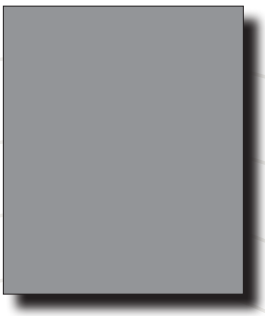
CROSS-CANADA UPDATE: INCREASES IN DAMAGES AND PENALTIES



FRANK MOLNAR

[1]Cases over the last five years illustrate a general increase in the damage awards made by the courts, labour arbitrators and human rights panels.

AWARDS BY THE COURTS

Awards of aggravated and punitive damages

Prior to the Supreme Court of Canada's decision in *Vorvis v. Insurance corp. of British Columbia*[2], damages for mental distress were awarded where it was in the contemplation of the parties at the time of hiring that termination without reasonable notice would cause the plaintiff mental distress. The decisions in *Vorvis*, supra, and *Wallace v. United Grain Growers Ltd.*[3], restricted the award of damages for mental distress in a case of wrongful dismissal to situations "where the acts complained of were also independently actionable", and confirmed that foreseeability of mental distress is not a factor to be considered in determining whether damages for mental distress can be awarded. So when are aggravated and punitive damages awarded?

In *Fidler v. Sun Life Assurance Co. of Canada*[4], the insured was diagnosed with chronic fatigue syndrome and granted long-term disability benefits. Despite lack of medical evidence that the insured could return to work, the insurer terminated the benefits after video surveillance recorded the insured driving and shopping. The insured brought an action for loss of long term disability benefits. The insurer reinstated the benefits one month before the trial. As a result, the court was concerned only with the question of whether the insured was entitled to aggravated and punitive damages.

In discussing damages for mental distress, the trial judge distinguished between true aggravated damages, which rest on a separate actionable wrong usually in tort, and aggravated damages that arise out of the contractual breach itself, which may be awarded where the object of the contract is to provide pleasure, relaxation and peace of mind, even in the absence of a separate actionable cause of action. In considering the case before him, the trial judge concluded that where the losses arise from the breach of contract itself, as was the case in *Fidler*, damages are to be determined according to what was in the reasonable contemplation of the parties at the time of contract formation. The court awarded $20,000 for loss of the intangible benefit of peace of mind caused by the insurer's unwarranted delay in honoring the contract of insurance.

With respect to punitive damages, the court held that in order to attract punitive damages, the impugned conduct, must depart markedly from ordinary standards of decency such that it can be described as "malicious,

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1 I wish to acknowledge and thank Victoria Uretsky, articling student at Field LLP, for her assistance in preparing this paper
2 [1989] 1 S.C.R. 1085 (S.C.C.) .
3 [1997] 3 S.C.R. 701 (S.C.C.)
4 [2006] 2 S.C.R. 3 (S.C.C.)

oppressive or high-handed". After examining the evidence before him, the trial judge denied the award of punitive damages on the basis that Sun Life Assurance's conduct fell short of "bad faith" justifying such award. The British Columbia Court of Appeal overturned the decision of the trial judge and awarded $100,000 in punitive damages. The Supreme Court of Canada reinstated the decision of the trial judge and overturned the award of punitive damages.

While *Fidler*, supra, makes it clear that damages for mental distress may be awarded in cases where the breach is of a contract whose object is to "secure a particular psychological benefit", with no requirement that there be a separate actionable wrong, the jurisprudence appears to be clear that in cases of wrongful dismissal, aggravated and punitive damages will only be awarded, where the wrong complained of is independently actionable. While the manner of termination and breach of duty of good faith and fair dealing may result in the court increasing the notice period, damages for mental distress only arise where the actions of the employer constitutes a separate cause of action. The court in *Wallace*, supra, emphasized that although "bad faith" on the part of the employer in dismissing an employee is not sufficient to form a separate wrong to warrant the award of true aggravated or punitive damages, the conduct falls under a separate head of damages, known as Wallace damages.

Punitive damages in wrongful dismissal cases have traditionally been in the range of $15,000 to $50,000, rarely going up to $75,000. Recent cases indicate that the courts may be prepared to award such damages on a significantly higher level.

In *Keays v. Honda Canada Inc.*[5], Keays' employment was terminated after fourteen years employment for insubordination as a result of failing to comply with the employer's direction that he undergo an assessment by its occupational medicine specialist without first being advised of the purpose, scope and methodology of the intended examination. Shortly after commencing his employment with Honda, Keays developed health problems and was subsequently diagnosed with chronic fatigue syndrome, which resulted in frequent absences from work over a number of years. While Honda provided some accommodation for Keays' absences, it required him to provide a doctor's note validating each absence before he could return to work. Employees with "mainstream" illnesses did not face this requirement. His referral to the company's doctor resulted in Keays being threatened with transfer to a physically demanding production position, which he feared would exacerbate his condition. Keays' legal counsel wrote to Honda outlining Keays concerns in what the trial judge found to be extremely conciliatory terms, and offering to work toward a resolution of their differences. Honda did not respond to the letter. Rather, it met with Keays and directed him to meet with Dr. Brennan, its occupational medicine specialist. In a letter to Keays summarizing the meeting, Honda falsely stated that it's doctors had not been able to find a diagnosis that indicated that Keays was disabled from working and advised that it wanted Keays to meet with its occupational medicine specialist. Honda also withdrew the limited accommodation it had been providing without acquiring any fresh medical information from him. Keays replied that on the advice of his lawyer he would not attend the meeting without clarification of the purpose, methodology and parameters of the assessment. Honda replied in writing that it did not accept the need for Keays' recent absence, it would not be providing the requested clarification and Keays would not attend the meeting his employment would be terminated. When Keays failed to attend the assessment, he was advised of his termination

5 [2005] O.J. No. 1145 (Ont. S.C.J.); varied on appeal (2006) 274 D.L.R. (4th) 107 (Ont. C.A.), leave to appeal granted to Supreme Court of Canada

by a co-worker who phoned him at home to tell him that his dismissal had been announced to the department. As a result of his termination, Keays suffered a three to four month period of post-traumatic adjustment disorder, was unable to work since his termination and ultimately qualified for a disability pension from the Canada Pension Plan. The trial found that Honda's order to attend the assessment was unreasonable and was not made in good faith, but as a prelude to terminating Keay's employment and to avoid having to accommodate his disability. The trial judge concluded that the order to meet with Dr. Brennan, who had expressed skepticism about Keays' diagnosis to design the proper accommodation owed to him was not reasonable and Keays had a reasonable excuse for not complying with that order.

In determining whether the conduct of the employer warranted an award for punitive damages, the trial judge considered whether the conduct complained of constituted an independent actionable wrong. The trial judge held that Honda's course of conduct, culminating in termination, constituted discrimination and harassment of Keays in his employment and gave rise to an independent cause of action under the *Ontario Human Rights Code*, sufficient to support an award of punitive damages. In awarding punitive damages of $500,000, the trial judge found that:

- Honda's motivation for terminating Keays was to avoid its obligation to accommodate his disability;
- Honda attempted to intimidate Keays into seeing its occupational medicine specialist; and
- Honda did those acts based on the knowledge of Keays' vulnerability because of his disability.

On appeal, Honda argued that discriminatory conduct in violation of Ontario's Human Rights Code could not serve as an independent actionable wrong necessary to support an award of punitive damages. It was argued that the Code constituted a complete remedial regime that permit punishment only in limited circumstances of prosecution with the written consent of the Attorney General, and then only to a maximum fine of $25,000. The Ontario Court of Appeal[6] noted that the objective of punitive damages is to punish the defendant, rather than compensate the plaintiff and that punishment is a legitimate objective of the civil law, not just of the criminal law. Consequently, the prosecution provisions of the Code did not preclude an award for punitive damages.

