MANAGEMENT COUNSEL

Employment and Labour Law Update

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"An insurance contract is different from other commercial contracts precisely because it exists to give a party peace of mind."

...see inside

Reading Between The Lines: What's in a Contract?

In June 2006, the Supreme Court of Canada released a landmark decision in *Fidler v. Sun Life Assurance Company of Canada*. Previously, a plaintiff had been unable to obtain damages for mental distress caused by a breach of contract, unless the defendant had committed a "separately actionable wrong," such as slander, for example. *Fidler* has relaxed this restriction, at least for certain types of contractual situations.

THE FACTS

The plaintiff, Connie Fidler, had been employed by Royal Bank as a receptionist until she was hospitalized for a kidney infection. After she recovered from that illness, Ms. Fidler was diagnosed with chronic fatigue syndrome and fibromyalgia. Consequently, she was unable to return to work. Her workplace benefits included a long-term disability benefits plan with Sun Life.

After approximately six years of paying long-term disability benefits, Sun Life abruptly terminated Ms. Fidler's benefits. Sun Life had video evidence showing Ms. Fidler engaged in activities that she had claimed she could not perform. Ms. Fidler acknowledged that she had engaged in those activities, but explained that it had only been for brief periods of time and she insisted that she could not hold a job. Her doctor also maintained that she was totally disabled.

Ms. Fidler continued to pursue her long-term disability benefits from Sun Life for two years. Eventually the parties agreed that Ms. Fidler would undergo an independent medical examination. The independent doctor concluded that Ms. Fidler was "increasingly able to consider returning to work… Prior to this being successful, [Ms. Fidler] should embark upon a graduated training program to improve her level of physical fitness." Sun Life interpreted this as meaning Ms. Fidler was able to return to work and was therefore not entitled to long-term disability benefits.

In response, Ms. Fidler launched an action against Sun Life. One week prior to trial, Sun Life reversed itself and agreed to reinstate Ms. Fidler's benefits. As such the trial focused on the single issue of whether Sun Life was liable for aggravated or punitive damages for having failed to pay the disability benefits earlier.

TRIAL COURT

The trial judge held that Ms. Fidler was entitled to $20,000 for aggravated damages for mental distress, without needing to prove a separately actionable wrong. Because disability insurance contracts are for "peace of mind", a separately actionable wrong was not necessary. Ms. Fidler was not awarded punitive damages though, because Sun Life had not acted in bad faith.

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BRITISH COLUMBIA COURT OF APPEAL

The Court of Appeal upheld the trial judge's decision to award aggravated damages for mental distress, because the contract was for peace of mind. The Court of Appeal further found that Sun Life did act in bad faith and awarded Ms. Fidler $100,000 in punitive damages.

SUPREME COURT OF CANADA

The Supreme Court agreed with the lower courts that mental distress damages were appropriate, and further that proof of a separately actionable wrong was not required. The Court held that a separately actionable wrong is only required for awards of aggravated damages. In this case, damages for mental distress were not to be viewed as aggravated damages.

The Court acknowledged that this was a departure from its traditional stance against awarding mental distress damages for contractual breaches. What justified this departure was that traditional contract law had been developed with typical commercial contracts in mind. An insurance contract is different from other commercial contracts precisely because it exists to give a party peace of mind. For example, there is a "perceived minimal nature of mental suffering" if there was a breach of a commercial contract - whereas this is not necessarily the case with an insurance contract.

Returning to first principles, the Court emphasized that the purpose of contract law is to compensate the plaintiff for damages that "may fairly and reasonably be considered either arising naturally from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties."

So, for certain types of contracts, it would be reasonable to expect the innocent party to suffer mental distress upon breach of the contract. For example, various Canadian courts have awarded mental distress damages for the breach of vacation, wedding service, luxury good and insurance contracts. These types of contracts are not considered exceptions to the general rule that there is no compensation for mental distress damages in breach of contract actions. Rather, these cases are seen as applications of the principle that damages for breach of contract are awarded if they are reasonably in the contemplation of the parties at the time of contracting.

