I would conclude that while aggravated damages may be awarded in actions for breach of contract in appropriate cases, this is not a case where they should be given. The rule long established in the *Addis* and *Peso Silver Mines* cases has generally been applied to deny such damages, and the employer/employee relationship (in the absence of collective agreements which involve consideration of the modern labour law régime) has always been one where either party could terminate the contract of employment by due notice, and therefore the only damage which could arise would result from a failure to give such notice.

[52] The Court in *Vorvis* nevertheless left open the possibility of allocating aggravated damages in wrongful dismissal cases where the acts complained of were also independently actionable. McIntyre J. stated at p. 1103:

> I would not wish to be taken as saying that aggravated damages could never be awarded in a case of wrongful dismissal, particularly where the acts complained of were also independently actionable, a factor not present here. [Emphasis added.]

[53] In *Wallace*, Iacobucci J. endorsed a strict interpretation of the *Vorvis* "independently actionable wrong" approach, rejecting both an implied contractual duty of good faith and a tort of bad faith discharge. At para. 73, he said:

> Relying upon the principles enunciated in *Vorvis*, *supra*, the Court of Appeal held that any award of damages beyond compensation for breach of contract for failure to give reasonable notice of termination "must be founded on a separately actionable course of conduct" (p. 184). Although there has been criticism of *Vorvis* ... this is an accurate statement of the law....An employment contract is not one in which peace of mind is the very matter contracted for (see e.g. *Jarvis v. Swan Tours Ltd.*, [1973] 1 Q.B. 233 (C.A.)) and so, absent an independently actionable wrong, the foreseeability of mental distress or the fact that the parties contemplated its occurrence is of no consequence. [Emphasis added.]

[54] This brings us to *Fidler*, where the Court, *per* McLachlin C.J. and Abella J., concluded that it was no longer necessary that there be an independent actionable wrong before damages for mental distress can be awarded for breach of contract, whether or not it is a "peace of mind" contract. It stated at para. 49:

> We conclude that the “peace of mind” class of cases should not be viewed as an exception to the general rule of the non-availability of damages for mental distress in contract law, but rather as an application of the reasonable contemplation or foreseeability principle that applies generally to determine the availability of damages for breach of contract.

This conclusion was based on the principle, articulated in *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145, that damages are recoverable for a contractual breach if the damages are “such as may fairly and reasonably be considered either arising naturally... from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties” (p. 151). The court in *Hadley* explained the principle of reasonable expectation as follows:

> Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. [p. 151]

[55] Thus, in cases where parties have contemplated at the time of the contract that a breach in certain circumstances would cause the plaintiff mental distress, the plaintiff is entitled to recover (para. 42 of *Fidler*; p. 1102 of *Vorvis*). This principle was

reaffirmed in para. 54 of *Fidler*, where the Court recognized that the *Hadley* rule explains the extended notice period in *Wallace*.

> It follows that there is only one rule by which compensatory damages for breach of contract should be assessed: the rule in *Hadley v. Baxendale*. The *Hadley* test unites all forms of contractual damages under a single principle. It explains why damages may be awarded where an object of the contract is to secure a psychological benefit, just as they may be awarded where an object of the contract is to secure a material one. It also explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law: see *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701. In all cases, these results are based on what was in the reasonable contemplation of the parties at the time of contract formation. [Emphasis deleted.]

[56] We must therefore begin by asking what was contemplated by the parties at the time of the formation of the contract, or, as stated in para. 44 of *Fidler*: "what did the contract promise?" The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.

[57] Damages resulting from the manner of dismissal must then be available only if they result from the circumstances described in *Wallace*, namely where the employer engages in conduct during the course of dismissal that is "unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive" (para. 98).

[58] The application of *Fidler* makes it unnecessary to pursue an extended analysis of the scope of any implied duty of good faith in an employment contract. *Fidler* provides that "as long as the promise in relation to state of mind is a part of the

bargain in the reasonable contemplation of the contracting parties, mental distress damages arising from its breach are recoverable" (para. 48). In *Wallace*, the Court held employers "to an obligation of good faith and fair dealing in the manner of dismissal" (para. 95) and created the expectation that, in the course of dismissal, employers would be "candid, reasonable, honest and forthright with their employees" (para. 98). At least since that time, then, there has been expectation by both parties to the contract that employers will act in good faith in the manner of dismissal. Failure to do so can lead to foreseeable, compensable damages. As aforementioned, this Court recognized as much in *Fidler* itself, where we noted that the principle in *Hadley* "explains why an extended period of notice may have been awarded upon wrongful dismissal in employment law" (para. 54).

[59] To be perfectly clear, I will conclude this analysis of our jurisprudence by saying that there is no reason to retain the distinction between "true aggravated damages" resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination. Damages attributable to conduct in the manner of dismissal are always to be awarded under the *Hadley* principle. Moreover, in cases where damages are awarded, no extension of the notice period is to be used to determine the proper amount to be paid. The amount is to be fixed according to the same principles and in the same way as in all other cases dealing with moral damages. Thus, if the employee can prove that the manner of dismissal caused mental distress that was in the contemplation of the parties, those damages will be awarded not through an arbitrary extension of the notice period, but through an award that reflects the actual damages. Examples of conduct in dismissal resulting in compensable damages are attacking the employee's reputation by declarations made at the time of dismissal, misrepresentation regarding the reason for the decision, or dismissal meant

to deprive the employee of a pension benefit or other right, permanent status for instance (see also the examples in *Wallace*, at paras. 99-100).

[60] In light of the above discussion, the confusion between damages for conduct in dismissal and punitive damages is unsurprising, given that both have to do with conduct at the time of dismissal. It is important to emphasize here that the fundamental nature of damages for conduct in dismissal must be retained. This means that the award of damages for psychological injury in this context is still intended to be compensatory. The Court must avoid the pitfall of double-compensation or double-punishment that has been exemplified by this case.