Honda also challenged the award of punitive damages based the decision of the Supreme Court of Canada in *Bhaduaria v. Seneca College of Applied Arts and Technology*[7] which held that a civil action could not be based directly on a breach of the Ontario Human Rights Code. The Court of Appeal distinguished *Bhaduaria* on the basis of subsequent authority which found that an action for wrongful dismissal can be properly based on a dismissal that constitutes discrimination contrary to human rights legislation[8], which is different than basing the civil action directly on a breach of human rights legislation. The Court noted that the trial judge had, albeit reluctantly, dismissed such a claim made by Keays based directly on breach of the Ontario Human Rights Code. The Court also noted that in *McKinley v. BC Tel*[9], Iacobucci J., writing for the court, made it clear that breaches of

6 (2006) 274 D.L.R. (4th) 107 (Ont. C.A.), leave to appeal granted to Supreme Court of Canada

7 [1981] 2. S.C.R. 181 (S.C.C.)

8 See: MacDonald v 283076 Ontario Inc. (1979), 26 O.R. (2d) 1 (Ont. C.A.); L'Attiboudeaire v. Royal Bank,[1996] O.J. 178 (Ont. C.A.) and Gnanasegaram v. Allianz Insurance Co. of Canada, [2005] O.J. No. 1076 (Ont. C.A.)

9 [2001] 2. S.C.R. 161, 200 D.L.R. (4th) 385 (S.C.C.). In McKinley, the court held there was insufficient evidence in that case to establish an act of discrimination in violation of human rights legislation.

human rights legislation may serve as a separate actionable wrong so as to give rise to a punitive damages award in a wrongful dismissal case.
The Court of Appeal agreed with the trial judge that a number of acts of discrimination supported an award of punitive damages. Goudge J.A. made the following comments (paras 52-55 and 57-58):

> "In this case, there was ample evidence to sustain the trial judge's conclusion that the appellant's course of conduct culminating in termination included a number of acts of discrimination and harassment. The appellant required the respondent to justify his medical absences because of his particular disability when employees with "mainstream illnesses" were not so required. Due to absences caused by his disability, the appellant subjected him to the first step in the discipline process and then refused to remove the disciplinary "coaching" from his record. It required him to attend an interview with the company doctor where his disability was belittled and, as the trial judge found, he was treated with gross insensitivity. What limited accommodation the company gave the respondent was cancelled in retaliation for his having retained a lawyer to advance the rights guaranteed to him by the *Human Rights Code*. And the trial judge found that when the respondent refused to be "bullied" into seeing Dr. Brennan without an assurance that he would not be abused again, he was fired. These findings of fact amply demonstrate the appellant's discrimination and harassment of the respondent in his employment."
>
> This, I conclude that the appellant's attack on the trial judge's finding of an independent actionable wrong cannot succeed.

The appellant then argues that an award of punitive damages should not have been made at all in this case because its conduct was not harsh, vindictive, reprehensible or malicious.

The trial judge carefully listed the acts by the appellant that he characterized as outrageous and high-handed conduct requiring the retribution, denunciation and deterrence of punitive damages. These include the following: that the appellant's motivation for terminating the respondent was to avoid its obligation to accommodate his disability; that it attempted to intimidate him into seeing its occupational medicine specialist who employed a hardball approach to employee absence; and that the appellant did all of this in full knowledge of the respondent's vulnerability because of his disability.

…

Given this conduct, an award of punitive damages was a rational response on the part of the trial judge. There is no doubt that it is permissible, indeed desirable for an employer to engage professional assistance in the accommodation process. It is also entitled to require the employee to participate as well. Where only accommodation to the point of undue hardship will suffice, the employer can decline to provide it. But it must engage in this process reasonably and in good faith. Where it proceeds in bad faith and seeks to evade its legal obligation to accommodate those rendered vulnerable through disability by wrongfully terminating them, compensation and punishment are both justified.

That is what the trial judge found

> happened here. In essence, he found that the appellant refused to give genuine recognition to the respondent's disability and seek, in an open minded, unbiased and good faith way, to meet with him to find a reasonable accommodation. Rather, the appellant deliberately contrived in bad faith to intimidate and then wrongfully terminate him to avoid its duty to accommodate a disability whose legitimacy it could not accept. Given his findings of fact, I find no reviewable error in these conclusions. They provide a rational basis for an award of punitive damages, as deterrence and denunciation of conduct causing significant harm to those who are disadvantaged and vulnerable due to disability."

Goudge J.A. would have upheld the quantum of the punitive damages at $500,000 for the following reasons based on the Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co.*[10] (paras 62-66):

> "First is the level of blameworthiness of the appellant's conduct. The trial judge found it to be planned and deliberate, and designed to escape its responsibilities to accommodate the respondent's disability. The appellant thereby violated something deeply personal to the respondent, his sense of dignity and self worth. The trial judge was entitled to view this as significant blameworthiness.
>
> The degree of vulnerability of the respondent is also an important factor. Here the respondent was not only vulnerable as a long term employee losing his job, important enough as Iacobucci J. outlined in Wallace. But to the knowledge of the appellant, his doctors had found that the respondent suffered from a serious medical condition, which added to his vulnerability. Given this, the appellant's abuse of its power was clear.
>
> Another important factor is the harm to the respondent. It too was significant. He was rendered totally disabled and has remained so ever since.
>
> Moreover, it was reasonable for the trial judge to see the need for deterrence as significant. The need for this large employer, and indeed all employers to take seriously their responsibilities in accommodating employees with disabilities is very important. This is, if anything, more true for employees whose disabilities may be seen by some as outside the mainstream and therefore not genuine. The accommodation process must be approached in good faith, openly, and sensitively if the dignity and equality of disabled employees is to be respected as required by the law and morality. Such an employer must be deterred from engaging in subterfuge to wrongfully terminate a disabled employee in order to escape these responsibilities.
>
> Putting together the unique combination of circumstances here, particularly the blameworthiness of the appellant's conduct, the respondent's particular vulnerability, the harm to him and the need to deter this large employer from wrongfully terminating in order to evade its duty to accommodate, I cannot conclude that $500,000 in punitive damages, when added to the compensatory damages awarded to the respondent exceeds what is rationally required to punish the appellant. As Binnie J. did in Whiten, I conclude that while I would not have awarded that sum, it is not so disproportionate as to exceed the bound of rationality."

10 [2002] 1. S.C.R. 595 (S.C.C.)

While the majority agreed with Goudge J.A.'s disposition of the appeal, it disagreed with respect to the award of punitive damages. The majority found that while a number of the trial judge's factual findings were not supported on the evidence, there were sufficient findings to support an award of punitive damages. Applying the proportionality analysis set out in Whiten, the majority reduced the punitive damages award to $100,000.

In *Downham v. Lennox & Addington (County)*[11], Downham was dismissed on the basis that his involvement in helping a convicted offender apply for an apartment constituted a conflict of interest. Downham was a Manager for a Non-Profit Housing project and had been employed for 12 years and was 50 years of age at termination. He and his wife were support persons for a church friend, a convicted pedophile who had been released into their supervision. Downham assisted the offender obtain applications for subsidized housing at a non-profit corporation and accompanied him to meet the property manager. While the offender met all eligibility requirements, the property manager became concerned when she saw the letter prepared by the offender regarding his criminal record and parole restrictions. Downham's supervisor, Williams, became concerned that in light of Downham's position, he had acted in conflict of interest by helping the offender apply for the vacancy. The investigation conducted by the County was based on misleading notes, which also became the basis of a report that was prepared. The report contained numerous false statements as a result of which Downham was dismissed.

