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COURT OF APPEAL FOR ONTARIO

ROSENBERG, GOUDGE AND FELDMAN JJ.A.

B E T W E E N :	)	
	)	
KEVIN KEAYS	)	**J. Scott Maidment**
	)	**and Lisa Parliament**
	)	**for the appellant**
Plaintiff (Respondent)	)	
	)	
- and -	)	**Hugh R. Scher**
	)	**and Bryan Finlay, Q.C.**
HONDA CANADA INC. operating as HONDA OF CANADA MFG.	)	**for the respondent**
	)	
Defendant (Appellant)	)	**Anthony D. Griffin**
	)	**for the intervener**
	)	**Ontario Human Rights**
	)	**Commission**
	)	
	)	**Heard: April 3, 2006**

On appeal from the judgment of Justice John R. McIsaac of the Superior Court of Justice dated March 17, 2005.

GOUDGE J.A.: (dissenting in part)

INTRODUCTION

[1] Kevin Keays was terminated by Honda Canada Inc. (Honda) on March 29, 2000, after fourteen years of employment. He had developed Chronic Fatigue Syndrome (CFS) and had been directed by his employer to meet with its occupational medicine specialist, Dr. Brennan. He declined to do so without clarification from Honda as to the purpose of the meeting, the methodology to be used, and the parameters of Dr. Brennan's assessment. Honda refused to provide him with such clarification, and terminated him for disobeying its direction.

[2] Keays sued for wrongful dismissal. After a twenty-nine day trial, McIsaac J. concluded that Keays had been terminated without just cause. The trial judge fixed fifteen months as the period of reasonable notice and added a further nine months for the manner of Keays' dismissal. In addition, he ordered $500,000 in punitive damages because he found that Honda's treatment of Keays constituted discrimination and harassment, was contrary to Ontario human rights legislation, and was both outrageous and high-handed. Finally, he awarded Keays costs on a substantial indemnity basis, together with a premium.

[3] Honda appeals each of these findings and, as well, alleges bias on the part of the trial judge. While it is not presented for determination here, the approach required of employers to accommodate employee disabilities is the backdrop for many of the issues raised in this appeal. For the reasons that follow, I have concluded that, with one minor exception concerning the costs premium, I can find no error in the trial judge's conclusions. Nor was he biased. I would therefore dismiss the appeal.

THE FACTS

[4] The respondent started to work for the appellant in 1986, soon after it began operating a new assembly plant in Alliston, Ontario. He began on the production line, but after twenty months joined the Quality Engineering Department. He was selected to receive instruction in the appellant's new global computer system with the expectation that he would train others in it. He was beyond doubt a dedicated and conscientious employee.

[5] Shortly after he commenced work, he began to experience health problems. His resulting absences from time to time caused problems for the lean staffing model used by the appellant. Ultimately he went on disability leave in October 1996, and remained on leave until December 1998, when the appellant's long term disability (LTD) insurer determined that he was able to return to work and terminated his benefits. The trial judge found that the respondent's LTD benefits were wrongly terminated by the insurer following its evaluation of his ability to return to work. The trial judge characterized that evaluation as a farce. In fact, during his absence on LTD, the respondent had been referred by his own doctor to the Director of the Sleep Disorders Clinic at the Toronto Hospital and, in March 1997, had been diagnosed with CFS, according to the criteria recognized by the Centre for Disease Control in Atlanta, Georgia.

[6] After his LTD benefits were terminated, the respondent returned to work, although under the protests of both himself and his treating physician that he was still too sick to do so. He soon began to experience intermittent work absences, that resulted in his being

"coached" by way of a written report, the first step in the appellant's progressive discipline process.

[7] In response to the respondent's continued expressions of concern about the difficulty he was having in maintaining regular attendance because of his illness, the appellant advised him of its program to provide some accommodation for such a disability. In September 1999, the respondent's doctor completed the necessary form for this program. On the form, the doctor made it clear that the respondent suffered from CFS and would likely have to continue to miss about four days of work a month.

[8] Pursuant to its program, the appellant provided some accommodation for the respondent's intermittent absences, thus recognizing, at least at this point, his CFS disability as a legal and medical excuse for those absences. However, the appellant also instituted a requirement at that time that the respondent had to get a doctor's note validating each absence before he could return to work. Employees with "mainstream" illnesses did not face this requirement. Moreover, having to go to the trouble of obtaining these notes had the effect of lengthening each of the respondent's absences.

[9] When the respondent was absent for six days in October 1999, he was asked to see Dr. Affoo, the company doctor. It was not a positive encounter. The respondent testified that the doctor threatened to move him back to the physically demanding production line, which he feared would enormously exacerbate his condition. When the respondent complained about this to his superiors, he was assured only that there was no intention to move him "at that time."

[10] In January and February 2000, the respondent continued to request that his employer remove the "coaching" from his record and revisit the requirement that he provide a medical note for each absence. However, he continued to be "stonewalled" (as the trial judge found) in connection with this requirement, the appellant's acknowledgement of the validity of his disability, and his need for reasonable accommodation. As a result, he retained counsel who wrote to the appellant on March 17, 2000, outlining these concerns in what the trial judge found to be extremely conciliatory terms, and offering to work toward a resolution of their differences.

[11] The appellant did not respond to this letter. Instead, the appellant met with the respondent on March 21, 2000 and asked him to meet with Dr. Brennan, an occupational medicine specialist. The appellant documented the matters discussed at this meeting in a letter to the respondent dated March 28, 2000:

> 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 [the company doctor] who is familiar with your case. In addition, we had Dr. Brennan [the company's occupational medicine specialist] review your complete 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.

[12] The day after the March 21 meeting, the respondent told his employer that on the advice of his lawyer he would not meet with Dr. Brennan until he was provided with clarification of the purpose, the methodology and the parameters of the assessment to be

done by the doctor. This resulted in the following direction to him in the appellant's letter of March 28:

> 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.

[13] The letter concluded with the warning that if the respondent did not meet with Dr. Brennan, he would be terminated.

[14] That is what happened. The appellant was advised of his termination by a co-worker who phoned him at home to tell him that his dismissal had been announced to the department. As a result of being fired, the respondent suffered a three or four month period of post-traumatic adjustment disorder. He has been unable to work since his termination, and has since qualified for a total disability pension from the Canada Pension Plan. That pension was continuing at the time of trial.

