CITATION: Greater Toronto Airports Authority v. Public Service Alliance Canada Local 004, 2011 ONSC 487
DIVISIONAL COURT FILE NO.: 150/10
DATE: 20110128

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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KRUZICK, SWINTON AND HARVISON YOUNG JJ.

B E T W E E N:	
GREATER TORONTO AIRPORTS AUTHORITY Applicant	*Mark D. Contini*, for the Applicant
- and -	
PUBLIC SERVICE ALLIANCE CANADA LOCAL 0004 Respondent	*Lewis N. Gottheil and Niki Lundquist*, for the Respondent
	HEARD at Toronto: October 13 and 14, 2010

Swinton J.:

Overview

[1] The applicant, the Greater Toronto Airports Authority (the "GTAA"), seeks judicial review of an arbitration award of Owen Shime, Q.C. ("the arbitrator") dated February 12, 2010. While the arbitrator held that the GTAA did not have just cause to dismiss the grievor, a long term employee, he awarded significant damages instead of reinstatement to employment, including damages for past wage losses and future economic loss, as well as damages for mental distress and pain and suffering in the amount of $50,000.00 and punitive damages of $50,000.00. The GTAA argues that the award is unprecedented and should be quashed because of a number of legal errors or, in the alternative, because of a denial of natural justice.

[2] For the reasons that follow, I would grant this application for judicial review in part and refer the issues of the quantification of the damages for mental distress and the award of punitive damages back to the arbitrator.

Factual Background

[3] The GTAA has been the operator and manager of Toronto's Pearson International Airport for many years. At the time of the grievor's termination, the GTAA was experiencing a costly absenteeism and sick leave abuse problem that it was attempting to address. Employees were put under surveillance if there were reasonable grounds to believe that sick leave was being abused, and their employment was terminated if the surveillance confirmed the abuse.

[4] The grievor was discharged in March 2004. At that time, she was 47 years old and had been an employee of the GTAA and its predecessors for approximately 23 years. Prior to a work-related injury on October 31, 2003, she was employed as a Fleet Coordinator, with responsibilities involving the coordination of maintenance for GTAA vehicles, including delivery to and pick up from dealerships and body shops where maintenance was undertaken. Her regular duties involved a considerable amount of walking.

[5] On October 31, 2003, she injured her knee at work and was referred by the GTAA to a medical clinic at Terminal 2, where she saw Dr. Nagpal. He prescribed physiotherapy for six months. The GTAA accommodated her injury by providing her with modified duties involving administration and accounting tasks that she could perform while she was sitting at a desk.

[6] The grievor continued full-time employment until she had arthroscopic surgery to repair the meniscus in her knee on February 19, 2004. On February 24, 2004, Dr. Gordon, her orthopaedic surgeon, provided her with a medical note indicating that she should be off work for four weeks as a result of the surgery.

[7] Following the surgery, the grievor began physiotherapy on a daily basis with a registered physiotherapist, Gizella Farkas.

[8] Unbeknownst to the GTAA, the grievor was living with another GTAA employee, Terry Townshend. He was under surveillance for suspected sick leave abuse. On February 27, 2004, the grievor was observed in the course of that surveillance, when Mr. Townshend drove her to the physiotherapy clinic. As a result, the GTAA decided that she, too, would be put under surveillance.

[9] Video surveillance of the grievor occurred on March 9 and 10, 2004. On March 9, she went to the physiotherapy clinic and then to Wal-Mart for about 15 minutes. From there, she went to a pharmacy, a Canadian Tire gas station, and a community mail box. She returned home, but later that day she was observed driving to and from the airport to pick up a male individual. The airport was 27 kilometres from her residence.

[10] On the morning of March 10, the grievor was observed again at the physiotherapy clinic. She then spent about 20 minutes at a grocery store and returned home for the rest of the day.

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[11] On March 11, 2004, the GTAA contacted the grievor and directed her to produce information from her physician as to why she required four weeks off work and whether she could return earlier, with or without restrictions. As she was unable to contact Dr. Gordon, the grievor asked her physiotherapist for a note. Ms. Farkas believed that the grievor needed a further week off work (until March 22), and indicated her opinion in a note dated March 12, 2004. Ms. Farkas gave evidence at the arbitration hearing that the grievor was lacking full movement and full strength in her knee at that time, and her knee had not completely healed.

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[12] Despite Ms. Farkas' recommendation, the grievor returned to work March 15. However, a supervisor sent her home after refusing to accept Ms. Farkas' note.

[13] On March 16, 2004, the GTAA terminated the employment of Mr. Townshend. This was his second discharge: he had previously been reinstated by an arbitrator and awarded a significant amount of back pay.

[14] That same day, the grievor saw Dr. Gordon and asked for a medical note to allow her to return to work. She informed the doctor that she feared losing her job. He called her supervisor and left a voice message, as he was angry and wanted to know why his diagnosis was being questioned. Nevertheless, Dr. Gordon provided a note permitting the grievor to return to work on modified duties, in a sedentary job, with no driving or walking greater than 10 minutes. He added, "... it takes six weeks to physiologically heal. If you have any questions, please call...". No one from the GTAA ever called him.

[15] The grievor returned to work on March 17, 2004. She was not provided with modified duties, and her knee injury was aggravated. She was in significant pain by the end of the day, and she was observed to be limping when she left the workplace. She was under surveillance when she stopped at a community mail box, where she was again observed to be limping heavily. She then returned home.

[16] On March 19, 2004, the grievor was called into a meeting with GTAA representatives, as well as a union representative. It was put to her that she had been seen on video surveillance on February 27, March 9 and March 10 walking normally for more than 10 minutes at a time, with no apparent discomfort, and that she had been seen driving long distances with no apparent difficulty, even though these activities were in clear conflict with the restrictions imposed by her surgeon. The grievor was given a chance to respond. At the end of the meeting, she was suspended indefinitely, pending a final determination of her employment status.

[17] Surveillance of the grievor's residence occurred on March 20 and 21, 2004. On these days, she did not leave her home.

[18] GTAA management was not satisfied by the grievor's responses and concluded that she had been dishonest in reporting her absences for part of the period February 19 to March 16, 2004, and in her untruthful responses at the meeting. A termination letter was issued March 24, 2004, confirming that she was terminated for dishonesty.

[19] At the time of the discharge, the grievor had a clear disciplinary record and was regarded as a satisfactory employee. It should also be noted that throughout her years of employment, the grievor had experienced significant problems because of her personal life. She had been subject to mental, physical and sexual abuse by her former husband that included stalking and death threats. The GTAA was aware of this. As well, she had had significant relationship issues with her daughter and mother, and she had at one point taken a two month absence from work because of a mental breakdown.

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The Arbitration Process

[20] The grievor filed a grievance, initially seeking reinstatement, as well as damages for pain and suffering, slander and defamation. She also sought punitive damages. Particulars provided by the union made reference to allegations of harassment and discrimination.

[21] The arbitration hearing began August 3, 2004, and continued over a period of almost four years to June 10, 2009. During the grievor's cross-examination in September 2006, she indicated that she no longer sought reinstatement and was seeking damages instead.

