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Citation: 2003 PSSRB 27



Public Service Staff  
Relations Act

Before the Public Service  
Staff Relations Board

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BETWEEN

AUGUSTIN ERNEST CHÉNIER

Grievor

and

TREASURY BOARD  
(Solicitor General Canada - Correctional Service)

Employer



*Before:* Joseph W. Potter, Vice-Chairperson

*For the Grievor:* Jacques Bazinet, Counsel, UCCO-SACC-CSN

*For the Employer:* Richard E. Fader, Counsel

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Heard at Kingston, Ontario,  
February 6, 2003.



## DECISION

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[1] On April 11, 2002, I rendered a decision concerning the suspension and subsequent termination of Correctional Officer Augustin Chénier, 2002 PSSRB 40 (166-2-30887 and 30888). The decision substituted a penalty of time served (a duration of almost 11 months) for that of termination. I retained jurisdiction with respect to the implementation of the award.

[2] By way of a letter dated June 28, 2002, the Public Service Staff Relations Board (the Board) was informed that Mr. Chénier wanted to be heard with respect to the issue of damages.

[3] The employer replied on July 3, 2002, indicating it had no objection to a hearing, but requested particulars.

[4] On December 5, 2002, the bargaining agent wrote to the Board and stated Mr. Chénier was seeking \$15,000. for "... stress, distress, anxiety, etc. creating a depressive state of mind".

[5] Following numerous attempts to find a mutually acceptable hearing date, the matter was set down for a hearing on February 6, 2003.

[6] At the hearing, Irene Chénier, the grievor's wife, testified that after her husband received his letter of termination, he became depressed and angry. His behavior at home changed significantly, to the point where he would not assist with household chores or play with his children.

[7] Mr. Chénier testified that when he received his letter of suspension (cited in part, in paragraph 61 of the original decision) he stated to the employer the charges were wrong. He was being suspended for introducing marijuana and alcohol into Kingston Penitentiary, as well as having an inappropriate relationship with an inmate. He later received a letter of termination for providing inmates with unauthorized items (as stated in paragraph 62 of the original decision).

[8] Mr. Chénier had admitted providing an inmate with a bank card, but denied all other charges.

[9] During his testimony, Mr. Chénier stated that the first time he became aware of the specific reasons for his termination was at the commencement of his adjudication hearing, which was February 6, 2002. From May 29, 2001, when he received his

termination letter until his adjudication hearing, he was not told the specific reason for being terminated. This, he said, led to extreme anxiety, stress and depression. He was embarrassed, as his fellow officers were all aware of the generalized allegations.

[10] Between receiving the letter of termination, and being ordered reinstated, Mr. Chénier was under a psychologist's care. The psychologist's report was submitted, on consent, and is identified as Exhibit G-2 of these proceedings. The report states, in part:

*Mr. Chenier's actions were wrong and he needed to be consequenced. Emotionally and financially Mr. Chenier has paid an extremely high price for his mistake. Having said this, I believe that the process leading to his punishment and how it was implemented added both unnecessary stress and psychological pain to Mr. Chenier and his family. It is my professional opinion that:*

- 1. Information regarding the process and his charges could have been more clearly and systematically presented.*
- 2. Punishment other than termination should have been considered at an earlier stage of the process. This is especially significant since Mr. Chenier believed his charges involved entrapment.*

[11] Mr. Chénier testified he felt his employer left him hanging for a year on things he did not do. The accusations were the only things on his mind, and he felt being accused of things he did not do caused his difficulty. It was for that reason he was seeking damages.

#### Argument for the Grievor

[12] The language of clause 1.01 of the grievor's collective agreement allows an adjudicator to award damages in this instance.

[13] For damages to be awarded, they must be certain and not speculative. In this situation, the psychologist's report states Mr. Chénier encountered a depressive state of mind. The damages, here, are real.

[14] Was the employer's behavior a contributing factor? This is a difficult question. It is hard to separate the level of stress encountered if the exact nature of the charges

at the outset had been known, versus the level of stress without knowing them. However, it did play some significant role, and this has been demonstrated.

[15] The entire investigative process was done through a police investigation which led the grievor to believe he would be charged criminally. No charges were ever filed. When the employer knew there would be no criminal charges, why not tell him?

[16] This case satisfies the level of showing some negligence on the part of the employer.

[17] Damages can be assessed against the behavior of the employer. If it was negligent, its negligence contributed to Mr. Chénier's depressive state of mind.

[18] How much is the negligence worth? No way exists to figure out the amount with precision, but in broad terms a figure of \$15,000. was arrived at. These are aggravated damages, not punitive.

