

Court of Appeal overturns decision on arbitrator's jurisdiction to award aggravated and punitive damages

In *Ontario Public Service Employees Union v. Seneca College of Applied Arts and Technology* (May 4, 2006), the Ontario Court of Appeal has reversed a decision of the Divisional Court that quashed an award by a board of arbitration (see "["Remedial loose threads": Court rules arbitrators can award aggravated and punitive damages](#)" on our Publications page). The board had held that it did not have the jurisdiction to award aggravated or punitive damages to a reinstated grievor. The Court of Appeal's ruling once again illustrates the difficulty of applying the principles set out in the Supreme Court of Canada's landmark decision of *Weber v. Ontario Hydro* concerning the exclusive jurisdiction of arbitrators to resolve matters arising under collective agreements.

ARBITRATION BOARD

A majority of the arbitration board concluded that the collective agreement did not give the board jurisdiction to award aggravated or punitive damages. It applied the principles established in *Weber* and held that the essence of the dispute involved an allegation by the grievor that the employer had committed the torts of defamation and intentional infliction of mental distress. In the view of the majority, that dispute did not arise under the collective agreement. As a result, it held that the board had no power to grant the damages sought by the union for the employer's tortious conduct and that the union would have to go to court to seek those damages.

The board distinguished the collective agreement in *Weber* from one before it. It noted that the agreement in *Weber* contained a clause that extended the grievance and arbitration process to "any allegation that an employee has been subjected to unfair treatment". The Supreme Court of Canada relied on this clause to conclude that the employer's alleged tortious conduct arose under the collective agreement and, therefore, was arbitrable. The agreement before the board contained no such clause.

The board also found no evidence that the parties had intended their collective agreement to cover such tort damages; the parties could have included clauses prohibiting tortious misconduct in their collective agreement but had chosen not to do so.

DIVISIONAL COURT

The Divisional Court quashed the award, holding that the board had concluded incorrectly that it had no jurisdiction to award aggravated or punitive damages. The court held that the essence of the dispute was the unjust dismissal and the appropriate remedy for that dismissal. In the court's view, the board had broad powers to remedy the unjust dismissal, including the power to award aggravated and punitive damages. The issue of such damages was a dispute between the parties that arose from the collective agreement and was, therefore, within the exclusive jurisdiction of the board.

COURT OF APPEAL

In reversing the Divisional Court's decision and restoring the board's award, the Court of Appeal did not hold that the board had been correct in declining to consider the issue of aggravated and punitive damages. Rather, it held that the Divisional Court had erred in reviewing the board's decision on the standard of correctness. In the Court of Appeal's view, the correct standard of review was that of patent unreasonableness and it could not say that the board's decision was

unreasonable. The Court expressly declined to state whether it agreed with the board's decision, holding that, even if the decision was wrong, the board was entitled to be wrong without judicial interference.

In Our View

While the Court expressly did not hold that the board's reasoning was correct, it did set it out in detail. The board had canvassed a number of policy reasons for not hearing claims for aggravated and punitive damages, including the following:

- allegations of tortious conduct are not the normal subject matter of a collective agreement, which is itself the product of an ongoing relationship, often of lengthy duration;
- traditionally, courts have dealt with those allegations while labour arbitrators have focused on the workplace, not on personal issues;
- allowing arbitrators to deal with those allegations would strain the financial resources available for arbitration proceedings; and
- placing those wrongs within the grievance and arbitration process would put "the very efficiency and vitality" of that process at risk.

These are policy reasons that apply to almost all unionized settings and can be asserted to resist union claims for tort damages at arbitration. However, in all cases, the contractual language agreed to by the parties must be considered carefully to determine whether such claims arise under the collective agreement and are, therefore, arbitrable.

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