THE TRIAL JUDGMENT

[15] The trial judge turned first to the issue of just cause. He found that the appellant's direction that Keays see Dr. Brennan was unreasonable in all the circumstances and, moreover, that it was not made in good faith, but rather, as a prelude to terminating the respondent to avoid having to accommodate his disability. He also found that because of the difficulties the respondent had previously experienced with his employer over his absences, the respondent had good reason not to comply with the direction. Finally, he found that the appellant's response was disproportionate and that the respondent's refusal to see Dr. Brennan without further explanation was not a repudiation of his employment with the appellant. The trial judge therefore concluded that the appellant did not have just cause for terminating the respondent.

[16] The trial judge applied the factors set out in *Bardal v. Globe & Mail Ltd.*, [1960] O.W.N. 253 (H.C.J.) to determine that the respondent was entitled to a reasonable notice period of fifteen months. In addition, the trial judge found that the appellant displayed egregious bad faith in the manner in which it terminated the respondent, and as a result, the respondent suffered significant medical consequences. The trial judge therefore

extended the notice period by nine months to twenty-four months pursuant to *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701.

[17] The trial judge went on to dismiss the following three additional claims for damages made by the respondent: (1) intentional infliction of mental distress; (2) the cause of action of discrimination and harassment; and (3) lost disability benefits.

[18] He then turned to the claim for punitive damages and found that the appellant's course of conduct, culminating in the respondent's dismissal, constituted discrimination and harassment in employment. Further, this violation of the respondent's human rights constituted an independent actionable wrong. The trial judge catalogued a litany of examples of conduct warranting the description of outrageous and high-handed. He concluded that a punitive damages award in the amount of $500,000 was necessary to bring this point home to the appellant.

[19] Finally, the trial judge considered the appellant's motion, brought after final argument but before judgment, to have him step aside because of a reasonable apprehension of bias. He dismissed the motion because he found that it was not sufficiently promptly brought. He therefore found it unnecessary to address the particular allegations of bias.

[20] Following the trial, the trial judge received submissions on costs and issued a supplementary decision in which he awarded costs to the respondent on a substantial indemnity basis. These included the costs of a first attempt to try this case in front of another judge. That trial ended in a mistrial because of the illness of the judge. He based the award in large part on the appellant's conduct. He also added a premium of 25% because of the respondent's tenuous economic circumstances, and the resulting risk undertaken by his counsel for fees and disbursements incurred. The trial judge then fixed the quantum of the respondent's costs at $610,000 inclusive of disbursements and G.S.T.

[21] As I have indicated, the appellant challenges all of these conclusions. The respondent cross-appeals from the dismissal of his three additional claims. I will deal with each of these issues in turn.

ANALYSIS

i) Just Cause

[22] There was no dispute in this court that to establish just cause based on an employee's disobedience of an order, an employer must show that the order was

reasonable in the circumstances. This is perhaps nowhere more important than when the order is given in the context of an employer's obligation to accommodate an employee's disability, a process fundamental to the dignity and equality of persons with disabilities in our society.

[23] The trial judge determined that the order to see Dr. Brennan was unreasonable. As a heavily fact laden conclusion, that finding must be accorded considerable deference on appeal. I see no basis to interfere with it.

[24] The trial judge found that in determining how to address the respondent's absences the first information gap that the appellant had to fill was whether the respondent's doctors had ever made a proper diagnosis of CFS. This would remove any doubts the appellant could reasonably have had about the legitimacy of the respondent's disability. The trial judge determined that it was unreasonable to compel the respondent to meet with Dr. Brennan in order to get this information when all of his medical records were either already available to or obtainable by the appellant and would answer the question best. Moreover, the ostensible basis upon which the respondent was ordered to see Dr. Brennan was that the doctor had already reviewed his file, which if completely accurate would have made the meeting unnecessary.

[25] The trial judge also found that in the circumstances, it was unreasonable to order the respondent to attend the meeting without clarifying its purpose. Again, this finding is beyond challenge in this court. Only a cursory explanation had been given to the respondent (contrasted with the much fuller explanation later offered at trial). Given these facts, the trial judge could properly conclude that the respondent's request for clarification was reasonably made. Its peremptory denial would seem more consistent with the exercise of authority for its own sake than with an attempt to make the accommodation process function in a way that respected the respondent's dignity and equality.

[26] The appellant's letter of March 28, 2000 simply underlines the unreasonableness of the order to meet with Dr. Brennan. It required the respondent to participate in a meeting ostensibly to find out more about his condition. Yet, as the trial judge found, the letter clearly implied that, contrary to its view in 1999, the appellant had now concluded that his condition was "bogus". This prejudgment is inconsistent with the avowed purpose of the meeting, and incompatible with the proper functioning of the process for accommodating disability.

[27] In argument, the appellant sought to defend the mandatory meeting as necessary not just to find out about the respondent's condition but to design an accommodation for the respondent's disability. Despite the assertion in the March 28 letter that he had done

so, Dr. Brennan had in fact not reviewed the respondent's entire medical record. In addition, as the trial judge found, the letter made clear that the appellant had already apparently concluded, without fully reviewing those records, that the respondent's alleged condition was not valid and that intermittent absence, the one accommodation suggested by his own doctors, was impermissible.

[28] In this context, the trial judge concluded that ordering the respondent to meet with a doctor who had expressed skepticism about his diagnosis to design the proper accommodation owed to him, was not reasonable. The factual findings underpinning this conclusion are grounded in the evidence, and there is no reason to interfere with his conclusion. It is important that the accommodation process display more open-mindedness and less prejudgment if disabled employees are to be accorded the dignity and equality to which they are entitled.

[29] The trial judge also found that in all the circumstances, the respondent had a reasonable excuse for not complying with the order. This finding, in essence the corollary of the unreasonable order finding, must also be accorded deference on appeal because of its factual dimension. Moreover, I see no basis to quarrel with it, and for the same reasons. The appellant had just withdrawn the limited accommodation it had been providing for the respondent's disability without acquiring any fresh medical information from him. Despite the professed objective of the proposed meeting with Dr. Brennan, the March 28 letter clearly implied that the appellant had already determined that it did not accept that the respondent suffered from CFS and rejected intermittent absences as an accommodation. Further, the respondent was denied the clarification he sought about the goals of the meeting. Given these facts, I can see no error in the trial judge's conclusion that it was not unreasonable in those circumstances for the respondent to decline to attend such a meeting until further clarification was forthcoming.