[19] Counsel for the grievor submitted the following caselaw:

*Adams c. R.*, 500-05-033116-979, 2002-03-14, juge Danielle Grenier, C.S,

*Canadian Labour Arbitration*, Third Edition, Re: Jurisdiction of the Arbitrator,

*Vorvis v. I.C.B.C.* [1989] 1 R.C.S. 1085,

*Whiten v. Pilot Insurance Co.*, 2002 SCC 18,

*Wallace v. United Grain Growers Ltd.* [1997], 3 S.C.R. 701,

*Athey v. Leonati* [1996], 3 S.C.R. 458,

*Re Goodyear Canada Inc. and U.S.W.A.* [2002], 107 L.A.C. (4th) 289,

*Re ABT Building Products Canada Ltd. and C.E.P.* [2000], 90 L.A.C. (4th) 1

#### Argument for the Employer

[20] There is no jurisdiction to make an award as requested by the grievor given the lack of a clear provision in the collective agreement permitting it. In addition, nothing in the *Public Service Staff Relations Act* permits making such an award, either.

[21] The claim here does not flow from what was originally in front of the adjudicator. The original question was "Was there a basis for termination?" The remedy crafted addressed this issue. Now the bargaining agent is requesting an entirely new review over process. An adjudicator cannot enter into a separate inquiry.

[22] Today's claim is essentially a claim for negligence. This goes beyond making the grievor whole, and there is no jurisdiction to do that.

[23] In the alternative, this is not a case to award damages. Very serious misconduct was committed by the grievor and an extremely lengthy penalty of 11 months ensued.

[24] The grievor knew that the charge of handing a bank card to an inmate was serious. He knew this charge from the very beginning.

[25] Counsel for the employer submitted the following caselaw:

*Ménard v. Canada (C.A.)*, [1992] 3 F.C. 521,

*Canada (Attorney General) v. Hester (T.D.)*, [1997] 2 F.C. 706,

*Champagne v. Canada (Public Service Staff Relations Board) (F.C.A.)*, [1987] F.C.J. No. 906,

*Ontario Hydro and C.U.P.E., Loc. 1000, Re* (1990), *Re*, 16 L.A.C. (4th) 264,

*Seneca College and O.P.S.E.U. (Olivo) (Re)* (2001), 102 L.A.C. (4th) 298,

*Chénier* 2002 PSSRB 40 (166-2-30887 and 30888),

*Wells* (Board file 166-2-27802),

*Bradley* 2000 PSSRB 82 (166-2-29308),

*Re Canada Post Corporation and Canadian Union of Postal Workers* (1984), 16 L.A.C. (3d) 283.

### Reply

[26] If the employer had terminated the grievor on the bank card issue itself, we would not be here. However, the employer cited vague allegations that were never presented or proven, and this heightened the level of stress.

[27] There is nothing in either the collective agreement or the PSSRA which prohibits an adjudicator from making a ruling on damages, therefore an adjudicator has jurisdiction to do so.

Decision

[28] Does an adjudicator have jurisdiction to award damages, and, if so, is this a case where it would be appropriate to award damages? As I see it, these are the two questions being put to me for a decision. If I answer yes to each question, then I have to determine the amount of damages that would be appropriate.

[29] Turning to the particular claim for damages in this case, the bargaining agent has stated it is not seeking punitive damages here, but rather aggravated damages. What then is the proper characterization of the damage sought here and is this within an adjudicator's jurisdiction to award?

[30] In *Lussier* (166-2-21434), the adjudicator made a determination that the grievor could not take his vacation leave because of an administrative error on the part of the employer. In order to compensate the grievor for this, the adjudicator awarded Mr. Lussier the sum of \$100.

[31] The matter was referred to the Federal Court of Appeal and Mr. Justice Létourneau wrote:

*Moreover, in the context of this case, particularly in view of the absence of any evidence of damage, the fact that the adjudicator awarded compensation for the error made is much more in the nature of awarding punitive damages than of genuine compensation for damage actually suffered. The adjudicator exceeded his jurisdiction by awarding such damages.*

[32] My understanding of Justice Létourneau's decision was to state that an adjudicator had no authority to award punitive damages.

[33] In *Canada (Attorney General) v. Hester* (supra) Gibson, J. of the Federal Court of Canada, Trial Division, wrote at paragraph 16:

*There can be no question that the tribunal had the authority to impose a remedy against the employer in circumstances where it found the respondent to have suffered a loss.*

Gibson, J. went on to find that the award in that case was punitive, and therefore the adjudicator had exceeded his jurisdiction.

[34] In light of these pronouncements, to award punitive damages would be exceeding my jurisdiction and counsel for the grievor has stressed this is not a claim for punitive damages. What cannot be done is, I believe, clear. An adjudicator exceeds his or her jurisdiction when awarding punitive damages.

