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COURT OF APPEAL FOR ONTARIO

LASKIN, CRONK AND ARMSTRONG JJ.A.

B E T W E E N :	)	
	)	
ONTARIO PUBLIC SERVICE EMPLOYEES UNION	)	**Nicholas S. Coleman and Caroline Jones for the respondent OPSEU**
	)	
Applicant/Respondent	)	
	)	
- and -	)	
	)	
SENECA COLLEGE OF APPLIED ARTS & TECHNOLOGY AND PAMELA COOPER PICHER, ROBERT J. GALLIVAN AND SHERRIL MURRAY	)	**Christopher G. Riggs, Q.C. and John-Paul Alexandrowicz for the appellant Seneca College**
	)	
Respondent/Appellant	)	
	)	
	)	**Heard: October 4, 2005**

On appeal from the order of the Divisional Court (Justice John G. O'Driscoll, Justice Jean L. MacFarland and Justice Katherine E. Swinton) dated November 1, 2004 made at Toronto, Ontario.

LASKIN J.A.:

A. INTRODUCTION

[1] The main issue on this appeal is the appropriate standard of review of a labour arbitration board's decision that the collective agreement did not give it authority to award aggravated or punitive damages in connection with a grievance for unjust dismissal. Put differently, is an arbitration board's application of the exclusive

jurisdiction principle in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 entitled to deference from a reviewing court?

[2] The appellant employer, Seneca College, says that the appropriate standard of review is patent unreasonableness. The respondent union, Ontario Public Service Employees Union (OPSEU), says that the standard is correctness. The Divisional Court agreed with OPSEU on the standard of review, and concluded that the Board of Arbitration erred in limiting the scope of its remedial authority. The Divisional Court therefore remitted the matter to the Board to determine whether aggravated and punitive damages should be awarded and, if so, in what amount.

B. BACKGROUND

1. The Grievance

[3] The incidents giving rise to the grievance and this litigation took place in the 1990s. Seneca College and OPSEU, Local 560 were parties to a collective agreement covering the academic staff of the College. Relations between the parties had been strained for several years. Two of the principal protagonists were Melvin Fogel, the College's Director of Employee Relations, and the eventual grievor, Larry Olivo, a lawyer, a teacher on staff since 1980 and, at the time of his dismissal, vice president of Local 560.

[4] The poor relations between the parties further deteriorated in 1997 when Fogel sued Olivo and other members of Local 560 for libel arising from statements in the Union's newsletter attributed to Fogel.

[5] In February 1998, Seneca College fired Olivo. The College contended that in 1990 and 1991, Olivo had sent anti-Semitic material to Fogel in reusable, inter-departmental envelopes. The material in question was blatantly anti-Semitic. Olivo, however, denied any involvement in either creating or sending the material to Fogel. OPSEU grieved his dismissal under the grievance and arbitration provisions of the collective agreement.

2. The Collective Agreement

[6] Articles 32.06, 32.07 and 32.08 of the collective agreement contained standard provisions for the grievance and arbitration of dismissals:

> **Dismissal**
>
> **32.06** It being understood that the dismissal of an employee during the probationary period shall not be the subject of a grievance, an employee who has completed the probationary

period may lodge a grievance in the manner set out in 32.07 and 32.08.

32.07 An employee who claims to have been dismissed without just cause shall, within 20 days of the date of receipt of the written notification of the dismissal, present a grievance in writing to the College President, or in the absence of the College President, the Acting President, commencing at Step Two and the President shall convene a meeting and give the grievor and the Union Steward the President's decision in accordance with the provisions of Step Two of 32.03.

32.08 If the grievor is not satisfied with the decision of the College President, the grievor shall, within 15 days of receipt of the decision of the College President, or in the absence of the President, the Acting President, by notice in writing to the College, refer the matter to arbitration, as provided in this Agreement.

[7] Articles 32.03, 32.04 A and 32.04 C of the collective agreement provided for "final and binding" arbitration of all differences arising from the interpretation, application, administration or alleged contravention of the agreement, including any question about whether a matter was arbitrable:

Grievances

32.03

…

In the event that any difference arising from the interpretation, application, administration or alleged contravention of this Agreement has not been satisfactorily settled under the foregoing Grievance Procedures, the matter shall then, by notice in writing given to the other party within 15 days of the date of receipt by the grievor of the decision of the College official at Step Two, be referred to arbitration.

