

PIVOTAL

Integrated HR Solutions

AVOIDING SEXIST LANGUAGE

Word choices and grammatical constructions that ignore or minimize the presence and contributions of one sex in society—at home or school or the workplace, in business or professional spheres, in social or personal relations—may be considered sexist. Many writers and

speakers try to avoid such sexist language that can offend individual whom it is intended to describe. Some try avoiding to use terms with and

Understanding and Preventing Workplace Harassment

Defining Harassment 3

What is Workplace Harassment? 5

**Harassment Consequences for
Organizations 9**

Minimizing the Risk of Harassment 11

**Appendix: Workplace Harassment in Canada
Making Headlines..... 18**

Defining Harassment

Harassment is a form of unlawful discrimination. Under the **Ontario Human Rights Code**, harassment is defined as: “*comments or actions that are unwelcome to you or should be known to be unwelcome.*” Under the Code, individuals are protected against discrimination at work, in housing, when it comes to the provision of goods and services, vocational associations, and trade unions.

Ontario has identified 16 specific “protected grounds” under which a complaint of harassment can be made. Any individual who believes that he/she has been harassed per any of the protected grounds, can make an official complaint to the Ontario Human Rights Commission. Ontario’s prohibited grounds include:

- race
- sex (including pregnancy)
- ancestry
- sexual orientation
- place of origin
- citizenship
- colour
- age
- ethnic origin
- marital status (including same-sex partners)
- citizenship
- disability
- creed (religion)
- family status
- record of offences (employment only)
- receipt of public assistance (housing only)

Harassment can take many forms, such as:

- threats or intimidation
- yelling, screaming, hostile displays of anger and loss of temper
- rude, demeaning, vulgar or belittling comments
- patronizing or condescending behaviour
- unwelcome remarks or jokes about subjects like race, religion, disability or age
- verbal or written abuse including misuse of power
- displaying sexist, racist or other offensive pictures or posters
- sexually suggestive remarks or gestures
- inappropriate physical contact (e.g. touching, patting, pinching)
- vandalism of personal property

How one Canadian arbitrator defined it:

Harassment includes words, gestures, actions which tend to annoy harm, abuse, torment, pester, persecute, bother, embarrass another person; subjecting someone to vexatious attacks, questions, demands or other unpleasantness.

(Stringer Brisbin Humphrey 2005).

What is Workplace Harassment?

Workplace Harassment is harassment perceived in the place of your work, or while conducting your job. This type of harassment, specifically, creates a negative/hostile work environment which interferes with job performance, and may result in your being refused a job, career advancement, or any other type of job reward.

Even if the harassment does not interfere with your job or job rewards directly, every employee has the right to work in a workplace that is free of harassment.

Workplace harassment can be classified into three broad categories:

1. Unwelcome behaviour that demeans, humiliates, or embarrasses.

This includes actions such as touching or pushing, comments such as jokes or name-calling and/or displays such as posters or screensavers. Federal and provincial human rights laws protect individuals from harassment on specifically named protected grounds (e.g., age, religion), but the spirit of the code can extend beyond these identified grounds.

An example of how the “spirit of the law” has been applied can be seen in the conception of “personal harassment”, which is being included in an increasing number of harassment prevention programs. Personal harassment is abusive behaviour that intimidates or excludes another individual and pertains to conduct not specifically based on a prohibited ground. Bullying is considered a form of personal harassment.

2. Unwanted sexual behavior.

The **Ontario Human Rights Commission** defines "Sexual harassment" as a situation in which someone is bothering you by saying or doing unwanted or unwelcome things of a sexual or gender-related nature. This can include:

- inappropriate touching
- making offensive jokes or remarks about women or men
- making sexual requests or suggestions
- staring at or making unwelcome comments about another person's body
- displaying sexually offensive pictures
- being verbally abusive to someone because of their gender

Sexual harassment does not have to be overtly sexual in nature. This specific type of harassment can take the form of “bothering” another person based on gender. Stereotyping can also be a form of sexual harassment.

There are two categories of sexual harassment behaviour which are included in workplace harassment. The first is known as “Quid Pro Quo” and the second is the “Poisoned Work Environment”.

(a) Quid Pro Quo or Sexual Solicitation:

This is where someone's employment benefits are contingent upon meeting sexual demands. For example: a promotion contingent upon providing sexual favours. It is often an attempt by one person to assert power over another.