[35] As described earlier, counsel for the grievor stated this is a claim for aggravated damages. What is the difference between punitive and aggravated damages?

[36] The Supreme Court of Canada reviewed the difference between punitive and aggravated damages in its decision of *Vorvis v. Insurance Corporation of British Columbia* (1989), 1 S.C.R. 1085.

[37] Commencing at page 1098, McIntyre, J. wrote:

*Before dealing with the question of punitive damages, it will be well to make clear the distinction between punitive and aggravated damages, for in the argument before us and in some of the materials filed there appeared some confusion as to the distinction. Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory. The distinction is clearly set out in Waddams, The Law of Damages (2nd ed. 1983), at p. 562, para. 979, in these words:*

*An exception exists to the general rule that damages are compensatory. This is the case of an award made for the purpose, not of compensating the plaintiff, but of punishing the defendant. Such awards have been called exemplary, vindictive, penal, punitive, aggravated and retributory, but the expressions in common modern use to describe damages going beyond compensatory are exemplary and punitive damages. "Exemplary" was preferred by the House of Lords in Cassell & Co. Ltd. v. Broome, but "punitive" has also been used in many Canadian courts including the Supreme Court of Canada in H.L. Weiss Forwarding Ltd. v. Omnis. The expression "aggravated damages", though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been*



*contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour. The expressions vindictive, penal and retributory have dropped out of common use.*

*Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.*

[38] Is there remedial authority for an adjudicator to award aggravated damages? Counsel for the employer states that unless the collective agreement or legislation so provides, there is no authority for an adjudicator to make such an award. Counsel for the grievor, on the other hand, submits nothing in the collective agreement or legislation prevents making such an award, and clause 1.01 of the grievor's collective agreement allows this.

[39] Clause 1.01 of the Correctional Officers' collective agreement states:

#### ARTICLE 1

##### PURPOSE AND SCOPE OF AGREEMENT

1.01 *The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the Bargaining Agent and the employees and to set forth herein certain terms and conditions of employment for all employees described in the certificates issued by the Public Service Staff Relations Board on March 13, 2001 covering employees in the Correctional Group.*

This, in my view, does not either specifically allow or prohibit an adjudicator from making a ruling on the issue of damages. It is a general provision that can fairly be described as prevalent in most, if not all Federal Public Service collective agreements and is designed, I believe, to set out more of a philosophical approach to labour relations than an outline of the remedial authority of adjudicators.

[40] In my view, there can be no question that adjudicators have remedial authority to fashion appropriate remedies with a view to "compensating the wrong" and making the aggrieved party whole when it has suffered damages as a result of its rights having been infringed (see *Heustis v. New Brunswick Power Corporation*, [1979] 2 S.C.R. 768. This is true unless there are specific provisions in the legislation or collective agreement preventing the adjudicator from doing so. For example, subsection 96(2) of the PSSRA states:

*(2) No adjudicator shall, in respect of any grievance, render any decision thereon the effect of which would be to require the amendment of a collective agreement or an arbitral award.*

This section prohibits an adjudicator from issuing a decision that would amend a collective agreement. This section is clear as to what an adjudicator cannot do.

[41] There was nothing I was made aware of that specifically prohibited an adjudicator from awarding damages in cases where it was appropriate to do so. Awards must be fashioned to correct whatever wrong the adjudicator perceives has been committed.

[42] With respect to the employer's counsel submission that there was nothing in the PSSRA which specifically allowed the awarding of damages, therefore it could not be done, I respectfully disagree with this position. In a recent decision of the Federal Court Trial Division, Dubé J. wrote that adjudicators have jurisdiction to inquire into whether the employer made a diligent search for alternate employment for an employee who was terminated (see *Singh v. Canada (Public Works and Government Services)* 2001 F.C.T. 577. The PSSRA did not specifically state an adjudicator had the power to order a search, but the Federal Court stated the adjudicator could order a search be made.

[43] In a decision rendered under the *Ontario Labour Relations Act* (OLRA) the adjudicator dealt with the remedial powers of an arbitrator. In *Colonial Furniture (Ottawa) Ltd. And R.W.S.U., Local 414* (1995), 47 L.A.C. (4th) 165 at page 174, the adjudicator wrote:

*The remedies sought by the union in the instant case raise the issue of the extent of the arbitrator's remedial powers. In this regard, it is established that the arbitrator's duty to "make a final and conclusive settlement of the differences*

between the parties"(s. 45(8) of the O.L.R.A.) implies remedial powers inherent to its adjudicative function. This is what Professor Laskin wrote in *Re Oil, Chemical & Atomic Workers and Polymer Corp.* (1959), 10 L.A.C. 51 at p. 60, 59 C.L.L.C. ¶18,159:

Once the parties have submitted themselves to the jurisdiction of a board of arbitration authorized to adjudicate on an alleged violation of a collective agreement obligation, they have accepted the full range of the tribunal's adjudicative powers (unless expressly limited) which are immanent in such adjudication.