The Court found that the exceptional circumstances, the conduct of the employer, and the injuries to the employee, warranted an award under all three heads of damages: Wallace damages, aggravated damages and punitive damages. The following aggravating factors were considered:

a. "There was no effort to contact Mr. Downham at the outset to ascertain his position and to minimize the damage
b. The investigation was biased, shoddy and substantially undocumented (despite the direction to create a paper trail). The information allegedly obtained from Mrs. Beaudrie and Ms. Stebbins was the underpinning of the report but was not recorded. The absence of such a record resulted in false and distorted information being included in the report and the inability of Mr. Downham to respond to it.
c. Mr. Downham was left for a long period in ignorance of what was happening which would foreseeably increase his anxiety.
d. Mr. Downham was treated unfairly by not being informed of the details of the allegations against him so he could give his version.
e. The report of Mr. Williams was recklessly prepared and contained numerous statements of fact and conclusions which were unfounded and which would have been discovered to be false if Mrs. Beaudrie had been carefully interviewed.
f. There was no consideration given to assisting Mr. Downham as an employee. The only focus was on minimizing political fall-out and in justifying his dismissal.
g. The letter exaggerated the grounds for dismissal set out in the report.
h. The letter contains extremely serious findings which are essentially groundless.
i. The letter was intended to cause Mr.

11 (2006), 56 C.C.E.L. (3d) 112, [2005] O.J. No. 5227 (Ont. S.C.J.)

Downham personal distress and to destroy his professional career. It accomplished its purpose. He was not able to find any full-time job until October 2003 and was never able to find comparable employment and finally left the social service field.

j. When the appeal letter of Mr. Downham disclosed information at odds with the content of Mr. Williams' report, none of the senior management staff involved in the appeal made any further investigation. Mr. Williams knew that the contrary information in the report was not well-founded.

k. The report was circulated to politicians whose knowledge would inevitably lead to problems in a small community.

l. The plaintiff has had to live with the consequences of the County's unfounded allegations from March 2002 until December 2005. This has affected all areas of his life including his social life, his volunteer activities, his employment and his having to deal with and feel responsible for the effects on this wife.

m. At trial the County maintained its position and contended that the errors they acknowledged in Mr. Williams' report were inconsequential.

n. At trial the County maintained its position on the basis of facts and conclusions which they knew or should have known before trial would be contradicted by Mrs. Beaudrie who was the primary source of the information. Mrs. Beaudrie was the County's witness. The County could not reasonably proceed to trial without interviewing her before trial."

Based on the above conduct, the court awarded the following amounts:

- Damages over notice period of 15 months and loss of remuneration for that period: $91,875
- Increase to the notice period of 5 months because of difficulty of finding alternate employment as a result of the employer's conduct and loss of remuneration over that additional 5 months beyond the 15 months period once employment was found: $30,625
- Intangible damages flowing from wrongful actions of the employer resulting in humiliation, embarrassment, loss of self-esteem and loss of enjoyment of social activities: $50,000
- Damage suffered to the employee's physical and mental health, which was found to be recoverable, both because of the Wallace type of conduct of the employer and under the tort of wrongful infliction of mental suffering: $20,000
- Difference in salary between what the employee first obtained and what he would have been paid at his new job, but for the injury to his reputation (when Downham was able to obtain new employment it was at 2/3 of his former salary): $9,000
- Tort of defamation: $1,000
- Special damages consisting of job search expenses: $2170
- Punitive damages: $100,000

The Court held that the aggravating factors of intending harm, recklessness and intentional lack of fairness warranted an award of punitive damages. The Court stated at paras 278-280:

> "Considering the numerous acts of misconduct and its continuance to trial I assess punitive damages at $100,000.
>
> I have considered the cumulative total of all these separate awards. I find they do

not exceed what would fairly compensate the plaintiff and punish the employer's conduct.

I do not believe this assessment will create a "floodgates" concern. The facts of this case are most unusual."

The cumulative damages award in *Downham* was $304,670.

Awards arising from workplace harassment and abuse

In *Sulz v. Attorney General of Canada et al.*[12] a former female employee of the Royal Canadian Mounted Police brought a civil action against her immediate supervisors for intentional and negligent harassment and against the Attorney General for Canada and the Province of British Columbia for failure to take proper steps to prevent the harassing conduct, to the point where she became so medically depressed that she had no choice but to accept a medical discharge. The Court found that her supervisor, staff sergeant Smith, had engaged in harassing conduct, including "angry outbursts" and "intemperate and at time, unreasonable behavior" which incidents created the "troubled work environment that the plaintiff experienced". As a result, the plaintiff was diagnosed with a major depressive disorder resulting in her initiating a medical discharge.

The Court found that the defendants breached their duty of care to the plaintiff. The outbursts and the cutting comments were the major source of the troubled work environment that the plaintiff experienced. Furthermore, the Court held that that the evidence showed that the harassment she had experienced was the proximate cause of her depression, which in turn, ended her career.

The Court found that the plaintiff's work as a RCMP officer was very important to her, to the extent that her sense of self was wrapped up in her position as a police officer. The medical evidence confirmed that the plaintiff was likely to continue to suffer from depression for the remainder of her life. As a result, her personal relationship with her husband and children was adversely affected. The Court compared the plaintiff's injuries to cases where plaintiffs have been inflicted with life-long handicaps. While the trial judge dismissed the claims against the federal Crown and the staff sergeant, it found the province of British Columbia vicariously liable for the tort of negligent infliction of mental suffering committed by the staff sergeant.

The trial judge awarded general damages of $125,000. In doing so, he expressly recognized that this figure was dramatically higher than the $5000 that had been awarded in *Clark v. Canada*[13], a case which he acknowledged had similar facts. The higher award was justified on the basis that the plaintiff in *Clark* was able to "recover her mental health and did not suffer the kind of lasting injury that the plaintiff in this case will be forced to deal with for the rest of her life."

The trial judge assessed the plaintiff's past wage loss to be $225,000.00. With respect to her loss of future income, the court took into account the fact that although the plaintiff's condition was caused by harassment; her personality was such that the pressures of pursuing a full-time career and raising a family would have weighed heavily on her. Her future loss of income was assessed at $600,000.00.

With respect to the aggravated and punitive damages, the court found that even though the defendant's conduct was tortious, it was not of the nature that required the imposition of punitive damages. The court noted that aggravated damages were already part of the general damages

12 (2006), 263 D.L.R. (4th) 58 (B.C.S.C.), upheld [2007], 2. W.W.R. 419 (B.C.C.A.)

13 [1994] 3 F.C. 323 (Fed T.D.)

award, which had been assessed at a "higher level than usual for the type of injury suffered in order to compensate the victim for injury to feelings, dignity, pride, and self respect resulting from the manner in which the injury was inflicted".

In total, the damage award was $950,000.

In *Pawlett v. Dominion Protection Services*[14] the plaintiff had been employed in a middle management for slightly less than one and a half years when she left the workplace and alleged constructive dismissal. The Court found that she had suffered sexual harassment through the display of sexually explicit images on her computer, unwanted physical contact by her direct supervisor (consisting of attempting to hold her hand on at least one occasion, putting his hand on her thigh while sitting next to her on several different occasions and slapping or tapping her buttocks when she up from beside him on several different occasions) and a serious sexual assault on February 9, 2006 (where the supervisor tried to kiss the plaintiff and forced his right hand under her sweater, touching the plaintiff on her bare torso just beneath her breast). The Court found that the actions of her supervisor constituted a fundamental breach by the employer of a major term in the employment contract, that she be treated with "civility, decency, respect and dignity", with the result that she was constructively dismissed. The notice period was set at 2 months given the plaintiff's short service and because the Court took judicial notice that the job market in Calgary was extremely strong in February, 2006. The Court extended the notice period by one month, to three months in total, based on *Wallace*.

