FTR Now

Damages at Arbitration – the Divisional Court Comments on an Arbitrator's Jurisdiction

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Last year, Arbitrator Owen Shime issued his now well known decision against the Greater Toronto Airport Authority ("GTAA") for the wrongful termination of an employee who had been on sick leave. The decision was judicially reviewed and the outcome highly anticipated given the significant principles at stake. This *FTR Now* reviews the recent decision of the Divisional Court and its key findings.

In our earlier FTR Now regarding the arbitration decision, we noted that in addition to the substantial amount of damages, its greater potential significance lied in its articulation of the underlying legal principles. The Divisional Court confirmed many of the legal principles upon which Arbitrator Shime relied, as well as a substantial portion of his damages award.

BACKGROUND

The grievor was a fleet coordinator whose position required driving and a considerable amount of walking. She had worked for the GTAA for 23 years, was considered a "well-liked and respected employee", and had a clean disciplinary and absenteeism record. In 2003, she injured her knee while climbing out of a work vehicle. She received physiotherapy and underwent arthroscopic surgery a few months later, after which she provided a medical note stating she should remain off work for four weeks and continue physiotherapy.

Around this time, the grievor's partner, also an employee at GTAA, was coincidentally on sick leave. Unknown to the parties, the GTAA considered his sick leave to be suspicious and had placed him under video surveillance. The grievor was seen in this surveillance, and the GTAA decided to place her under surveillance as well. That video surveillance captured the grievor performing some daily activities which involved driving and walking.

As a result of the surveillance, the grievor was asked to justify her absence by providing a physician's note, which she did. The note stated she was able to return to work with restrictions. Upon her return to work, the grievor was asked to attend a meeting which she thought was to discuss her return to work. However, at that meeting, the grievor was suspended on the basis that she had abused her sick leave. A few days later, her employment was terminated.

In terms of damages, Arbitrator Shime awarded 5½ years of back pay, two years compensation for loss of future earnings and benefits (until the grievor's first possible date of retirement), $50,000 in mental distress damages and $50,000 in punitive damages.

In the application for judicial review, the GTAA did not dispute Arbitrator Shime's findings of fact, but rather challenged the various heads of damages awarded.

THE DECISION

STANDARD OF REVIEW

The Divisional Court, following the Supreme Court of Canada's decision in *Dunsmuir*, concluded that the appropriate standard of review was reasonableness. This may prove to be significant: insofar as the Divisional Court upheld Arbitrator Shime's award, it concluded that his determinations regarding his authority to award the various types of damages, as well

as the actual amount of damages, were not necessarily correct, but fell within a range of reasonable outcomes. As a result, although arbitrators are not legally compelled to follow each other's decisions, some arbitrators may feel less inclined to follow Arbitrator Shime's conclusions on the basis that the Divisional Court only found them to be reasonable as opposed to correct.

DAMAGES FOR PAST AND FUTURE ECONOMIC LOSS

The Divisional Court easily upheld the approximate 5 ½ years of back pay as damages for past economic loss. The GTAA argued that this award was unreasonable because the grievor testified that she did not want to be reinstated and therefore she should not be able to claim to have suffered any wage or benefit loss. The Divisional Court disagreed and held that it was reasonable for the arbitrator to conclude that the GTAA's conduct was so unreasonable as to undermine the viability of any future employment relationship with the grievor. Accordingly, an award of full back pay (minus a period of time for which the union counsel was on leave) was found to be reasonable. As discussed in our earlier FTR Now, and aside from the quantum, there is nothing new or particularly controversial about this conclusion.

However, the Divisional Court also upheld the arbitrator's award of two years' compensation for future economic loss on the basis that, absent the unjust dismissal, the grievor would likely have worked with the GTAA until the date that she could first retire. The Court stated that, in this case, it was reasonable for the arbitrator "to look both forward and backward in determining the damages" that would put the grievor in the position that she would have been in absent the breach.

This award of damages is not common and certainly not without controversy. It is difficult in the best of circumstances to make assumptions that any employee will remain with a particular employer for any length of time, let alone until retirement. The facts of the GTAA decision should be unique enough to warrant distinction in other cases. Notwithstanding, we anticipate that this head of damages will most certainly be sought more frequently in discharge cases, particularly for long service employees who are relatively close to retirement.