3.2.2.2 *Application of the Revised Test to this Case*

[61] I have reviewed the major overriding and palpable errors which undermine the trial judge's finding that Honda acted in "bad faith" when terminating Keays. There was, in my opinion, no such breach and no justification for an award of damages for conduct in dismissal.

3.3 *Punitive Damages*

[62] In *Vorvis*, McIntyre J., for the majority, held that punitive damages are recoverable provided the defendant's conduct said to give rise to the claim is itself "an actionable wrong". This position stood until 2002 when my colleague Binnie J., writing for the majority, dealt comprehensively with the issue of punitive damages in the context of the *Whiten* case. He specified that an "actionable wrong" within the *Vorvis* rule does not require an independent tort and that a breach of the contractual duty of

good faith can qualify as an independent wrong. Binnie J. concluded, at para. 82, that "[a]n independent actionable wrong is required, but it can be found in breach of a distinct and separate contractual provision or other duty such as a fiduciary obligation". In the case at hand, the trial judge and the Court of Appeal concluded that Honda's "discriminatory conduct" amounted to an independent actionable wrong for the purposes of allocating punitive damages. This being said, there is no need to discuss the concept of "actionable wrong" here; this was done in *Whiten*. What matters here is that there was no basis for the judge's decision on the facts. I will therefore examine the facts and determine why punitive damages were not well justified according to the criteria in *Whiten*. I will also discuss the need to avoid duplication in damage awards. Damages for conduct in the manner of dismissal are compensatory; punitive damages are restricted to advertent wrongful acts that are so malicious and outrageous that they are deserving of punishment on their own. This distinction must guide judges in their analysis.

[63] In this case, the trial judge awarded punitive damages on the basis of discriminatory conduct by Honda. Honda argues that discrimination is precluded as an independent cause of action under *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181. In that case, this Court clearly articulated that a plaintiff is precluded from pursuing a common law remedy when human rights legislation contains a comprehensive enforcement scheme for violations of its substantive terms. The reasoning behind this conclusion is that the purpose of the Ontario *Human Rights Code* is to remedy the effects of discrimination; if breaches to the Code were actionable in common law courts, it would encourage litigants to use the Code for a purpose the legislature did not intend — namely, to punish employers who discriminate against their employees. Thus, a person who alleges a breach of the

provisions of the Code must seek a remedy within the statutory scheme set out in the Code itself. Moreover, the recent amendments to the Code (which would allow a plaintiff to advance a breach of the Code as a cause of action in connection with another wrong) restrict monetary compensation to loss arising out of the infringement, including any injuries to dignity, feelings and self-respect. In this respect, they confirm the Code's remedial thrust.

[64] The Court of Appeal, relying on *Mckinley*, concluded that *Bhadauria* only precludes a civil action based directly on a breach of the Code – but does not preclude finding an independent actionable wrong for the purpose of allocating punitive damages. It is my view that the Code provides a comprehensive scheme for the treatment of claims of discrimination and *Bhadauria* established that a breach of the Code cannot constitute an actionable wrong; the legal requirement is not met.

[65] Keays argued in cross-appeal before this Court that the decision in *Bhadauria* should be set aside and that a separate tort of discrimination should be recognized. In *Bhadauria*, Laskin C.J., writing for the Court, held that the plaintiff was precluded from pursuing a common law remedy because the applicable human rights legislation (the Code) contained a comprehensive enforcement scheme for violations of its substantive terms. The subtext of the *Bhadauria* decision is a concern that the broad, unfettered tort of discrimination created by the Court of Appeal would lead to indeterminate liability. Laskin C.J. wrote, at p. 189:

> It is one thing to apply a common law duty of care to standards of behaviour under a statute; that is simply to apply the law of negligence in the recognition of so-called statutory torts. It is quite a different thing to create by judicial fiat an obligation – one in no sense analogous to a duty of care in the law of negligence – to confer an economic benefit upon certain persons, with whom the alleged obligor has no connection ....

The concern that a tort of discrimination does not contain an effective limiting device was raised by interveners in this appeal. Moreover, as noted by the intervener Manitoba Human Rights Commission, jurisdictions outside Ontario have human rights legislation that vests jurisdiction exclusively with the provincial/territorial human rights tribunal. Accordingly, the concern in *Bhadauria* that recognition of a tort of discrimination would be inconsistent with legislative intent is still real.

[66] The Council of Canadians with Disabilities, another intervener, raised the concern that recognition of a tort of discrimination may undermine the statutory regime which, for many victims of discrimination, is a more accessible and effective means by which to seek redress.

[67] This said, there is no need to reconsider the position in *Bhadauria* in this case and deal with Keays' request for recognition of a distinct tort of discrimination. There was no evidence of discrimination to support a claim under s. 5 of the Ontario *Human Rights Code*, therefore no breach of human rights legislation serving as an actionable wrong, as required by Goudge J.A. Furthermore, there was no evidence of conduct meeting the strict requirements in *Whiten*. The trial judge concluded that the accommodation provided by admission to the disability program was itself discriminatory because Keays "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" (para. 53). The trial judge then added that it made little sense to have a disability program and then deter its use by asking for doctors' notes. The association of coaching and the requirement of notes made by the trial judge here is puzzling. The requirement of notes was in effect part of the accommodation because it permitted absences without the possibility of the same

leading to disciplinary action for failing to meet work requirements. There was no detriment in being part of the disability program and being treated differently from persons with "mainstream illnesses". The differential treatment was meant to accommodate the particular circumstances of persons with a particular type of disability and to provide a benefit to them. It is indeed apparent from the record that the program was designed to establish a continuous relation between management and treating physicians and monitor absences in order to establish in particular an expected rate of absences which would not give rise to disciplinary action. The suggestion that the program itself was discriminatory is not supported by the facts.

