

# Young Lawyers

YOUNG LAWYERS' DIVISION / DIVISION DES JEUNES AVOCAT(E)S

## Aggravated and Punitive Damages at Arbitration: The Debate Continues

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Until recently, and with rare exception, it has generally been accepted that aggravated and punitive damages are only awarded in wrongful dismissal cases where the dismissed employee can

prove that the employer has committed an "independent actionable wrong" not directly related to the discipline or termination at issue.

Even more rare is the awarding of aggravated and punitive damages in a unionized workplace where, in addition to the need for a separate actionable wrong, remedies can only be awarded for a grievance that arose expressly or inferentially under the collective agreement.

Recently, however, the test for awarding aggravated and punitive damages in unionized environments has been applied inconsistently. As a result, it may now be difficult for employers to gauge whether, in any given arbitration case, aggravated and punitive damages are likely to be awarded.

### Damages Denied:

In *OPSEU v. Seneca College of Applied Arts and Technology* (2006) 80 O.R. (3d) 1 (leave to appeal refused, [2006] S.C.C.A. No. 281 (Supreme Court of Canada), the Ontario Court of Appeal upheld a Board of

Arbitration's decision not to award aggravated and punitive damages to a grievor. However, the Court of Appeal left open the question of whether aggravated and punitive damages may be awarded in other cases.

The grievor in *Seneca College* was terminated in 1998 after allegedly circulating anti-Semitic material through the College's internal mail system in 1990 and 1991. The grievor denied sending the offensive materials and filed a grievance as a result of his termination. In addition to his reinstatement, the grievor requested aggravated and punitive damages on the basis that his employer intentionally inflicted mental distress on him and defamed him by labelling him an anti-Semite.

The Board of Arbitration reinstated the grievor with full seniority, benefits and lost compensation. In the Board's view, the evidence that the grievor had sent anti-Semitic materials through the mail "was weak at best". The Board also found that the College had unduly delayed imposing the discipline on the grievor, as the incident had happened seven or eight years before the grievor's termination.

The Board declined to award the grievor aggravated and punitive damages. In this case, the Board declined to award aggravated and punitive damages because it did not consider the grievor's complaint of intentional infliction of emotional distress or defamation to arise under the collective agreement. The

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Board held that, if the grievor wanted to pursue aggravated and punitive damages on either of these bases, he would have to sue his employer in the courts as opposed to obtaining his remedy at arbitration.

Upholding the Board's decision, the Court of Appeal specifically noted that the legislation governing the dispute, the *Colleges Collective Bargaining Act*, contained a strong privative clause that protected the decision of the Board from review. The clause read, in part:

No decision, or ruling of an arbitrator or board of arbitration shall be questioned or reviewed in any court, and no order shall be made or proceedings taken in any court or application for judicial review to question the arbitral finding.

In addition, the Court of Appeal found that the language of the collective agreement did not support the grievor's request for aggravated and punitive damages. The only clause which referenced the arbitration of disputes was not sufficient to bring the grievor's request for damages within the jurisdiction of the collective agreement. That clause read, in part:

The arbitration board shall not be authorized to alter, modify or amend any part of the terms of this Agreement nor to make any decision inconsistent therewith; nor to deal with any matter that is not a proper matter for grievance under this Agreement.

For these reasons the Court of Appeal upheld the Arbitration Board's decision not to award aggravated and punitive damages to a terminated grievor. However, the Court did indicate that "depend[ing] on the language of the collective agreement" other collective agreements may contain clauses that could result in an award of aggravated and punitive damages.

In *Prestressed Systems Inc. and L.I.U.N.A Loc. 625* (2005), 143 L.A.C. (4th) 340, Arbitrator Snow held that, while rare, monetary damages in the nature of punitive damages may be awarded where they are required to "remedy any wrong which [the arbitrator] might find". However, Arbitrator Snow did not award the grievor the \$5,000 damages sought for a racial comment made by his supervisor stating that an award of monetary damages "would be more a matter of punishment than a measure of compensation".

An analysis as to whether the collective agreement would support such an award in any event was not conducted.

### **Damages Considered:**

In *Tenaquip Ltd. And Teamsters Canada, Local 419* (2002), 112 L.A.C. (4th) 60, aggravated and punitive damages were sought by the grievor on the basis that his supervisor allegedly harassed him and had committed the tort of battery against him during a physical altercation in the workplace. Arbitrator Newman held that she had the authority to award punitive damages, in the appropriate case, stating:

In dealing with the grievances as particularized, I consider it within the arbitrator's appropriate jurisdiction to fashion what the Supreme Court has termed, "an appropriate remedy". That, in my view, includes the authority to award monetary damages.

As this was a preliminary award, the issue as to whether damages should be awarded in this particular case was not considered.

### **Damages Awarded:**

In *Toronto Transit Commission and A.T.U.*, Arbitrator Shime determined that he had the authority to award damages in the amount of \$25,000 to a grievor who was found to be the longstanding subject of harassment by his supervisor.

Influencing Arbitrator Shime's decision were two clauses of the collective agreement: one which created a Joint Health and Safety Committee for the safety of employees, and a second which encouraged workers to consult their union representative or health and safety representative about concerns pertaining to safety. Arbitrator Shime concluded that these two clauses meant that breaches of an employer's obligation to safeguard employee safety - including the right to be safe from psychological harassment - were arbitrable. As such, Arbitrator Shime found that he had the authority to issue a remedy of punitive damages.

Arbitrator Shime was also clearly influenced by the duration and the nature of the treatment experienced by the grievor, which was described as follows:

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[The grievor] was publicly humiliated on a regular and continual basis. This form of humiliation was akin to placing him in the public stocks. It isolated him from his co-workers, humiliated him publicly and stripped him of his dignity to the point where he felt “like [he] was nobody”. The treatment...also negatively affected his relationship with other employees and negatively affected his sense of identify, self worth and his health, including his emotional and psychological well-being.

### **Lessons Learned:**

While it is true that the law on this issue is not settled, it seems clear that the ability and willingness of an arbitrator to award aggravated and punitive damages will depend on a number of factors, including:

- the language of the collective agreement under consideration
- the ability of the union to phrase the grievance in such a way as to cause aggravated and punitive damages to flow from a violation of the collective agreement, separate and apart from the discipline or discharge at issue
- whether any other legislative authority affects the conduct of the grievance or the procedure used during a grievance proceeding
- the arbitrator’s view of what is the “just result”, for example, by compensating particularly severe treatment.

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