MENTAL DISTRESS DAMAGES

The Divisional Court also held that the arbitrator reasonably concluded that he had jurisdiction to award damages for mental distress such that the "real issue" was the reasonableness of the quantum of the award. Ultimately, the Divisional Court set aside this award of damages for two reasons.

First, the Divisional Court held that it was unreasonable for the arbitrator to conclude that damages for mental distress were within the reasonable contemplation of the parties because the collective agreement was generally meant to secure a psychological benefit and mental security. The Court determined that this could not have been contemplated by the parties for a variety of reasons, including: (1) in *Honda v. Keays*, the Supreme Court of Canada stated that the normal distress and hurt feelings resulting from dismissal from employment are not compensable because an employment contract does not promise "peace of mind"; (2) at the time the collective agreement was bargained (August 1, 2003), damages for mental distress for breach of contract still required proof of an independent actionable wrong; and (3) also at that time, the *Wallace* case had been held not to apply in a collective agreement setting and arbitrators had been refusing to award such damages.

Second, the Divisional Court held that the portion of these damages that was related to pain and suffering for the grievor's knee was unreasonable. Arbitrator Shime concluded that the grievor's knee injury had been aggravated because she had to temporarily stop her physiotherapy treatment as a result of being dismissed. The Divisional Court found that this conclusion was not supported by the evidence and, in addition, the arbitrator did not show how it was within the reasonable contemplation of the parties at the time they made the contract.

Had these been the only bases for the award of mental distress damages, the Divisional Court would have completely overturned this aspect of the decision.

However, in addition to the above, Arbitrator Shime offered an alternative basis for the award of mental distress damages

which the Divisional Court did find to be reasonable. He applied the principles from *Wallace* in determining that mental distress is a reasonably foreseeable incident of discharge particularly when it is unjust, unreasonable and in bad faith. Importantly, the Divisional Court confirmed this principle, stating that since *Honda v. Keays*, “it is clear that damages for mental distress in a wrongful dismissal case result in an award of damages based on the gravity of the injury caused. Therefore it is possible to award them in a unionized setting, even if an employee is reinstated.” The Divisional Court concluded that the award of mental distress damages based on bad faith of the employer in the manner of dismissal in the GTAA case fell within a range of reasonable outcomes.

The Divisional Court ultimately remitted this issue back to Arbitrator Shime to reconsider the appropriate amount of mental distress damages that resulted from the manner of termination only (and not from the now overturned finding of a knee-injury aggravation).

PUNITIVE DAMAGES

The Divisional Court found that the arbitrator’s conclusion that he had jurisdiction to award punitive damages, despite the refusal of other arbitrators to do so, was reasonable.

It referred to statements made by the Supreme Court of Canada in two recent decisions (*Whiten* and *Honda v. Keays*) to emphasize that an award of punitive damage is exceptional in cases of breach of contract, like wrongful dismissals. The Court confirmed the following required elements for an award of punitive damages: (1) there must be an independent actionable wrong; (2) the basis for the award must be rational; and (3) the quantum must be rational. The Court also confirmed that punitive damages should be awarded only if all other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence and denunciation.

The Court set aside the $50,000 punitive damages award for two reasons. First, there was a denial of natural justice in that the GTAA’s counsel was not given proper notice on the issue of an independent actionable wrong. Second, the award was not reasonable because the arbitrator did not properly analyse the required elements.

This issue was also remitted back to Arbitrator Shime for further consideration.

CONCLUSION

The decision of the Divisional Court is very important for employers. Many of the principles relied upon by Arbitrator Shime in the GTAA case were confirmed by the Court and ultimately, much of his award was upheld. Based on this decision, we would expect to see an increase in unions seeking these kinds of damages on behalf of grievors and perhaps a renewed willingness on the part of arbitrators to award them. In addition, the Divisional Court has strongly suggested that employers are assumed to be aware of the law (both arbitral and court) when negotiating collective agreements and also in the treatment of their employees.

Overall, this judicial review decision clearly confirms how important it is for employers to treat employees with respect and dignity in the dismissal process, even if there is a suspicion of serious misconduct and particularly when the facts surrounding the dismissal are related to sick leave and/or disability.

Greater Toronto Airports Authority v. Public Service Alliance Canada Local 004, 2011 ONSC 487 (CanLII)

If you would like to discuss the impact that this decision may have on your organization, please contact Dolores M. Barbini at 416.864.7303 or your regular Hicks Morley lawyer.

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