32.04 A Any matter so referred to arbitration, including any question as to whether a matter is arbitrable, shall be heard by a Board of three arbitrators composed of an arbitrator

> appointed by each of the College and the Union and a third arbitrator who shall be Chair.
>
> …
>
> **32.04 C** The finding of the majority of the arbitrators as to the facts and as to the interpretation, application, administration or alleged contravention of the provisions of this Agreement shall be final and binding upon all parties concerned, including the employee(s) and the College.

[8] The collective agreement did not address the conduct relied on by OPSEU to assert claims for aggravated and punitive damages. Nor did it expressly authorize arbitrators to give these damages. However, the agreement did not expressly preclude them from doing so either. Article 32.04 D of the agreement, the only express limit on the Board's authority, precluded a board of arbitration from making any decision inconsistent with the agreement or from dealing with any matter "not a proper matter for grievance".

3. The Board of Arbitration's decision

[9] The grievance was heard by a three-person Board of Arbitration chaired by Ms. Pamela Picher, an experienced labour arbitrator.[1]

a. First Award: Reinstatement

[10] The Board found that the evidence linking Olivo to the anti-Semitic material was weak at best. More importantly, the College's delay of seven to eight years in taking action against Olivo was, in the words of the unanimous Board, "unwarranted, prejudicial and of sufficient gravity to vitiate Mr. Olivo's discharge in its entirety." On that ground alone, the Board voided Olivo's dismissal, and ordered that he be reinstated with full compensation, including seniority and benefits. Seneca College did not challenge this order.

b. Supplementary Award: OPSEU's Claim for Aggravated and Punitive Damages

[11] After a further hearing, the Board issued a supplementary award, because in addition to basic compensatory relief, OPSEU sought aggravated and punitive damages.

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[1] The Board consisted of Ms. Picher, Robert Gallivan (the College's nominee) and Sherril Murray (the Union's nominee). Ms. Murray dissented on the Supplementary Award. In her view, the Board was entitled to award aggravated and punitive damages. In these reasons, I refer to the majority decision as the decision of the Board.

It argued that the College intentionally inflicted mental distress on Olivo, and defamed him by labeling him as anti-Semitic. In seeking these tort-like damages, OPSEU relied on the Supreme Court of Canada's decisions in *Weber v. Ontario Hydro, supra, Vorvis v. Insurance Company of British Columbia* (1989), 58 D.L.R. (4th) 193 (S.C.C.), and *Wallace v. United Grain Growers Ltd*. (1997), 152 D.L.R. (4th) 1 (S.C.C.).

[12] According to OPSEU, in the light of *Weber*, the Board of Arbitration had the authority to adjudicate Olivo's claims of intentional infliction of mental suffering and defamation in connection with his dismissal because that authority arose inferentially from the collective agreement. Therefore, if the Board of Arbitration was seized with the authority to adjudicate these tort-like claims, OPSEU contended that the Board had the authority to remedy the tortious conduct by an award of aggravated and punitive damages.

[13] In *Vorvis*, the Supreme Court held that in rare instances, a court could award aggravated damages for mental distress and punitive damages in a wrongful dismissal case, if the acts complained of amounted to an independent, actionable wrong. OPSEU argued that the misconduct of the College was independently actionable because it constituted a breach of another article of the collective agreement – article 3.02 – the non-discrimination clause.

[14] In *Wallace*, the Supreme Court held that a court may award damages flowing from the manner of dismissal, in addition to damages resulting from the dismissal itself. In other words, an employer's bad faith conduct or unfair dealing during the course of a dismissal may be compensable. OPSEU argued that an employer's duty of good faith and fair dealing in the manner of dismissal under an individual contract of employment should apply to employers in collective bargaining relationships.

[15] In a lengthy and thorough decision, the Board of Arbitration concluded that the collective agreement did not give it jurisdiction to award aggravated or punitive damages. OPSEU was not powerless to seek these damages, but it could do so only in the courts. The Board reached this conclusion by applying the exclusive jurisdiction principle for resolving workplace disputes established by the Supreme Court of Canada in *Weber*. The Board held that the essential character of the dispute was the College's alleged tortious misconduct of defaming or intentionally inflicting mental distress on Mr. Olivo. In the Board's view, that dispute did not arise either expressly or inferentially under the collective agreement. Thus, the Board had no power to grant the damages sought by OPSEU for the College's tortious conduct. The power to award these damages based on *Vorvis* and *Wallace* resided in the residual jurisdiction of the courts.

