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THE GTAA DECISION: THE PRINCIPLES RELEVANT TO EMPLOYERS

Earlier this year, Arbitrator Owen Shime issued an award which has garnered much attention on account of the amount of damages assessed against the Greater Toronto Airport Authority (GTAA) for the wrongful termination of an employee who had been on sick leave. However, the greater potential significance of this award is found in its articulation of legal principles, and not the actual amount of damages. This *FTR Now* reviews some of those key principles.

BACKGROUND

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

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

As a result of the surveillance, the grievor was asked to justify her absence by providing a physician’s note, which she did. The note stated she was able to return to work with restrictions. Upon her return to work, the grievor was asked to attend a meeting which she thought was to discuss her return to work. However, at that meeting, the grievor was suspended on the basis that

she had abused her sick leave. A few days later, her employment was terminated.

THE DECISION

Arbitrator Shime found that the grievor was misled about the nature of the meeting, that the meeting was in fact an “interrogation session” and that the GTAA had a pre-conceived notion of the grievor’s dishonesty. It did not believe her, regardless of the fact she provided credible explanations supported by medical documentation. In addition, the Arbitrator found that the video surveillance did not establish that the grievor was medically fit to return to modified duties.

He also found that the grievor was traumatized by the manner in which she had been terminated and by the fact she had been, in her mind, stalked by the employer. He noted that GTAA knew of the grievor’s past experiences of abuse at the hands of her ex-husband and had, in fact, assisted her through this period.

In determining appropriate discipline for the perceived abuse of sick leave, the Arbitrator stated the GTAA should have considered that this was a “first offence” and should have weighed the grievor’s seniority and good work record in fashioning an appropriate penalty. If the GTAA had questions about the medical documentation, it could have obtained an independent medical opinion. The Arbitrator also felt the grievor was condemned “by association” with her partner, to whom the GTAA was “not partial”.

Arbitrator Shime found that there was an implied obligation on the GTAA to administer the collective agreement in good faith, and that it had acted unreasonably and in bad faith. Its conduct was sufficiently egregious to warrant mental distress and punitive damages. In scathing language, he stated: “[e]mployees are not like tissues to be used up and then thrown out at a whim into the bin of low level employment or unemployment”.

The following remedies were ordered:

- an expunging of the grievor’s employment file of any record of discipline;
- the provision of a positive letter of reference by the GTAA;
- compensation for lost income and benefits over the 5 ½ year period the arbitration was heard (less a short period of time that union counsel was on leave);
- compensation for loss of future earnings and benefits until the expected date of the grievor’s retirement at age 55;

- \$50,000 in mental distress damages; and
- \$50,000 in punitive damages.

SIGNIFICANCE OF THE AWARD

Certain aspects of the award follow established arbitral jurisprudence. For example, a large portion of the \$500,000 award was compensation for the grievor's past economic loss of income and benefits – in other words, “back pay” owing to the grievor over the approximately five-year period between the termination and the finding that the termination was not justified. Awarding “back pay” to employees terminated without just cause is not new, and, in fact, is to be expected in arbitration awards.

However, as discussed below, other aspects of the award entail novel principles that may have a significant impact on the types of damages unions will seek on behalf of improperly terminated employees in the future.

FUTURE ECONOMIC LOSS

Arbitrator Shime found that because the GTAA's conduct was so high-handed, arbitrary and capricious, the remedy of reinstatement – a remedy that usually mitigates future economic loss – was not viable. Instead, he took the unusual step of awarding damages for future economic loss based on the assumption that the grievor, then 47 years old, would have remained employed by GTAA until age 55, at which point she would become eligible to receive pension benefits.

It is difficult in the best of circumstances to make assumptions that any employee will remain with a particular employer until the date of retirement. Given the unique facts of the case, this decision should not be viewed as a precedent for this type of damages in all cases.

The Arbitrator further found that the grievor could not mitigate against her lost seniority under the collective agreement. Thus, the implication of this award is that employees may seek compensation for lost seniority when they lose their jobs without cause because they will not be able to recuperate the service accrued under a collective agreement which no longer governs their employment.

MENTAL DISTRESS DAMAGES

Arbitrator Shime concluded that one of the purposes of collective agreements is to provide for psychological and mental security. Relying on the Supreme Court of Canada decisions made in the insurance context (*Fidler v. Sun Life Assurance Co. of Canada* and *Whiten v. Pilot Insurance Co.*), he wrote:

One of the main purposes of a collective agreement is to provide employees with the 'psychological benefit' and 'mental security' in being gainfully employed...

In the result, I determine that the object of the collective agreement to both secure a psychological benefit and also mental security was within the reasonable contemplation of the parties and that mental distress damages arising from the breach are recoverable.

These statements are an unprecedented finding in labour law. They suggest that a range of breaches of a collective agreement by the employer could give rise to mental distress damages – despite the fact that the collective agreement is a contract between the employer and the union, not the employees themselves. It is suggested that this pushes the findings of the Supreme Court beyond their reasonable limits.

Arbitrator Shime also found that the GTAA's knowledge that the grievor had experienced past abuse meant that it was reasonably foreseeable that she would be devastated by the flawed investigation and termination. He found that, "clearly, given her past history, the grievor's traumatic reaction to the termination was reasonably foreseeable." He awarded \$50,000 as a result.

PUNITIVE DAMAGES

In awarding \$50,000 in punitive damages, Arbitrator Shime focused on deterrence:

A significant award is needed to deter the GTAA from exploiting the vulnerability of employees who are dependent on their employment with the GTAA.

In addition...it is important within the labour relations community to condemn the GTAA for the manner in which it has acted.

Compensatory damages to the grievor are, in my view, insufficient to accomplish the objectives of retribution, deterrence and denunciation as to what has occurred.

The award of punitive damages is questionable given the significant amount of compensatory damages already awarded, and seems to run counter to court decisions which have found that punitive damages should not be awarded where they are essentially based on the same behaviour underlying the other damages or where a large award of compensatory damages should be sufficient to bring home to the employer the gravity of its actions.

CONCLUSION

The GTAA has filed a judicial review challenging the Arbitrator’s decision, so some of these findings may yet be overturned by a reviewing court. Nevertheless, the decision serves as a stark reminder of the importance of treating employees with respect and dignity, even when they are suspected of serious misconduct. While this holds true for all employees, it is especially important where an employer is dealing with a long-service employee (and especially one with a clean disciplinary record).

The decision also reaffirms the principle that investigations should be conducted in a reasonable, fair and objective manner. While not always easy, it is important not to jump to conclusions or and filter all of the evidence in as objective a manner as possible. Employers should not mislead employees as to the nature of investigative meetings, and should review an employee’s answers objectively, without preconceived notions or biases. In situations where an employer believes an employee is abusing sick leave, and particularly where there appears to be conflicting evidence, the employer should take reasonable steps to try to resolve the conflict, which may include utilizing an independent medical review in some cases.

Please feel free to contact Dolores Barbini at 416.684.7303, David Ross at 416.864.7438 or your regular Hicks Morley lawyer to discuss the impact that this decision may have on your organization.

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