(b) Poisoned or Hostile Work Environment:

Even if the harassment is not directed towards a person specifically, that person can observe harassing behaviours such that the workplace becomes "poisoned". For example, sexual jokes that are not about you can still make you uncomfortable, and can be considered a form of harassment.

3. Abuse of Authority

When an individual uses their authority at work to unreasonably interfere with another employee or their job, it is considered a form of workplace harassment (*Quid Pro Quo* Sexual Harassment would fall under this category also). Non sexual instances of this abuse may take the form of humiliation, intimidation, threats and coercion.

***Workplace harassment is against the law.
Workers are protected by the Canadian Human Rights Act and the
Canada Labour Code in addition to provincial human rights laws.
The Criminal Code of Canada protects workers from physical or
sexual assault in any situation.***

Example: Abuse of Authority

Mr. Stina had worked for the TTC for 10 years without problems until he came under the supervision of Mr. Zuccaro. An arbitrator ruled that Mr. Stina experienced major depression as a direct result of Mr. Zuccaro's treatment. The following behaviours were specifically cited:

- publicly ordered him back to work after breaks and lunch when other employees were not so ordered
- restricted his access to the use of the phone where other employees were not so restricted
- allowed other employees to leave early the day they started their vacation where as Mr. Stina was not allowed
- followed Mr. Stina to the washroom
- made performance demands on Mr. Stina that were not placed on other employees
- attempted to discipline Mr. Stina where discipline was not merited
- directed Mr. Stino not to talk on the floor when other employees were allowed to

Overall, it was determined through these behaviours that Mr. Zuccaro was supervising Mr. Stina inconsistently and negatively. The arbitrator concluded that Mr. Stina was the victim of abuse and workplace harassment.

What did Mr. Stina get from the TTC as result of his complaint?

1. All of Mr. Stina's sick leave credits were restored.
2. Payment and the difference between sick pay and his regular salary for the time he was off, plus interest.
3. General damages award in the amount of \$25,000.
4. The TTC was ordered to ensure that Mr. Stina has a harassment free workplace including that he have no communication whatsoever from Mr. Zucarro.
5. The TTC was directed that Mr. Stina could move freely within the various workplaces under the TTC umbrella but that if he moved to any area where the supervisor, Mr. Zucarro, was present that the TTC was to move Mr. Zucarro.

(Stringer Brisbin Humphrey, Human Rights Law Alert, 2005)

Harassment Consequences for Organizations

Courts and tribunals are holding employers responsible for ensuring that the workplace is free from all harassment, and that the work culture promotes and maintains workers' mental and physical health. Regardless of who says/does what to whom, ultimately employers are held accountable for all acts of harassment in all work situations, *unless* they can clearly demonstrate that they could not have had reasonable knowledge of the harassment, or that they did everything they could to prevent/stop the harassment.

Courts have imposed a very high standard of care by employers to their employees when it comes to harassment.

Employers control the organization through supervisors/managers (individuals with influence and authority within the workplace). Therefore, employers are liable for acts of harassment carried out by these key employees.

An employer can also be responsible for an employee's actions, where they had or *should* have had knowledge of the harassment, condoned the behaviour, or failed to follow up. An exception may be where the employer made good faith efforts to prevent harassment and took proactive steps to stop and correct the behaviour. In this case, the liability maybe limited to the harasser.

Example: Employer's Responsibility

The first woman promoted as supervisor of a team of cleaners with a Federal department was sexually harassed by her foreman on several occasions. There were numerous conversations of a sexual nature and several physical encounters including attempted sexual intercourse. Most of these incidents took place while the woman was still in her probationary period. She testified at the hearing that she was afraid and intimidated. She continually told the foreman to stop, and that his advances were unwelcome. But the foreman used his authority and threatened repercussions to persuade her to agree to unwelcome acts.

The Department was held responsible for the foreman's acts. The Supreme Court of Canada decided that an employer is responsible for providing a work environment free of harassment. It added that "only an employer can remedy undesirable effects *[of discrimination]; only an employer can provide the most important remedy--a healthy work environment.*" Employers are therefore responsible for all acts of their employees that are in some way related or associated with employment.