[16] The Board distinguished the collective agreement in *Weber* from the collective agreement in this case. The agreement in *Weber* contained a clause extending the grievance and arbitration process to "any allegation that an employee has been subjected

to unfair treatment." The Supreme Court of Canada relied on this clause to conclude that the alleged tortious conduct of the employer arose inferentially under the collective agreement and, therefore, was arbitrable. The agreement before the Board contained no similar clause, nor in the Board's view, any other clause "that might give rise to an inference that the parties intended a Board of Arbitration to adjudicate alleged tortious wrongdoing."

[17] The Board considered OPSEU's argument that clause 3.02 of the collective agreement – which prohibited the College from intimidating or discriminating against an employee because of the employee's union activity – gave it authority to award the damages claimed. In rejecting this argument, the Board stated, "it is insufficient that the alleged wrongdoing simply be able to support a separate, related grievance complaint, in addition to the complaint of unjust cause for discharge."

[18] The Board also addressed the intention of the parties. It found no evidence that the College and OPSEU intended their collective agreement, or article 3.02 for that matter, to cover these tort damages. It noted that the parties could have included in their collective agreement clauses prohibiting tortious misconduct, but – as is typical of most parties to a collective agreement – had chosen not to do so. It gave several policy reasons why parties to a collective agreement have not clothed arbitrators with the authority to adjudicate allegations of tortious conduct:

- they are not the normal subject matter of a collective agreement, which itself is the product of an ongoing relationship usually of lengthy duration;[2]
- traditionally, courts have dealt with these allegations; labour arbitrators have focused on the workplace, not on personal issues;
- allowing arbitrators to deal with these allegations would strain the financial resources available for arbitration proceedings; and
- placing these wrongs within the grievance and arbitration process would put at risk "the very efficiency and vitality" of that process.

[19] Thus, the Board of Arbitration concluded that it had no jurisdiction over OPSEU's claim for additional damages:

> Accordingly we conclude that the Board has no jurisdiction to entertain these allegations in tort respecting the intentional infliction of mental distress or defamation and, therefore, that this Board does not have, under *Weber* principles, the jurisdiction to award the aggravated or punitive damages that

[2] For the Community Colleges, a duration of over thirty years

> might follow upon a finding of such alleged tortious wrongdoing.

4. The Divisional Court's decision

[20] The Divisional Court granted OPSEU's application for judicial review of the Board of Arbitration's decision that, under the collective agreement, it did not have jurisdiction to award aggravated or punitive damages to a grievor. The Court held that the standard of review was correctness because the Board of Arbitration was deciding a question of its jurisdiction and a question of law.

[21] The Divisional Court then held that the Board had incorrectly concluded it had no jurisdiction to award aggravated or punitive damages. The Divisional Court, like the Board, applied the exclusive jurisdiction principle in *Weber*. But unlike the Board, the Divisional Court held that the essential character of the dispute was the unjust dismissal and the appropriate remedy for the dismissal. In the court's view, the Board of Arbitration had broad powers to remedy the unjust dismissal, including the power to award aggravated and punitive damages:

> The essential character of the dispute before the Board of Arbitration was an unjust dismissal and the appropriate remedy therefor. In my view, the issue of aggravated and/or punitive damages is a dispute between the parties arising either directly or inferentially from the Collective Agreement and, therefore, within the exclusive jurisdiction of the Board of Arbitration. It is well established that labour arbitrators have broad remedial power, including the power to award damages (para. 26).

[22] The Divisional Court concluded that "the collective agreement *inferentially* included all aspects of the grievance advanced on behalf of Mr. Olivo with respect to his dismissal without just cause, including the claim for aggravated and/or punitive damages" (para. 33) [emphasis added]. The court did not, however, specify what provisions of the collective agreement inferentially gave the Board of Arbitration the power to award these damages.

C. ANALYSIS

1. The appropriate standard of review

a. The parameters of the debate

[23] In broad terms, this appeal raises two questions: first, what is the appropriate standard of review; and second, when assessed against that standard, should the decision of the Board of Arbitration be set aside? However, in the light of the way the two experienced and excellent labour law advocates framed their arguments on behalf of their clients, the first question – the appropriate standard of review – is decisive of this appeal.

[24] Mr. Riggs, for Seneca College, contended that the appropriate standard of review was patent unreasonableness, and that the Board's decision should stand, because it was not patently unreasonable. He did not press the argument that the Board's decision was correct.