[68] Even if I were to give deference to the trial judge on this issue, this Court has stated that punitive damages should "receive the most careful consideration and the discretion to award them should be most cautiously exercised" (*Vorvis*, at pp. 1104-5). Courts should only resort to punitive damages in exceptional cases (*Whiten*, at para. 69). The independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages. Another important thing to be considered is that conduct meriting punitive damages awards must be "harsh, vindictive, reprehensible and malicious", as well as "extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment" (*Vorvis*, at p. 1108). The facts of this case demonstrate no such conduct. Creating a disability program such as the one under review in this case cannot be equated with a malicious intent to discriminate against persons with a particular affliction.

[69] The majority of the Court of Appeal upheld the award of punitive damages, but reduced the quantum to $100,000. The findings supporting this decision are

demonstrably wrong and, in some cases, contradict the Court of Appeal's own findings. Before delving into the factual analysis, however, it is worth mentioning that even if the facts had justified an award of punitive damages, the lower courts should have been alert to the fact that compensatory damages were already awarded, and that under the old test, they carried an element of deterrence. This stems from the important principle that courts, when allocating punitive damages, must focus on the defendant's misconduct, not on the plaintiff's loss (*Whiten*, at para. 73). In this case, the same conduct underlays the awards of damages for conduct in dismissal and punitive damages. The lower courts erred by not questioning whether the allocation of punitive damages was necessary for the purposes of denunciation, deterrence and retribution, once the damages for conduct in dismissal were awarded. Be that as it may, we now have a clearer foundation to distinguish between damages for conduct in dismissal and punitive damages.

[70] As earlier mentioned, there was considerable duplication in the award of damages for conduct in dismissal and punitive damages in this case. The discussion of punitive damages must nevertheless begin with a consideration of the conduct attributed to Honda that justified the award.

[71] As earlier mentioned, the main allegation was that Honda discriminated by requiring Keays to bring in a doctor's note to justify each absence when employees with "mainstream illnesses" did not have to do so. The trial judge also found that this requirement had the effect of lengthening absences, ignoring the evidence of Ms. Selby who testified that Honda did not require the employee to produce a doctor's note as a precondition to returning to work. As discussed earlier, employees outside the disability program did not require notes for absences of less than five days but were

subject to discipline for excessive absences (A.R., at pp. 282-83), whereas employees in the program were allowed regular absences without discipline beyond the usual attendance requirement under a system of supervision based on regular contacts with doctors. The object of the disability program is to maintain regular contact with the family doctor in order to support treatment. It allows for disability-related absences, a form of accommodation determined in consultation with doctors. The program requires that medical notes be provided to establish that absences are in fact related to the disability. There is no stereotyping or arbitrariness here (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital général de Montréal*, [2007] 1 S.C.R. 161, 2007 SCC 4, at para. 49). In addition, I accept that the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce.

[72] The trial judge also found the refusal to remove the "coaching" record from Keays' file to be discriminatory, even if there was no evidence of any adverse consequences to the existence of a coaching file. The evidence was that coaching is not a disciplinary procedure and would simply permit entry into the disability program allowing absences without disciplinary consequences (A.R., at pp. 306-14).

[73] The trial judge also based his decision on harassment; he seemed to relate this entirely to a suggestion made by Dr. Affoo that Keays consider taking a position with a light physical component (trial judgment, at para. 55). It is certainly difficult to see a course of conduct in a single incident. Moreover, this was a single suggestion made by an independent expert, never acted upon. I have already dealt with this argument at para. 43 when discussing the damages for conduct in dismissal.

[74] A final basis for the finding that punitive damages were justified is that Honda had "retaliated" against Keays. I have dealt with this at para. 47.

[75] The Court of Appeal pointed to the finding that Honda knew that Keays valued his employment and was dependent upon it for disability benefits. It is no doubt true that Keays valued his job and that he was dependent upon that employment for his disability benefits. However, knowledge of this cannot justify an award of punitive damages. All employees value their jobs. What matters is Honda's conduct with regards to Keays' need for medical attention and special accommodation. In this respect, it was wrong to blame Honda for Keays' loss of disability benefits. London Life's decision to cut off Keays' long-term disability benefits had nothing to do with Honda. It was therefore erroneous to attribute the insurer's decision to Honda and allow for punitive damages on such grounds.

[76] The Court of Appeal found that Honda knew Keays was particularly vulnerable because of his medical condition. However, according to the Court of Appeal's own findings, Honda did not know about the seriousness or true nature of Keays' medical condition because Keays would not facilitate an exchange of information about it. Honda was sceptical about Keays' disability and was taking steps to confirm it. His medical file did not disclose a definitive diagnosis of CFS and Keays refused to meet with Dr. Brennan despite repeated assurances that the meeting was only a "get to know you" session, to be followed by contacts with Keays' personal physician.

[77] Finally, the Court of Appeal pointed to Honda's refusal to deal with Keays' counsel. There is no legal obligation on the part of any party to deal with an

employee's counsel while he or she continues with his or her employer. Parties are always entitled to deal with each other directly. What was egregious was the fact that Honda told Keays that hiring outside counsel was a mistake and that it would make things worse. This was surely a way of undermining the advice of the lawyer. This conduct was ill-advised and unnecessarily harsh, but it does not provide justification for an award of punitive damages.

[78] The evidence and the Court of Appeal's own findings lead me to conclude that Honda's conduct was not sufficiently egregious or outrageous to warrant an award of punitive damages under the *Whiten* criteria. The Court of Appeal's award must thus be overturned.

4. The Cost Premium

[79] The final issue that must be addressed relates to the cost premium. In *Walker v. Ritchie*, [2006] 2 S.C.R. 428, 2006 SCC 45, this Court found that the risk of non-payment of lawyer's fees is not a relevant factor under the Ontario *Rules of Civil Procedure* (Rule 57.01). This decision, which was released after the cost premium was awarded in this case, and Honda's success on this appeal are determinative. Thus, the cost premium should be set aside.

5. Conclusion

[80] The appeal is allowed in part and the cross-appeal is dismissed. The damages for conduct in dismissal and punitive damages awards are set aside. Costs on

this appeal and cross-appeal are awarded to Honda. At other levels, costs should be at a partial indemnity scale and the cost premium set aside.