[22] The parties requested that the arbitrator deal with both the merits of the grievance and remedy, rather than bifurcate those issues, as is commonly done. In the course of closing argument, the union requested broad relief, including general damages, punitive damages, damages with respect to the loss of a unionized position and past loss of wages. The GTAA filed a written reply to the union's arguments, including submissions on remedy.

[23] On September 9, 2009, the arbitrator issued a one page decision setting out his conclusion that the grievor had been dismissed without just cause, and indicating that reasons would be issued in due course. The arbitrator also stated that he wished to have a conference call to deal further with remedial issues, as he felt that the arguments on remedy had not been sufficient.

[24] A conference call was held October 15, 2009, with the arbitrator asking the GTAA to respond to the remedial requests of the union. The union indicated that the grievor did not seek reinstatement, but she was entitled to damages retroactively and in lieu of going back. The arbitrator also requested information on the pension plan, a copy of which was subsequently provided to him.

[25] The arbitrator issued his 134 page award in February 2010. He found that the GTAA had failed to prove that the grievor had been dishonest in reporting her absences and in her responses to questions in the March 19, 2004 meeting. As a result, the termination was without just cause. In the course of his reasons, he made a number of findings:

- All of the union's medical evidence supported the grievor's inability to return to work when asked, and it was apparent that the GTAA did not rely on any medical evidence in terminating her.

- The GTAA was entirely unjustified in its assessment of the video surveillance evidence and in its conclusion that the grievor was walking normally and engaging in activities

inconsistent with her reported work restrictions. The GTAA management personnel improperly assessed the medical condition of the grievor without possessing the necessary medical knowledge.

- The GTAA should have been put on notice that it should obtain further medical advice, given Dr. Gordon's note that a patient needs six weeks to physiologically heal and his statement that the grievor still had swelling. By not seeking confirmation from a qualified medical practitioner to verify the GTAA's suspicions of sick leave abuse, as it could have under article 24.07(c) of the collective agreement, the GTAA violated article 24.07. Therefore, the grievor's entitlement to sick leave continued to be operative in accordance with that article.

- The grievor was at all times honest and candid in responding to questions put to her in the March 19 meeting. The GTAA's conclusion that she had been evasive and dishonest was entirely unjustified. Moreover, the GTAA had come to the meeting with a preconceived notion that the grievor was dishonest.

- Before terminating her employment, the GTAA had a positive duty to consider the grievor's seniority, satisfactory work record and work performance, and to consider lesser penalties, in accordance with principles of corrective discipline. The GTAA made no assessment of the grievor's circumstances whatsoever.

- The GTAA did not establish that there was modified work activity that the grievor could have performed, given her post-operative condition. Therefore, there was not cause to terminate her for failing to perform modified work.

[26] The arbitrator found that the GTAA had acted in bad faith. He referred to article 4.04 of the collective agreement, found under the heading "Management Rights". It states, "The Employer shall exercise its rights in a reasonable manner and subject to and consistent with the provisions of the collective agreement". In addition, he referred to s. 50 of the *Canada Labour Code*, R.S.C. 1985, c. L-2 (the "*Code*"), which requires parties who are engaged in collective bargaining to bargain in good faith. From that statutory obligation, he implied an obligation on the GTAA to administer the collective agreement in good faith (Award, p. 104).

[27] The arbitrator then found that the GTAA had acted unreasonably and in bad faith based on two separate grounds: first, it had associated the grievor with Mr. Townshend and failed to assess her conduct independently; and second, its conduct was so egregious that it amounted to bad faith. In the words of the arbitrator (Award, p. 107):

> I determine that the GTAA associated the Grievor with Mr. Townshend, against whom the GTAA bore some animus, and terminated her based on that association. The GTAA willfully did not independently assess the Grievor's situation on its own merits and, in effect, condemned her by association. In so doing, I find the GTAA was both unreasonable and acted in bad faith by not individually and independently assessing the Grievor's circumstances to which she was surely entitled after so many years of faithful and diligent service.

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Following this quote, he set out, over the course of almost three pages, the conduct of the GTAA that he found so egregious as to amount to bad faith (Award, pp. 107-110).

[28] The arbitrator then turned to the issue of remedy, beginning with an overview of the remedial authority of arbitration boards. He made reference to the decision of the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, where Chief Justice McLachlin observed that arbitrators may refer to both common law and statutes (at para. 56).

[29] He then concluded this was not an appropriate case to reinstate the grievor, because the conduct of the GTAA "was so high handed, arbitrary, and capricious that [*sic*] it had such a destructive impact on the grievor" (Award, p. 117). The conduct of the GTAA was characterized as a breach of an implied contractual term of mutual trust and confidence. He also found that the events leading to the termination, including labeling the grievor as dishonest and untrustworthy, had precipitated Post-Traumatic Stress Disorder ("PTSD"), and going near the airport caused her distress. Therefore, he decided to award damages in lieu of reinstatement.

[30] The arbitrator ordered the GTAA to expunge all references to the discipline from its records and to provide the grievor with a letter of reference. He then went on to award damages for mental distress, citing the Supreme Court of Canada's decision in *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3. He concluded that "one of the main purposes of a collective agreement is to provide employees with the 'psychological benefit' and 'mental security' in being gainfully employed" (Award, p. 121). He found that this object of the collective agreement was within the reasonable contemplation of the parties and, therefore, damages for mental distress were recoverable.

[31] He also found that "the degree of mental suffering caused by the GTAA's breach was both reasonably foreseeable and also of a degree sufficient to warrant compensation and damages" (Award, p. 121). He then cited *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, and found that "mental distress is a reasonably foreseeable incident of discharge and particularly so when the discharge is both unjust, unreasonable and also in bad faith" (Award, p. 122). The arbitrator noted that the GTAA was aware of the grievor's history as a victim of sexual and physical abuse and of her previous breakdown and absence from work. He concluded,

> It was therefore reasonably foreseeable that terminating the Grievor without cause, without proper investigation and without regard to her record of service would be especially devastating in a way that was beyond what is usual in the event of a termination. (Award, p. 122)

[32] The arbitrator found that the grievor had suffered from anxiety and depression and her PTSD was revived. Given the interruption of her physiotherapy, he found that her knee injury was aggravated. Therefore, he awarded damages for the extended pain and suffering in her knee as well as damages for mental distress, assessed at $50,000.00.

[33] He also ordered the GTAA to compensate the grievor for loss of compensation and benefits from the date of termination to the date of the issuance of his award, subject to a

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deduction of six months due to the unavailability of union counsel. As well, monies actually earned by the grievor should be deducted, other than for the six month period just referred to. Interest was to be paid on that amount.

[34] The arbitrator also awarded damages for future economic loss. At p. 127 of the Award, he stated,

> In my view, the diminished financial situation in which the Grievor finds herself as a relatively unskilled person, without the benefits of service and seniority, is both patently obvious to employers, employees and unions as arising naturally from a breach of a collective agreement resulting in termination and is reasonably within the contemplation of those parties.