To receive mental distress damages, a plaintiff must demonstrate two things. First, that one of the objects of the contract was "to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties." The psychological benefit of the contract does not have to be the dominant aspect of the contract. Second, "the degree of mental suffering caused by the breach [must be] sufficient to warrant compensation."

Both these elements were satisfied in the case of Ms. Fidler entitling her to mental distress damages from Sun Life.

The Supreme Court restored the trial judge's decision regarding the denial of any punitive damages, because of the factual finding that there was no bad faith.

IMPACT ON EMPLOYMENT CONTRACTS AND COLLECTIVE AGREEMENTS

Although this case dealt with an insurance contract, it may become relevant in the employment context. Employment relationships are considered by our courts to be contracts. As such, an employee would be entitled to mental distress damages for breach of an employment contract upon proof that the two *Fidler* requirements were satisfied. That is, if one of the contract's purposes was to secure a psychological benefit and there is a sufficient degree of mental suffering to merit compensation.

One must still question whether one of the objects of an employment contract is to secure a psychological benefit. The Supreme Court has on a number of occasions quoted with approval the following passage:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.

However, the Supreme Court has previously held that mental distress damages cannot be obtained in the employment context, in the absence of a separately actionable wrong. It is unclear whether *Fidler* telegraphs a change to this approach.

Fidler would certainly raise at least the potential for an employee to claim that a contract of employment does have as one of its objects the conferring of a psychological benefit. This would re-open what had appeared to be a closed door to most employees' mental distress claims.

As for unionized employees, current case law would suggest that it is considerably more doubtful that this principle will be applied by labour arbitrators. For a more detail look at this latter issue, please see the companion article in this edition of *Management Counsel*, "Aggravated and Punitive Damages at Arbitration: the Debate Continues" which follows.

DID YOU KNOW?

The Ministry of Labour has produced a new ESA Poster, Version 3.0. The ESA provides that: "Every employer shall post and keep posted in at least one conspicuous place in every workplace of the employer where it is likely to come to the attention of employees in that workplace a copy of the most recent poster...". If you would like a copy of the poster please contact our office, or visit the Ministry website at: http://www.labour.gov.on.ca/english/es/poster.html

Aggravated and Punitive Damages at Arbitration: The Debate Continues

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, court and arbitration decisions have applied this test inconsistently. As a result, it is difficult for employers to gauge whether, in any given case, aggravated and punitive damages are likely to be awarded.

DAMAGES DENIED

In *OPSEU v. Seneca College of Applied Arts and Technology* the Ontario Court of Appeal recently 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 labeling 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 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.

DAMAGES CONSIDERED

In *Tenaquip Ltd. And Teamsters Canada, Local 419*, 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 took the same approach as that in *Seneca College* and stated:

> "...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 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.

Similarly, in *Prestressed Systems Inc. and L.I.U.N.A Loc. 625*, 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". In that particular case, Arbitrator Snow held that an award in favour of the grievor of $5,000 for a racial comment made by his supervisor was necessary to remedy the dispute between the parties.

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

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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:

> [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 as 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.

Next in our series of employment and labour law updates:

TOPIC: **Employment Standards - Non-Compliance is More Costly Than Ever Before**

HReview Seminar Series

The Ministry of Labour has announced a campaign to educate workers about their rights under the ESA, including 24 hour online filing for complaints. It's easier than ever for your employees to file Employment Standards Complaints - could your organization be a target? In this timely refresher, learn:

1. The ESA - to whom in your organization does it apply?
2. Record keeping - what are an employer's obligations?
3. Hours of Work, Overtime, Leaves of Absence, Termination and Severance of Employment - are you in compliance?
4. Strategies regarding excess hours of work applications and overtime averaging - where can your organization achieve cost savings?
5. Complaints and Enforcement - what is the latest?

DATE: Thursday, November 16, 2006, 7:30 a.m. – 9:00 a.m. Program to start at 8:00 a.m., breakfast provided.

VENUE: The Toronto Board of Trade Country Club, 20 Lloyd Street, Woodbridge, ON 905.856.4317

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