The reasons of LeBel and Fish were delivered by

[81] LEBEL J. – I have read the reasons of my colleague Justice Bastarache. I agree with him that there was no basis for the claim for punitive damages and that it overlaps with the award of what were formerly known as "*Wallace* damages". I also agree with him that there is a need to review the categories of damages for dismissal. But any revision must reflect the view accepted by this Court that the contract of employment is a good faith contract that is informed by the values protected by and recognized in the human rights codes and the *Canadian Charter of Rights and Freedoms*, particularly in respect of discrimination. As the Court found in *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, the contract of employment often reflects substantial power imbalances. As a result, it must be performed and terminated in good faith, and fairly.

[82] With respect, I believe that on the facts of this case, the award of additional damages for manner of dismissal (formerly "*Wallace* damages") should stand. The trial judge committed no overriding errors in this respect ((2005), 40 C.C.E.L. (3d) 258). Although his review of the facts may not have been flawless, there was a sufficient basis for the findings of bad faith and discrimination in the manner in which the employment of the respondent, Kevin Keays, was terminated by Honda.

[83] After discussing this, I will add a few comments on this Court's judgment in *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, and on its impact on the development of the law of torts.

I. Appellate Review and the Findings of Bad Faith

[84] This Court's jurisprudence has had a significant impact on the review of facts by appellate courts. Indeed, the Court recognizes that it too is bound by the principle of deference to the findings of a trier of fact (*St-Jean v. Mercier*, [2002] 1 S.C.R. 491, 2002 SCC 15, at paras. 37 and 46, *per* Gonthier J.). The trial in the Superior Court of Justice lasted 30 days. The trial judge heard extensive, and often conflicting, evidence about which he made numerous findings of fact. Despite some flaws in his review of the facts, his findings of bad faith and discrimination had an adequate factual foundation. Given the way the issues were addressed in this Court, I will discuss the errors allegedly committed by the trial judge in some detail in order to show that the factual foundation for those findings was adequate.

[85] I have reviewed the errors identified by the majority of the Court of Appeal, as well as those identified by Justice Bastarache to support his conclusion that *Wallace*, or manner of dismissal, damages were not warranted in this case. In my view, several of the findings the majority of the Court of Appeal identified as errors were in fact supported by the evidence. The findings my colleague identifies as errors are also, in my opinion, generally supported by the evidence. I will review each alleged error in turn below.

[86] I agree that the trial judge wrongly associated the termination of Mr. Keays' long-term disability insurance with Honda. The majority of the Court of Appeal properly rejected this finding, as there was no evidence that Honda was involved in the cancellation or in Mr. Keays' failed appeal. The majority of the Court of Appeal also identified the following findings as errors:

1. The appellant's misconduct was "planned and deliberate and formed a protracted corporate conspiracy". The majority found that this was not supported by the evidence.

2. The appellant conspired to interfere with the respondent's relationship with his own physician. The majority found that this contradicted the trial judge's finding that the appellant intended to dismiss the respondent. If it intended to dismiss him, there was no need to introduce Dr. Brennan into the relationship between Mr. Keays and his own physician.

3. The appellant benefited from its misconduct because it rid itself of a "problem associate". The majority could find no evidence to support this conclusion.

4. The appellant's in-house counsel breached the Rules of Professional Conduct of the Law Society of Upper Canada. The majority concluded that at most the behaviour was technical misconduct and that it provided no basis for increasing the punitive damages.

((2006), 82 O.R. (3d) 16, at paras. 91, 93, 96 at 100-101)

[87] In the case of the first finding, it may be that the trial judge exaggerated the extent of Honda's misconduct. However, the evidence supports the trial judge's view that Honda was unfairly skeptical of Mr. Keays' condition and was seeking to justify its skepticism. It should be kept in mind that Honda's intention in seeking to justify its skepticism was clearly: (1) to preclude Mr. Keays from using his condition to justify absences from work and thereby avoiding disciplinary action; and/or (2) to justify the termination of Mr. Keays for any continued absences. In either case, Honda's conduct was to Mr. Keays' detriment.

[88] The second finding, that of interference with the respondent's relationship with his doctor, was also reasonable. As I will explain below with respect to Dr. Brennan's "hardball" approach, the gist of this approach was that Dr. Brennan would be brought in to "second-guess" the opinion of an employee's treating physician. Further, there was a clear conflict between Dr. Brennan's objective – to maximize employee productivity – and the objective of an employee's treating physician – to maximize the individual's well-being. Such a conflict may not always play out. In this case, however, a high potential for conflict arose out of the controversial nature of chronic fatigue syndrome ("CFS") and the difficulty of making a diagnosis.

[89] In my view, it was fair for the trial judge to characterize Honda's conduct as interference with Mr. Keays' relationship with his treating physician. Honda did not accept the diagnosis and the assessments of Mr. Keays' treating physician. Yet, it gave no basis for its skepticism. The characterization of the notes of Mr. Keays' doctor as "cryptic" and as merely "parroting" his complaints is unfair because of the self-reporting nature of his condition. As the trial judge pointed out, if Honda was

skeptical, the first logical step "was to determine if there had been, at any time, any form of legitimate diagnosis for the claim of CFS" (para. 18).

[90] Further, this finding does not contradict the trial judge's conclusion that Honda had intended to terminate Mr. Keays. I do not read the trial judge's reasons as suggesting that Honda intended to terminate Mr. Keays from the outset. Rather, the trial judge refers to Honda's intent to "deprive him of the accommodation he had already earned" (para. 60). That was the primary objective. According to the trial judge, Honda went about this by means of a course of conduct whose purpose was to discourage absences (through intimidation and through the requirement that he provide a doctor's note before returning), and which ultimately resulted in termination when Mr. Keays refused to go along. The implication of the facts as found by the trial judge is that Honda wanted to introduce Dr. Brennan into the process in order to legitimize its conduct. Either Mr. Keays would meet with Dr. Brennan, who would justify Honda's skepticism and avert any further absences, or he would be fired for insubordination (or for continued illegitimate absences) and any need to accommodate him would disappear.

