

## **"Remedial loose threads": Court rules arbitrators can award aggravated and punitive damages**

Once again, an Ontario court has considered how to apply the principles set out in 1995 by the Supreme Court of Canada in the *Weber v. Ontario Hydro* case. In *Ontario Public Service Employees Union v. Seneca College of Applied Arts and Technology* (November 1, 2004), the issue before the Divisional Court was whether arbitrators have the jurisdiction to award aggravated damages for mental distress and punitive damages to deter an employer's alleged misconduct. The Court ruled that they do.

The case involved a professor who was discharged for allegedly sending anti-Semitic messages to the employer's Director of Employee Relations. The issue was complicated by the fact that no action had been taken against the employee until nearly eight years after the offending material was sent.

A unanimous board of arbitration upheld the union's grievance and reinstated the employee with full compensation. A majority of the board, however, held that it had no jurisdiction to award the employee aggravated and punitive damages. It distinguished the circumstances in *Weber* by noting that, in that case, the collective agreement had conferred the right to grieve "unjust treatment" which, in turn, gave the arbitrator jurisdiction to deal with allegations of tortious conduct by the employer. In this collective agreement, the majority held, there was nothing to ground "such extraordinary jurisdiction". The union applied to have this part of the award judicially reviewed.

### **DIVISIONAL COURT: DAMAGES ISSUE ARISES UNDER COLLECTIVE AGREEMENT**

The Divisional Court quashed the board's award of damages and ordered it to consider whether aggravated and punitive damages should be awarded and, if so, the amount of the damages. Noting that "it is well established that labour arbitrators have broad remedial powers", the Court held that the essence of the dispute involved an unjust dismissal and the appropriate remedy for it. Therefore, the dispute over aggravated and punitive damages arose either directly or inferentially under the collective agreement.

The Court observed that the grievance did not involve a distinct tort claim but, rather, whether the manner of termination justified a remedy for infliction of mental distress:

"[T]he Board erred in holding that [the employee] should bring a civil action regarding two "leftover remedial claims" and in treating them as separate tort claims. The facts underlying the remedial claims have been presented at a 12 day hearing before the Board. As counsel for the Union state ...: "The claim for aggravated and punitive damages are remedial "loose threads", not independent claims, and the Board simply left them dangling"."

Accordingly, the Court held that the arbitration board had erred when it declined to address the issue of aggravated and punitive damages.

### In Our View

The principle that emerges from this decision appears to be that, if the essence of a dispute arises under a collective agreement, thus conferring exclusive jurisdiction on the arbitrator to deal with the dispute, there must be no deprivation of the ultimate remedy. Therefore, if the basic dispute can be dealt with only through arbitration, all remedial issues raised by it must also be addressed at arbitration. The effect of this ruling may well be an increase in grievances claiming aggravated or punitive damages, as it appears that the Court did not believe that a collective agreement had to specifically confer this remedial jurisdiction for arbitrators to consider such claims. For more on the application of *Weber*, see "[Jurisdiction of courts and arbitrators: the Supreme Court of Canada applies \*Weber\*](#)", and "[Court rules former police officer must arbitrate dispute with supervisor](#)", and "[Fine-tuning \*Weber\*: unionized employee can sue for malicious prosecution](#)".

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