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ARBITRATORS CAN AWARD PUNITIVE AND AGGRAVATED DAMAGES: COURT RULES

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On Ontario court has overturned an arbitration award that had determined arbitrators do not have jurisdiction to award aggravated and punitive damages for wrongdoing such as defamation and intentional infliction of mental distress.¹

The case involved a Seneca College ("College") professor whose employment was terminated in 1998 after being accused of sending anti-Semitic letters to a college administrator in 1990 and 1991. Although the professor was identified as a suspected author in 1990, the College did not confront the professor until February 1998. Although he denied sending the letters, the professor's employment was terminated.

In May 2000, a three-member board of arbitration unanimously reinstated the professor, with full compensation, ruling that the eight-years between the alleged letter writing and the actual termination was so prejudicial to the professor's ability to defend himself that it was tantamount to a denial of procedural fairness. Accordingly, the termination was ruled void.

The union also advanced claims, on the grievor's behalf, that combined aggravated and punitive damages in the amount of \$10,000 should be awarded for intentional infliction of mental distress and defamation. A majority of the arbitration board issued a supplementary award stating that they lacked the jurisdiction to award such damages because there was no clause in the collective agreement that "might give rise to an inference that the parties intended a board of arbitration to adjudicate alleged tortious wrongdoing".

The union judicially reviewed the supplementary award arguing that the professor's tort claim for wrongful infliction of mental distress and defamation arose "either expressly or inferentially from the collective agreement". The Court agreed with the union and found that arbitrators do have the jurisdiction to award aggravated and punitive damages.

In this case, the Court found a connection between the professor's termination and an arbitration board's broad remedial authority. The Court stated:

The essential character of the dispute before the board of arbitration was an unjust dismissal and the appropriate remedy therefor...Since the manner in which the grievor was dismissed gave rise to the

¹ *O.P.S.E.U. v. Seneca College of Applied Arts and Technology*, November 1, 2004, O'Driscoll J. (Ont. Div. Ct.).

allegation regarding defamation and hurt feelings, the issue of aggravated damages and/or punitive damages is a dispute between the parties arising either directly or inferentially from the collective agreement and, therefore, within the exclusive jurisdiction of the board of arbitration.

The Court overruled the board's supplementary award and ordered the board to consider "whether the requested damages should or should not be awarded and, if "yes", the quantum."

The implications of this decision are clear: when an employer engages in tortious conduct (i.e., behaviour that is harsh, vindictive, reprehensible and/or malicious) that relates to an unjust dismissal or other disciplinary matter, arbitrators will have the jurisdiction to award aggravated and punitive damages. However, the circumstances in which such damages will be awarded are still to be determined.

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