The Court also pointed out that although employers will be liable for harassment, whether they knew of it or not, the penalties imposed will be less, or non-existent, for an employer that "*responds quickly and effectively to a complaint...to remedy and prevent recurrence.*" Robichaud v. Treasury Board (Department of National Defence)

CASE STUDY 1

Brenda is the Team Leader for a management consulting firm. Her team includes five members: three women, and two men; one of whom is named John.

While Brenda and John evidently don't have an out-of-work relationship (nor do they claim to have one), they regularly share sexually-charged remarks, back and forth, during business hours. Both Brenda and John are very open about these remarks and, clearly, don't mind them; in fact, they claim to find the banter enjoyable and "good for a positive, creative and fun work environment."

However, the other four team members are not "sharing" Brenda and John's joy and positive feelings. In fact, they find the sexually-charged comments tactless and, in some cases, offensive and embarrassing.

These four team members met privately, discussed their mutual difficulty with the ongoing (and seemingly endless) sexual innuendo, and decided to write a letter to the Human Resources Director. In that letter, they documented ten episodes of what they claimed was "inappropriate workplace language and behaviour." They also quoted sections of the Ontario Human Right Code which they claimed have been breached.

The Human Resource Director met with the four team members for additional fact-finding, and then decided to meet with Brenda and John, separately. Both Brenda and John claimed that they were not bothered by the comments. In fact, both Brenda and John referred to their "open, playful relationship" as a key reason why they enjoyed their job so much, and why they felt supported and "welcomed and valued" at work. They even felt that it made them more productive employees, which was good for the company overall.

Questions to consider:

1. What weight – if any – should be placed on what Brenda and John are saying about this "open, playful relationship"?
2. Does the employer bear any responsibility for not clearly identifying *what* "harassment at work" is, and is not?
3. Can employees who are not directly affected by workplace harassment behaviour claim to be suffering from harassment? Why or why not?
4. What steps can an employer pro-actively take to ensure that this kind of situation does not arise in the first place?

Minimizing the Risk of Harassment

Create a Harassment Policy

Develop and implement a company policy on workplace harassment. Ensure the policy addresses the following key components:

- Statement that workplace harassment is not tolerated and that it is against the law.
- Definition of harassment including examples and descriptions of inappropriate behaviours.
- A clear outline of the internal complaint process. It should include who to talk to, the exact procedures involved, and the timeframe for each step of the process.
- Address how the privacy and confidentiality of the parties involved will be handled.
- Clarify the roles of designated individuals that might become involved such as Human Resources, Senior Management, Union representative, etc. Individuals should know how a complaint might escalate and who has 'final say' from the company regarding whether harassment has occurred.
- Disciplinary actions that the company is willing to take against harassing behaviours.
- There should be a provision that there will be reprisals for lodging a frivolous complaint.
- Information about external resources, e.g., Ontario Human Rights Commission.

Overall, employees should be clear on what is expected of them and what they can expect. The policy should be supported by management, demonstrated by management, and be clear and fair. Do not forget to monitor and review the policy regularly. Learn from any mistakes and continuously improve the policy, so that the latest version always reflects full commitment towards a harassment-free workplace.

Make Sure Employees Know About the Policy

Discuss the policy openly with employees, and ensure the complaint and discipline process is well defined and understood. In order for the policy to work, it must be known to everyone and applied to everyone.

An "on-paper" policy will not suffice. Employees will be confused and potentially misguided as to their rights and responsibilities and more likely to commit and condone harassment in the workplace. Furthermore, the Human Rights Commission demands that employers give life to their policies through knowledge, training and implementation of what has been written on paper.

Go Beyond the Policy

Ensure all managers, supervisors and unions are trained on harassment management and prevention on an on-going basis. If the investigation is to be conducted using internal resources only, the designated individual(s) should be trained on how to conduct a fair and unbiased harassment investigation.

Do not forget to train employees, too. Many employees need information and coaching to ensure that they are acting in accordance with a harassment-free work environment. This is especially true for more 'subtle' forms of harassment, such as joking and stereotypical comments which are often unrecognized as harassing behaviours. Education of employees allows for them to self-monitor and correct their own behaviour before it becomes a complaint. It is far easier and cheaper to educate, than to police and correct.