[91] I will now turn to the third finding. If it is accepted that Honda intended to deprive Mr. Keays of any accommodation, then Honda clearly succeeded in this objective by terminating him. It is logical to assume that if Honda intended to deprive him of accommodation, it would in some way benefit from doing so. The facts include concerns about workplace morale and Mr. Keays' ability to perform the duties of his job in accordance with the requirements of Honda's "lean" operation policy. To the extent that Mr. Keays impeded efficiency goals, Honda clearly benefited from his termination.

[92] As regards the fourth finding, I agree after reviewing the record that the trial judge mischaracterized the situation, at least according to the other two Honda employees who testified (Susan Selby and Betty Magill). They stated that they had met with Mr. Keays to discuss the proposed meeting with Dr. Brennan. After Mr. Keays left the room, Ms. Selby and Ms. Magill were paged by Honda's in-house counsel, who wanted to meet with them about an unrelated matter. Counsel came to the room they were in, and Mr. Keays re-entered the room after counsel had arrived. Some discussion about Mr. Keays' situation ensued, although it appears to have been minimal.

[93] In summary, it is my view that the Court of Appeal correctly identified three errors made by the trial judge: (1) his association of Honda with the cancellation of Mr. Keays' long-term disability insurance; (2) his conclusion, based on the date the insurance was terminated, that Honda's course of conduct had lasted five years; and (3) his characterization of the incident involving Honda's in-house counsel as a breach of the Rules of Professional Conduct. However, I disagree with the majority's conclusions in respect of the other alleged errors. These "errors" relate to some extent to the error identified by Justice Bastarache regarding the March 28 letter, which I will now discuss.

A. *The March 28 Letter*

[94] At paras. 37-42 of his reasons, Justice Bastarache explains his conclusion that the trial judge erred in finding that Honda had deliberately misrepresented the positions of Dr. Affoo and Dr. Brennan in its March 28 letter for the purpose of intimidation. He states, at para. 40, that there was "nothing misleading" about the letter. He concludes, at para. 42, that the "letter simply conveyed to Keays that Honda

wanted him to meet with Dr. Brennan because their experts had advised them that his condition did not preclude him from working."

[95] However, there was evidence on which the trial judge could conclude that the letter was misleading. The letter contained the following statement: "Both doctors advised us that they could find no diagnosis indicating that you are disabled from working." The following comment was also made: "we advised you that we would no longer accept that you have a disability requiring you to be absent". Yet, as the trial judge pointed out, Dr. Brennan testified that "he never told Honda that Mr. Keays did not have a disability, only that he was unable to 'verify' one" (para. 43). The trial judge also mentioned the testimony of Dr. Affoo, who agreed with the plaintiff's suggestion that absences of four per month was in the 'ball-park' for an individual who suffered [from] CFS" (para. 43). Moreover, it should be noted that although Dr. Affoo testified, on the basis of his experience with other CFS patients, that four CFS-related absences a month would not be unreasonable, he also said that he could not recall precisely what he told Ms. Selby regarding the rate of absence that could be expected from Mr. Keays. Dr. Affoo merely recalled confirming that "he may be off due to his condition" (A.R., at p. 572).

[96] The trial judge concluded that "the clear implication of this communication was that his condition was 'bogus' and that he was able to attend work without absences" (para. 43). While it is arguable whether the letter implied that Mr. Keays' condition was bogus, it clearly did imply that his condition did not require him to miss work. I am unable to find any evidence that either doctor advised Honda that he believed Mr. Keays' condition was bogus or that Mr. Keays was able to attend work without any CFS-related absences. To the contrary, Dr. Affoo testified that he had

informed Honda that some absences were to be expected. It was therefore open to the trial judge to conclude that the letter was a "misrepresentation of the medical information available to Honda at the time" (para. 43).

B. *Allegations of a "Set-up" and a "Hardball" Approach*

[97] At paras. 43-46, Justice Bastarache rejects the trial judge's finding that Mr. Keays was being "set up" by Honda when it insisted that he meet with Dr. Brennan, as well as his finding that Dr. Brennan took a "hardball" approach to workplace absences. My colleague's bases for rejecting these findings are: (1) that Dr. Brennan was merely relying on the criteria for diagnosing CFS developed by the "Centre for Disease Control ("CDC"); and (2) that Honda cannot be faulted for taking its expert's advice unless a conspiracy existed (and none did). Justice Bastarache concludes that Honda's request that Mr. Keays meet with Dr. Brennan was "perfectly normal in the circumstances" (para. 46). After reviewing the record, in my opinion, the trial judge could reasonably conclude that Dr. Brennan took a "hardball" approach and that Mr. Keays was, at least to a certain extent, being "set up" for failure by Honda's request that he meet with Dr. Brennan.

[98] First, I must point out that Justice Bastarache erroneously associates the trial judge's reference to Dr. Brennan's "hardball" attitude with Dr. Brennan's approach to CFS. In refuting the trial judge's view that Dr. Brennan took a "hardball" approach, my colleague reviews Dr. Brennan's opinion on CFS in order to demonstrate that Dr. Brennan was "simply espousing the prevalent approach adopted by the CDC" (para. 45). However, what the trial judge actually stated was that "the record establishes beyond any debate that Dr. Brennan is of the 'hardball'approach to

workplace absences associated with illnesses or injuries" (para. 45 (emphasis added)). Dr. Brennan's opinion concerning CFS is a separate issue. Although Justice Bastarache makes reference to Dr. Brennan's "'hardball' approach to workplace absences" (at paras. 44 and 45), his only discussion of that approach relates to Dr. Brennan's views on CFS.