The Court considered the punitive damages award in *Honda*. The Court concluded that the various misdeeds of the supervisor culminating in the sexual assault of February 9, 2006 justified a punitive damages award of $50,000. The Court found that the sexual assault which occurred also constituted the separate tort of sexual battery, for which the employer was found vicariously liable. The Court awarded general damages for sexual battery in the amount of $25,000. The total damages awarded were $88,091.55, less any amounts earned by the plaintiff from her new employer during the notice period.

Damages for loss of reputation

In *Pelletier v. Canada*[15], the Quebec Superior Court ruled in favour of former Via Rail Chair Pelletier after he had been fired by former Prime Minister Paul Martin after insulting former Olympic gold medalist Myriam Bedard. Following the publication of a report regarding the federal sponsorship scandal, Bedard, claimed that she was forced from her marketing job at Via because she had raised questions of excessive billings made by a corporation at the heart of the scandal. Despite it being determined that Bedard voluntarily quit her employment and that Pelletier was not implicated with her departure, in March 2004, the Governor General on the recommendation of the Minister of Transport revoked Pelletier's nomination for President of the Via Administrative Council. The Quebec Superior Court ordered that Pelletier be placed in the position he would have been had he remained as President of the Administrative Council of Via Rail, resulting in damages of $235,161. In addition, the Court awarded damages for loss of reputation in the amount of $100,000. The significant award for loss of reputation was due to the Court's finding that the breach of contract in reporting and publishing various accusations against Pelletier across Canada regarding Bedard's dismissal greatly and wrongfully harmed Pelletier's long-earned reputation. Life had been made extremely difficult for him and his family and there had been instances where Pelletier was forced to cross the street to avoid angry members of the public.

14 [2007] A.J. No. 1364 (Alta. Q.B.)

15 [2007] J.Q. No. 13166 (Que. S.C.)

In *Drouillard v. Cogeco Cable Inc.*[16], the Ontario Court of Appeal reduced the damage award made by the trial judge where his former employer, Cogeco, was found to have interfered with his employment with a new employer. Drouillard was a long term employee of Cogeco before he left to pursue employment opportunities in another city. He returned two years later and obtained employment with Mastec, a cable industry contractor to work on cable upgrades for Cegeco in the Windsor area. Upon being advised by Cogeco that it did not want Drouillard working on any of its equipment. Drouillard was terminated almost immediately after starting work for Mastec. The trial judge found that Cogeco had committed the tort of unlawful interference with Drouillard's economic relations and awarded damages of $200,000. The Court of Appeal upheld the award of $62,465 "at-large" damages. It was significant the Cogeco was the monopoly cable operator in the Windsor area and for a cable and fibre optic installer, it was difficult if not impossible to find regular employment in the Windsor area without being in a position to work on Cogeco equipment. The non-pecuniary damages of $62,465 were upheld as proper for the humiliation and loss of reputation suffered as a result of Cogeco's conduct.

Damages for humiliation and loss of enjoyment of social activities

In *Downham v. Lennox & Addington (County),supra.*, Downham was awarded $50,000 for humiliation, embarrassment, loss of self-esteem and loss of enjoyment of social activities.

Breaking past the 24 month notice cap

In *Baranowski v. Binks Manufacturing Co.*[17], the Court acknowledged that while there is no upper limit on the appropriate period of notice, it was only the exceptional case where a notice period in excess of 24 months would be warranted[18]. Baranowski was 54 years of age at the time of termination and had 29 years service, 15 as the senior executive of Bink's Canadian subsidiary. Baranowski was informed of his termination as President of Bink's Canada by a note delivered to his home by a taxi driver on the night of his son's graduation.

In determining what constitutes the reasonable notice, the Court referred to Chief Justice McRuer's oft-quoted statement in *Bardal v. Globe & Mail Ltd.*[19](at para 276):

> "There can be no catalogue laid down as to what is reasonable in particular classes of cases. The reasonableness of the notice must be decided with reference to each particular case, having regard to the character of the employment, the length of the service of the servant, the age of the servant and the availability of similar employment, having regard to the experience, training and qualifications of the servant."

In applying the *Bardal* factors, the Court noted that Baranowksi had served the company for 29 years and had risen to a presidential position, he had stayed in Canada, even though his wife was not pleased to move, on the assurances from his mentor that he would be employed until he retired, and at no point in his career had he been criticized for his performance. The Court also noted that at the time of his dismissal he was 54 years old, "effectively a man nearing the twilight of his working years". Taking into consideration the above factors and the circumstances of

16 [2007] O.J. No. 1664 (Ont. C.A.)

17 [2000] O.J. No. 49 (Ont. S.C.J.)

18 See Veer v. Dover Corp. (Canada) Ltd. (1997), 31 C.C.E.L. (2d) 119 (Ont. Gen. Div., aff'd [1999] O.J. No. 1727 (Ont. C.A.)

19 (1960) 24 D.L.R. (2d) 140 (Ont. H.C.)

the case, the Court concluded that this was an "exceptional case", one which warranted a notice period in excess of 24 months. The reasonable expectation that his employment was secure until retirement warranted an award of a notice period of 30 months.

After determining the appropriate notice period, the Court also examined the manner of Mr. Baranowski's discharge. Binks' bad faith conduct both in carrying out the dismissal, by waiting until Baranowski was at his son's graduation, and during the trial, by making allegations through its counterclaim which it knew or ought to have known were baseless, warranted an extension of the notice period by way of aggravated and punitive damages, by an additional 6 months. The additional 6 month Wallace extension resulted in a combined notice period of 356 months.

In *Lowndes v. Summit Ford Sales Ltd.*[20] the Ontario Court of Appeal overturned the trial judges' decision to award 30 months pay in lieu of reasonable notice, reducing it to 24 months. Lowndes was terminated at age 59, while in the position of General Manager of a car dealership and after 28 years of service. The trial judge had set the notice period at 30 months and awarded an additional 4 month Wallace increase.

In reducing the notice period to 24 months, the Court of Appeal stated that the trial judge had failed to consider whether the employee had "demonstrated exceptional circumstances warranting a base notice period in excess of 24 months". The court stated (at para 10):

> "Although it is true that reasonable notice of employment termination must be determined on a case-specific basis and there is no absolute upper limit or cap on what constitutes reasonable notice, generally only exceptional circumstances will support a base notice period in excess of 24 months: see *Baranowski v. Binks Manufacturing Co.,* [2000] O.J. No 49 (S.C.J.) at para 277 and *Rienzo v. Washington Mills Electro Minerals Corp.,* [2005] O.J. No. 5126 (C.A.)."

The Court found that unlike the *Baranowski* case, supra, the employee was not a senior executive at any time and had never received any assurance of secure employment until the age of retirement. The Court stated that it was not denigrating the employee's important contributions to the appellant's car dealership business.

> "However, a base notice period of 24 months, the high end of the appropriate range of reasonable notice for long-term employees in the respondent's position recognizes these factors and rewards them accordingly."

Notwithstanding the decision to reduce the reasonable notice period to 24 months, the Court upheld the trial judge's decision to increase the notice period by an additional 4 months as a result of the employer's bad faith conduct in the manner of termination, to a combined notice period of 28 months.

The *Baranowski and Lowndes* decisions indicate that in only the exceptionally rare case will the courts move past their self-imposed cap of 24 months.