All complaints should be investigated promptly and thoroughly. Be proactive, and watch for problem signs such as absenteeism, and an unusually high number of transfer requests. In dealing with complaints, it is critical that an organization demonstrates consistency of process, even though each complaint will likely be quite unique.

Effective policies and processes cost far less to develop and maintain than the costs of harassment (sick leave, performance, turnover, complaints, legal fees, fines, etc.). Further, healthy workplaces (i.e., harassment-free) contribute to the happiness, health and overall confidence of employees -- who are likely to be retained over time. These employees are much more likely to have a positive impact on the company's bottom line by way of job commitment and customer service. This can be a distinct advantage in today's competitive marketplace.

Example: Employer Costs

A woman in a trade was paid more than \$100,000 by her employer as compensation for harassment and discrimination at work. She constantly faced sexist remarks, such as "this is a man's job" and "women should be home doing dishes and washing," as well as questions about her bathroom habits. As a result of the ensuing stress, she was forced to take extensive sick leave. Her sick leave resulted in a poor performance appraisal, and she was eventually fired.

Other female employees had also been subjected to sexist comments, and said their supervisors and male peers were rude or uncooperative. Some of them said their male colleagues had lied to them about job-related information

The company had no anti-harassment policy and no staff trained to deal with harassment. As a result of the Canadian Human Rights Commission's investigation and the settlement of the complaint, the company agreed to financial compensation for the complainant. It also agreed to develop an anti-harassment policy, set up an internal redress procedure, train staff to investigate complaints, create some positions whose mandate was to eliminate discrimination, and provide harassment awareness seminars for all its employees.

The Investigation Process

Investigation must take place as soon as possible after receiving the complaint. The process may include reviewing documentation, interviewing complainant(s), alleged harasser(s), and any witnesses to determine the facts.

The next step is to counsel the parties involved on alternative courses of action, with the goal being to resolve the complaint and reach a resolution.

Some complainants will refuse to participate in this process, or are highly reluctant. In these cases, it is very important to acknowledge their fear and concerns. Verbally reinforce the policy and emphasize the “no reprisal” rule.

When investigating, ensure the process is fair by:

1. Making sure that the alleged harasser’s behaviour is actually in contravention of the workplace harassment policy.
2. Investigating thoroughly. Give all parties the opportunity to present their “side of the story” and any supporting evidence.
3. Matching the level of discipline to the alleged harassment.

Make recommendations and provide decisions within the timeframe specified by company policy.

Confidentiality should be maintained to the highest level possible given the situation.

Seeking Resolution

Informal procedures are often the most effective and least costly means of resolving a harassment situation. It is often the preferred choice of the complainant, too.

Informal resolution can take several avenues depending on the situation:

- Complainant tells harasser the behaviour is unwelcome and must stop (may choose to have a witness present). Complainant may choose to write a letter to the harasser instead.
- Third party intervention. Human Resources or Manager can meet with harasser and complainant to help resolve situation. It is critical that any third parties are trained to deal with the situation fairly and sensitively.
- Employee assistance program (EAP). EAP can provide counselling assistance to help a complainant deal with problems related to experiencing harassment.

Complainants can also take more formal steps such as:

- Filing an internal formal complaint as per Company harassment policy. Formal investigation procedures would apply.
- Filing a grievance. Applicable for unionized environment. Would fall under collective agreement guidelines.
- Formal complaints to Ontario Human Rights must be filed within 6 months of incident(s) occurring. An employee can decide to pursue a complaint with Human Rights at any time, and concurrently, with any other resolution seeking process.
- Complaints under the criminal code. In situations where criminal offences have occurred (e.g., rape).
- Civil litigation. Complainant may choose to contact a lawyer for legal advice or possible civil action for damages cause by harassment.

Resolving Complaints

Human Rights Tribunal/Court rulings will be very specific in what is required to resolve the complaint.

If the matter is being handled internally, and an allegation is substantiated, it is important to consider appropriate disciplinary actions and preventative measures. Disciplinary measures are situational. They could range from an apology to a dismissal in extreme situations. It's important that everyone (victim and harasser) is treated fairly.

There is additional legal protection against reprisal for anyone claiming or enforcing their rights and the Human Rights Code. For example, a company cannot fire or discipline an employee for bringing a workplace harassment claim forward.

However, malicious or bad faith complaints can, and should be, subject to discipline.