[25] Mr. Coleman, for OPSEU, contended that the Divisional Court was right in holding the standard of review to be correctness, and that the Board's decision was unquestionably incorrect. He did not contend, however, that the Board's decision was patently unreasonable. Implicitly, if not explicitly, he accepted that if the standard of review was patent unreasonableness, the Board's decision should stand. I accept the way counsel framed the parameters of the debate in this court.

[26] I agree with Mr. Riggs' position. The "pragmatic and functional approach", called for by the Supreme Court of Canada, demonstrates that the standard of review is patent unreasonableness. And I cannot say that the Board's decision was patently unreasonable. Even if the Board's decision was incorrect – and I pass no judgment on that question – it had the right to be wrong without interference from a reviewing court.

b. The legislature's intent and the four contextual factors

[27] Seneca College's position is that the question of the Board of Arbitration's authority to award aggravated or punitive damages was a question of arbitrability, to which a reviewing court should show deference. OPSEU's position is that the Board was not deciding "an issue of arbitrability within jurisdiction," but instead, was deciding "an issue of jurisdiction in the formal sense", by applying the common law principle in *Weber*. The Board's decision was therefore not entitled to deference; the Board was required to be correct.

[28] Although outlining their positions in these general terms, both sides recognized that the standard of review must be determined by applying the four contextual factors underlying the pragmatic and functional analysis:

> (1) the presence or absence of a privative clause or statutory right of appeal;
>
> (2) the purposes of the legislation and the provision in particular;
>
> (3) the nature of the question – law, fact or mixed fact and law; and
>
> (4) the expertise of the tribunal compared to the reviewing court on the question in issue. See *Pushpanathan v. Canada (Minister of Cizitenship and Immigration)*, [1998] 1 S.C.R. 982; and *Voice Construction Ltd. v. Construction and General Workers' Union, Local 192*, [2004] 1 S.C.R. 609 at para. 16.[3]

[29] Unfortunately, in its decision, the Divisional Court did not undertake this pragmatic and functional analysis. Instead, it seemed to take the view that because the question in issue was, in its opinion, a question of jurisdiction and a question of law, the standard of review must be correctness.

[30] That is not a sound view. Simply because the court labels an issue "jurisdictional" does not automatically mean that the standard of review of a tribunal's decision on that issue is correctness. As Evans J.A. pointed out in *Via Rail Canada Inc. v. Cairns* (2004), 241 D.L.R. (4th) 700 at para. 33 (F.C.A.), "Conceptual abstractions, such as 'jurisdictional question', now play a much reduced role in determining the standard of review applicable to the impugned aspect of a tribunal's decision."

[31] In other words, a court's finding that an issue has a jurisdictional aspect does not obviate the court's obligation to do a pragmatic and functional analysis. See *Voice Construction, supra* at paras. 20-22; *Dr. Q v. College of Physicians and Surgeons of*

British Columbia, [2003] 1 S.C.R 236 at para. 21; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.C. 4 at paras. 22-23. The "jurisdictional" nature of the issue is but a factor in that analysis, or more often, the characterization of the outcome of that analysis. See *Via Rail, supra* at para. 36 and *Pushpanathan, supra* at para. 28.

[32] The purpose of the pragmatic and functional analysis – of considering the four contextual factors – is to ascertain the legislature's intent. See *Dr. Q, supra* at para 26. Did the legislature intend that a reviewing court give deference to the Board's decision, and if so, what level of deference? Or, put in terms of jurisdiction, did the legislator intend this issue to be exclusively within the Board's jurisdiction to resolve? See *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048 at 1089-1091.

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[3] The cases list "expertise" as the second factor. I have changed the order and listed it fourth. It seems to me that expertise cannot be assessed until the purposes of the provision in issue and the nature of the question are identified.

[33] In my opinion, the interplay of the four contextual factors points to a high degree of deference to the Board of Arbitration's decision. The question of the Board's remedial authority to award aggravated and punitive damages is a question that the legislature intended the arbitrators to decide. Their decision must stand unless it is patently unreasonable.

(i) The presence or absence of a privative clause or statutory right of appeal

[34] The *Colleges Collective Bargaining Act*, R.S.O. 1990, c. C-15 (CCBA) governs collective agreements in the community college system. It does not provide a statutory right of appeal from the decision of a board of arbitration. The CCBA, however, contains two privative clauses, one in s. 46(5), and the other, a more comprehensive clause, in s. 84(1).