[35] He concluded that the grievor had to show that “there is a reasonable and substantial risk of loss of income in the future”, and both positive and negative contingencies must be taken into account. He emphasized the importance of the grievor’s long seniority, describing it as “like a capital investment”, with a positive impact on promotions, wage and benefit increases, vacation and pension and protection against layoff (Award, p. 129). He found that it was most probable that the grievor would have continued to work at the GTAA until retirement, and he awarded damages from the date of the award to the date at which she could have taken early retirement at age 55, with a deduction for amounts earned.

[36] Finally, the arbitrator also awarded punitive damages, finding that the GTAA’s conduct was “high handed, malicious and arbitrary”, and that it had ignored its obligation to deal with the grievor in a reasonable manner (Award, p. 132). He found that punitive damages should serve as a deterrent to any future misconduct by the GTAA in administering the collective agreement. In his words, “A significant award is needed to deter the GTAA from exploiting the vulnerability of employees who are dependent on their employment with the GTAA” (Award, p. 133). He also found that it was necessary to condemn the GTAA’s conduct within the labour relations community (Award, p. 134). Finally, he found that compensatory damages were insufficient to meet the objectives of retribution, deterrence and denunciation, citing the decision of the Supreme Court of Canada in *Whiten v. Pilot Insurance*, [2002] 1 S.C.R. 595. Accordingly, he awarded a further $50,000.00 in punitive damages, stating that when he determined the amount he had considered the likely total of compensation to the grievor.

The Issues

[37] In its factum for this application for judicial review, the GTAA had argued that the arbitrator’s award on the merits should be set aside on the basis that he had committed jurisdictional error in making a number of findings of fact. At the hearing of the application, the GTAA reasonably did not pursue this line of argument. Therefore, the issues in this application all arise from the decision on remedy.

[38] The issues argued were the following:

1. What is the appropriate standard of review?

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2. Was there a denial of natural justice respecting the remedial part of the award?
3. Did the arbitrator unreasonably award damages for past economic loss and future economic loss?
4. Did the arbitrator commit jurisdictional error in awarding mental distress damages?
5. Did the arbitrator err in awarding punitive damages?

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The Standard of Review

[39] The GTAA argues that the arbitrator committed a jurisdictional error in awarding damages, including punitive damages, on the basis that there was no limitation on his remedial authority in the collective agreement. In addition, in determining whether to award the various heads of damage, he was required to apply principles of common law that were not within his area of expertise. Therefore, the standard of review is said to be correctness.

[40] The union submits that the standard of review is reasonableness. I agree. In determining the appropriate remedies, the arbitrator had to consider the terms of the collective agreement and the provisions of the *Code*, as well as the facts of the particular case. Article 13.14 of the collective agreement provides that an arbitrator

> shall have all the powers vested in it by the *Canada Labour Code* and the collective agreement, including in the case of discharge or discipline, the power to substitute for discharge or discipline such other penalties that the arbitrator deems just and reasonable in the circumstances, including compensation for lost income and benefits ...

Subsection 60(2) of the *Code* allows an arbitrator to substitute a just and reasonable penalty for discharge or discipline, if the collective agreement does not contain a specific penalty.

[41] Whether the arbitrator could award the various heads of damages was a question of arbitrability, the resolution of which required the application of the arbitrator's specialized expertise. His determination as to whether he had authority to award the various heads of damages is not a narrow issue of jurisdiction, described in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 as the authority of the tribunal to decide a particular matter (at para. 59). The arbitrator clearly had the jurisdiction to determine an appropriate remedy and, in doing so, to decide whether the collective agreement and the statutory regime permitted him to award the various heads of damages claimed. Indeed, the GTAA never contested his authority to award such damages; rather, it challenged the merits of awarding the various damages claimed by the union in the circumstances of this case.

[42] In *Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology* (2006), 80 O.R. (3d) 1, the Court of Appeal addressed the standard of review applicable to an arbitration board's determination that it had no jurisdiction under the applicable collective agreement to award aggravated and punitive damages for tortious conduct. In that case, the grievor sought such damages for intentional infliction of mental suffering and defamation in the course of dismissal, and the arbitration board determined that it had no jurisdiction to grant such relief. Its determination was characterized as a question of arbitrability

by the Court of Appeal – namely, the issue being decided was whether the collective agreement gave the board the authority to award the damages sought (at paras. 48, 52). After applying the pragmatic and functional analysis, the Court of Appeal determined that the standard of judicial review was patent unreasonableness (at para. 69).

[43] *Dunsmuir,* decided after *Seneca College,* collapsed the patent unreasonableness and reasonableness standards. *Dunsmuir* also held that a standard of review analysis need not be undertaken if existing jurisprudence has determined, in a satisfactory manner, the standard of review for a particular type of question (at para. 57). Therefore, given *Seneca College*, the standard of review in the present case is reasonableness with respect to the arbitrator's determination as to his authority to award the damages sought, as well as to his actual determination of remedy.

[44] The GTAA also alleges a breach of the rules of natural justice. No standard of review analysis is required with respect to this issue. Rather, the Court must determine whether the requisite standards of fairness were met by the arbitrator (*London (City) v. Ayerswood Development Corp.* (2002), 167 O.A.C. 120 (C.A.) at paras. 9-10).

The Remedial Authority of the Arbitrator

[45] An arbitrator has a broad authority to provide a remedy for breach of a collective agreement. In this particular case, article 13.15 of the collective agreement provides the arbitrator with the authority to provide a final and binding settlement of a grievance. So, too, does s. 58(1) of the *Code*.

[46] Article 13.14 of the collective agreement, quoted above in part, provides a wide ranging power to find a remedy that is "just and reasonable" in all the circumstances. This power is also supported by s. 60(2) of the *Code.* In light of these provisions, the arbitrator concluded that there were no contractual limitations on his remedial authority. In my view, that was a reasonable conclusion.

[47] In this case, the arbitrator also made reference to *Weber v. Ontario Hydro, supra*, where the Supreme Court of Canada held that a board of arbitration has the exclusive jurisdiction to rule upon matters that arise either expressly or inferentially under a collective agreement (at para. 54). In exercising that jurisdiction, an arbitrator may refer to both common law and statutes (at para. 56).

[48] The GTAA argued that the arbitrator focused on the wrong question by assuming that there were no restrictions on his authority to order remedies. Instead, he should have asked whether the remedies he imposed were contemplated by the collective agreement (*Hamilton (City) v. Canadian Union of Public Employees, Local 167* (1997), 33 O.R. (3d) 5 (C.A.) at para. 25). I note that in the *Hamilton* case, the arbitrator effectively imposed an obligation on the employer not contemplated by the collective agreement - namely, red-circling the salary of an employee transferred to another position. In contrast, in the present case, the arbitrator was determining the remedies appropriate to give relief for the employer's breach of the collective

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agreement. In doing so, he did not improperly impose an obligation on the employer not found in the collective agreement.

[49] The GTAA also submitted that the decision of the arbitration board in *Seneca College* should have been determinative in the present case, although the arbitrator made no reference to it. There, the arbitration board held that it had no jurisdiction under the language of the applicable collective agreement to adjudicate claims for damages for tortious conduct (*Seneca College v. O.P.S.E.U. (Olivo Grievance)* (2001), 102 L.A.C. (4th) 298 (P. Picher) at p. 318). Applying *Weber,* the board concluded that the tortious misconduct did not arise under the collective agreement.