[30] The appellant also attacks the trial judge's finding that the appellant's dismissal of the respondent was totally disproportionate to his alleged insubordination and, therefore, was done without just cause.

[31] In my view, this argument also fails. In *McKinley v. B.C. Tel.*, [2001] 2 S.C.R. 161 at paras. 53-57, the Supreme Court of Canada made it clear that an employer's response to employee misconduct must reflect the principle of proportionality. Just cause for the most serious sanction, namely dismissal, requires the most serious misconduct. The Court describes this degree of employee misconduct in a number of different ways: conduct that gives rise to a breakdown in the employment relationship; conduct that is fundamentally or directly inconsistent with the employee's obligations; or conduct that violates an essential condition of the employment contract. In a broad sense, the question

is whether the employee misconduct is irreconcilable with his or her continued employment.

[32] In this case, the trial judge found that the respondent had done nothing to suggest that he was in any way repudiating his contract of employment with the appellant. He had been a dedicated employee for fourteen years who continued to want to contribute when medically able to do so. His refusal to meet with Dr. Brennan was not absolute, but subject only to receiving clarification of the basis for the meeting. Pursuant to its own policies, the appellant had available lesser penalties up to and including suspension for an employee who, in circumstances like these, declined a legitimate direction to play his own necessary part in the accommodation of his disability.

[33] At some stage, termination for insubordination would, of course, be justified. However on the facts as found, I would not interfere with the trial judge's finding that the appellant did not have just cause to simply terminate the respondent.

[34] In summary, the trial judge did not err in finding that the order that the respondent was penalized for disobeying was unreasonable, that he was justified in not complying with it and that, in any event, terminating him was a disproportionate sanction. Therefore, the trial judge properly found that the appellant dismissed the respondent without just cause.

ii) Notice

[35] The trial judge began his consideration of the respondent's reasonable notice entitlement by describing the appellant's relatively flat management structure. He found that its use of a less hierarchal employment model was a factor tending to lengthen the notice period. He then applied the well-known factors in *Bardal*, *supra*, and concluded that in light of the respondent's almost fourteen years of service, and his important team leader role in the Quality Engineering Department, he was entitled to fifteen months' notice.

[36] The appellant argues that the trial judge erred in taking into account its management structure in determining the appropriate notice period. In my view, he did not err in this regard. In *Cronk v. Canadian General Insurance Company* (1995), 25 O.R. (3d) 505 at 536, Morden A.C.J.O. explained that the *Bardal* factors include the employee's level of employment with the employer. The degree to which the employer utilizes a hierarchal organizational structure is relevant to that assessment. An employer who seeks a better, more efficient workplace, by instituting a structure that gives employees' responsibilities more equal worth, cannot expect to entirely escape the consequences of that fact when reasonable notice periods are assessed. Moreover, the

trial judge did not give unreasonable weight to this factor and his assessment of fifteen months' notice is reasonable, in all the circumstances.

iii) Extended Notice

[37] The trial judge applied *Wallace*, *supra*, and found that the notice period should be extended to twenty-four months because of the egregious bad faith displayed by the appellant in the manner of terminating the respondent and the medical consequences he suffered as a result.

[38] The appellant argues that the trial judge erred in finding that it acted in bad faith. In my view, this is a finding of fact that can be successfully attacked only by demonstrating that the trial judge committed a palpable and overriding error. It is not enough that the appellant disagrees with the finding. The appellant has shown no such error.

[39] The trial judge pointed to a number of indicia of bad faith in the termination process. He found that the March 28 letter misrepresented the views of both the company doctor and Dr. Brennan by clearly implying that both doctors thought he was not suffering from a disability but malingering, and by stating that both doctors believed he should be attending work on a regular basis. Neither had come to those conclusions. The trial judge also found that the respondent was being set up for an adverse outcome by being asked to meet with Dr. Brennan. The trial judge concluded, on the basis of Dr. Brennan's own evidence, that he generally practised the "hardball" approach to workplace absences associated with illness. In particular, Dr. Brennan was of the view that regular attendance at work was therapeutic for CFS patients. The order that the respondent meet with Dr. Brennan was the appellant's attempt to subject the respondent to that hardball approach without fully explaining this to him. The trial judge also factored in the appellant's March 21 cancellation of the limited accommodation that the respondent had been receiving. He found that this was a reprisal for the respondent having engaged counsel to advance his human rights, and therefore in contravention of provincial human rights legislation.

[40] These findings of fact are all well supported in the evidence and not open to attack on appeal. They properly ground the finding of bad faith in the appellant's course of conduct that culminated in its dismissal of the respondent. Together with the significant adverse consequences to the respondent, they fully justify an extension of the notice period pursuant to *Wallace, supra*.

[41] While the length of that extension is not an issue before us, I would say simply that what might seem to be a very generous extension must be seen in the circumstances of this employee. He not only shared the vulnerability of any employee at the time of termination but had the added vulnerability of his disability, a condition of which the appellant was aware although reluctant to accept.

iv) Punitive Damages

[42] The appellant also challenges the award of punitive damages in the amount of $500,000. It says that the trial judge erred in finding an independent actionable wrong, in concluding that its conduct was sufficiently reprehensible to warrant punishment, and in assessing the quantum at an exorbitant amount for which there is no rational basis. In my view, none of these arguments can succeed.

[43] The trial judge began his discussion of punitive damages by acknowledging that in a breach of contract case, the recovery of punitive damages requires that the defendant's conduct causing the injury complained of must also constitute an independent actionable wrong. He went on to find that the appellant's course of conduct, culminating in its termination of the respondent, constituted discrimination and harassment of the respondent in his employment and that this contravened his rights under the Ontario *Human Rights Code*, R.S.O. 1990, c. H-19. The trial judge concluded that this met the requirement for an independent actionable wrong.

[44] The appellant argues that this finding is directly contrary to the decision of the Supreme Court of Canada in *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181.