[35] Section 46(1) provides for the "final and binding" settlement of disputes between an employer and a union by arbitration, including disputes over whether a matter is arbitrable. Section 46(5) specifically states that decisions of arbitrators are final and binding:

> 46(5) The decision of an arbitrator or of an arbitration board is final and binding upon the employer, employee organization and upon employees covered by the agreement who are affected by the decision, and such employer, employee organization and employees shall do or refrain from doing anything required of them by the decision.

[36] Section 84(1) is a full privative clause:

> 84(1) No decision, order, determination, direction, declaration or ruling of the Commission, a fact finder, an arbitrator or board of arbitration, a selector or the Ontario Labour Relations Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, application for judicial review or otherwise, to question, review, prohibit or restrain the Commission, fact finder, arbitrator or board of arbitration, selector or the Ontario Labour Relations Board or the proceedings of any of them.

[37] The full privative protection given to the decisions of arbitrators and boards of arbitration in s. 84(1) of the CCBA points to a highly deferential standard of review. By

comparison, s. 84(1) of the CCBA is an even stronger privative clause than s. 48(1) of Ontario's *Labour Relations Act, 1995*, S.O. 1995 c. 1 Sch. A. – the reasonably strong finality clause that protects the decisions of Ontario labour arbitrators. In *Lakeport Beverages, A Division of Lakeport Brewing Corp. v. Teamsters Local Union 938* (2005), 77 O.R. (3d) 543 (C.A.), this court concluded that s. 48(1) pointed to a large measure of deference to an arbitrator's decision.

[38] Section 84(1) of the CCBA is also stronger than the relatively weak privative clauses under Alberta's *Labour Relations Code*, S.A. 1988, C. L-12, as amended by R.S.A. 2000, c. L-1. The Supreme Court of Canada held that the limited privative clauses in Alberta's *Code* dictated the less deferential reasonableness standard of review. See *Voice Construction*, *supra* at paras. 26 and 30 and *Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 at para. 16. These cases demonstrate – as McLachlin C.J.C. said in *Dr. Q*, *supra* at para. 27 – that "The stronger the privative clause, the more deference is generally due." Section 84(1) of the CCBA is a very strong privative clause and thus attracts significant deference.

(ii) The purposes of the legislation and the provisions in question

[39] The purpose of s. 46(1) of the CCBA, and of the corresponding grievance and arbitration provisions of the collective agreement, is to secure a final and binding resolution of workplace disputes and to secure this resolution in a prompt, efficient and cost-effective way. Peace and harmony in the workplace depend on maintaining the integrity of the grievance and arbitration process. In turn, the integrity of this process will be maintained only if the courts give significant deference to the decisions of arbitrators. Moreover, under the statute, boards of arbitration resolve two-party disputes, not broad policy issues. See *Parry Sound (District) Social Services Administration Board v. OPSEU, Local 324* (2003), 230 D.L.R. (4th) 257 (S.C.C.). See also *Lakeport Beverages*, *supra;* and *Toronto (City) Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487 at paras. 35-37; *Voice Construction, supra* at para. 28. This contextual factor, therefore, also points to a highly deferential standard of review.

(iii) The nature of the question

[40] The Board of Arbitration applied the exclusive jurisdiction principle in *Weber* to decide whether it had authority to award aggravated and punitive damages for an unjust dismissal. Seneca College contends that this was a question of arbitrability, because the Board was simply determining the scope of its remedial authority over a dispute (Olivo's dismissal) that arose under the collective agreement. And, as the Supreme Court of Canada recently affirmed in *Parry Sound*, *supra* at para. 16, questions of arbitrability ordinarily are reviewable only for patently unreasonable error. See also *Fanshawe College v. OPSEU*, [1994] O.J. No. 3697 at para. 1 (C.A.).

[41] OPSEU contends that the question of the Board's authority to award these damages was a question of law that "went to jurisdiction" because the Board was determining the boundary between its jurisdiction and that of the courts. Indeed, the Board itself described its task as deciding whether it had jurisdiction to award aggravated and punitive damages.

