Greater Toronto Airport Authority – Update

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Last year we told you about the decision of Arbitrator Owen Shime in *Greater Toronto Airports Authority v P.S.A.C., Local 0004*. In this decision Arbitrator Shime awarded a grievor in excess of $500,000.00 in damages – including damages for future economic loss and mental distress and punitive damages. At that time we queried whether the Divisional Court would vary the damages awarded when it considered the Greater Toronto Airport Authority's ("GTAA") application for judicial review. The decision on that review application has since been released, and as expected, damages were a significant issue addressed by the Divisional Court.

RECAP OF THE FACTS

The grievor was a 23 year employee of the GTAA. Her employment duties involved driving and a considerable amount of walking. Following a workplace injury the grievor went on modified duties until she underwent arthroscopic knee surgery. Post-surgery she provided the GTAA with a medical note authorizing her to be off work for four weeks. Unbeknownst to the GTAA, the grievor was living with another GTAA employee. This employee was under surveillance for suspected sick-leave abuse. In the course of this surveillance the grievor was observed being driven to a medical appointment by this other employee. Further surveillance of the grievor was undertaken and she was observed attending additional medical appointments and running errands. In light of this surveillance, the grievor was asked to produce additional medical documentation and to return to work early.

Although her doctor advised that the grievor should return to work on modified duties, upon her return she was not provided with modified duties and aggravated her knee injury. At a meeting called by the GTAA, the results of the surveillance were put to the grievor. She was given an opportunity to respond and then suspended indefinitely pending a final determination of her employment status. Upon review the GTAA determined it was not satisfied with the grievor's explanations and it terminated her employment on the grounds of dishonesty.

The grievor had an unblemished disciplinary record. However, during her career she had experienced significant trauma in her personal life, including mental, physical and sexual abuse by her former husband, stalking and death threats. The GTAA was aware of this, and in fact, at one point the grievor had taken a two month absence from work on account of a mental breakdown.

ARBITRATOR SHIME'S DECISION

The grievor grieved her termination. She sought damages in lieu of reinstatement. Arbitrator Shime found that the grievor had been terminated without cause, saying that the grievor had dealt with her medical issues, and with the GTAA, honestly and candidly. In contrast, Arbitrator Shime found that the GTAA had acted in bad faith. He determined the GTAA simply associated the grievor with the other employee they had been monitoring and failed to assess her conduct independently. He further found that the GTAA's conduct as a whole was so egregious that it amounted to bad faith.

Arbitrator Shime found that reinstatement would not be appropriate given the high-handed conduct of the GTAA. He awarded damages in lieu of reinstatement (for past and future lost income), ordered the GTAA to delete all references to the discipline from its records and to provide the grievor with a letter of reference. He also awarded $50,000 for a combination of pain and suffering related to the grievor's knee injury and for mental distress related to the anxiety, depression and post-traumatic stress experienced by the grievor. He awarded a further $50,000 for punitive damages on account of the GTAA's "highhanded" conduct.

THE DIVISIONAL COURT'S DECISION

Arbitrator Shime's decision was largely upheld by the Divisional Court which determined there to be no error with respect to the monies he awarded for economic loss. It was completely appropriate they said, in the circumstances, for damages in lieu of reinstatement to be given. Further, they agreed it was appropriate to rely on classic contract principles in calculating the damages under this heading – namely that damages for breach of contract should place the person seeking them in the same position as if the contract had been performed, and that damages should be awarded that fairly and reasonably arise from the breach or as may reasonably have been in the contemplation of the parties at the time the contract was made.

Although it disagreed with a large part of his reasoning on the issue, it also found that Arbitrator Shime's award for mental distress damages could largely be justified. In particular, the Divisional Court stated that given the manner of the dismissal, and the particular characteristics of this grievor, mental distress damages were foreseeable by the parties.

There were, however, two main points of Arbitrator Shime's decision with which the Divisional Court disagreed. First, the Divisional Court found that Arbitrator Shime failed to provide the appropriate justification for including an award for pain and suffering related to the grievor's

knee injury, which formed part of the mental distress damages. Secondly, the Court found that he failed to set out the appropriate justification for his award of punitive damages.

An award of punitive damages requires that there be a separate actionable wrong, apart from the wrongful dismissal. For example, a breach of a distinct contractual provision or duty may suffice as an independent actionable wrong. So too may a tort. What the Divisional Court found problematic here was that Arbitrator Shime failed to specify what separate actionable wrong he was relying upon to support his award for punitive damages. Further, although he claimed that punitive damages were required in this case to denounce the conduct of the GTAA and to act as a deterrent, the Divisional Court found that Arbitrator Shime failed to explain why the other damages that had been awarded, which were significant, were not sufficient in this regard. He also failed to explain his rationale in selecting $50,000 as the appropriate amount for these damages.

At the end of its reasons the Divisional Court determined it was appropriate to set aside the mental distress and punitive damage awards and remit them back to Arbitrator Shime for reconsideration. The remainder of the award was upheld.

IMPACT OF THE DECISIONS

A new decision from Arbitrator Shime has not yet been released, and so, the story of the *GTAA v P.S.A.C., Local 004* continues. In the meantime, his original finding, and the subsequent decision of the Divisional Court, underscore the importance for employers to act in an even-handed manner and in good faith when disciplining an employee, particularly a long-standing employee with an unblemished record. Employers must take particular care when engaged in surveillance, dealing with employees on medical leave, and when dealing with individuals who are known to them as being particularly sensitive and vulnerable. To do otherwise will leave employers exposed to a range of damages far beyond what we might have been expected prior to Arbitrator Shime's decision.