[50] In the alternative, the arbitration board in *Seneca* also considered *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085. The Supreme Court of Canada held in *Vorvis* that there must be an independent actionable wrong before damages for mental distress could be awarded for breach of contract. As set out below and as noted by the arbitrator in the current case, that is no longer a legal requirement in breach of contract cases.

[51] The board in *Seneca* held that a collective agreement must "expressly or through compelling implication" confer the power on an arbitration board to award aggravated or punitive damages (at p. 334). As well, it held that the principles in *Wallace v. United Grain Growers, supra*, allowing an extension of the notice period when there has been bad faith in the manner of dismissal, do not apply in a collective bargaining context (at p. 348).

[52] The fact that the board in *Seneca* reached these conclusions is not determinative of the scope of the remedial authority in this case for three reasons. First, the Court of Appeal determined that the arbitration board's decision was not patently unreasonable, not that it was correct. A standard of reasonableness contemplates that there can be more than one reasonable interpretation or result. Second, the result in *Seneca* turns, in part, on the language of the particular collective agreement and, in part, on the nature of the particular dispute before that arbitration board. Third, the arbitration award in *Seneca* was rendered at a time when the leading cases from the Supreme Court of Canada were *Vorvis* and *Wallace*. Since it was decided, the Supreme Court has clarified the law respecting damages for mental distress in other cases that I will discuss in the following section of these reasons.

The Evolving Law on Damages for Mental Distress and Punitive Damages

[53] Before discussing the issues raised by the GTAA in this application, it is useful to describe briefly the evolution in the jurisprudence of the Supreme Court of Canada on damages for mental distress and punitive damages when there has been a breach of contract. This is important both to evaluate the reasonableness of the arbitrator's decision and to understand the natural justice issue.

[54] Until 2006, the jurisprudence of the Supreme Court of Canada took a very restrictive approach to the award of damages for mental distress in contract cases. Generally, damages for mental distress were not recoverable for breach of contract. However, where there was a contract for "peace of mind", damages for mental distress could be awarded, provided that such

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damages were in the reasonable contemplation of the parties at the time they made their contract – for example, breach of a contract for a vacation or for wedding services (*Fidler, supra* at paras. 38-43).

[55] In other contracts, including employment contracts, damages for mental distress could be obtained only if there was an independent actionable wrong. This latter principle was set out in the Supreme Court's 1989 decision in *Vorvis, supra*.

[56] In 1997, the Supreme Court decided *Wallace, supra*, which held that a plaintiff in a wrongful dismissal action could obtain an extended period of notice if the employer had shown bad faith in the manner of dismissal (at para. 103). The Court commented in that decision that an employment contract is not one in which peace of mind is the object of the contract (at para. 73).

[57] In *Whiten,* in 2002, the Supreme Court dealt with punitive damages in a dispute involving breach of an insurance contract. The Court emphasized the exceptional nature of an award of punitive damages. It also held that an independent actionable wrong was not restricted to a tort, but could include breach of another contractual obligation or a breach of fiduciary duty. As well, the Court set out, in detail, the factors to be considered in determining whether an award of punitive damages is rational.

[58] In 2006, in *Fidler,* the Supreme Court again dealt with mental distress damages, in a case where an insurer denied payment of benefits under a long term disability insurance policy. No longer would it be necessary to show that there was an independent actionable wrong in order to obtain damages for mental distress for breach of contract (at para. 55). Instead, the Supreme Court adopted a principled approach to the award of damages for mental distress by asking what the particular contract promised. If one of the objects of a contract was to provide a particular psychological benefit, damages for mental distress would be recoverable if they were within the reasonable contemplation of the parties at the time the contract was made.

[59] The Court noted that in normal commercial contracts, "the likelihood of a breach of contract causing mental distress is not ordinarily within the reasonable contemplation of the parties" (at para. 45). The Court went on (at para. 45):

> The matter is otherwise, however, when the parties enter into a contract, an object of which is to secure a particular psychological benefit. In such a case, damages arising from such mental distress should in principle be recoverable where they are established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made. The basic principles of contract damages do not cease to operate merely because what is promised is an intangible, like mental security.

The Court also commented on the *Wallace* decision, treating it as a case based on reasonable foreseeability (at para. 54).

[60] Subsequently, in its most recent decision, *Keays v. Honda Canada Inc.*, [2008] 2 S.C.R. 362*,* the Supreme Court of Canada again commented on *Wallace*, the foreseeability analysis

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underlying an award of damages for mental distress, and punitive damages – this time in a wrongful dismissal action. Neither the parties nor the arbitrator in the present case made reference to this decision.

[61] In the majority decision in *Keays*, Bastarache J. stated that the normal distress and hurt feelings resulting from dismissal from employment are not compensable. In his words (at para. 56):

> The contract of employment is, by its very terms, subject to cancellation on notice or subject to payment of damages in lieu of notice without regard to the ordinary psychological impact of that decision. At the time the contract was formed, there would not ordinarily be contemplation of psychological damage resulting from the dismissal since the dismissal is a clear legal possibility. The normal distress and hurt feelings resulting from dismissal are not compensable.

[62] The Court also held that damages can be obtained for the manner of dismissal if the employer engages in conduct during the course of dismissal that is unfair or in bad faith – for example, by being untruthful, misleading or unduly insensitive (at paras. 56-58). Notably, the Court commented that, since *Wallace*, both parties to an employment contract should have an expectation of good faith in the manner of dismissal, and breach of that duty can lead to foreseeable, compensable damages (at para. 58). The Court also held that compensation should no longer be in the form of a longer notice period; rather, if the employee can prove the manner of dismissal caused mental distress that was in the parties' contemplation, damages should be awarded (at para. 59).

[63] The Court also commented on punitive damages, reiterating the need for an independent actionable wrong (at paras. 62 and 68). The Court stated that the lower courts in *Keays* had erred by failing to ask whether punitive damages were necessary to denunciation, deterrence and retribution once damages for conduct in dismissal were awarded (at para. 69).

[64] In sum, there has been a significant change in the jurisprudence of the Supreme Court of Canada concerning damages for mental distress for breach of contract since the decision in *Vorvis* in 1989, as well as important clarification of the principles governing the award of punitive damages.

Was there a Denial of Natural Justice Respecting the Remedial Part of the Award?

[65] The GTAA argues that it was denied natural justice because it did not have an adequate opportunity to address the remedial issues. In particular, it had no opportunity to make submissions with respect to a number of cases that the arbitrator relied on, including:

- *Malik v. Bank of Credit and Commerce International S.A.*, [1977] 3 All E.R. 1 (H.L.), to which he referred before finding the GTAA, as employer, had breached its obligation of trust to its employee;

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- *Fidler*, *supra*, which superseded *Vorvis, supra* (the case that had been cited to the arbitrator and discussed in the GTAA's reply argument), was relied on by the arbitrator in the analysis of damages for mental distress in breach of contract cases;
- *Wallace*, *supra*, which allowed an extended notice period to compensate for mental distress caused by the manner of dismissal;
- *Whiten*, *supra*, on punitive damages; and
- *Weber v. Ontario Hydro*, *supra*, a case on the jurisdiction of arbitrators.