[42] As I perceive it, OPSEU's argument has two related branches, both accepted by the Divisional Court. One branch is that the issue in question – the Board's authority to award these damages – was a jurisdiction-conferring or jurisdiction-limiting issue on which the Board had to be correct. In the words of LaForest J. in *Dayco (Canada) Ltd. v. C.A.W. – Canada* (1993), 102 D.L.R. (4th) 609 at 619 (S.C.C.), relied on by the Divisional Court:

> In my view the arbitrator was not acting *within* his jurisdiction *stricto sensu*. Rather he was deciding *upon* jurisdiction. As such, he was required to be correct [emphasis in original].

[43] The second branch of OPSEU's argument is a specific application of the first branch: the question whether the Board could impose a particular remedy was "jurisdictional in nature" and, therefore, reviewable on a correctness standard. On this branch of the argument, both OPSEU and the Divisional Court relied on the following passage from the judgment of Cory J. in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 at para. 59:

> The Canada Labour Relations Board has been granted the power to impose remedies by s. 99(2) of the Code. Thus, the question as to whether the Board may or may not impose remedies on the parties is jurisdictional in nature. If the Board concluded that it could not impose a remedy to counteract a breach by one of the parties, the aggrieved party would have the right to argue before a reviewing court that the Board had incorrectly interpreted its enabling statute. The court, in addressing this jurisdictional question, would then be entitled to review the Board's decision, on a correctness standard, to determine whether in fact the Board did have the power it claimed to lack.

[44] I do not agree with OPSEU's position or the Divisional Court's analysis for four related reasons.

[45] First, I do not think that the passage from *Dayco, supra* relied on by the Divisional Court governs the nature of the question in this case. In *Dayco*, the union had launched a grievance over the company's failure to pay retirement benefits. These benefits were promised in a collective agreement that had expired. The Supreme Court had to decide whether the arbitrator had jurisdiction to hear the grievance. However, LaForest J. distinguished between two kinds of "jurisdictional" questions: the broad question, whether a promise of retirement benefits could survive the expiry of an agreement; and the narrow question, whether the terms of the specific collective agreement between the parties provided for the vesting of retirement benefits.

[46] The passage from *Dayco* relied on by the Divisional Court concerned the broad jurisdictional question, whether a collective agreement on which to base the grievance even existed. As an agreement was the foundation of the arbitrator's jurisdiction to hear the grievance, LaForest J. held that the question was a jurisdiction-conferring issue on which the arbitrator was not entitled to deference (at p. 620-621).

[47] However, LaForest J. also discussed the narrower jurisdictional question: the interpretation of the specific terms of the collective agreement to determine whether a matter is arbitrable. On that question, he stated that the arbitrator would be entitled to deference:

> It is clear that an arbitrator has jurisdiction *stricto sensu* to interpret the provisions of a collective agreement in the course of determining the arbitrability of matters under that agreement. In that case the arbitrator is acting within his or her "home territory", and any judicial review of that interpretation must only be to a standard of patent unreasonableness (p. 620).

[48] In my view, it is in the narrower sense of jurisdiction that the Board of Arbitration concluded it had no jurisdiction to award aggravated and punitive damages. In other words, the Board was determining a question of arbitrability. It was not deciding a jurisdiction-conferring or jurisdiction-limiting issue in the broad sense. In a broad sense, the collective agreement gave the Board jurisdiction to deal with Olivo's grievance. That was not in dispute. What was in dispute was the narrower question, whether this collective agreement gave the Board the jurisdiction to award the specific damages OPSEU claimed.

[49] Second, it seems to me that the analysis in *Dayco* itself now has to be read in the light of the Supreme Court's later decision in *Pushpanathan, supra* at para. 28. As Bastarache J. said in that case, "jurisdictional questions" describe those provisions attracting a correctness standard of review based on the outcome of the pragmatic and

functional analysis. They don't dictate the appropriate standard of review. As I am endeavouring to demonstrate, the outcome of the pragmatic and functional analysis in this case points to a highly deferential standard of review. In other words, the question here is not, in any broad sense, "jurisdictional."

[50] The third reason I disagree with OPSEU's position is that it seriously compromises the notion of arbitrability. Every question about whether a collective agreement gives an arbitrator authority to grant a particular remedy for an unjust dismissal can be labelled a "jurisdictional question." If "jurisdiction" in this sense – and it was the sense in which the Board used the word – means that a Board of Arbitration's answer to the question receives no curial deference, the principle that its decisions on matters of arbitrability are entitled to deference, will have little, if any, practical meaning. A "labeling approach" to determining the proper standard of review cannot be permitted to undermine or displace the pragmatic and functional approach.