Bring closure to the process in writing. The individuals that were involved (even as co-workers or witnesses) should be made aware that the matter is closed. The level of detail and the "who needs to know" should be guided by Human Resources or Senior Management.

Developing an Effective Internal Complaints Process

Step 1	<ul style="list-style-type: none"> Complainant should inform alleged harasser that the behaviour is unwelcome and is to be stopped. <i>Stress informal resolution.</i> If the initial attempts are unsuccessful, or if the harassment is serious or threatening, the employee must report issue to their manager and/or Human Resources. Employee should document the incident(s) in writing and keep current notes.
Step 2	<ul style="list-style-type: none"> Complainants should bring issues to their immediate Manager. It should be well known that employees can go directly to Human Resources or Senior Management. This is very important for employees who have an issue with their own Manager. It's critical that the Senior Management team is trained to deal with harassment issues when brought forward.
Step 3	<ul style="list-style-type: none"> All complaints received by Managers should go to Human Resources or Senior Management. Important to keep names of parties involved and circumstances confidential. Disclosure should only occur for investigation purposes or where there is a "business need to know".
Step 4	<ul style="list-style-type: none"> Formal complaints will trigger a formal investigation by Human Resources or designated person. Company must ensure complete documentation of events and conversations are retained. Documentation should include: <ul style="list-style-type: none"> ✓ What happened. ✓ Where it happened. ✓ Who saw it happen (witnesses). ✓ Any other related documents or materials.
Step 5	<ul style="list-style-type: none"> Ruling on the investigation (it should be well known who the final decision maker within the organization is). Disciplinary follow up as required by the ruling. Provide closure to all affected parties.

Wrongful Termination

There have been cases where the courts have found termination for harassment to be wrongful and without just cause. Some of the factors taken into consideration were:

- No company policy in place or one that did not clearly outline consequences of harassing behaviour. Inconsistent enforcement of a policy can also be mitigating.
- Employee was not specifically told their conduct was unacceptable or warned that it would lead to dismissal.
- Employer did not respond to the complaint fast enough.
- The harassment was not “serious”.
- Employer had not provided counselling or support to employees who breached company harassment policies.
- The conduct was considered consensual behaviour and not harassment.

Best Practices Checklist

- Create a harassment policy
 - State that harassment is not tolerated.
 - Define harassment with examples.
 - Outline complaint process.
 - Address confidentiality.
 - Clarify roles.
 - Reassure that there will be no punishment for any complaint made in good faith and that there will be punishment for any complaint made in bad faith.
- Ensure employees are aware of the policy and process.
- Provide training for employees at all levels.
- Follow up on complaints consistently as per the policy.
- Provide closure to all affected parties once the matter has been resolved.
- Review policy and processes on an ongoing basis.

CASE STUDY - 2

Bill had spent fifteen years working his way up from the plant floor to a production manager position with a manufacturing company. His reputation at work was impeccable, and was often viewed as a “model employee”.

One morning, Bill was called into the Plant Manager’s office and informed that a complaint had been made against him for sexual harassment. Since the alleged harassment took place in his division, as part of the company’s processes and initial “fact finding investigation”, Bill was temporarily transferred to a different division.

Despite his solid reputation, however, word in Bill’s temporarily new division soon spread that there was a “harassment problem” in his old division, and that “he was being investigated for harassment.” Very swiftly, word spread “informally” throughout the company.

Two weeks passed, and the result of the fact-finding investigation clarified that Bill was not, in fact, sexually harassing a new female employee, Joanna. Evidently, he had called her “honey”, and Joanna had interpreted this as unwelcome, improper language that was suggestive and sexual in nature. Bill admitted that he had used that term many times in the past with many other female employees (of all ages), and truly didn’t believe that he was being sexist or offensive. However, he did accept that it could be seen as offensive, committed never to use that term again at work under any circumstances, and offered an apology to Joanna, which she accepted.

As the process had been resolved quite “happily” (both parties were satisfied and relieved that it was over), Bill was returned to his original division. Unfortunately, the rumours about his “sexual harassment problem” continued to swirl and refused to fade away. Bill noticed that female employees throughout the company (not just in his own division) would either look at him with hatred and scorn, or refuse to look at him at all, instead obviously choosing to look away or simply walk in another direction.

