

**EMPLOYERS GONE WILD, VOLUME II: A  
\$500,000.00 LESSON IN BAD FAITH DISCHARGE**

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This paper is for general discussion purposes and does not constitute legal advice or an opinion.

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## INTRODUCTION

Just as we thought that excessive dismissal awards were a thing of the past (see *Honda Canada Inc. v. Keays*, [2008] S.C.J. No. 40), one prominent labour arbitrator has moved boldly in the opposite direction. In *Greater Toronto Airports Authority and P.S.A.C. Loc. 0004* (2010), Arbitrator Shime awarded approximately \$500,000.00 in damages to a grievor who was dismissed after being wrongfully accused of malingering and fraud.

## FACTS

The grievor was a well respected, twenty-three year employee of the Greater Toronto Airport Authority (“GTAA”) with a clean disciplinary record. As a Fleet Coordinator, she was responsible for the maintenance and repair of the company’s vehicles and her job required a significant amount of walking and driving. When she injured her knee on the job in 2003, the Company doctor ordered X-rays and physiotherapy, which was not effective. The doctor then referred the grievor to an orthopaedic surgeon who operated on her knee in February of 2004. The grievor was advised to stay off work for four weeks to recuperate.

Unbeknownst to the grievor, the GTAA was conducting covert video surveillance of her partner, who was also an employee. The GTAA was hostile towards her partner because he had previously been dismissed and had been reinstated by an arbitrator. He was under surveillance because he was suspected of sick leave fraud. When the grievor was captured on the surveillance videos of her partner, the GTAA decided to place her under surveillance as well even though they knew that she had been stalked by her ex-husband and had suffered a nervous break down as a result.

The video surveillance of the grievor showed that she spent most of her time at home, but it also showed her attending physiotherapy, picking someone up from the airport and performing some errands.

Based upon the video surveillance, the GTAA concluded that the grievor was engaging in activities inconsistent with her injuries and asked her to provide a note from her doctor indicating whether she could return to work early. The doctor was away on vacation, but the grievor provided a physiotherapist’s note, which was summarily rejected by the employer. At the first opportunity, the grievor provided a note from her surgeon indicating that she could return to work early on modified duties.

The GTAA decided that it would continue video surveillance of the grievor at work. When she was recorded walking with a noticeable limp, the GTAA concluded that she was faking her injury because it had not noticed her limp in previous surveillance videos.

Two days later, the grievor was called in a meeting with several managers and interrogated about the surveillance video and urged to “come clean”. The grievor, who had thought the meeting was about her modified duties, explained that there was a difference between brief periods of exercise as shown on the video, and the steady amount of exercise at work. She pointed out that her surgeon permitted her to drive for brief periods of time, and that she felt better after physiotherapy and after taking painkillers, which she did not feel comfortable taking at work.

The GTAA concluded that the grievor had been dishonest about the amount of time she needed to recover from surgery and about some of her answers during the interrogation. As a result, she was dismissed for cause on the basis that her dishonesty led to a complete loss of trust, which made future employment impossible.

Post-termination, the grievor suffered panic attacks and she was diagnosed with Post Traumatic Stress Disorder and prescribed anti-depressants. She attended counselling and eventually found alternative employment at a greatly reduced salary.

The Union filed a grievance seeking reinstatement to an equivalent position in a safe environment free from harassment with full back pay and benefits, a written apology, payment for all therapy, damages for pain and suffering, slander, defamation, and punitive damages. At arbitration, the Union did not pursue the remedy of reinstatement because the grievor claimed that her mistreatment made it impossible for her to return to work.

Arbitrator Shime upheld the grievance. He found that the grievor was honest and diligent and was entitled to damages. She followed her surgeon’s instructions and she did not malingering. The video evidence did not establish that she was medically fit to return to work and it was consistent with the grievor’s explanation that she felt better after physiotherapy and after taking pain medication. Her evidence that she had not sufficiently healed to return to work was corroborated by her surgeon and physiotherapist. Among other things, Arbitrator Shime awarded:

1. Damages for mental distress and extended pain and suffering of \$50,000.00.
2. Lost wages to the date of the award, less amounts earned in mitigation.
3. Damages for future economic loss to compensate for loss of seniority, pension and other benefits until the date of her early retirement.
4. Punitive damages of \$50,000.00.