[99] Several excerpts from Dr. Brennan's testimony are indicative of a "hardball" approach toward absences, and toward accommodating disabilities generally. In describing his approach to accommodation, Dr. Brennan stated that "the gold standard for accommodating somebody, in fact, is to not to have to accommodate them, meaning that their impairment is not of a nature that would stop them from doing their regular work" (A.R., at p. 618 (emphasis added)). He then went on to describe a process whereby disabled workers are "matched" with duties they can perform despite their impairments. Later in his testimony, Dr. Brennan acknowledged that some people have issues with an "accommodation" that involves being moved to another job they view as less "prestigious" (A.R., at p. 662). He added that this does not affect his recommendation as to the appropriate "accommodation", stating that "... my opinion is based on [a] medical approach or a functional approach. Prestige isn't a medical issue."

[100] These excerpts are troubling. The implication is that Dr. Brennan's objective is to recommend the "accommodation" that is best for Honda, not the one that is best for the employee. Although he suggests that he is only giving a "medical" opinion, his opinion is focussed on maximizing an employee's productivity for Honda in light of the employee's condition. His goal is clearly not to find ways for Honda to make it easier for the disabled employee to do his or her current job. Certainly,

disabilities may make it impossible for individuals to continue in their current positions. But if accommodation is truly a cooperative and collaborative process, it requires give and take on both sides. Dr. Brennan's approach suggests that rather than assisting disabled employees to continue in their current roles, employers can simply place disabled employees in other roles that do not require any true accommodation on the employers' part. This approach makes the disability the employee's problem, not a problem shared with the employer. This is of concern from an equality perspective because it limits the employment options available to disabled persons.

[101] Generally, Dr. Brennan appeared to be of the view that only he can truly ascertain whether an employee has an impairment. He showed skepticism toward the opinions of other doctors and indicated that he would insist on meeting with an employee no matter what was in the employee's medical records, because he needed to assess the person himself in order to assess the employee's "impairment" and determine the appropriate "accommodation". As a doctor, he was able to give a "medical" opinion both about what an individual was capable of doing and about what would be "best" for the individual from a medical perspective. This could easily lead to a situation in which Dr. Brennan's opinion conflicts with the opinion of the employee's treating physician. His objective is not to provide medical care for the individual employee but, as I mentioned above, to maximize productivity. In my view, the above passages provide ample support for the trial judge's view that Dr. Brennan took a "hardball" approach to absences, and to accommodation generally.

[102] It was argued that regardless of Dr. Brennan's approach, Honda cannot be faulted for taking its expert's advice unless a conspiracy existed. The "advice" referred to is purportedly that Dr. Brennan needed to meet with Mr. Keays face to face in order

to accept the diagnosis of CFS. However, the trial judge expressly rejected the argument that it was necessary for Dr. Brennan to meet with Mr. Keays. This was a critical finding in the trial judge's analysis of the wrongful dismissal claim. The trial judge found that, given the numerous references to CFS in Mr. Keays' medical file as well as his lengthy period of CFS-related disability, there was no need for Mr. Keays to meet with Dr. Brennan "to resolve [his] attendance defaults" (para. 18).

[103] Mr. Keays was concerned about meeting with Dr. Brennan because of his previous experience with his insurer. The insurer had required him to meet with its doctor for an assessment, after which his long-term disability insurance was terminated even though his own physician was still of the view that he was not able to return to work. Mr. Keays feared that a similar situation would occur in which Dr. Brennan would not accept that he had to miss work due to his CFS, and that this would have negative implications for his continued employment at Honda. It appears that the trial judge referred to Dr. Brennan's "hardball" approach in order to validate Mr. Keays' concern that Dr. Brennan would not accept his need for CFS-related absences. There was some evidence that Honda knew (and approved) of Dr. Brennan's approach. Ms. Selby testified that Dr. Brennan "had a very good reputation, from what I was told, in terms of dealing with workplace absences and a fresh approach, fresh start" (A.R., at p. 449).

[104] The trial judge's main point appears to be that Honda was relying on Dr. Brennan and his approach to "deal with" Mr. Keays and his absences. In other words, Honda was relying on Dr. Brennan to legitimize its view that the absences were not warranted. In light of the evidence, this conclusion was not unreasonable.

[105] In regard to the issue of whether Mr. Keays was being “set up”, Dr. Brennan testified that he was asked by Susan Selby to review Mr. Keays’ file and “provide an opinion as to whether there was a proven impairment and whether he should be attending work” (A.R., at p. 624). This suggests that before involving Dr. Brennan in the case, Honda already harboured suspicions about the legitimacy of Mr. Keays’ condition. Further, Honda cancelled its accommodation of Mr. Keays’ condition at the same time as it urged Mr. Keays to meet with Dr. Brennan (the trial judge referred specifically to this fact at para. 29). It was therefore not unreasonable for the trial judge to conclude that the purpose of the meeting was to confirm Honda’s view that the absences were not justified. I will discuss this further below with respect to reprisal.

[106] Finally, although it was suggested that Dr. Brennan was consulted in order to confirm the diagnosis of Mr. Keays’ condition, the testimony of Ms. Magill and Ms. Selby is unclear in this regard. At several points, they suggested that Dr. Brennan was consulted in order to obtain his opinion on whether Mr. Keays was able to work on a more regular basis (i.e. without CFS-related absences), not on whether Mr. Keays had a *bona fide* medical condition. Ms. Magill testified that the purposes of having Mr. Keays meet with Dr. Brennan were threefold: first, simply to review Mr. Keays’ medical file with him in person and to discuss his condition, his symptoms and their impact on his work; second, to develop a treatment plan that was to be coordinated with Mr. Keays’ own physician; and third, to review and assess any restrictions on Mr. Keays’ ability to work and to consider alternative roles for him at Honda (A.R., at pp. 402-3). Ms. Magill stated that Dr. Brennan had not reached a conclusion on Mr. Keays’ condition, but had simply reached one about his ability to work (A.R., at p. 406).