[45] I do not agree. *Bhadauria* determined that a civil action could not be based directly on a breach of the Ontario *Human Rights Code*. Indeed, in this case the respondent made just such a claim, which the trial judge dismissed, albeit reluctantly, by applying both *Bhadauria* and this court's recent application of that decision in *Taylor v. Bank of Nova Scotia*, [2005] O.J. No. 838.

[46] However, in the context of punitive damages, the appellant's conduct is not advanced to support a cause of action for breach of the respondent's human rights, but as an independent wrong actionable by way of wrongful dismissal. What matters is that the appellant's acts of discrimination and harassment triggered the respondent's termination. In fact, the trial judge found that the appellant's course of discriminatory conduct culminated in the most dramatic form of employment harassment, namely the respondent's termination. This would give rise to a cause of action for wrongful dismissal apart altogether from any question of the respondent's disobedience. It is in

this context that the trial judge found the appellant's discriminatory conduct to constitute an independent actionable wrong.

[47] In *McKinley*, *supra* at para. 88, Iacobucci J., writing for the court, made it clear 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. Although there was insufficient evidence to establish discrimination in McKinley, (so that the statement is *obiter* in a technical sense) it leaves little doubt of the Supreme Court's view on the issue of awarding punitive damages in a wrongful dismissal case where discrimination is proven on the evidence.

[48] The jurisprudence of this court is clear that an action for wrongful dismissal can be properly based on a dismissal that constitutes discrimination contrary to human rights legislation. See, for example: *MacDonald v. 283076 Ontario Inc.* (1979), 26 O.R. (2d) 1 (Ont. C.A.); *L'Attiboudeaire v. Royal Bank of Canada*, [1996] O.J. No. 178 (C.A.); and *Gnanasegaram v. Allianz Insurance Co. of Canada*, [2005] O.J. No. 1076 (C.A.). The difference between this and an attempt to base a cause of action directly on a breach of the plaintiff's human rights is underlined in both *L'Attiboudeaire* and *Gnanasegaram*. *Bhadauria* is therefore not the bar the appellant argues it to be.

[49] The appellant also says that discriminatory conduct, in violation of the Ontario *Human Rights Code* cannot serve as the independent actionable wrong necessary for an award of punitive damages because the *Code* is a complete remedial regime that permits punishment only in the limited circumstances of prosecution with the written consent of the Attorney General, and then, only to a maximum fine of $25,000.00.

[50] There is no doubt that the objective of punitive damages is to punish the defendant rather than to compensate the plaintiff. However, there is also no doubt that punishment is a legitimate objective of the civil law, not just of the criminal law. The availability of criminal punishment, or even its actual imposition, does not preclude punitive damages in the civil context. See *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 at paras. 37, 69 and 123. By analogy, therefore, the prosecution provisions in the *Code* do not preclude punitive damages.

[51] Moreover, I cannot read those provisions as expressing a legislative intention to remove the civil remedy of punitive damages. Nor does anything in those provisions imply such an intent.

[52] In this case, there was ample evidence to sustain the trial judge's conclusion that the appellant's course of conduct culminating in termination included a number of acts of

discrimination and harassment. The appellant required the respondent to justify his medical absences because of his particular disability when employees with "mainstream" illnesses were not so required. Due to absences caused by his disability, the appellant subjected him to the first step in the discipline process and then refused to remove the disciplinary "coaching" from his record. It required him to attend an interview with the company doctor where his disability was belittled and, as the trial judge found, he was treated with gross insensitivity. What limited accommodation the company gave the respondent was cancelled in retaliation for his having retained a lawyer to advance the rights guaranteed to him by the *Human Rights Code*. And the trial judge found that when the respondent refused to be "bullied" into seeing Dr. Brennan without an assurance that he would not be abused again, he was fired. These findings of fact amply demonstrate the appellant's discrimination and harassment of the respondent in his employment.

[53] Thus, I conclude that the appellant's attack on the trial judge's finding of an independent actionable wrong cannot succeed.

[54] The appellant then argues that an award of punitive damages should not have been made at all in this case because its conduct was not harsh, vindictive, reprehensible or malicious.

[55] The trial judge carefully listed the acts by the appellant that he characterized as outrageous and high-handed conduct requiring the retribution, denunciation and deterrence of punitive damages. These include the following: that the appellant's motivation for terminating the respondent was to avoid its obligation to accommodate his disability; that it attempted to intimidate him into seeing its occupational medicine specialist who employed a hardball approach to employee absence; and that the appellant did all of this in full knowledge of the respondent's particular vulnerability because of his disability.

[56] These are all findings of fact which were available to the trial judge on this record. None represents palpable and overriding error. Indeed, in its factum, the appellant does not allege such an error. Rather, it advances other evidence to demonstrate that it acted reasonably. However, that evidence was all before the trial judge and it is not the role of this court to retry the case. On the findings made, the appellant went substantially beyond simply involving an occupational medicine specialist in the accommodation process. It was open to the trial judge to characterize its conduct as outrageous and high-handed.

[57] Given this conduct, an award of punitive damages was a rational response on the part of the trial judge. There is no doubt that it is permissible, indeed desirable for an employer to engage professional assistance in the accommodation process. It is also entitled to require the employee to participate as well. Where only accommodation to the

point of hardship will suffice, the employer can decline to provide it. But it must engage in this process reasonably and in good faith. Where it proceeds in bad faith and seeks to evade its legal obligation to accommodate those rendered vulnerable through disability by wrongfully terminating them, compensation and punishment are both justified.

[58] That is what the trial judge found happened here. In essence, he found that the appellant refused to give genuine recognition to the respondent's disability and seek, in an open minded, unbiased and good faith way, to meet with him to find a reasonable accommodation. Rather, the appellant deliberately contrived in bad faith to intimidate and then wrongfully terminate him to avoid its duty to accommodate a disability whose legitimacy it could not accept. Given his findings of fact, I find no reviewable error in these conclusions. They provide a rational basis for an award of punitive damages, as deterrence and denunciation of conduct causing significant harm to those who are disadvantaged and vulnerable due to disability.

[59] Lastly, the appellant challenges the quantum of punitive damages assessed. The trial judge found that in light of all the circumstances, the appropriate award was $500,000.00.

[60] *Whiten, supra* at paras. 76 and 96, tells us that, as with the question of whether an award of punitive damages should be made at all, 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. This is a more interventionist approach than that applied to awards of general damages.