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[66] The GTAA relied on an affidavit from Paula Rusak, its counsel at the arbitration hearings. She stated that in the brief conference call with the arbitrator held on October 15, 2009 to discuss remedy, the union sought damages retroactively and in lieu of reinstatement, but it did not suggest that the damages should be based on loss of future earnings. She also stated that "no evidence was called to suggest that the parties ever contemplated that employees covered by the collective agreement could become entitled to damages for mental distress" (at para. 26).

[67] In her affidavit, she conceded that the union did request punitive damages, but stated that the union did not make the basis for the request clear. In her view, the claim appeared to be based on an independent actionable wrong such as defamation, harassment, stalking or breach of the *Canada Human Rights Act*, R.S.C. 1985, c. H-6 (the "*CHRA*"). However, the union never argued a breach of a provision of the collective agreement such as article 4.04 or article 24.07, nor did it argue bad faith in the manner of discharge. She also stated that the union made no argument with respect to the *Code* requirement that parties bargain collectively and in good faith; that the collective agreement provides a psychological benefit and mental security to bargaining unit employees; or that the grievor should be compensated for extended pain and suffering in her knee.

[68] In a responding affidavit, Daniel Fisher, a Grievance and Adjudication Officer who had represented the grievor at the hearings, noted that the grievance included a claim for compensation, punitive damages and damages for pain and suffering. He noted that a number of the cases were relied on, including the arbitration decision in *Seneca College*, *supra*, and *Santoro*, an unreported arbitration case involving the GTAA. *Weber* and *Whiten*, *supra*, were discussed in those cases.

[69] I see no merit to the GTAA's argument that it was denied natural justice because the GTAA did not know the kind of relief sought, particularly with respect to the future economic loss claim. It clearly had notice of each of the heads of relief sought by the union from the grievance and from submissions. With respect to the economic loss issues, the union made it clear that it sought damages for lost wages, since the GTAA reply submissions take issue with a claim for back pay for four years. In those reply submissions, the GTAA also refers to the union's claim for damages "for giving up her unionized position." The GTAA responded with an argument that the grievor was not entitled to any relief because she would have quit her employment. In the alternative, it argued that damages should be minimal.

[70] The GTAA also made submissions with respect to damages for pain and suffering and breach of the *CHRA*, although it appears that its focus was on a claim of harassment, not the pain

and suffering from the knee injury. As well, the written reply submissions after the arbitration hearing dealt with *Vorvis* and damages for mental distress.

[71] The GTAA also takes issue with the fact that the arbitrator engaged in his own legal research and relied on cases which had not been cited to him. I see no denial of natural justice in the fact that the arbitrator updated the case law presented to him. *Whiten, Wallace* and *Weber* were all discussed in the *Seneca College* and *Santoro* cases presented to him, and they were readily available to counsel for the GTAA.

[72] The fact that the arbitrator updated the law by looking at the more recent *Fidler* case does not constitute a denial of natural justice. Bora Laskin, sitting as an arbitrator, stated in *Re United Electrical, Radio and Machine Workers of America, Local 514 and Amalgamated Electric Corporation* (1950), 2 L.A.C. 597, that arbitrators, like judges, could research questions of law and consider cases not cited by the parties (at p. 598).

[73] It might have been preferable had the arbitrator asked the parties for submissions on *Fidler*, given its importance. However, the GTAA was reasonably informed of all the remedial issues in dispute, and its counsel could have found *Fidler* with reasonable diligence. Along with the union, the GTAA consented to the arbitration board dealing with remedy along with the merits, rather than bifurcate the hearing. In my view, the arbitrator did not deny natural justice to the GTAA by engaging in further legal research.

[74] However, I find that the arbitrator did not act fairly with respect to the punitive damages claim. While the GTAA had notice of the claims for punitive damages and damages for mental distress, it had submitted that there was no independent actionable wrong, and that the union had identified none. It is evident from the GTAA's written submissions in reply argument that this was an issue of concern to the GTAA. At para. 27, the submissions state:

> As was the case with the Union's request for general damages, the Union once again failed to point to what specific facts or evidence it relies on as the foundation for the request for punitive damages.
>
> (a) We are therefore put in the impossible situation of trying to guess or divine "what independent actionable wrong or conduct" the Union is relying on in its demand for punitive damages.

[75] Apparently, there were allegations by the union of harassment and breach of human rights legislation. However, Ms. Rusak's affidavit stated that the union never relied on article 4.04, the obligation on management to exercise its rights reasonably, or article 24.07, the sick leave provisions, as the independent actionable wrong (at para. 29). Nor did the union rely on the duty to act in good faith found in the *Code*. The union affidavit filed in reply does not respond to these statements.

[76] The grievance makes reference to articles 3, 9, 18 and 23, as well as "all other relevant articles", but does not mention article 4.04. As well, it makes reference to harassment, stalking and the *CHRA*.

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[77] Thus, the arbitrator found a breach of article 4.04 of the collective agreement, as well as article 24.07, and found an implied obligation of good faith in contract administration arising from the *Code* without giving the GTAA an opportunity to make submissions on these matters. This is particularly significant because of the apparent impact of his findings of unreasonable and bad faith conduct on the punitive damages award, which I will discuss further when I come to the issue of punitive damages.

[78] In *Whiten*, *supra*, the Supreme Court emphasized the importance of fairness to the defendant when a plaintiff claims punitive damages. While the Court was speaking in the context of a civil action, where there are pleadings, the concern that there be adequate notice of the basis for a claim for punitive damages and the opportunity to respond is relevant in the labour arbitration context as well. An award of punitive damages in a discharge case like this is unprecedented. In my view, the GTAA did not have fair notice of the basis of the punitive damages claim or an opportunity to respond. Therefore, the punitive damages award must be set aside.

Did the Arbitrator Unreasonably Award Damages for Past Economic Loss and Future Economic Loss?

[79] In this case, the arbitrator decided that reinstatement, the usual remedy for unjust dismissal, was not appropriate because of the employer's conduct and its impact on the grievor's mental health. He awarded damages for past economic loss up to the date of his award and then damages for future economic loss calculated up to the date of her early retirement. The effect of the award was to give close to six years in back pay and approximately two years in future economic loss (less amounts earned). This is obviously a very large award of damages.

[80] The GTAA submits that damages for past economic loss were unreasonable, because the grievor indicated in September 2006, during cross-examination, that she no longer sought to be reinstated, and she was only seeking damages. Given her choice not to return, the GTAA argues, she could not be said to have suffered any wage or benefit loss because of her termination.

[81] As to future economic loss, the GTAA argues that there is no jurisdiction to make such an award, absent express language in the collective agreement. As well, the award was unreasonable, as it was unsupported by evidence – for example, with respect to the grievor's retirement plans. In effect, the GTAA argues, the arbitrator has ordered specific performance of the employment contract until the age of early retirement and without imposing any express obligation to mitigate.

[82] The union argues that the awards are reasonable. The award of past compensation was consistent with the jurisprudence that awards an employee, dismissed without just cause, back pay to the date of reinstatement in employment. The future loss award amounted to approximately one month's salary for each year of service prior to her discharge – a total of about twenty-four months for an employee with 23 years of service at the time of dismissal.