[Emphasis added.] In that case, after having concluded the union had breached a clause of the collective agreement prohibiting work stoppages during the life of the agreement, Professor Laskin held he had the power not only to make a declaration that the union had breached the collective agreement but also to order the payment of damages to the employer. Professor Laskin wrote the following at p. 56 of his decision:

In short, boards of arbitration were entrusted with a duty of effective adjudication differing in no way, save perhaps in the greater responsibility conferred upon them, from the adjudicative authority exercised by the ordinary Courts in civil cases of breach of contract. That the adjudication was intended to be remedial as well as declaratory could hardly be doubted.

Professor Laskin went on to make the following comments on the limits to the arbitrator's remedial powers at p. 57 of his decision:

[A] board's remedial authority, if it has any, must be addressed to the vindication of violated rights by putting the innocent party, so far as can reasonably be done, in the position in which he or it would be if the particular rights had not been violated. The redress, if any can be given, must be suited to or measured by the wrong done. A board of arbitration is not, however, a criminal court. True enough, it may play a role in passing upon or modifying a penalty imposed by an employer as a matter of discipline, but in so doing it is merely assessing the permissible limits of employer action taken under the collective agreement and not fashioning a penalty to reward an innocent party.

(Emphasis added.)

On judicial review, Professor Laskin's decision was upheld by the Ontario High Court (*Re Polymer Corp. and Oil, Chemical & Atomic Workers Int'l Union*, Loc. 16-14

(1961), 26 D.L.R. (2d) 609, 61 C.L.L.C. ¶15,341, [1961] O.R. 176 [affirmed 28 D.L.R. (2d) 81, [1961] O.R. 438], as well as by the Supreme Court of Canada (33 D.L.R. (2d) 124, [1962] S.C.R. 338 sub nom. Imbleau v. Laskin, 62 C.L.L.C. ¶15,406). The following passage from the Ontario Court of Appeal decision, at p. 82, is of particular interest:

*We are further of the opinion that the arbitrators would be remiss in their duties under the submission to them if they do not proceed to assess and award compensation for the violation of the agreement which they had found to have taken place, that is to say, compensation in the sense in which the Board of Arbitration itself has defined it.*

*(Emphasis added)*

[44] After having reviewed the case law submitted by the parties, as well as other decisions cited herein (see *Cléroux v. Canada*, 2001 F.C.T. 342, conf'd by 2002 F.C.T. (Federal Court of Appeal); *Johnson-Paquette v. Canada*, 1998 F.C.T. 1741, conf'd by 2000 F.C.J. 441 (Federal Court of Appeal); *Jadwani v. Canada* (2001) 52 O.R. (3<sup>rd</sup>) 660 (Ontario Court of Appeal), I have come to the conclusion that the awarding of aggravated damages would be within an adjudicator's jurisdiction to do so, if it were indeed appropriate given the facts of the case, including such situations as a particularly reprehensible, malicious or arbitrary conduct of the employer towards the employee in the course of the termination process. In such a situation an adjudicator would, I believe, have jurisdiction to award damages for, as Mr. Justice Létourneau stated, "... genuine compensation for damage actually suffered" (supra).

[45] Is this an appropriate case to award aggravated damages?

[46] To be succinct, I feel that the grievor has fallen short of demonstrating this is an appropriate case to award damages.

[47] The grievor stated that he suffered stress and discomfort at being terminated. The employer did not dispute this, but suggested many employees in that situation would feel the same, and this is not the employer's fault. The employee committed a very serious wrong, one which he admitted to.

[48] Counsel for the employer said the actions of the employer were caused, at least in part, by the employee's introducing a bank card into a maximum security

institution. This is extremely serious. I agree. I have given the grievor a second chance at his job, but I did so without any retroactivity.

[49] I do not find the employer's actions warrant the awarding of damages in this instance. The fact the employer cited reasons for termination, in addition to the bank card, at the outset are not, in my view, sufficient to arrive at a conclusion that this action caused added stress to Mr. Chénier. Perhaps he would have been under just as much, if not more stress had the employer limited the reason for termination to the bank card, an act admitted to by Mr. Chénier. Also, there is absolutely no question in my mind Mr. Chénier knew at the very beginning that one of the reasons for termination was the issuing of the bank card. This was no surprise.

[50] I believe the grievor has been fully compensated, in this situation, by being given a second chance at proving himself in the workplace. Nothing further, in my mind, is warranted. The request for damages is denied.

**Joseph W. Potter,  
Vice-Chairperson.**

OTTAWA, March 18, 2003.