Wallace damages

In *Wallace v. United Grain Growers Ltd., supra.*, Mr. Justice Iacobucci, emphasized the duty of "good faith and fair dealing" imposed on employers with respect to the manner of dismissal of employees and the award of an extension in the notice period, known as the Wallace damages, associated with a breach of such duty (paras 95 and98):

20 [2006] O.J.No. 13 (C.A.)

> "In my opinion, to ensure that employees receive adequate protection, employers ought to be held to an obligation of good faith and fair dealing in the manner of dismissal, the breach of which will be compensated by adding to the length of the notice period.
>
> The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive."

Initially the cases applied a soft cap on Wallace damages of 6 months. There have been recent instances where courts have awarded significant Wallace extensions. In most cases, these awards have been pulled back on appeal.

For example, in *Mastrogiuseppe v. Bank of Nova Scotia*[21], the employer commissioned an internal investigation of alleged employee misconduct, pursuant to which the employee was subsequently dismissed. The Court found that the employer failed to look behind the report, ignored nuances and ambiguities in the employer's policies and uncritically acted upon the report. The trial judge set the notice period at 22 months and awarded an additional 8 months of notice as compensation for the employer's unfair dealings in the manner of the Plaintiff's dismissal. The Ontario Court of Appeal[22] reduced the 8 Wallace bump-up to 4 months, stating that the trial judge had taken into account certain factors that he ought not have in making the award. The Court stated as follows (at para 4):

> "In particular, we see no bad faith on the part of the Bank in pursuing the allegations of dishonesty, albeit that in the end, those allegations were not proved. (See Cassaday v. Wyeth-Ayerst Canada Inc. (1998), 163 D.L.R. (4th) 1 at p. 20 (B.C.C.A.) and Clendenning v. Lowndes Lambert (B.C.) Ltd. (2000), 193 D.L.R. (4th) 610 per Saunders J.A. at p. 633 (B.C.C.A.)). As well, along those lines, the Bank cannot be faulted for not giving the respondent a letter of reference. We are also of the view that the Bank did not act improperly, in the circumstances of this case, in couriering the respondent's belongings to her.
>
> In our view, had the trial judge considered only the relevant factors, he would have awarded Wallace damages of four months."

As an aside, the Court upheld the trial judge's award of $25,000 in punitive damages as the minimal amount capable of deterring and denouncing the Bank's conduct. The Court agreed that the Bank's conduct was oppressive and high-handed in blacklisting the employee's relatives and in improperly deducting funds from the employee's account at another bank to pay her outstanding loans with the Bank.

In J*essen v. CHC Helicopters International Inc.*[23] a notice period at 4 months with a Wallace bump-up of 48 months was set at trial in a jury award. Jessen was employed by CHC Helicopters for two and a half years as assistant base manager at the Halifax base before her dismissal. In July 2000, when she returned from a vacation she discovered that her position as assistant base manager was being advertised and that she would now be a contracts manager. The next day however, she was told that the Halifax base did not need a contracts

21 (2005) Ont. 7607 (Ont. S.C.J.)

22 2007 ONCA 726 (Ont. C.A.)

23 [2006] N.S.J. No. 282

manager. During her meeting with the President of CHC Helicopters in Vancouver, Ms. Jessen said that there were comments from customers that "there was lack of competency and leadership" at the Halifax base. After learning of the above, the Halifax base manager told Jessen that he could not trust her anymore and dismissed her.

The Nova Scotia Court of Appeal reduced the extended notice period of 48 months to 9 months. The Court of Appeal found that the employer's conduct in delaying sending the record of employment within five days as statutorily required and failing to send the letter of reference as promised was not particularly egregious. Moreover, the assessment of 48 month in damages constituted an erroneous determination of the facts that was palpable and overriding, and shocked the conscience of the court.

In *Keays v. Honda Canada Inc., supra.,* Wallace damages of 9 months were added to a notice period of 15 months, for a total combined notice period of 24 months, for an employee working as a team leader in the Quality Engineering Department with 14 years service.

There appears to be confusion by some courts about whether Wallace damages should be awarded through an increase to the notice period or by awarding a monetary lump sum. The court in *Downham v. Lennox & Addington (County), supra.*, commented on this confusion (at para 247):

> "The situation in the field of wrongful dismissal damages is now like that described in *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (Ont. C.A.) concerning punitive and aggravated damages; recent judgments do not break down the amounts awarded for various aspects of wrongful conduct. As a result, we see courts awarding monetary lump sums under headings like "Wallace bump up", "aggravated damages" and "punitive damages" and in the form of extended "notice period" damages all without any separate assessment of the losses being compensated for or the specific factors included."

In *Wilde v. Archean Energy Ltd.*[24], the trial found that the plaintiffs had been constructively dismissed and awarded a lump sum of $200,000 in punitive and aggravated damages based on the *Wallace* factors. While the trial judge's decision was overturned by the Alberta Court of Appeal[25] with respect to the finding of constructive dismissal, the Court said that given its finding, it was not necessary for it to express its opinion regarding the Wallace damages.

Are Wallace damages subject to the duty to mitigate?

Every wrongfully dismissed employee has a duty to take all reasonable steps to mitigate his or her damages and reduce the amount payable by the employer. This duty applies whether the employer provides working notice, pay in lieu of notice, or no pay or notice. Minimum termination notice or other amounts required by employment standards statutes may not have to be mitigated, although some courts have disagreed[26]. Does the duty to mitigate apply to a Wallace extension?

A number of cases have held that the Wallace extension ought not be subject to mitigation. In *Prinzo v. Baycrest Centre for Geriatric Care*[27], the Ontario Court of Appeal stated (para 72):

> "Prinzo fulfilled her duty to mitigate by finding alternative employment. Her new

24 [2005] ABQB 636 (Alta. Q.B.)
25 [2007] A.J. No. 1335 (Alta. C.A.)
26 See Yanez v. Canac Kitchens [2004] O.J. No. 5238, 45 C.C.L.E. (3d) 7 (S.C.J)
27 (2002) 161 O.A.C. 302

> employment paid somewhat less than her previous employment. Baycrest only has to make up the difference between her salary level at Baycrest and what she was earning at Allstate during the ordinary notice period. If this deduction of earned income were also made from the damages awarded in relation to a "*Wallace* extension", Prinzo would not effectively be compensated for the injury done to her. This result would appear incongruent with the Supreme Court's view in Wallace that the injuries resulting from bad faith conduct on the part of the employer are "sufficient to merit compensation in and of themselves" irrespective of whether the bad faith conduct affects employment prospects. On the basis that intangible injuries cannot normally and completely be mitigated by finding other employment, it has been suggested that the extended notice period be treated as akin to a severance payment which is not subject to mitigation.

In *Bouma v. Flex-N-Gate-Canada Co.*[28] Justice Weiler of the Ontario Superior Court in referring to the decision in *Prinzo*, supra, concluded that the employee's Wallace damages of 4 months ought not to be subject to mitigation.

The same conclusion was arrived at in *Jessen v. CHC Helicopters International Inc., supra.* The Nova Scotia Court of Appeal emphasized that while the last statement at paragraph 72 in *Prinzo*, supra, was *obiter*, it has been followed in Ontario. Upon reviewing the reasons in Prinzo, the court concluded that reducing an award of Wallace damages by the amount of earned income does not accord with the Supreme Court of Canada's view in *Wallace*, supra.

28 2005) 40 C.C.E.L. (3d) 2

AWARDS BY LABOUR ARBITRATORS

Can labour arbitrators make awards of aggravated or punitive damages?

The question of whether a labour arbitrator has jurisdiction to award aggravated and punitive damages for mental distress, continues to remain unsettled.