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[83] In general, the remedy for a unionized employee who has been discharged without just cause will be reinstatement to employment. However, arbitrators have recognized that there are exceptional circumstances in which reinstatement is not appropriate. In *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727, the Supreme Court of Canada stated that reinstatement should be the normal remedy for unjust discharge. However, it upheld an arbitration award of damages in lieu of reinstatement, on the basis that damages are appropriate when an arbitrator finds the employment relationship is no longer viable (at para. 56). In that case, an award of four months' salary was ordered.

[84] In the present case, it was reasonable for the arbitrator to conclude that reinstatement was not an appropriate remedy, given the employer's treatment of the grievor and the deleterious impact on her. In reaching this decision, he found that there was a reciprocal duty to maintain a relationship of trust and confidence between the employer and the grievor. In doing so, he made reference to the *Malik* case, *supra*, to which the GTAA takes objection: first, because it was not cited to him and, second, because it deals with individual employment, not a unionized setting.

[85] In my view, it was reasonable to conclude that the conduct of the employer had resulted in a loss of trust that would prevent a viable employment relationship. Even if *Malik* does not apply directly, the arbitrator's decision does not turn on the legal principles in that case. Lack of trust between an employer and employee is a relevant consideration when arbitrators decide whether to award damages rather than reinstate (see, for example, *DeHavilland Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 112 (Mayer Grievance)* (1999), 83 L.A.C. (4th) 157 (Rayner) at p. 159). Moreover, the GTAA had a contractual obligation to act reasonably in the exercise of its management rights, and its conduct here was clearly unreasonable and undermined the viability of any future employment relationship with this grievor.

[86] The challenge in the cases in which damages have been awarded in lieu of reinstatement is to determine the appropriate principles for the calculation of damages. A helpful discussion of the case law is found in the decision of the Saskatchewan Court of Appeal in *Saskatchewan Centre of the Arts v. I.A.T.S.E., Local 295* (2008), 178 L.A.C. (4th) 385, 2008 SKCA 136 at paras. 17-19.

[87] Some arbitrators have applied common law principles from the law of wrongful dismissal and determined an appropriate notice period. Others have rejected that approach and focused on compensation for the loss of a unionized position, with the value of seniority and the job security it provides. For example, in *Re NAV Canada and I.B.E.W., Loc. 2228 (Coulter)* (2004), 131 L.A.C. (4th) 429, Arbitrator Kuttner rejected the approach taken by the arbitrator in the present case when asked to make an award for loss of income up to the date of reinstatement and another sum for future loss of income. In his view, there was no entitlement to back pay absent an order of reinstatement (at para. 26). Instead, he calculated the damages owing at the date of termination at one and a half months' salary for each year of service plus 15 per cent for benefits (a total of 19.5 months in that case), and he refused to take into account any monies earned as mitigation. (See, also, *Metropolitan Toronto (Municipality) and C.U.P.E., Local 79 (Dalton Grievance)* (2001), 78 L.A.C. (4th) 1 (Simmons) at p. 12; *Canvil, a division of Mueller Canada*

Ltd. v. International Assn. of Machinists and Aerospace Workers, Lodge 1547 (Stone Grievance) (2006), 152 L.A.C. (4th) 378 (Marcotte) at p. 392).

[88] In the *Saskatchewan Centre* case, the arbitrator used the approach in *NAV Canada*, compensating the grievor for five weeks of salary for each year of service up to the date of termination, plus 14% for benefits, plus eight weeks pay in lieu of statutory notice. The Saskatchewan Court of Appeal found that the approach taken by arbitrators in valuing the loss of benefits under a collective agreement is reasonable, with the exception of the failure to consider mitigation (at para. 22). However, the decision under review was held to be unreasonable because it failed to take into account monies earned by the grievor following his termination (at para. 26).

[89] The arbitrator here did not follow the approach in *NAV Canada*, but he was not required to do so. Indeed, the facts of the two cases are very different. In *NAV Canada*, the arbitrator held that dismissal was not justified, but substituted a suspension of three weeks. The grievor in that case had previously been dismissed for insubordination and reinstated on conditions. This time, the arbitrator refused to reinstate, as the employment relationship was not viable, and so he ordered damages. Clearly, the grievor there had contributed to the breakdown of the employment relationship.

[90] In contrast, in the present case, the grievor was blameless. The dismissal was totally without cause. Moreover, the employer acted in bad faith in the manner of dismissal, and it was the cause of the breakdown of a viable employment relationship.

[91] In determining the damages for economic loss, the arbitrator relied on classic contract law principles governing the award of damages for breach, citing *Hadley v. Baxendale* (1854), 9 Ex. 341, 156 E.R. 145 and *Fidler, supra*. First, so far as it is possible, damages for breach of contract should place the person seeking damages in the same position as if the contract had been performed. Second, damages should be awarded that fairly and reasonably arise from the breach or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. It was reasonable to look to those principles.

[92] The arbitrator made a finding that absent the unjust dismissal, the grievor would likely have stayed in her employment with the GTAA until the date she could first retire. That was a reasonable finding, given her age, length of service, clear record and the benefits that come with long term employment in a unionized setting, such as protection against layoff and the right to longer vacations.

[93] The arbitrator's award is consistent with the principle that compensation for loss of a unionized position is not achieved by simply replicating the calculation of pay in lieu of notice at common law. In the unique circumstances of this case, it was reasonable for him to look both forward and backward in determining the damages to compensate the grievor for loss of income, subject to consideration of contingencies and mitigation. But for the employer's egregious conduct, the grievor would have been reinstated with substantial back pay, and she would likely have continued to work, at least until early retirement. To put her in the position, through damages, that she would have been in absent the breach, back pay would not be sufficient. Here,

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an award of two more years salary was a fair and reasonable amount that aimed to place her in the position in which she would have been had the contract been performed.

[94] Given that the grievor is now in her fifties, had 23 years of service at the time of dismissal, and had lost her seniority, pension and other benefits based on length of service, it cannot be said that the economic loss award falls outside a range of reasonable, acceptable outcomes in the circumstances.

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Did the Arbitrator Commit Jurisdictional Error in Awarding Mental Distress Damages?

[95] The GTAA argued that the arbitrator erred in finding that the grievor was entitled to damages for mental distress, given the holding of the arbitration board in *Seneca College*, as well as a number of other cases where arbitrators refused to award such damages (see, for example, *NAV Canada* and *Canvil, supra*).

[96] In the present case, the arbitrator gave a number of reasons for awarding damages for mental distress. First, he found that the object of the collective agreement is to secure a psychological benefit and mental security, and that was within the reasonable contemplation of the parties (Award, p. 121). Here, he appears to be applying the analysis from *Fidler, supra*. However, he went on to comment on the manner of dismissal, which seems to draw on the analysis in *Wallace, supra.*

[97] In my view, the arbitrator reasonably concluded that he had jurisdiction to award damages for mental distress. The real issue is the reasonableness of the award he actually made.