[61] In *Whiten,* at paras. 111 to 126, Binnie J. sets out a number of ways to measure whether the quantum (which was $1 million in that case) is rationally proportionate to the objective of providing appropriate retribution, denunciation and deterrence. I need only refer to some of them.

[62] First is the level of blameworthiness of the appellant's conduct. The trial judge found it to be planned and deliberate, and designed to escape its responsibilities to accommodate the respondent's disability. The appellant thereby violated something deeply personal to the respondent, his sense of dignity and self worth. The trial judge was entitled to view this as significant blameworthiness.

[63] The degree of vulnerability of the respondent is also an important factor. Here the respondent was not only vulnerable as a long-term employee losing his job, important enough as Iacobucci J. outlined in *Wallace*. But to the knowledge of the appellant, his

doctors had found that the respondent suffered from a serious medical condition, which added to his vulnerability. Given this, the appellant's abuse of its power was clear.

[64] Another important factor is the harm to the respondent. It too was significant. He was rendered totally disabled and has remained so ever since.

[65] Moreover, it was reasonable for the trial judge to see the need for deterrence as significant. The need for this large employer, and indeed all employers, to take seriously their responsibilities in accommodating employees with disabilities is very important. This is, if anything, more true for employees whose disabilities may be seen by some as outside the mainstream and therefore not genuine. The accommodation process must be approached in good faith, openly, and sensitively if the dignity and equality of disabled employees is to be respected as required by the law and morality. Such an employer must be deterred from engaging in subterfuge to wrongfully terminate a disabled employee in order to escape these responsibilities.

[66] Putting together the unique combination of circumstances here, particularly the blameworthiness of the appellant's conduct, the respondent's particular vulnerability, the harm to him and the need to deter this large employer from wrongfully terminating in order to evade its duty to accommodate, I cannot conclude that $500,000 in punitive damages, when added to the compensatory damages awarded to the respondent, exceeds what is rationally required to punish the appellant. As Binnie J. did in *Whiten*, I conclude that while I would not have awarded that sum, it is not so disproportionate as to exceed the bounds of rationality.

v) Bias

[67] The appellant's final ground of appeal is that the conduct of the trial judge created a reasonable apprehension of bias, requiring a new trial.

[68] This trial ended on April 19, 2004 when submissions were concluded. On June 17, 2004, the appellant filed its bias motion which was heard by the trial judge on October 26, 2004, while the judgment was still under reserve. He dismissed the motion that day with reasons to follow. Those reasons were included with his trial reasons, released March 17, 2005. He explained that he had dismissed the motion because the appellant had not brought it sufficiently promptly, and therefore, he found it unnecessary to address the merits of the allegations.

[69] The appellant has tendered fresh evidence in this court to explain the timing of its motion, but also makes a number of submissions on the substance of its bias claim. It is unnecessary for me to deal with the trial judge's reasons for dismissing the motion because I think the interest of justice is best served by addressing the appellant's bias claim on its merits.

[70] The appellant's complaints fall into four categories. First, it says that the trial judge conducted his own internet medical research and then improperly relied on that information to contradict Dr. Brennan's expert evidence.

[71] This submission is completely without merit. In para. 7 of his reasons for judgment, (reported at [2005] O.J. No. 1145 (Sup. Ct. J.)) the trial judge indicated that both counsel agreed that he could access the website of the Centre for Disease Control in Atlanta Georgia to better understand CFS. Counsel for the appellant acknowledged this agreement and, when questioned, also acknowledged that neither counsel at trial placed any limitations on the use that the trial judge could make of the information thus acquired. When the trial judge found that Dr. Brennan's view that most patients with CFS improve significantly within three years was inconsistent with the CDC's information that the actual percentage of patients who recover is unknown, he clearly did nothing improper.

[72] Second, the appellant submits that the trial judge added to the apprehension of bias "by refusing to deal with the merits" of the mistrial motion. This is simply an inaccurate description of what the trial judge did. He did not refuse to deal with the merits of the motion but found it unnecessary to do so. This example of the exercise of a routine judicial practice does not in any way point to an apprehension of bias. The appellant's second submission is also without merit.

[73] The appellant's third submission derives from comments made by the trial judge during closing submissions. In several ways, he expressed his view that Dr. Brennan and the appellant were out of the same mould. The appellant suggests that this indicates a predisposition to find a conspiracy among the appellant's witnesses. However, these comments were coupled with the trial judge making clear to counsel that this was his thinking at the moment and inviting submissions as to why he should not come to that conclusion. I do not see how a reasonable and informed observer would take those comments to indicate that the trial judge had already concluded that there was a conspiracy of any kind among the appellant's employees, let alone the conspiracy he later described in his reasons for judgment. Again, I find no merit in this submission.

[74] Lastly, the appellant looks to the language in the trial reasons themselves to support its claim of bias. Most of the examples cited are in the context of the trial judge's

descriptions of the bad faith he found to characterize the dismissal, or the outrageous and high-handed conduct he found to warrant the punishment of punitive damages. It is hardly surprising that such findings evoked strong language. Finally, it must be remembered that the words complained of appear in the reasons for judgment after the evidence and submissions were concluded and the decision reached. They reflect the decision maker's judgment not his prejudgment.

[75] There is no doubt that judges must always be sensitive to the words they use. In my view, moderate rather than extreme language is probably the wiser course in most circumstances. In this case, the trial judge used several colourful metaphors where more benign alternatives might have been better. However, where as here, the evidence sustains findings of bad faith and outrageous and high-handed conduct some strong judicial language cannot be avoided. Nor can it be said to reflect a want of fairness or impartiality in coming to those conclusions.

[76] This ground of appeal therefore fails.

iv) Costs

[77] The appellant also seeks to appeal the award of costs to the respondent on a substantial indemnity basis together with a premium of 25%. The trial judge fixed an amount of $610,000 in total inclusive of disbursements and G.S.T., the amount sought by the respondent. The appellant contests the scale, the inclusion of costs for the eight-day mistrial, and the premium. The appellant also submits that the trial judge failed to scrutinize the amount sought by the respondent.