The labour arbitration board's decision in *OPSEU v. Seneca College of Applied Arts & Technology*[29], upheld on appeal to the Ontario Court of Appeal[30], held that an arbitrator's jurisdiction to award aggravated or punitive damages is limited to cases where the conduct complained of arises expressly or inferentially out of the collective agreement, unless the collective agreement expressly allows the arbitrator to award remedies for tortious conduct. In that case, the grievor had been unjustly accused of sending anti-Semitic communications to another employee. The Board of Arbitration awarded reinstatement but refused to award damages for infliction of mental distress and defamation on the ground that it did not have jurisdiction to remedy tortious conduct that did not arise out of the collective agreement where the collective agreement itself did not give it such jurisdiction. After lengthy consideration of the *Weber v. Ontario Hydro*[31] decision and the language in the collective agreement, the arbitration board held that unlike the collective agreement in *Weber*, supra, which extended the grievance and arbitration process to "any allegations that an employee has been subject to unfair treatment", there was no similar language in the present agreement that "might give rise to an inference that the parties intended a Board of Arbitration to adjudicate alleged tortious wrongdoing". This decision was overturned on

29 (2005), 247 D.L.R. (4th) 178, (Ont. S.C.J.)
30 (2006), 267 D.L.R. (4th) 509 (Ont. C.A.)
31 (1995) 125 D.L.R. (4th) 583 (S.C.C.)

judicial review, but was subsequently reinstated by the Court of Appeal.

In *British Columbia Public School Employers' Assn (School District No. 36(Surrey)) v. British Columbia Teachers' Federation (Surrey Teachers' Assn.) (Wyndham Grievance)*[32], the Union brought an application for remedy arising out of an award that held that the grievor's applications for partial medical leave were unreasonably denied. The Union sought damages for mental distress and punitive damages. The employer challenged the jurisdiction of the arbitrator to make the awards requested by the Union and the issue of jurisdiction was heard and determined as a preliminary matter. The Union relied on the decision in *Fidler*, supra, (where the Plaintiff had been awarded $20,000 for loss of the intangible benefit of peace of mind), claiming that the object of the partial medical leave provisions of the collective agreement was to secure a physiological benefit which brought the prospect of mental distress upon breach within the reasonable contemplation of the parties at the time the contract was made. The Union argued that while *Fidler*, supra, involved the denial of long-term disability benefits, the case at hand involved the denial of partial medical leaves, which in turn was similar in purpose to the "peace of mind" contract in *Fidler*, supra. The Union further distinguished the present case from the decision in *Seneca*, supra, stating that *Seneca* involved a claim for aggravated and punitive damages arising from a dismissal without cause.

The arbitrator, in considering the Supreme Court of Canada decision in *Fidler*, supra, concluded that arbitrators could award the same compensatory damages as the courts for mental distress where it is to remedy breach of the parties' agreement (at para 61).

> "The Supreme Court of Canada's decision in Fidler concerns the nature of obligations undertaken by agreement, and compensatory damages for breach of those obligations. That is the issue before me. In the arbitral forum, policy reasons may require a high standard for the degree of proven mental distress that warrants compensation, so that such claims do not become routine and thereby undermine the efficacy of arbitration as an expeditious and cost-effective dispute resolution mechanism. However, I am unable to agree with the Employer's absolutist proposition that an arbitrator lacks any such jurisdiction. I conclude that an arbitrator may award compensatory damages for mental distress in circumstances where it is to remedy breach of the parties' agreement, as explained by the Court in Fidler."

Damages for loss of psychological benefit

In *Charlton v. Ontario (Ministry of Community Safety and Correctional Services)*[33] the grievance arose from a serious incident of racial harassment related to the workplace. The grievor, a black Canadian woman, received a threatening anonymous letter at her residence which contained inappropriate racial contents. There were a series of anonymous letters received by a total of 8 Black and other racial minority correctional officers who worked at the Toronto jail. The grievor had been employed as a corrections officer at the Toronto jail and had been promoted to Operation Manager. Once notified of the letter, the employer contacted the police and provided the grievor with the applicable workers' compensation forms. As a result of the traumatic effect that the letters had on her mental psyche, she was unable to return to work. Despite the grievor receiving workers' compensation benefits and the employer's attempts to minimize her injuries and offer employment opportunities to help her return to her normal life, the grievor sustained substantial injuries to her health and

32 [2007] B.C.C.A.A.A. No. 229 (Taylor)

33 [2007] O.P.S.G.B.A. No. 4

dignity. In order to expedite the matter, the parties agreed that the Public Service Grievance Board would determine the appropriate remedy based on an agreed statement of facts.

Counsel for the plaintiff requested a range of remedies intended to compensate her for the damages resulting from this human right violation. One set of damages was directed at reintegrating the grievor back into the work place while others were directed at compensating the grievor for the economic loss and the emotional distress caused by the serious breach of her human rights. The grievor also claimed damages for breach of a contractual guarantee of freedom from racial harassment in the workplace.

The first issue considered by the Ontario Public Service Grievance Board ("Board") was its jurisdiction to deal with a matter of racial harassment. The Board looked at s.26 of the *Human Rights Code*[34] and the Supreme Court of Canada decision in *Parry Sound Services Administration Board v. OPSEU, Local 324*[35], for the proposition that an employee's right to a harassment free environment is not only incorporated into the individual employment contract by the *Ontario Human Rights Code*, but is also an implicit term of every employment contract. Given the Board's mandate to provide dispute resolution services to resolve disputes between members of the Ontario Public Service who were not covered by the collective agreements and their employers, the Board concluded that it had the remedial jurisdiction to deal with this matter.

In considering the compensation for the financial loss suffered by the grievor, the Board ordered the employer to pay the difference between what she would have earned had the racial harassment not occurred and the workers' compensation benefits she had received. The Board concluded that an award for the time period until the grievor was reintegrated into a position that is the financial equivalent of the position that she held would be an appropriate award to compensate for the injury to her dignitary interests.

With respect to the injuries warranting an award for mental distress, the Board referred to the Supreme Court of Canada decision in *Fidler*, supra, which made it clear that even in the absence of bad faith, mental distress damages may flow from the breach of contracts that create the expectation of a "psychological benefit" and there need not be an independent actionable wrong. The Board concluded that a contract whose primary term is a guarantee of freedom from racial harassment in the workplace, does create a "psychological benefit", since such provision is intended to protect the dignity of employees. As such, the substantial disruption to the grievor's life and peace of mind caused by the breach of such contract warranted damages for mental distress in the amount not less than what was considered appropriate in *Fidler*, supra, i.e. $20,000.

Can a labour arbitrator award *Wallace* damages?

Does a labour arbitrator's jurisdiction include the ability to award Wallace damages?

In considering whether an arbitrator has the authority to award Wallace damages, the court in *Quebec (Comission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General) ("Morin")*[36], stated that one must look at the relevant legislation and the nature of the dispute to see if the legislation suggests that it falls exclusively to the arbitrator.

The first arbitration decision to incorporate Wallace damages into the remedy for a dismissal without just cause was *British Columbia Nurses' Columbia*

34 R.S.O. 1990, ch 19
35 [2003] S.C.J.No. 42
36 (2004) SCC 39 (S.C.C.)

on behalf of the Salvation Army (Sunset Lodge)[37]. In that case the grievor was reinstated in a previous award which stated that the grievor was "entitled to damages for wage loss with interest and to the reinstatement of all applicable benefit entitlement". The main issue was the amount of compensation the grievor was entitled to post reinstatement. The employer argued that the grievor's lost wages would be less than his earnings for a similar time period in the past, based on the earnings of employees with comparable seniority. What the arbitrator found was that the grievor would have been available to work all days and afternoon shifts, seven days per week over the relevant period. Moreover, the employee's only income after his dismissal was Employment Insurance and the $3,000 *ex gratia* payment negotiated with the employer, which in turn made it very difficult on the employee to return to work post reinstatement as he returned to his home town to escape the allegations. The arbitrator concluded that the "obligation of good faith and fair dealing in the manner of dismissal, articulated by Iacobucci, J. in *Wallace*, reflected a principle "which can and should be imported into the law of the collective agreement"[38]. The arbitrator concluded that the employer's conduct was unfair and affected the employee's chances of securing alternate employment, such that it justified extending the grievor's entitlement to compensation beyond the date of his reinstatement.