[98] While this Court owes deference to the arbitrator, his first justification for an award of damages for mental distress is unreasonable – that is, his conclusion that damages for mental distress were within the reasonable contemplation of the parties because the collective agreement is meant to secure a psychological benefit and mental security.

[99] In accordance with *Fidler*, the arbitrator was required to ask first, whether the parties – that is, the union and the employer – had as one of their objects to provide a psychological benefit in the collective agreement, and, second, whether damages for mental distress were within their reasonable contemplation at the time the contract was made. When one looks at the context, at the time the parties entered this collective agreement, it is hard to find any basis for the arbitrator's conclusions.

[100] The collective agreement in effect at the time of the discharge became effective August 1, 2003. Thus, at the time the parties entered this agreement, the Supreme Court of Canada had not yet decided *Fidler*. Damages for mental distress, in the case of breach of contract, then required proof of an independent actionable wrong, and *Wallace* had been held not to apply in a collective agreement setting (see the arbitration decision in *Seneca College, supra*).

[101] Generally, arbitrators have refused to award damages for mental distress. Those who have done so based their decision on the nature of the particular clause that had been breached and that led to the grievance. For example, the Public Service Grievance Board of Ontario

awarded $20,000.00 in damages for mental distress where the grievor had been a victim of racial harassment, contrary to a contractual right to be free from racial discrimination. The Board held that such a term created an expectation of a psychological benefit, as it was meant to protect the dignity of an employee. Therefore, its breach would be expected to cause mental distress (*Ontario (Ministry of Community Safety and Correctional Services) and Charlton (Re)* (2007), 162 L.A.C. (4th) 71 (D. Carter) at p. 83). Notably, the Board observed (at p. 83):

> Clearly not all terms and conditions of employment create the expectation of a "psychological benefit", and damages for mental distress are only available for breach of this type of contractual term.

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[102] Union counsel argued that the arbitrator here relied on particular terms of the collective agreement as creating a psychological benefit, such as the provisions relating to sick leave that were breached. However, the arbitrator's reasons are not rooted in that part of the agreement, for he speaks of a main purpose of the collective agreement to provide a psychological benefit of gainful employment (Award, p. 121).

[103] We were referred to no case that has held that a principal object of a collective agreement is to secure psychological benefit and mental security, and there is no evidence cited to indicate why these parties would have contemplated this agreement to be a contract for psychological benefit. Indeed, in *Wallace, supra*, the Supreme Court had stated that an employment contract has not been regarded as a peace of mind contract.

[104] Moreover, given that damages for mental distress were exceptional in a contractual dispute, and required an independent actionable wrong at the time the parties entered the collective agreement, I fail to see any reasoned basis for the conclusion that the parties would have reasonably contemplated an award for mental distress damages on breach of the collective agreement.

[105] Had this been the only basis for the award of mental distress damages, I would have found this aspect of the award unreasonable. However, the arbitrator rested his award on alternative grounds, and the Supreme Court made it clear in *Law Society v. Ryan*, [2003] 1 S.C.R. 247, that a decision will be found reasonable if there is *any* line of analysis that is reasonable and justifies the outcome (at para. 55).

[106] The arbitrator also applied the principles from *Wallace*, *supra*, focusing on the manner of dismissal. As he said, "I *further* determine that mental distress is a reasonably foreseeable incident of discharge and particularly so when the discharge is both unjust, unreasonable and also in bad faith" (Award, p. 122, emphasis added).

[107] The arbitrator does not make mention of the passage in *Keays, supra*, where the Supreme Court stated that, since *Wallace,* parties should have in their expectation that there will be good faith in the manner of dismissal. Nevertheless, it was reasonable for him to conclude that mental distress was foreseeable here, given the manner of dismissal and the circumstances of the particular grievor.

[108] It is true that other arbitrators have refused to apply *Wallace* in a collective agreement setting (for example, the arbitration board in *Seneca College, supra*). However, they did so at a time when *Wallace* resulted in an extension of the notice period, and it therefore seemed inapplicable in a collective agreement setting, where reinstatement is the normal remedy. However, since *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.

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[109] The GTAA argues that the award of such damages in *Wallace* rests on the inequality of bargaining power between employer and individual employee, and there is no such inequality in the unionized setting. While the Supreme Court did comment on this inequality of bargaining power, the Court also commented on the vulnerability of an employee at the time of dismissal. While a unionized employee may be less vulnerable than the non-unionized because of the protections of a just cause clause, the remedy of reinstatement and union representation, such an employee is still vulnerable to mental distress if the employer acts in bad faith in the manner of dismissal, as the GTAA did here.

[110] The arbitrator set out in detail his reasons for finding bad faith on the part of the GTAA, for finding significant mental distress caused to a particularly vulnerable individual and for finding that the GTAA had knowledge of that vulnerability. In the circumstances of this case, his decision to award damages for mental distress based on the bad faith of the employer in the manner of dismissal fell within a range of reasonable outcomes.

[111] There is, however, a difficulty with the actual award made. The arbitrator awarded not only damages for mental distress, but also damages for pain and suffering associated with the grievor's knee injury. The arbitrator found that the knee injury was aggravated because she had to choose between physiotherapy and psychotherapy for financial reasons. While he noted that she was able to continue with the physiotherapy at a hospital, he found that her knee had not completely healed. Therefore, he awarded a global amount of $50,000.00 for pain and suffering and for mental distress.

[112] The arbitrator did not set out the basis for his jurisdiction to award damages for pain and suffering for the knee. To the extent that the damages for mental distress are based on the manner of dismissal, this does not encompass damages for a physical injury that was aggravated because of delays in physiotherapy. Nor has he explained, using the analysis from *Fidler*, *supra*, why such a head of damages would be in the reasonable contemplation of the parties to a collective agreement as arising from its breach.

[113] Moreover, there is no mention of any medical evidence to support the conclusion that the grievor's knee injury was aggravated because of the dismissal and the few weeks without physiotherapy. In his summary of the evidence, the arbitrator states that on April 5, 2004, Dr. Gordon gave the grievor a reference for publicly funded physiotherapy at a hospital, and the evidence indicates she was still seeing the physiotherapist three times a week in July 2004. The arbitrator makes no reference to any medical evidence to support his conclusion that the knee condition was aggravated, or that it had not completely healed as a result of the short interruption in physiotherapy treatment.

[114] In my view, the award of damages for pain and suffering to the knee is not supported by the evidence, and the arbitrator has not shown how such damages would have been in the reasonable contemplation of the parties at the time they made the contract. That aspect of the award is unreasonable.

[115] While it was reasonable to award damages for mental distress, his failure to separate the damages for pain and suffering from the damages for mental distress caused by the manner of dismissal makes his award of $50,000.00 unreasonable and requires that the issue of damages for mental distress be sent back to the arbitrator to determine the appropriate quantum of such damages.

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Did the Arbitrator Err in Awarding Punitive Damages?

[116] The arbitrator concluded that he had jurisdiction to award punitive damages. While other arbitrators have been reluctant to find such jurisdiction, he could reasonably come to this conclusion given his broad remedial power under the *Code* and the collective agreement.

