



MILLER THOMSON LLP

Barristers & Solicitors
Patent & Trade-Mark Agents



August 28, 2006

LABOUR AND EMPLOYMENT COMMUNIQUÉ

A publication of Miller
Thomson LLPs Labour &
Employment Practice
Group

Michael C. Conradi
Toronto
Tel. 416.595.8550
mconradi@millerthomson.com

Rob England
Toronto
Tel.: 416.595.8566
rengland@millerthomson.com

RECENT COURT OF APPEAL AND SUPREME COURT OF CANADA DECISIONS ADDRESS AGGRAVATED AND PUNITIVE DAMAGES IN BOTH UNIONIZED AND NON- UNION WORKPLACES

This issue of the Labour & Employment Communiqué discusses three recent decisions that address aggravated and punitive damages in both unionized and non-union workplaces.

COURTS SHOULD DEFER TO ARBITRATORS' DECISION WHETHER TO AWARD AGGRAVATED AND PUNITIVE DAMAGES UNDER COLLECTIVE AGREEMENT: COURT OF APPEAL

by Michael C. Conradi

Note:

This *Communiqué* is provided as an information service and is a summary of current legal issues of concern to the Labour & Employment Industry. *Communiqués* are not meant as legal opinions and readers are cautioned not to act on information provided in this *Communiqué* without seeking specific legal advice with respect to their unique circumstances. Your comments and suggestions are most welcome. Please direct them to: mconradi@millerthomson.ca

In 2000, a three-member panel of arbitrators ruled in *O.P.S.E.U. v. Seneca College of Applied Arts & Technology* that it lacked jurisdiction to award aggravated and punitive damages to an employee who had grieved his dismissal under the provisions of his collective agreement.

In 2004, an Ontario court reversed that decision and held that arbitrators may award aggravated and punitive damages for wrongdoing such as defamation and intentional infliction of mental distress. Now, in a May 2006 decision, the Ontario Court of Appeal has restored the arbitrators' decision holding that the particular collective agreement, does not permit the arbitrator to award aggravated and punitive damages. The Court of Appeal stated that it should not intervene in this type of case unless the arbitration board's reasoning is patently unreasonable or is clearly irrational. The Court concluded that the award in question was not irrational.

The case involved a professor at Seneca College who was dismissed in 1998 after being accused of sending anti-Semitic letters to a college administrator in 1990. The College did not confront the professor until 1998. Despite denying sending the letters, the professor's employment was terminated and the union grieved his dismissal.

The arbitration board reinstated the professor, ruling that the eight-year delay in dismissing him was prejudicial. In response to the union's request for aggravated and punitive damages due to defamation and intentional infliction of mental distress, the arbitration board ruled that it lacked the authority to make such a damage award primarily for two reasons. First, the board found no provision in the collective agreement that allowed for the provision of aggravated and punitive damages. Second, the board determined that the essential nature of the claim, defamation and intentional infliction of mental distress, did not arise either directly or inferentially from the application of the collective agreement. Therefore, no special damages could be awarded.

The union applied to the Divisional Court for judicial review. The Divisional Court concluded that a connection did exist between the professor's termination, the collective agreement, and the arbitration board's broad remedial authority. The Court held that because the allegations of defamation and hurt feelings derived from the manner of the professor's unjust dismissal, the issue of punitive and aggravated damages was a dispute arising either directly or inferentially from the collective agreement. Accordingly, the Court overruled the arbitration board's decision and ordered the board to reconsider whether such damages should have been awarded and, if so, in what amount.

Seneca appealed this decision to the Court of Appeal, which restored the arbitrators' order. The Court of Appeal considered the appropriate standard of judicial review that should be applied to decisions of a board of arbitrators and determined that a high level of deference was appropriate.

For these reasons, the Court of Appeal indicated that a decision of a board of arbitrators should only be overturned where that decision is patently unreasonable. In this case, the Court of Appeal ruled that the board's decision was not patently unreasonable when it concluded that the particular collective agreement did not authorize it to award punitive or aggravated damages. Accordingly, the board's decision was upheld.

It remains to be seen how this decision will influence the decisions of arbitrators with respect to claims for aggravated and punitive damages. Will arbitrators become bolder or more reticent to award such damages in the wake of this decision? Currently, arbitration awards involving aggravated and punitive damages are relatively unusual.

RECENT COURT OF APPEAL AND SUPREME COURT OF CANADA DECISIONS ADDRESS AGGRAVATED AND PUNITIVE DAMAGES IN NON-UNION WORKPLACE

by Rob England

The March 2006 Ontario Court of Appeal decision released in late March in *Sommerard v. I.B.M.* is of some interest with respect to cause, the notice period, *Wallace* damages and aggravated and punitive damages.