In *Canadian Blood Services v. Hospital Employees' Union*[39] arbitrator M. Jackson briefly stated that while he agreed with the principles in *Wallace*, the facts in the case before him did not support a claim for exemplary damages.

In *Thompson v. Burnco Rock Products Ltd.*[40], the Alberta Court of Queen's Bench agreed with the arbitrator that he did not have jurisdiction to award Wallace damages based on the particular wording of the collective agreement

While not a labour arbitration decision, an arbitrator pursuant to an agreement under Ontario's *Arbitration Act*, in *Emergis Inc. v. Doyle*[41], extended the notice period by four months where the employer had suspended an employee without pay while investigating sexual harassment allegations, refused to provide him with full particulars of the allegations in a timely manner, failed to give him an extension to reply to the formal particulars over the Christmas period and interfered with an employment opportunity when it communicated directly with the prospective employer about a confidentiality agreement. The arbitrator's decision was appealed. While the Court agreed that Wallace damages were appropriate, it reduced the Wallace bump from 4 months to 2 months.

AWARDS BY HUMAN RIGHTS PANELS

A Prince Edward Island Human Rights Panel in a hearing between *Reverend Gael Matheson and the Presbytery of Prince Edward Island*[42] awarded the complaint $50,000.00 in general damages. The complaint was against the Presbytery for discriminating against the complainant on the basis of sex by its response to the anonymous letters she received while a Minister with the Presbyterian Church and failing to provide a workplace environment free from sexual harassment. The Panel recognized that in determining the appropriate award a number of factors must be considered:

- The nature of the harassment

37 [2003] L.V.I. 3404-1 (Hope)
38 At para 55
39 [2004] B.C.C.A.A.A. No. 308 (Jackson)
40 [2003] A.B.Q.B. No. 1506 (Alta. Q.B.)
41 (2007), 56. C.C.E.L. (3d) 303 (Ont. S.C.J.)
42 May 31, 2007, P.E.I.H.R.T.

- The degree of aggressiveness and physical contact
- The on-going nature or time period of the harassment
- The frequency of the harassment
- The age of the victim
- The vulnerability of the victim, and
- The psychological impact of the harassment upon the victim

The Panel found that the complaint was aggressively pursued on an ongoing basis for approximately 4 years. This affected every aspect of her life and severely impacted her psychological state. Her employment was derailed, which ultimately resulted in her removal from her Charge. Additionally, the publicity surrounding her human rights complaint and the hearing had continuing effects on her reputation and ability to work.

The employer was required to provide the complainant with a letter of apology, a letter of reference and find her an alternate Charge. In addition to the award of general damages, the complainant was awarded the following:

Lost Income – $425,058
Educational Allowance - $1,000
Out of Pocket and Medical Expenses - $5,000
Lost Pension Contributions - $16,029
Legal Costs - $102,310.50 plus applicable taxes.

In *Lane v. ADGA Group Consultants Inc.*[43], Paul Lane, a quality Assurance Analyst with ADGA Group Consultants complained that ADGA discriminated against him on the ground of disability after his employment was terminated during his probationary period, after 8 days of employment. Two days after the complainant had commenced employment he advised his supervisor that he had a bipolar disorder, that his behavior should be monitored and that she should not hesitate to intervene if she observed any inappropriate behavior (including speech) on his part. ADGA submitted that Mr. Lane's employment was terminated because he was incapable of performing the essential tasks of his job for which he had been hired. The Panel found that ADGA failed to meet its obligation not to dismiss Lane without establishing that it could not accommodate his disability without undue hardship and awarded $35,000 in general damages, $10,000 for mental anguish and $34,278.75 in special damages for loss of wages.

In *Pchelkina v. Tomsons*[44], the Ontario Human Rights Tribunal awarded Pchelkina $10,000 in general damages for the employer's violation of the Ontario *Human Rights Code* to provide a working environment free from sexual solicitation or advancement made by a person who is in a position to confer or deny a benefit. Shortly after emigrating from Russia, Pchelkina obtained a job as a personal assistant in Tomsons' real estate office. She worked for him for a week, during which Tomsons asked her to go out with him on three occasions. She refused each time stating that she was a married woman. On the third refusal, he told her that she would be fired if she did not go out with him. When Pchelkina did not respond, she was dismissed. She worked five days in total. The Panel concluded that while the invitations to go to dinner and clubs were relatively minor forms of sexual solicitation, Tomsons made them repeatedly, and used his power as employer to place Pchelkina in the untenable situation of choosing between unwanted invitations and her job. In addition to the award of $10,000 in general damages, the panel awarded $1,600 in special damages for the period Pchelkina was unemployed following her dismissal and $1,060.54 for the difference between her hourly wage working for Tomsons and the wage that she received when she found a new position.

43 [2007] HRTO 34 (Ont. H.R.T.D.)

44 [2007] O.H.R.T.D. No. 42(Ont. H.R.T.D.)

COMPETING JURISDICTIONS: Can a human rights claim proceed simultaneously through grievance arbitration and as a complaint before the Human Rights Commission?

Recent case law in Alberta has confirmed that both forums, a labour arbitration board and the Human Rights Commission, have concurrent jurisdiction to deal with human rights complaints. The question as to which is the better forum to deal with a complaint is to be determined on a case-by-case basis.

The Alberta Court of Appeal in *Calgary Health Region v. Alberta (Human Rights and Citizenship Commission)*[45] and *Amalgamated Transit Union, Local v. Calgary (A.T.U. v. Calgary)*[46] confirmed that a grievor is not limited to a single forum and can bring a human rights complaint simultaneously through collective agreement grievance arbitration and as a complaint before the Human Rights Commission. The Court however, also made it clear that in order to avoid multiplicity of actions and preserve the exclusivity of a labour arbitration panel to deal with workplace disputes, where a human rights complaint is part of a grievance under the collective agreement, the labour arbitration board is a better forum to deal with the complaint, to the extent presented.

The jurisdiction of arbitration boards has been addressed by the Supreme Court of Canada in a number of decisions which outlined guiding principles to help determine whether or not tribunals have or ought to exercise jurisdiction in a particular matter. In applying those principles the courts distinguished between two lines of cases: those that deal with the contest of jurisdiction between courts and arbitration boards, and those that deal with a contest between competing statutory tribunals. While *Bisaillon v. Concordia University*[47] adopted a liberal position with respect to the jurisdiction of labour arbitrators over issues relating to conditions of employment, in an attempt to preserve the jurisdictional exclusivity of an arbitrator with respect to workplace disputes, the Alberta Court of Appeal in *A.T.U. v. Calgary*, supra, has warned of the application of the same principles to cases involving competing statutory regimes. In determining whether a labor arbitration board has exclusive jurisdiction to hear allegations of human rights violations as part of a grievance under a collective agreement, thereby ousting the jurisdiction of the Alberta Human Rights Commission, the court in *A.T.U. v. Calgary*, supra, adopted the two step approach enunciated in *Morin*, supra (para 40):

> "The first step is to look at the relevant legislation and what it says about the arbitrator's jurisdiction. The second step is to look at the nature of the dispute, and see whether the legislation suggests it falls exclusively to the arbitrator. The second step is logically necessary since the question is whether the legislative mandate applies to the particular dispute at issue. It facilitates a better fit between the tribunal and the dispute and helps "to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties"."