[117] The Supreme Court of Canada in both *Whiten* and *Keays*, *supra*, emphasized that an award of punitive damages is exceptional in a breach of contract case. In *Keays,* the Court stated at para. 68,

> ... this Court has stated that punitive damages should “receive the most careful consideration and the discretion to award them should be most cautiously exercised” (*Vorvis*, at pp. 1104-5).

[118] In order to award punitive damages for breach of contract, there must be an independent actionable wrong. In *Keays*, the Court stated that “[t]he independent actionable wrong requirement is but one of many factors that merit careful consideration by the courts in allocating punitive damages” (at para. 68).

[119] In *Whiten*, *supra*, the Supreme Court held that an independent actionable wrong was not limited to a tort, but could include the breach of a distinct contractual provision, such as a breach of a contractual duty of good faith, or breach of another duty, such as a fiduciary obligation (at paras. 79 and 82). The Court found at para. 79 that breach of an insurer’s contractual duty of good faith is “independent of and in addition to the breach of contractual duty to pay the loss”.

[120] In addition to an independent actionable wrong, an award of punitive damages must be rational. This requires a determination as to whether the wrongdoer’s misconduct is so outrageous as to require punitive damages for purposes of retribution, deterrence and denunciation. As well, the quantum must be rational, as the Court stated at para. 109 of *Whiten*:

> If the award of punitive damages, when added to the compensatory damages, produces a total sum that is so “inordinately large” that it exceeds what is “rationally” required to punish the defendant, it will be reduced or set aside on appeal.

The Court also noted that compensatory damages may also punish, and went on at para. 123:

> The key point is that punitive damages are awarded "if, but only if" *all* other penalties have been taken into account and found to be inadequate to accomplish the objectives of retribution, deterrence, and denunciation.

[121] The arbitrator here found the GTAA's conduct to be high-handed, malicious and arbitrary, and held that punitive damages were necessary for deterrence and denunciation. However, he made no mention of the requirement of an independent actionable wrong, and, therefore, it cannot be said that he gave this issue the careful consideration required. This failure to discuss an independent actionable wrong is troublesome for two reasons: first, because of the importance of this requirement and, second, because of the lack of notice to the GTAA as to what the union relied on in asserting an independent actionable wrong, which was discussed earlier in these reasons in the context of natural justice.

[122] One might infer that the arbitrator found such a wrong, either in an implied duty of good faith in contract administration from the *Code* or from the breach of article 4.04 of the collective agreement. If he was relying on the *Code*, I note that union counsel in the argument before this Court conceded that the duty to bargain in good faith does not go so far as to impose a duty of good faith in contract administration. Moreover, if the arbitrator was relying on the *Code*, he never explained why a breach of that legislation would be actionable in damages in a civil proceeding.

[123] If the arbitrator was relying on article 4.04 of the collective agreement, he failed to address whether that provision creates an actionable wrong that is separate and distinct from the wrongful dismissal. Much of the discussion on the merits of the grievance deals with the unreasonable actions of the employer in the context of whether there was just cause for dismissal – for example, the failure to consider the grievor's record and principles of corrective discipline, the failure to obtain medical evidence to support the suspicions of the grievor, and the failure to approach the meeting with the grievor with an open mind. The overlap between just cause and the unreasonable behaviour of the employer is illustrated at p. 104 of the Award, where the arbitrator states,

> The GTAA has failed to demonstrate on the balance of probabilities that the Grievor wrongfully claimed sick leave benefits and without the slightest hesitation, I determine that the GTAA did not act reasonably and that there was not cause to terminate the Grievor.

[124] The issue of what constitutes an independent actionable wrong in the collective agreement context is an important one. For example, the arbitration board in *Seneca College, supra*, was of the opinion that such a wrong must be more than a breach of a collective agreement provision that could give rise to a separate grievance. At p. 333, that board stated,

> Rather, in the opinion of this Board, the provision which, in its breach, could constitute a separate actionable wrong in contract, within the meaning of *Vorvis*,

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> as applied under a collective agreement, would be one that protects employees or employers from tortious or intangible injuries and one in respect of which the parties intend, either expressly or by clear implication, the availability of such extraordinary remedies as aggravated and punitive damages.

While the arbitrator in this case was not bound by those conclusions, they illustrate that there is room for serious debate as to what constitutes an independent actionable wrong in this case.

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[125] Furthermore, the arbitrator never expressly referred to the rationality and proportionality analysis in *Whiten*. He stated that he awarded punitive damages both to deter future misconduct by the GTAA and to denounce the conduct within the labour relations community. In his view, compensatory damages were inadequate, and he stated that he did consider the totality of the amounts awarded under other heads of compensation.

[126] However, the arbitrator never stood back and looked at the totality of the damages he had already awarded, and never explained why the compensatory damages were inadequate. As the Supreme Court has made clear in both *Whiten* (at para. 123) and *Keays* (at para. 69), compensatory damages can have a deterrent effect. In this case, the arbitrator gave a very significant award of damages for past and future economic loss, amounting to about 8 years of salary less amounts earned in mitigation. At discharge, the grievor was earning about $50,000.00 and after she earned around $20,000.00. On the past loss, the arbitrator ordered interest. As well, he ordered $50,000.00 for mental distress and aggravation to the knee injury. One would expect such an award to have a significant deterrent effect on an employer, especially coupled with the findings of fact he made. However, no explanation is given as to why this would be insufficient deterrent.

[127] Nor is there any discussion as to why a penalty of $50,000.00, as opposed to some lesser amount, was necessary to deter and denounce, again in light of the already significant compensatory award.

[128] In my view, the award of punitive damages cannot stand, for two reasons. First, there was a denial of natural justice resulting from the lack of notice on the issue of the independent actionable wrong. Second, the award was not reasonable because the arbitrator failed to discuss the issue of the independent actionable wrong or to address proportionality in a meaningful way. Therefore, his reasons do not meet the *Dunsmuir* requirements of justification, transparency, and intelligibility.

Conclusion

[129] The application for judicial review is granted in part. The award of damages for mental distress/pain and suffering and the award of punitive damages are set aside.

[130] In many cases, this Court, in setting aside an arbitration award, has referred the matter back to another arbitrator, and that is what the GTAA requested here. However, to do so in the present case is impractical, as the process would have to start again, and that is in no one's interests after all these years since the dismissal. The present arbitrator is experienced and

respected, and he is in the best position to determine the quantum of damages for mental distress, after separating out the amount for pain and suffering, as well as the punitive damages issue in light of this decision. Therefore, these issues are remitted to him.

[131] Each party sought costs in the event it was successful on the application. As success is divided, there will be no costs of the application.

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Swinton J.

____
Kruzick J.

____
Harvison Young J.

Released: January 28, 2011

CITATION: Greater Toronto Airports Authority v. Public Service Alliance Canada Local 0004, 2011 ONSC 487
DIVISIONAL COURT FILE NO.: 150/10
DATE: 20110128

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ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

KRUZICK, SWINTON and HARVISON YOUNG JJ.

BETWEEN:

GREATER TORONTO AIRPORTS AUTHORITY

Applicant

– and –

PUBLIC SERVICE ALLIANCE CANADA LOCAL 0004

Respondent

REASONS FOR JUDGMENT

SWINTON J.

RELEASED: January 28, 2011