[107] Ms. Selby denied that one of the purposes of the meeting was to develop a treatment plan for Mr. Keays that Dr. Brennan was to coordinate with Mr. Keays' physician (A.R., at p. 506). However, she did testify that one of the purposes of the proposed meeting, in addition to sharing information, was to see whether "there was something that Dr. Brennan could do to help support [Mr. Keays] in the future" (A.R., at p. 457). Ms. Selby also testified that Mr. Keays "didn't have restrictions to assess" and therefore denied that one of the purposes of the meeting was to assess any restrictions in order to consider an alternative role for Mr. Keays at Honda (A.R., at p. 507).

[108] Ms. Selby testified that she had originally spoken to Dr. Brennan regarding Mr. Keays in order to get his opinion on whether it was "fair to expect Kevin to provide regular attendance" (A.R., at p. 449). However, Dr. Brennan testified that Ms. Selby had asked him to review Mr. Keays' record in order to "provide an opinion as to whether there was a proven impairment and whether he should be attending work" (A.R., at p. 624). Dr. Brennan added that he had proposed to Ms. Selby that he meet with Mr. Keays in order to go over his medical history (A.R., at pp. 667-68). Both Ms. Magill and Ms. Selby stated that Mr. Keays was told that the purpose of the meeting was to review his file and share information (A.R., pp. 341 and 503).

[109] I raise the purpose of the meeting as a concern in relation to the set-up issue, because the record shows an apparent lack of candour in what Mr. Keays was told about the purpose of the meeting. The testimony of Ms. Magill, Ms. Selby and Dr. Brennan is somewhat conflicting, so the precise purpose of the meeting remains unclear. Dr. Brennan's testimony suggests that the meeting was held in response to Ms. Selby's request to verify whether there was a "proven impairment" and whether

Mr. Keays' absences were justified. Yet, this does not seem to be what Mr. Keays was told. Although Ms. Magill mentioned some other purposes, none of these were communicated to Mr. Keays either. If there was a lack of candour, this might support the trial judge's view that Mr. Keays was being "set up."

C. *Reprisal*

[110] At para. 47, Justice Bastarache rejects the trial judge's finding that Honda had cancelled Mr. Keays' accommodation as a reprisal for his having retained legal counsel. Justice Bastarache suggests that "Honda was simply seeking to confirm Keays' disability". He also notes that Mr. Keays' superiors had met to address the deficiencies in his doctors' notes "well before Keays' lawyer sent his letter."

[111] In my view, the timing of the cancellation and of the insistence that Mr. Keays meet with Dr. Brennan is suspect. The letter from Mr. Keays' counsel was dated March 16. In it, counsel requested that Mr. Keays be exempted from providing a doctor's note for each absence before returning to work. This was a request for a more appropriate accommodation of Mr. Keays' disability. Honda's response to Mr. Keays' request that he be exempted from providing doctors' notes was to preclude him from claiming *any* disability-related absences. It was at a meeting on March 21 that Honda told Mr. Keays that it would no longer accept that he had a disability requiring him to be absent and that he would have to meet with Dr. Brennan in order to "manage" his condition.

[112] I disagree that it was a palpable and overriding error for the trial judge to conclude that the cancellation was, at least in part, a reprisal for Mr. Keays' attempt

to assert his right to proper accommodation under the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19. Instead of considering Mr. Keays' position, Honda denied any need for his continued absences. I do not see how this could be seen as an attempt by Honda "to confirm Keays' disability". Honda stated expressly in the March 28 letter that it no longer accepted that he had a disability requiring absences. Further, even if Honda was suspicious of Mr. Keays' condition, the fact that such concerns had been raised prior to the March 21 meeting does not, in my view, explain or justify the unilateral cancellation, on such short notice, of the minimal accommodation that had been provided.

D. *Keays' Worsened Condition*

[113] Justice Bastarache also rejects the trial judge's consideration of Mr. Keays' worsened condition because he rejects the conclusion that Honda acted in bad faith. As I explained above, I question the reasoning that leads him to reject the trial judge's findings of fact. In my view, the impugned findings of fact were supported by the evidence. Given my view that Honda did act in bad faith, Mr. Keays' worsened condition following his termination is relevant to the assessment of *Wallace* damages.

II. Reconsidering the Issue of *Wallace* Damages

[114] In his reasons, Justice Bastarache clarifies the proper approach to assessing *Wallace* damages in a wrongful dismissal action. As I mentioned above, his review is a necessary and welcome restatement of the law on damages for wrongful dismissal. Justice Bastarache explains that *Wallace* damages will be available where "the manner of dismissal caused mental distress that was in the contemplation of the parties"

(para. 59). But because this Court held in *Wallace* that employers have an obligation of good faith and fair dealing when dismissing employees "and created the expectation that, in the course of dismissal, employers would be 'candid, reasonable, honest and forthright with their employees'" (para. 58), an employer's failure to properly discharge that obligation makes it foreseeable that a dismissal might cause mental distress. A failure to show good faith may therefore justify an award of compensatory damages. The instant case is a case in point.

[115] There is ample evidence to support the trial judge's conclusion that Honda acted in bad faith. Several aspects of Honda's conduct are particularly persuasive in this regard. Most notable is the misleading nature of the March 28 letter, which indicated that, according to Dr. Affoo and Dr. Brennan, Mr. Keays did not have a disability requiring him to be absent from work. The clear implication was that Mr. Keays' recent absences were unrelated to his disability or, at the very least, that they were medically unnecessary. A further implication, one that was expressly spelled out later in the letter, was that any CFS-related absences from work by Mr. Keays in excess of the normal allowances would result in disciplinary action. In other words, he was no longer eligible to participate in the disability program. The justification given for this decision was the opinion of Honda's medical experts, yet neither doctor had recommended that Mr. Keays be removed from the disability program, nor had they claimed that any CFS-related absences were unjustified.