In this case, the Alberta Court of Appeal reversed the arbitration board's decision that it had the exclusive jurisdiction to deal with the employee's termination grievance as well as the human rights complaint. The grievor had worked as a preventative maintenance person with Calgary Transit and was a member of the Amalgamated Transit Union when her employment was terminated due to an alleged use of profane language towards her co-workers. The Union grieved the termination. The collective agreement included a clause expressly prohibiting

45 [2007] ABCA 120 (C.A.)
46 [2007] ABCA 121 (C.A.)
47 [2006] SCC 19 (S.C.C)

discrimination and harassment, but that clause was not cited. The Union's main position was that there were insufficient warnings and notice provided prior to the termination. A few days later, the grievor filed a human rights complaint with the Commission, alleging discrimination on the grounds of gender, sexual orientation and mental disability and arguing that she was treated differently from the male co-workers with respect to work assignments and conditions.

In determining the question of jurisdiction, the Court considered a number of authorities dealing with cases involving competing statutory tribunals as well as the underlining goals and intention of the Alberta legislature in enacting the *Labour Relations Code*[48] and the *Human Rights Act, Citizenship and Multiculturalism Act*[49]. In *Canada (House of Commons) v. Vaid*[50], cited in *A.T.U. v. Calgary*, supra, the dispute concerned the competing jurisdictions of the *Parliamentary Employment and Staff Relations Act* ("*PESRA*") and the *Canadian Human Rights Act* with respect to an employee's discrimination complaint. The Court concluded that since an exclusivity clause provided that no other Act of Parliament would apply with respect to "matters similar to those provided for under" the *PESRA*, it was intended that the jurisdiction under the *PESRA* was exclusive. Such however, might not always be as clear, and other tribunals, may possess overlapping or concurrent jurisdiction depending on the legislation and the nature of the dispute. Following a thorough analysis of the *Labour Relations Code* and the *Human Rights Act, Citizenship and Multiculturalism Act*, in particular the lack of a deferral clause and its clear legislative intent that all persons should have access to the complaints procedure, the Court in *A.T.U. v. Calgary*, supra, concluded that it was the intention of the legislature that either tribunal should have jurisdiction over all human rights issues that arise in the unionized workplace, such as to give it concurrent jurisdiction.

With respect to the analysis contained in the second step of the test set out in *Morin*, supra, the Court took issue with the arbitrator's classification of the employee's termination grievance and the human rights complaint as an inseparable dispute. The Court stated that even though the collective agreement stated that it was the right of the Union and not the aggrieved employee to submit a dispute for arbitration, given the decision of the Union not to pursue the issue of discrimination in the arbitration proceedings, the employee's right to access the human rights regime could not be removed. As a result, the Court held that there were two separate disputes, such that in the absence of a clear indication to the contrary in the *Labour Relations Code* removing access of unionized employees to human rights protection, the matter may proceed before both tribunals (para 68):

> "…Where neither applicable legislative regime expressly precludes access to the other forum, and particularly where, as here, one of those fora is not entitled to decline to hear a matter, the jurisdiction over the matter is concurrent. Both tribunals have jurisdiction over the human rights issues raised by these disputes."

The same issue was addressed by the court in *Calgary Health Region*, supra, which concluded that even though both tribunals have concurrent jurisdiction to deal with the human rights complaint, based on the facts, the dispute should be determined by the arbitrator.

The employee was a nurse with the Foothills Medical Centre, operated by the Calgary Health Region ("CHR") when her employment was terminated. The United Nurses of Alberta filed a grievance alleging the CHR had acted in bad faith and violated the collective agreement, including its

48 R.S.A. 2000, c. L-1
49 R.S.A. 2000, c. H-14
50 [2005] SCC 30 (S.C.C.)

provisions prohibiting discrimination. Subsequent to the filing of the grievance, the employee filed a complaint with the Alberta Human Rights Commission alleging discriminatory practices by the CHR relating to "physical and mental disability".

In determining the question of jurisdiction, the Court went through the two-part analysis outlined in *Morin*, supra. In the first step, the Court found that given the interplay of the two legislative schemes, the legislature clearly intended that arbitration boards and the Commission have concurrent jurisdiction over human rights issues that arose out of workplace disputes. However, the Court concluded that since the allegations of discrimination were brought before the arbitration board as part of the termination grievance, the board should proceed to exercise its jurisdiction and process the grievance, including the human rights issues it had raised (para 38):

> "…Both the grievance and the human rights complaint focus on workplace events culminating in the allegedly discriminatory decision to terminate the employee's employment. Although the provisions of the Labour Relations Code that establish the grievance procedure do not clearly grant the arbitration board jurisdiction to the exclusion of the Commission, they do indicate a legislative preference to have arbitrators hear employer-union disputes in the interest of expeditious resolution of workplace differences. Permitting the arbitration board to address all issues arising from the termination of employment advances the purpose of labour relations legislation, including promoting the prompt, final and binding resolution of disputes with minimal disruption to the employer-employee relationship: Parry Sound at paras. 50-51."

In *University Health Network v. Ontario Nurses' Assn.*[51], a grievance was filed on December 20, 2006 on behalf of the grievor, a hemodialysis nurse, by the Association alleging that the employer violated the collective agreement by giving the grievor an unjust letter of discipline. The grievor had filed a complaint with the Ontario Human Rights Commission ("HRC") on September 25, 2006 alleging discrimination on the grounds of "colour", "race" and "reprisal". On December 8, 2006 the grievor was given a letter of discipline in regard to events involving the performance of her duties on November 14, 2006. On December 11, 2006 the grievor filed a second complaint with the HRC on the same grounds in connection with events that occurred on November 14, 2006, and December 4 and 8, 2006. On December 13, 2006 the grievor was presented with a letter of dismissal. The main issue concerned the jurisdiction and the forum most appropriate to deal with the allegations. The employer argued that since the allegations in the grievor's December 11, 2006 human rights complaint were essentially the same as those referred to in her December 20, 2006 discharge grievance, it was appropriate under s.48(12)(j) of the *Labour Relations Act* for the arbitrator to take jurisdiction of the human rights complaints and deal with them in the arbitration process.

Arbitrator Marcotte considered the two step test enunciated in *Morin*, supra, and s.48(12)(j) of the Ontario *Labour Relations Act* and stated as follows (para 20):

> "Undoubtedly, and there is no issue in the instant case, I have exclusive jurisdiction to deal with the grievance concerning the grievor's December 8, 2006, discipline letter and her December 13, 2006 discharge. Under s.48(12)(j), I do have the requisite jurisdiction to deal with the grievor's Human Rights Commission complaints. However, under that section the "power" provided

51 [2007] O.L.A.A. No. 178 (Marcotte)

> to an arbitrator, which is essentially discretionary in nature, does not extend so far as to prohibit the grievor from filing with the Human Rights Commission, or to prohibit the Human Rights Commission from dealing with such complaints. Were I to uphold the Employer's motion I would effectively impose such prohibitions."

The arbitrator then proceeded to consider the nature of the grievor's complaint, to determine the appropriate forum. Based on his analysis, the arbitrator concluded that the essential nature of the grievance before him related to the grievor's discipline and discharge and not to her discrimination complaints filed with the Human Rights Commission. Therefore, the grievor was not precluded from advancing her complaints with the Human Rights Commission and the employer's motion to have the grievor's Human Rights complaints dealt with in the arbitration was denied.

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