[51] The dividing line between the nature of questions pointing to significant deference and the nature of questions pointing to little or no deference is at times a hard line to draw. If, however, doubt arises about the proper characterization of a question or whether the question points to more or to less deference, the wise and often-repeated caution of Dickson J. in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at 233 becomes apt:

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

This principle, in different words, has been reaffirmed many times by the Supreme Court. See for example *Teamsters Union, Local 983 v. Massicotte*, [1982] 1 S.C.R. 710 at 722 and 724; *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157 at para. 34.

[52] Although I do not consider the characterization difficult in this case, if necessary I would invoke Dickson J.'s caution. In my view, in deciding whether the collective agreement inferentially gave it the authority to award aggravated and punitive damages, the Board was deciding a question of arbitrability. Its resolution of that question was therefore entitled to deference.

[53] The final reason I depart from the Divisional Court's holding is that I do not think *Royal Oak*, *supra* can be relied on to support OPSEU's position. In the light of the Supreme Court's insistence that the standard of review must be determined by the

pragmatic and functional approach, the passage from *Royal Oak* now has to be viewed as an overly broad, if not incorrect, statement of the current law.

[54] As Evans J.A. observed in *Via Rail*, *supra* at para. 46, the comment in *Royal Oak* that the interpretation of a board's remedial authority is reviewable on a correctness standard because the question is jurisdictional "has been washed away by the torrent of the standard of review jurisprudence" from the Supreme Court in the last decade. But two examples are L'Heureux-Dubé J.'s judgment for the Supreme Court in *C.U.P.E., Local 301 v. Montreal (City)*, [1997] 1 S.C.R. 793 at paras. 44-47, in which she held that on the pragmatic and functional analysis, a tribunal's interpretation of its remedial powers was entitled to deference even though those powers "appear to limit a tribunal's jurisdiction"; and Iacobucci J.'s reasons in *Lethbridge Community College*, *supra* at paras. 22-23 in which he took a similar approach to the standard of review of the tribunal's interpretation of its remedial authority.

[55] Admittedly, in *Lethbridge Community College*, the Supreme Court said that questions of remedial authority may have both a jurisdictional aspect and an arbitrability aspect. In that case, a board of arbitration was required to interpret the scope of its remedial authority under a section of Alberta's *Labour Relations Code*. Iacobucci J., at paras. 18-19, said the extent of the board's authority was a question of law that was both jurisdictional and remedial. The former suggested less deference; the latter more deference.

[56] It is superficially attractive to take a similar approach to the Board's application of the common law principle in *Weber*, especially since that principle dictates the scope of the tribunal's jurisdiction and the court's jurisdiction. But the Board's task here differed from that of the board in *Lethbridge Community College* in crucial ways.

[57] In *Lethbridge*, the scope of the board's remedial authority depended on the interpretation of a statutory provision, a question of law with considerable precedential significance. Even so, because that interpretation required an understanding of labour law issues, some deference was still warranted.

[58] In the case before us, even greater deference is warranted because the Board was not even called on to interpret a statutory provision. Instead, it had to decide whether a particular collective agreement gave it authority to grant specified remedies for unjust dismissal. As I have already said, it was in this narrow sense that the Board was deciding whether it had jurisdiction over OPSEU's claim.

[59] Moreover, the application of *Weber* involves not a general question of law alone, but a question that is partly factual and partly turns on the particular provisions of the collective agreement. *Weber* and the cases that have come after it required the Board of Arbitration to resolve three issues: what was the essential character of the dispute in its

essential character, did this dispute arise out of the interpretation, application administration or violation of the collective agreement and, could the arbitration process under the collective agreement give an effective remedy for the dispute? See *Gaignard v. Canada (Attorney General)* (2003), 67 O.R. (3d) 611 at paras. 15-18 (C.A.).

[60] The first issue is largely factual; the second and third issues, though questions of law, turn on the Board of Arbitration's interpretation of the scope of its remedial authority under the collective agreement – in other words, whether OPSEU's claim for aggravated and punitive damages was arbitrable. In resolving these issues, the Board was on the familiar terrain of the provisions of the collective agreement. Thus, the Board's resolution of these issues should be entitled to a large measure of deference.