[78] Awarding costs is a paradigmatic exercise of judicial discretion. In light of the appellant's bad faith and outrageous conduct as found by the trial judge, I can find no error in his choice of the substantial indemnity scale. This is not a duplication of the award of damages, but rather, it compensates the respondent for the legal costs he incurred. Nor is the inclusion of the costs of the mistrial a reversible error. While the appellant did not cause the mistrial, the respondent incurred the costs of it and it is logical that he be compensated for it.

[79] The trial judge awarded a premium because he found that the respondent's limited income was totally inadequate to fund a twenty-nine day trial. His counsel therefore took on the litigation at the risk of non-payment of significant fees and disbursements, yet achieved very significant success. None of this can be contested. On the basis of this court's decision in *Walker v. Ritchie*, [2005] O.J. No. 1600, it was open to the trial judge to award a premium and I would not interfere with his decision to do so. The risk undertaken and the reward achieved justify awarding a premium in this case.

[80] However, the trial judge quantified the premium at 25%. While he did not expressly articulate it this way, the amount he fixed for the premium, namely $155,000, indicates that he based the amount entirely on the quantum of damages recovered by the respondent. The premium represents 25% of that sum.

[81] In my view, he erred in principle in doing so. The premium is justified not only by the result achieved, but also, by the risk undertaken by counsel of non-payment of significant fees and disbursements. See *Walker*, *supra* at para. 108. A consideration of both factors, not just one, is required in fixing the quantum of the premium. Here, the fees and disbursements ultimately risked by the respondent's counsel amounted to $393,000, considerably less than the recovery of almost $620,000. Keeping both in mind, and recognizing that fixing the quantum of the premium is an art not a science, I would set aside the award of $155,000 and reduce the premium to $77,500.

[82] Finally, I can find no basis to conclude that the trial judge failed to sufficiently scrutinize the amount the respondent requested for the purpose of fixing costs. He was provided by the respondent with a comprehensive bill of costs and complete dockets of time and disbursements. He was intimately familiar with the way the trial had been conducted, the issues and what reasonable preparation was required for counsel to address them. I would not interfere with the amount he fixed.

[83] In summary, therefore, save for the modification made to the costs premium, I would dismiss the appeal in its entirety.

THE CROSS-APPEAL

[84] The respondent cross-appeals from the trial judge's dismissal of his claims for intentional infliction of emotional distress, for the cause of action of discrimination, and for lost disability benefits. Each can be disposed of briefly.

[85] First, since the trial judge extended the notice period, in part to address the respondent's mental suffering caused by the bad faith dismissal, it was open to the trial judge to decline relief for what would essentially be the same thing albeit characterized as a claim for intentional infliction of emotional distress.

[86] Second, the respondent's attempt to have this court revisit *Bhadauria*, *supra* in order to establish an independent cause of action of discrimination must fail. *Bhadauria* has been followed in this court as recently as *Taylor*, *supra* and I must do so as well.

[87] Third, I see no error in the trial judge's dismissal of the respondent's claim for lost disability benefits. No such claim was properly pleaded.

[88] Thus, I would dismiss the cross-appeal.

[89] In the result, save for the amount of the costs premium, the appeal is dismissed. The cross-appeal is also dismissed. Since the main appeal consumed virtually the entirety of the attention of the parties in this court, it is fair to say that the respondent has been almost completely successful. He seeks costs on a partial indemnity basis in the amount of $40,000 all inclusive, which is significantly less than his partial indemnity bill of costs. The appellant would have sought $65,000 on a partial indemnity basis had it been successful. In all the circumstances, including the nature, length and complexity of the appeal, a reasonable award of costs on a partial indemnity basis is $35,000 inclusive of disbursements and G.S.T. and I would so order.

Signed: "S.T. Goudge J.A."

ROSENBERG J.A.:

[90] I have had the opportunity to read the reasons of my colleague Goudge J.A. and I agree with his disposition of the appeal, except with respect to punitive damages. While I agree that it was open to the trial judge to award punitive damages, for the following reasons I would reduce the quantum to $100,000. I reach that conclusion because the trial judge relied on findings of fact that are not supported by the evidence and because the award *inter alia* fails to accord with the fundamental principle of proportionality. I will first deal with the findings of fact relied upon by the trial judge as the basis for the award for punitive damages that are not supported by the evidence.

[91] The trial judge found that the appellant's misconduct was "planned and deliberate and formed a protracted corporate conspiracy". 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.

[92] The finding of a conspiracy appears to be based on the following reasoning:

> The subterfuge *practiced by everyone associated with Honda* in attempting to intimidate him to seeing their occupational medicine specialist should make the blood boil of any right-thinking individual. *This scheme was nothing less than a conspiracy* to insinuate Dr. Brennan into the plaintiff's long-established medical relationship with his own doctors and, hopefully, to exclude them from any participation in advocating for his patient's rights.

[93] There is no evidence to support this allegation of a broad-based conspiracy. Dr. Brennan was an occupational medicine specialist. The trial judge found that the request to have the respondent meet with Dr. Brennan was not made in good faith. Be that as it may, the events have to be kept in context. This request was communicated on March 21, 2000; events rapidly deteriorated and a week later the respondent's employment was terminated. The trial judge found that the respondent's request to have Dr. Brennan's role clarified was reasonable and the appellant's refusal to do so unreasonable. But, 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.

[94] The trial judge found that the appellant's "outrageous conduct has persisted over a period of five years without a hint of modification of their position that Mr. Keays was the one in the wrong". This is a gross distortion of the circumstances and amounts to a palpable and overriding error. The respondent was dismissed in March 2000. From October 1996 to December 1998, the respondent was on long-term disability. After the termination of the benefits, the respondent returned to work. There is no evidence that the appellant had anything to do with the insurer's decision to terminate the benefits. If there was any misconduct by the insurer (and the trial judge found there was), that misconduct cannot be laid at the feet of the appellant.

[95] For almost a year after the respondent returned to work on a full-time basis in January 1999, the appellant accommodated his absences. It was only in August of 1999 when the "coaching" incident occurred that the appellant implemented the requirement of a physician's note and in October of 1999 with the attendance at Dr. Afoo that any serious misconduct begins. Thus, this case concerns a period of seven months not five years. It is difficult to determine where the reference to five years of outrageous conduct comes from except that the trial judge is simply counting the time from the respondent's return to work to the trial.

