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employment and labour relations bulletin

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"employees are not like tissues": arbitrator awards more than $500,000 for bad faith discharge

Just when we thought the courts had closed the door on excessive employee dismissal damage awards (see *Keays v. Honda Canada Inc.* – Supreme Court of Canada and Honda in Accord), a noted Ontario arbitrator has figuratively kicked the door off its hinges. In a stunning grievance arbitration decision,[1] arbitrator Owen Shime has awarded more than $500,000 in damages against a unionized employer for its bad faith conduct towards an injured worker.

Background facts

The grievor was employed by the Greater Toronto Airport Authority ("GTAA") for 23 years with no disciplinary record. In 2003, she injured her knee and was ultimately referred to surgery in February, 2004 followed by recuperation at home.

There was no question about the legitimacy of the grievor's knee injury. However, unbeknownst to the grievor, the GTAA had her under surveillance as it was conducting surveillance of her partner, another GTAA employee, whom the GTAA suspected was taking a fraudulent sick leave.

When the GTAA saw videotape of the grievor engaged in activities that it believed to be inconsistent with her injury, it asked her to provide a note from her doctor indicating whether she could return to work prior to her return date. Her doctor provided a note that indicated that she could return to work on modified duties.

Two days after she returned, the grievor was called into a meeting with management. The grievor was questioned aggressively about her absence and asked to explain her activities as shown on the video surveillance. Following the meeting, the GTAA believed that the employee had been dishonest about the amount of time she needed to recover from her surgery and in answering questions during the meeting. The GTAA dismissed her for cause.

GTAA breaches implied duty of good faith

The arbitrator accepted evidence from a number of medical professionals that attested to the legitimacy of the grievor's injury, that her actions were not inconsistent with her recovery and that she should not have returned to work earlier than the original return date. Evidence was also given that she suffered from post-traumatic stress and depression as a result of the abrupt dismissal. The arbitrator found that the grievor's psychological issues were worsened by the surveillance, as she had previously been stalked by her former husband (a fact that the arbitrator found was within the knowledge of the GTAA).

In upholding the grievance, the arbitrator found that the GTAA had made assumptions about her activities that were incorrect and led to conclusions that were "unwarranted and unreasonable". He found that the GTAA did not properly consider the grievor's long period of service and discipline-free record. In considering the GTAA's conduct, the arbitrator stated that "employees are not like tissues to be used up and then thrown out at a whim into the bin of low level employment or unemployment."

As a result, the arbitrator found that the GTAA had acted unreasonably and breached an implied duty of good faith. He held that just as a unionized employer has an obligation to bargain in good faith, it also has an obligation to administer the terms of a collective agreement reasonably and in good faith.

In fashioning the remedy, the arbitrator found that reinstatement was inappropriate. The arbitrator awarded the grievor damages for lost income from the date of termination to the date of the award, which is common. However, he went further and found that the grievor was entitled to damages for the future loss of her employment, calculated from the date of the award until the date that the grievor would have first been eligible to retire (approximately two years).

The arbitrator also awarded $50,000 in damages for mental distress, on the basis that such damages were in the reasonable contemplation of the parties at the time the "contract of employment" was made. The arbitrator found that a collective agreement provides a "psychological benefit" and "mental security" to an employee and concluded that it was reasonably foreseeable that GTAA's conduct would cause the grievor's mental suffering if it breached the collective agreement.

Finally, the arbitrator awarded a further $50,000 as punitive damages. He held that the conduct of the GTAA was such a marked departure from the ordinary standards of decent behaviour that compensatory damages were insufficient to accomplish the objectives of retribution, deterrence and denunciation.

What *GTAA* means for unionized employers

The arbitrator's factual findings were not surprising, nor was his determination that the conduct of the GTAA was unreasonable. What is disconcerting for unionized employers is the arbitrator's link between the "mental security" of a collective agreement and the availability of mental distress and punitive damages.

While there have been other decisions that have held that an employer must act reasonably and in good faith in administering a collective agreement, this decision goes much further. Since the arbitrator found that a collective agreement provides "mental security" to an employee, an employee's mental distress following a breach is in the reasonable contemplation of the employer and mental distress damages can be awarded.

Similarly, the arbitrator held that the GTAA's conduct exploited "the vulnerability of employees who are dependent" on the GTAA for their employment. He therefore found that the GTAA's conduct was deserving of an award of punitive damages because of the "mental security" provided by the collective agreement that was "stripped" away by the GTAA.

At the time of writing we understand that the GTAA is seeking judicial review of this award. In the meantime, a unionized employer is well advised to step carefully when dealing with any situation of suspected malingering as this decision clearly lowers the bar for awards of mental distress and punitive damages.

Any member of our employment and labour relations group would be pleased to discuss the impact of this decision.

by Dave McKechnie

(Endnotes)

[1] *Public Service Alliance of Canada, Local 0004 v. Greater Toronto Airports Authority*, February 12, 2010 (Shime)

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