A few weeks later, Bill filed for extended sick leave, in order to deal with what he claimed was unrelenting stress and anxiety on the job. Two months later, he filed a civil suit against his employer for effectively not protecting him and his well-earned reputation during their sexual harassment investigation. Bill claimed that the process had caused him severe emotional and psychological suffering, and rendered him unable to perform his job.

Questions to consider:

1. What could the employer have done differently – if anything – to anticipate this possible problem and take steps to prevent it?
2. Does an employer have an obligation to “deal with” the informal, underground, “water cooler” communication channels when they investigate harassment?
3. Should the employer have re-assigned Bill? If the harassment was real and extensive, would your answer change? Why/why not?

**Appendix: Workplace Harassment in Canada Making
Headlines**

The RCMP ordered to pay almost 1 million.

Employers have an obligation to ensure that their workplace is free of harassment. The Ontario Human Rights Code states that every employee has a right to freedom from harassment at work by an employer, and agent of the employer or another employee because of race, age, family status, sex and a number of other grounds. In an effort to comply with the Code many employers have

created harassment policies. That is a good thing. A well drafted harassment policy is an important first step in ensuring that an employer's obligations with respect to a harassment-free workplace are met. But a policy is not enough. Employers have to ensure that they, and their employees, comply with the policy. The cost of not complying with a harassment policy can be very significant. A recent court decision in B.C., Sulz v. Attorney General et al, shows not only how costly it can be, but it also shows how courts are becoming more willing to step in and penalize an employer for not complying with an employee's human rights.

Summary of Damages:

Past wage loss - \$225,000
Future wage loss - \$600,000
General damages - \$125,000
Total = \$950,000 + legal costs

According to the decision, Nancy Sulz was employed as a general duty police officer with an RCMP detachment in Merritt, B.C. She received excellent performance evaluations and was looking forward to a long career. Things changed for her when a new commander was assigned to the Merritt detachment. According to the decision, the commander was prone to angry outbursts towards Sulz, and made verbally abusive and cutting comments to her and about her. His negative opinions about Sulz were well known within the detachment and Sulz's reputation among the close-knit RCMP community suffered. As a result, Sulz became so clinically depressed that she had no choice but to accept a medical discharge. She sued among others the commander and the Provincial Crown on behalf of the commander.

The Court found that the Provincial Crown, which in this case was for all intents and purposes the employer, was effectively responsible for the commander's actions, which, in the Court's view, amounted to a negligent infliction of mental suffering. According to the Court, the commander was in charge of the detachment and he was responsible for ensuring that the workplace was free of harassment in accordance with RCMP's own policy. Because of the commander's position and his responsibility for the harassment policy, the commander owed a duty of care to Sulz. In spite of that duty of care, the commander harassed Sulz even when he knew or ought to have known that his "intemperate" and "unreasonable behaviour" was causing serious emotional problems for Sulz. His actions ultimately led to Sulz's depression – an illness that was so severe that it ended her career with the RCMP and it would likely affect her ability to work for the remainder of her life. As a result, the Court awarded Sulz \$950,000 in damages.

From an employment law perspective, the Court's decision is important for a number of reasons. First, and most obviously, the amount of damages that Sulz was awarded is, relatively speaking, huge. Sulz was not a well-compensated executive but, in the RCMP hierarchy, a frontline employee. Second, the claim was based, in part, on sexual harassment. Courts will rarely hear these types of cases; human rights complaints are, generally speaking, reserved for specialized human rights tribunals. Thirdly, the Court applies negligence principles to an employment relationship, effectively imposing on the employer and its managers a duty of care to comply with its own harassment policies and to not harass employees – in this case with angry outburst and cutting comments.

From an employer's perspective the Sulz case is an important reminder of how important it is for the employer and its employees to comply with its own harassment policy. Treating employees fairly and respectfully is simply good business.

(By David Spears LLP, (Taken from Ottawa Business Journal, February 2006)

Honda Canada ordered to pay 500,000 in punitive damages.

In *Keays v. Honda Canada Inc.*, the Ontario Court of Appeal has upheld (although reduced the amount of) a punitive damages award against an employer who wrongfully terminated an employee after failing to adequately accommodate the employee's disability.

Employers need to exercise caution, be sensitive to an employee's disability and, in requesting medical evidence to support a disability claim, in no way suggest that the employee is malingering.