[96] There was no outrageous conduct after March 2000 and the trial judge did not identify any. Defending a wrongful dismissal claim cannot itself be misconduct that gives rise to grounds for punitive damages. This is not like *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 592 where, from the date of the fire until trial, the defendant engaged in continuous misconduct including attempts by its counsel to influence the opinions of experts. Nor is this case like other cases of wrongful dismissal leading to punitive damage awards where, after the wrongful dismissal, the employer embarks on a course of conduct, such as slander, to injure the employee.

[97] Moreover, although the appellant required a physician's note for each absence (a requirement not imposed on other employees with "mainstream" illnesses), the record also shows that it initially accepted those notes without question and accommodated the absences. It is only when the absences became more frequent and obtaining the notes became very onerous for the respondent, but Honda wrongfully refused to remove the physician's note requirement, that matters began to spiral out of control.

[98] The trial judge found that the appellant "clearly benefited from their misconduct because they rid themselves of an irritation that they viewed as a 'problem' associate". I can see nothing in this record to support this finding. There is no question that Honda was sceptical about the respondent's disability and was taking steps to confirm its reality but there is no evidence that the respondent was viewed as a problem associate. This characterization of the appellant's conduct by the trial judge suggests that the appellant

was intent on making an example of the respondent, yet the trial judge found that there was no pattern of abuse of other associates.

[99] The trial judge stated: "It would appear to me that Honda ran amok as a result of their blind insistence on production 'efficiency' at the expense of their obligation to provide a long-time employee reasonable accommodation that included his own physician's participation". Again, in my view this is a distortion of the circumstances. I see nothing in this record to show that this appellant "ran amok". Certain employees in positions of responsibility, relying upon some expert advice, made decisions that were clearly wrong. But the record does not support this grave allegation of corporate malfeasance levelled at the appellant by the trial judge.

[100] Finally, the trial judge took into account that the appellant's in-house counsel "breached the Rules of Professional Conduct of the Law Society of Upper Canada when she participated in the 'scrum' to attempt to persuade Mr. Keay's to abandon his request for clarification of Dr. Brennan's mandate". Earlier in his reasons, the trial judge wrote that this conduct by counsel was "made in the face of a direct reference in counsel's letter that Mr. Keays found it stressful dealing with these issues directly with Honda management and that future discussions were to be had with counsel, not Mr. Keays". He also said that this was an attempt to have the respondent reject the advice given by his lawyer.

[101] On the appeal, counsel carefully reviewed the facts surrounding this incident and I think it important to put these events in their proper context. Even on the respondent's version, it is apparent that it was simply coincidence that the in-house counsel happened to be in a meeting with the respondent's superiors on March 21 when the respondent asked to meet them. It might have been prudent for counsel to have left the room. However, I note that the letter to which the trial judge refers concerning contact with "counsel, not Mr. Keays" was not sent until a week later on March 28. An earlier letter from the respondent's counsel to Honda on March 16 did not ask Honda not to deal with the respondent directly. Finally, there was no evidence that Honda was aware at the March 21 meeting that counsel's advice was that the respondent not meet with Dr. Brennan. Honda did not receive notice of this decision until March 22. If the fact that in-house counsel remained in the meeting was misconduct, a matter which I need not decide, it was technical misconduct and no basis for increasing the punitive damages.

[102] When the erroneous findings of fact are disregarded, the quantum of punitive damages can be supported only on the basis of the following findings:

- The appellant's intent to intimidate and eventually terminate the respondent was for the purpose of depriving him of the accommodation he had earned.

- The appellant did not reveal the extremely damaging letter from Dr. Brennan until late in the trial.

- The appellant was aware of its obligation to accommodate and must have known it was wrong to terminate the accommodation without just cause and terminate him as an act of retaliation.

- The appellant knew that the respondent valued his employment and that he was dependent upon it for disability benefits.

- The appellant knew that the respondent was a victim of particular vulnerability because of his precarious medical condition.

[103] I would add to this list Honda's refusal to deal with the respondent's counsel who made a reasonable request to discuss accommodation of the respondent's disability. Thus, while I accept that based on these findings the appellant's conduct was sufficiently outrageous to warrant an award of punitive damages, the quantum needs to be reconsidered.

[104] The punitive damage award in this case is on the same scale as awards in *Whiten* [$1 million] and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 [$800,000]. Punitive damage awards in other wrongful dismissal cases have been far more modest even in the face of serious misconduct such as slander of the employee. The awards in such cases have been in the range of $15,000 to $50,000 and, rarely, up to $75,000.[1]

[105] In my view, a punitive damage award on the scale imposed in this case can be justified only by extraordinary circumstances of a similar nature to those in *Whiten* and

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[1] See *Ribeiro v. Canadian Imperial Bank of Commerce* (1992), 13 O.R. (3d) 278 (C.A.) [$50,000]; *Francis v. C.I.B.C.* (1994), 21 O.R. (3d) 75 (C.A.) [$40,000]; *Fedele v. Windsor Teachers Credit Union Ltd.* (2001), 10 C.C.E.L. (3d) 254 (Ont. C.A.) [$15,000]; *Hawley v. GMD Resource Corp.* (2002), 16 C.C.E.L. (3d) 248 (B.C.S.C.) [$50,000]; and *Dixon v. B.C. Transit* (1995), 13 C.C.E.L. (2d) 272 (B.C.S.C.) [$75,000].

Hill. Since *Whiten*, like this case, is a contract case, I found it to be the most reasonable comparator. Thus, I think it helpful in considering the application of the factors identified in *Whiten*, to bear in mind the facts of *Whiten* as they compare to this case.

[106] In his discussion in *Whiten* at para. 112 of the requirement that the award be proportionate to the blameworthiness of the defendant's conduct, Binnie J. singled out for particular attention the duration of the misconduct. He said the following:

> The more reprehensible the conduct, the higher the rational limits to the potential award. *The need for denunciation is aggravated where, as in this case, the conduct is persisted in over a lengthy period of time (two years to trial) without any rational justification, and despite the defendant's awareness of the hardship it knew it was inflicting* (indeed, the respondent anticipated that the greater the hardship to the appellant, the lower the settlement she would ultimately be forced to accept). [Emphasis added.]