The facts are relatively straightforward. The Plaintiff employee worked for I.B.M. for just short of four years during which his performance was marked by a number of incidents of angry outbursts. He went on short-term disability then applied for long-term disability but the application was rejected. After learning that the insurance carrier had denied his LTD application the employee advised an I.B.M. nurse that he could not return to work because he was afraid that he would hurt or hit someone at work. I.B.M. concluded that the risk of allowing him to return to work was too great and, therefore, terminated his employment.

At trial, a jury held that I.B.M. did not have cause and determined that the notice period was 9 months, gave a further 4 months on account of *Wallace* damages, \$1,000 for aggravated damages and \$22,000 for punitive damages.

The findings of the Court of Appeal were as follows.

First, as to cause the Court of Appeal was not prepared to interfere with the determination by the jury that I.B.M. had acted precipitously in dismissing the Plaintiff. The jury had accepted the argument that I.B.M. rushed to the decision to terminate the employment with inadequate investigation into the incident, the illness and alternatives to termination.

Second, the Court of Appeal held that the appropriate range of notice was 3 to 5 months and that the jury award of 9 months was well beyond what was reasonable and allowed that aspect of the appeal.

Third, while the Court of Appeal recognized that I.B.M. was in a difficult position, it was not prepared to interfere with the decision of the jury insofar as it both found bad faith and awarded 4 months on account of

Wallace damages which, the Court of Appeal noted, was "very generous."

Fourth, the Court dealt with the award of aggravated damages and the award of punitive damages. The Court reiterated that it is common ground in wrongful dismissal actions that aggravated and punitive damages can only be awarded where the employee is able to establish that the employer engaged in an independent actionable wrong that was separate and apart from the breach of contract for failure to give reasonable notice of termination of employment. In the instant case, the only independent actionable wrong that could have existed was the tort of intentional infliction of mental distress. The jury having found no such independent tort, it necessarily followed that there could be no awards of aggravated and punitive damages. It is worthy of note that the Court of Appeal pointed out the importance of proper pleadings to avoid this sort of problem. The Court specifically stated that those Plaintiffs who seek aggravated and/or punitive damages should particularize the independent actionable wrong or wrongs upon which they are relying and the material facts in support of such claims.

A further clarification with respect to the analytical framework within which aggravated and punitive damages are awarded was given in the Supreme Court of Canada case of *Fidler v. Sun Life Assurance Co. of Canada* which was released on June 29, 2006.

In that case, an employee covered by a group policy went on leave and was in receipt of LTD benefits for more than 5 years. The insurer caused an investigation to be conducted and determined that the beneficiary was, in fact, able to perform any occupation. It therefore terminated her coverage. The insurer, in fact, had medical evidence in its possession that indicated that the Plaintiff may not have been able to perform any work, its surveillance was flawed and its medical conclusions unfounded. Just prior to the commencement of trial the insurer reinstated the Plaintiff to benefits and paid the arrears with interest. The trial was, therefore, concerned only with her claim for aggravated and punitive damages.

The Supreme Court of Canada canvassed the jurisprudence with respect to the availability of damages for mental distress in breach of contract cases. The Court held that such damages are not available in "peace of mind" contracts as an exception to the general rule denying recoverability of such damages. Instead such damages are to be seen as damages that are available in a breach of contract case on the basis of *Hadley v. Baxendale* if it can be established on the evidence and shown to have been within the reasonable contemplation of the parties at the time the contract was made that damages for mental distress will flow from a breach of the contract. There is no necessity for an independent actionable wrong nor any necessity to view any such damages as being an exception to the general principle set out in *Hadley v. Baxendale* with respect to damages in contract cases. That said, the Plaintiff must prove his or her loss. The Court must be satisfied that: (a) an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties and (b) the degree of mental suffering caused by the breach was of sufficient degree to warrant compensation. Damages on this basis ought not to be considered "aggravated damages" as such damages exist independent of any aggravating circumstances and are based upon the parties' expectation at the time of contract formation. Damages that flow from a separate cause of action, including damages on account of mental distress, arise out of that independent cause of action and are properly considered "aggravated damages".

Finally, the Supreme Court set aside the award of punitive damages because of the finding of the trial judge that there had not been bad faith on the part of the insurer.

ABOUT THE AUTHORS :

Rob England and Michael C. Conradi are members of our Labour & Employment Group. They provide legal services and advice to a wide range of clients in the public and private sectors.

Our Labour and Employment Practice Group is dedicated to providing comprehensive and integrated legal services, and advises management in all aspects of labour relations and employment law. For more information about our Group, visit our website at www.millerthomson.com or contact:

*Miller Thomson LLP
40 King Street West, Suite 5800*

Toronto, ON M5H 3S1
416.595.8500
416.595.8695 (fax)

This newsletter is provided as an information service to our clients and is a summary of current legal issues. These articles are not meant as legal opinions and readers are cautioned not to act on information provided in this newsletter without seeking specific legal advice with respect to their unique circumstances. Miller Thomson LLP uses your contact information to send you information on legal topics that may be of interest to you. It does not share your personal information outside the firm, except with subcontractors who have agreed to abide by its privacy policy and other rules.