Facts: Kevin Keays was terminated by Honda after fourteen years of employment. He had developed Chronic Fatigue Syndrome, making it difficult for him to maintain regular attendance. Honda directed him to meet with its occupational medicine specialist. Mr. Keays declined to do so without clarification from Honda about the purpose of the meeting, the methodology to be used and the parameters of the assessment. Honda refused to provide clarification and terminated Mr. Keays for disobeying its direction.

Accommodation: Before being terminated, Mr. Keays had been involved in Honda's disability accommodation program. According to the program and based on Mr. Keay's doctor's recommendation, Honda accommodated Mr. Keays by permitting absences from work. However, unlike other employees with "mainstream" illnesses, Mr. Keays was also required to provide a doctor's note validating each absence. Shortly before Mr. Keays was terminated, Honda unilaterally cancelled Mr. Keays' accommodation.

Notice Plus Damages: Following a lengthy trial, Mr. Justice McIsaac concluded that Mr. Keays had been terminated without just cause. He fixed fifteen months as the reasonable notice period and added a further nine months due to Honda's bad faith in terminating Mr. Keays. He also ordered Honda to pay \$500,000 in punitive damages. In

addition, he found Honda's treatment of Mr. Keays constituted discrimination and harassment, contrary to the Ontario Human Rights Code. Honda's conduct was both outrageous and high-handed. Mr. Keays was also awarded costs on a substantial indemnity basis, along with a premium.

Appeal: Honda appealed each of these findings. Justices Goudge, Rosenberg and Feldman heard the appeal. Justice Goudge upheld the trial decision in full, except for the costs premium, which he reduced by half. Justices Rosenberg and Feldman agreed with Justice Goudge on his disposition of all issues except for the quantum of punitive damages, which they reduced from \$500,000 to \$100,000.

Duty to Accommodate: It is clear from both the trial and appellate decisions that the duty to accommodate must be taken seriously and exercised in good faith by an employer. In this case, the imposition of both an extended notice period and punitive damages was based on Honda's approach to its duty to accommodate Mr. Keays. Both the trial and appeal courts found the requirement that Mr. Keays provide medical notes to validate his absences to be discriminatory.

Harassment: They also found such requirement to be insensitive to Mr. Keays' disability, since the requirement itself exacerbated his illness and caused more absences. The courts also found that the employer's actions in requiring the employee to attend a meeting with the company's occupational medicine specialist, who they knew took a "hardball" approach to the employee's type of illness, constituted harassment and was intended to sever the involvement of the employee's own physician in determining his accommodation.

Punitive Damages: Even at the reduced amount of \$100,000, the punitive damages award in this case is very high for a wrongful dismissal case. Justice Rosenberg (of the Court of Appeal) recognized that punitive damages awards in wrongful dismissal cases have historically been modest, generally in the range of \$15,000 to \$50,000 and, rarely, up to \$75,000.

Conduct of Employer: The award of \$100,000 was supported by the following facts:

- the conduct by Honda was found to be planned and deliberate and designed to intimidate and ultimately terminate the employment of a particularly vulnerable employee
- Honda cancelled his accommodation in retaliation for Mr. Keays retaining a lawyer and terminated his employment to avoid its obligation to accommodate his disability
- the company did not reveal an extremely damaging letter from its occupational medicine specialist until very late in the trial
- Honda knew that Mr. Keays valued his employment and was dependent on it for his disability benefits.

Independent Actionable Wrongs: It is also significant that all three of the appeal judges accepted that the punitive damages award could be based on discrimination and harassment as independent actionable wrongs. Although there can be no civil liability for

discrimination and harassment per se, Honda's acts of discrimination and harassment triggered Mr. Keays' termination. These acts alone would give rise to an action for wrongful dismissal, independent of Mr. Keays' disobedience.

Significance: The primary lesson to be taken from this case is to exercise caution when dealing with an employee who requires accommodation for a disability. Specifically, ensure that the manner in which the accommodation is carried out is sensitive to the employee's disability, and avoid terminating an employee for disability-related reasons without consulting with legal counsel. Moreover, when asking for medical evidence to support a disability claim, in no way suggest that the employee is malingering.

- *Osler Update, October 2006 (www.osler.com)*