[107] As I have explained, that is not our case. The misconduct for which the appellant must take responsibility took place over a period of seven months and was simply not on the same scale as occurred in *Whiten.* At para. 112, Binnie J. listed seven factors, including duration of the impugned conduct, that the court must consider in fixing the quantum of the award. The trial judge made findings against the appellant on several of those factors, including: the misconduct was planned and deliberate and the appellant knew that the respondent was particularly vulnerable because of his disability.

[108] Another factor the court must consider is described at para. 117 of *Whiten* as whether the conduct towards the victim was malicious and high-handed. Despite the gravity of some of the findings of misconduct the trial judge made against the appellant, the appellant's conduct cannot fairly be described as malicious.

[109] The trial judge placed special emphasis on the need for deterrence. He said this:

> It would appear to me that Honda ran amok as a result of their blinded insistence on production "efficiency" at the expense of their obligation to provide a long-time employee reasonable accommodation that included his own physician's participation. It goes without saying that Honda is a worldwide corporation, a "Leviathan" compared to the "minnow" that Mr. Keays represents. As Binnie, J. stated in *Whiten, supra*, a "large whack" is required to "wake up a

> wealthy and powerful defendant to its responsibilities" (see para 118).
>
> I am also taking account the fact that this large corporation can easily afford to hire its own medical and legal advocates and insinuate them into established patient and client relationships without impunity as to professional and ethical concerns. Honda's in-house counsel breached the Rules of Professional Conduct of the Law Society of Upper Canada when she participated in the "scrum" to attempt to persuade Mr. Keay's to abandon his request for clarification of Dr. Brennan's mandate: see rule 4.03(2).

[110] I have already commented on the allegation concerning the doctor-patient relationship and the alleged breach of the Rule of Professional Conduct by the in-house counsel. I have also explained why findings such as the company “running amok” and a “broad-based conspiracy” are not supported by the evidence. The need for deterrence thus seems to rest almost exclusively on the comparative positions of the appellant and the respondent. In *Whiten*, at paras. 118-20, Binnie J. explained the care with which this factor must be approached. Contrary to the comment by the trial judge, Binnie J. did not adopt the principle that “it takes a large whack to wake up a wealthy and powerful defendant to its responsibilities”. To the contrary he described this as a theory and said at para. 118, that the relative size of the corporate defendant is “a factor of limited importance”. Indiscriminate use of the relative power of the defendant and the plaintiff as a significant factor would lead to unprincipled awards. Binnie J.’s approach in *Whiten* was much more nuanced and rigourous, as he explained at para. 119:

> A defendant's financial power may become relevant (1) if the defendant chooses to argue financial hardship, or (2) it is *directly* relevant to the defendant's misconduct (e.g., financial power is what enabled the defendant Church of Scientology to sustain such an outrageous campaign for so long against the plaintiff in *Hill, supra*), or (3) other circumstances where it may *rationally* be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence. [Emphasis in original]

[111] None of those factors apply in this case. In particular, there were no circumstances from which it could rationally be concluded that a lesser award would fail to achieve deterrence. The trial judge’s finding to the contrary is directly inconsistent

with his earlier finding that there was no pattern of abuse of other associates and the absence of any finding, contrary to the case in *Whiten* (see para. 120), that the misconduct by middle management was known at the time to top management who took no corrective action.

[112] Another factor mentioned in *Whiten* as part of the proportionality analysis is the need to consider the totality of all other penalties including compensatory damages imposed on the defendant. In this case, the trial judge had to bear in mind that he had already increased the damages for wrongful dismissal in accordance with *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 for essentially the same conduct that attracted the punitive damage award. The trial judge stated that he was taking into account "all the circumstances, including the compensatory awards already made", but it is unclear on what basis he did so.

[113] The final factor to be considered is the need for the punitive damage award to be proportional to the advantage wrongfully gained. As the court held in *Whiten* at para. 124: "A traditional function of punitive damages is to ensure that the defendant does not treat compensatory damages merely as a licence to get its way irrespective of the legal or other rights of the plaintiff." Even accepting the trial judge's finding that the appellant wanted to terminate the respondent because his prolonged absences were interfering with the smooth running of the operation, there is nothing on the record to show that the appellant saw the possibility of wrongful dismissal damages as nothing more than a licence fee.

[114] I conclude by returning to the comparison of this case to *Whiten*. Two factors stand out when comparing the two cases. First, in *Whiten* there was a two-year period of escalating misconduct up to the trial. Here the misconduct was for no more than seven months and is largely focused on the events of March. I have already referred to the trial judge's mischaracterization of a five-year period of outrageous conduct. Although the trial judge identified one instance of late disclosure of a letter in the conduct of the trial, this does not extend the period of misconduct by Honda to the five years referred to by the trial judge. Second, in *Whiten*, the defendant persisted in its course of conduct, based on a theory that the plaintiff deliberately set the fire, in the face of repeated findings from its own experts and advisors that the fire was accidental. Binnie J. described the defendant's attitude to the plaintiffs at para. 4 as "harsh and unreasoning opposition" and an attempt to "exploit a family in crisis". That is not the case here. The appellant had advice, albeit wrong and based on incomplete information, that caused it to question the respondent's disability and it had, for almost a year, accommodated his absences.

[115] I come then to the difficult problem of assessing the quantum of punitive damages bearing in mind the overarching principle that the award must be "that amount, *and no*

less, [that is] rationally required to punish the defendant's misconduct" (*Whiten* at para. 96, emphasis in original).

[116] Bearing in mind the trial judge's findings that can be supported by the evidence, and in particular the findings that the conduct by the appellant was planned and deliberate and designed to intimidate and ultimately terminate the employment of a particularly vulnerable employee and that the appellant was aware of its continuing duty to accommodate, an award in excess of those awarded in other wrongful dismissal cases is appropriate. But, given the compensatory damages awarded, especially the *Wallace* damages, and that there were no special factors requiring deterrence such as a pattern of abuse or the kind of conduct found in *Whiten*, as well as the relatively short duration of the misconduct, in my view, an award of no more than $100,000 can be justified.

[117] I would reduce the punitive damage award accordingly. In all other respects, I agree with my colleague's disposition of the appeal and cross-appeal.

Signed: "M. Rosenberg J.A."

"I agree K. Feldman J.A."

RELEASED: "MR" September 29, 2006