### NOVEL LEGAL FINDINGS

This extraordinary award is dependent on Arbitrator Shime's adoption and application of equally extraordinary legal principles.

First, Arbitrator Shime held that the employer had an implied duty to administer the collective agreement in good faith. This conclusion flowed from both the Collective Agreement language and also from the duty to bargain in good faith found in the *Canada Labour Code*. Arbitrator Shime held that it "would be completely antithetical to the *Code* to bargain the provisions of a collective agreement in good faith and not administer them in the same manner."

Second, Arbitrator Shime held that the employer had a duty not to destroy the mutual trust and confidence of the employment relationship. While this is a fundamental and familiar tenet of British employment law, it has not been applied in Canada. Arbitrator Shime relied upon the House of Lords discussion in *Malik v. Bank of Credit and Commerce International*, [1997] 3 ALL E.R. 1, in which former bank employees were awarded damages because they could not find jobs due to the bank's reputation, which was destroyed as a result of a massive fraud perpetrated by those in control.

Third, Arbitrator Shime held that one of the main purposes of collective agreements is to provide employees with the "psychological benefit" and "mental security" of being gainfully employed, job security in the event of lay-off and employment protection in the form of a just cause requirement for termination.

## SIGNIFICANCE OF LEGAL FINDINGS

### **Damages Were More Appropriate Than Reinstatement**

Arbitrator Shime held that the employer's actions were so high-handed, arbitrary and capricious and that they had such a destructive impact on the grievor that the GTAA had destroyed the mutual trust and confidence in the relationship and, as a result, reinstatement was inappropriate. To make the grievor whole, he awarded all future financial benefits that she would have received had the employment relationship continued through to the grievor's anticipated early retirement date at age 55.

### **Mental Distress Damages**

Having found that one of the purposes of a collective agreement is to provide employees with a psychological benefit and mental security, Arbitrator Shime, relying on *Fidler v. Sunlife Assurance Company of Canada* [2006] 2 S.C.R. 3 (an insurance case), held that mental distress damages were reasonably foreseeable and of a degree to warrant compensation. This was especially true given the grievor's history of domestic abuse and her previous nervous break down, which were known to the employer.

### **Punitive Damages**

Relying on the Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (another insurance case), Arbitrator Shime held that as the employer's conduct in both its investigation and also in its decision to dismiss were in bad faith, the grievor was entitled to punitive damages.

Arbitrator Shime simply could not believe that the GTAA jumped to such unreasonable and unwarranted conclusions about the video surveillance. He was shocked that they failed to independently assess the grievor's case, but condemned her by association. He was appalled that they did not consider clear evidence that supported her position, her lengthy seniority, her work record, or the fundamental principle of progressive discipline.

Arbitrator Shime held that punitive damages were needed to serve as a deterrent to any future misconduct in administering the collective agreement and dealing with other employees.

### **ADVICE TO EMPLOYERS**

To our knowledge this is the largest award ever given to a dismissed unionized employee. The decision is a marked departure from established arbitral principles and it is no surprise that the GTAA has applied for judicial review.

Regardless of whether Arbitrator Shime's decision stands or falls, it is a sharp reminder that employers proceed at their own peril when they discipline employees without considering all the evidence and without conducting a reasonably diligent investigation. The following should be kept in mind when investigating an employee for culpable misconduct:

1. **Avoid Assumptions.** Each case should be considered on its own merits and discipline should only be taken when allegations of cause are supported by clear evidence gathered through a proper and thorough investigation.
2. **Be wary of video surveillance.** Video can be very useful evidence but it is seldom determinative and like any other evidence it must be interpreted. It is often advisable to obtain a professional medical opinion before concluding that an employee is faking an injury or illness.
3. **Apply progressive discipline.** An employee's work history and disciplinary record must be considered before making any decisions about discipline and particularly about termination which should be considered a last resort.