[116] A further concern is the apparent lack of candour on Honda's part in regard to the purpose of the proposed meeting between Mr. Keays and Dr. Brennan. Neither Ms. Magill nor Ms. Selby provided any justification for their refusal to explain the purpose of the meeting to Mr. Keays other than to say that the purpose had already

been explained to him in person. Yet, as I mentioned above, there was conflicting testimony about the purpose of this meeting. Given the confusion among Honda's own employees, it is understandable that Mr. Keays was still unclear about the purpose and that he sought further clarification. In addition, the failure to provide clarification in writing is somewhat suspicious. Further, given that Mr. Keays was willing to meet with Dr. Brennan if clarification was provided and that Mr. Keays' refusal to meet with Dr. Brennan without such clarification resulted in his dismissal, the refusal to provide it seems unduly harsh.

[117] The nature of the events leading up to Mr. Keays' termination makes it reasonable to conclude that the conduct of Honda surrounding his termination, and not the fact of termination alone, led to his worsened state. Accordingly, an award of damages can be justified in this case on the basis of Honda's conduct and of the harm Mr. Keays suffered as a result. Although, as Justice Bastarache explains, *Wallace* damages are intended to be compensatory, given the lack of evidence on the precise loss Mr. Keays suffered as a result of Honda's conduct, I would uphold the compensation the trial judge granted over and above the 15-month notice period. The quantum of the damages appears reasonable and would give Mr. Keays adequate compensation.

III. *Bhadauria* and Tort Law

[118] I agree that it is not necessary to reconsider *Bhadauria* in the present appeal. But in my opinion Laskin C.J. went further than was strictly necessary in *Bhadauria*. The main thrust of the decision was that Ms. Bhadauria did not have a legally protected interest at common law that had been harmed by the defendant's

allegedly discriminatory conduct (pp. 191-92). However, rather than stop there, Laskin C.J. went on to hold that *The Ontario Human Rights Code* "foreclose[s] any civil action based directly upon a breach thereof [and] also excludes any common law action based on an invocation of the public policy expressed in the Code" (p. 195). These conclusions imply (and have been interpreted to mean) that any allegations resembling the type of conduct that is prohibited by the Code cannot be litigated at common law. The Code covers a broad range of conduct in promoting the goal of equality. Yet the conduct at issue in *Bhadauria* was limited to the facts of that case. It would have been sufficient to simply conclude that the interest advanced by Ms. Bhadauria was not protected at common law. It was not necessary for this Court to preclude all common law actions based on all forms of discriminatory conduct.

[119] The development of tort law ought not to be frozen forever on the basis of this *obiter dictum*. The legal landscape has changed. The strong prohibitions of human rights codes and of the *Charter* have informed many aspects of the development of the common law.

[120] On the facts of this appeal, discrimination was a troubling aspect of the decision to terminate Mr. Keays. The presence of this discrimination aspect taints the process and has an impact on the issue of whether the employment relationship was terminated in good faith. Justice Bastarache notes that Mr. Keays suffered no detriment in being treated differently from employees with "mainstream" illnesses, because the differential treatment was intended to accommodate him and he is thus implicitly compared with that category of employees (para. 67). However, Justice Bastarache does not inquire into whether this method of accommodation was

appropriate and whether it addressed the difference of the employee, namely his particular disability.

[121] The National ME/FM Action Network, an intervener in this appeal, explained why the accommodation provided by Honda was not appropriate:

> ME/CFS is as yet poorly understood. Those who suffer from it may have highly variable symptoms. There is no laboratory test that can be used to confirm a diagnosis. In this context, attributing undue significance to matters such as doctors' notes which are based upon the patient's own reporting of symptoms, the treating doctor's lack of precision in forecasting absences, and the inability of doctors employed or retained by an employer to "verify" a diagnosis of CFS or to accept CFS as justifying absences, will likely be inimical to the accommodation required under human rights codes.
>
> (Factum, at para. 14)

Although I agree with Justice Bastarache that employers are justified in monitoring the absences of employees, particularly those who are regularly absent from work (at para. 71), he did not consider whether Honda's method of monitoring absences was appropriate (i.e. non-discriminatory). Honda's assertion that its disability program and its treatment of Mr. Keays under that program were non-discriminatory cannot simply be taken at face value.

[122] Mr. Keays had requested to be exempted from the requirement to provide a doctor's note for each CFS-related absence. Honda refused to consider this request, despite the assertion by Mr. Keays' attorney that Mr. Keays was concerned that the note requirement created a barrier to his speedy return to work. Regardless of whether or not the notes created a barrier, it is clear that Honda was skeptical of Mr. Keays' condition because of the "cryptic" nature of his doctors' notes and because his

absences had become more frequent than originally predicted. Yet if variable self-reporting conditions are characteristic of Mr. Keays' disability, it is arguable that Honda acted in a discriminatory manner in subjecting him to the kind of scrutiny he underwent and, in fact, denying him accommodation for his disability.

[123] While monitoring employee absences certainly remains a valid objective, this can be done in a variety of ways. Requiring a doctor's note for each absence is only one alternative. Others include seeking semi-regular updates from an employee's physician regarding the nature of the condition and the course of treatment, checking in with the employee directly, or requiring doctors' notes only when the number of absences exceeds the expected number within a given time frame. Not all monitoring methods may be considered non-discriminatory in every context. As stated by the Ontario Network of Injured Workers' Groups, another intervener in this appeal, "[i]ndividualized accommodation is at the heart of the duty to accommodate and is instrumental in creating a discrimination free workplace" (Factum, at para. 17). In my view, the employer must, in monitoring absences, remain mindful of all the circumstances, which include the nature of the employee's condition. It should not be assumed that all monitoring methods are acceptable and non-discriminatory.

[124] For these reasons, I would allow the appeal in part by setting aside the award of punitive damages and the costs premium. The cross-appeal should be dismissed. Given the outcome and the circumstances of the case, I would award costs to the respondent.

Appeal allowed in part, LEBEL *and* FISH JJ. *dissenting in part. Cross-appeal dismissed.*

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