[61] One consideration that might suggest less deference is that the Board's decision has some modest precedential value. The decision does depend on the language of this collective agreement, and is not strictly binding on other arbitrators. Nonetheless, the question whether standard grievance provisions in a collective agreement give arbitrators authority to award tort-like damages in connection with a dismissal is of general significance to the labour arbitration community. On balance, however, this third contextual factor also points to deference to the Board.

(iv) Expertise

[62] The final contextual factor is expertise, in particular, the comparative expertise of the Board of Arbitration and the courts on the question in issue. Where the Board has more expertise, deference is warranted; where the courts have as much or more expertise, little or no deference is warranted. See *Dr. Q*, *supra* at para. 28. Here, in my view, the expertise factor also points to a deferential standard of review.

[63] In deciding whether the parties gave it authority to award aggravated damages for Olivo's mental distress and punitive damages for Seneca College's defamatory accusations, the Board of Arbitration was required to interpret the collective agreement. The interpretation of the provisions of a collective agreement lies at the heart of a labour arbitrator's expertise, an expertise ordinarily greater than that of the courts. The Board of Arbitration's expertise in this area thus points to deference. See *Lakeport*, *supra* at para. 28. See also *Voice Construction*, *supra* at para. 27

[64] OPSEU, however, submits that the question the Board had to answer did not engage its expertise in interpreting collective agreements. Rather, OPSEU argues that the Board was required to interpret and apply the exclusive jurisdiction principle in *Weber*, which is judge-made law, and that judges have as much or more expertise than arbitrators in applying this common law principle. I do not accept this submission.

[65] The exclusive jurisdiction principle in *Weber* is a judge-made or common law principle. And as my colleague Doherty J.A. noted in *Toronto (City) v. Canadian Union of Public Employees, Local 79* (2001), 55 O.R. (3d) 541 at para. 32 (C.A.), aff'd [2003] 3 S.C.R. 77, "While arbitrators are no doubt competent to apply common law principles and must do so on a daily basis, they have no special expertise in that area." However, as Doherty J.A. also pointed out, their lack of expertise relates only to common law or judge-made principles that have "no special application in the labour law field."

[66] *Weber*, however, is judge-made law that does have special application in the labour law field. In applying *Weber*, arbitrators must determine the essential character of the workplace dispute and then assess that dispute against the provisions of the collective agreement to determine whether the dispute arises explicitly or inferentially from the agreement. This is the kind of task arbitrators frequently undertake. It is a task they are better qualified to undertake than courts.

[67] The court's assessment of relative expertise when arbitrators apply a common law principle should parallel its approach when arbitrators interpret and apply a statute in the course of their decision. If the statute is linked to a board of arbitration's mandate, and frequently encountered by it, then its interpretation and application of the statute warrants deference from a reviewing court. See, for example, *CBC Canada* , *supra*, at para. 48. Similarly, if, as is the case here, a common law principle is linked to a board of arbitration's mandate, and is frequently dealt with by the board, then the board's interpretation and application of that principle likewise warrants deference.

[68] In short, this fourth contextual factor – the Board of Arbitration's expertise on the question in issue – also points to a deferential standard of review.

[69] Overall, in my opinion, all four contextual factors weigh heavily in favour of deference. They indicate that the Legislature intended the Board of Arbitration to decide whether these parties, through their collective agreement, gave it the authority to award aggravated and punitive damages. Therefore, the court should review the Board's decision against a standard of patent unreasonableness.

2. The Board of Arbitration's decision was not patently unreasonable

[70] The Supreme Court of Canada has used a variety of adjectives and adverbs to describe a patently unreasonable decision. Many of these are summarized in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, *supra* at paras 41-46. See also *Canada (Attorney General) v. Public Service Association of Canada*, [1993] 1 S.C.R. 941 at 963-4. The phrases "clearly irrational" or "evidently not in accordance with reason" best describe this highly deferential standard of review. A reviewing court should not interfere with a tribunal's decision unless that decision is "clearly irrational".

[71] I do not think that the Board of Arbitration's decision was clearly irrational. The Board had to determine whether the parties intended their collective agreement to give the Board the power to award aggravated and punitive damages for tort-like conduct. The collective agreement did not give the Board express authority to award these damages. The Board gave cogent reasons why no provisions of the collective agreement inferentially gave it this authority. And the Board offered several policy justifications for why the parties would not inferentially give it this authority, and would instead limit its authority to award damages to damages for lost pay and benefits. Moreover, the views of the arbitral community are not unanimous on whether arbitrators do have the power to award aggravated and punitive damages. See Brown, Donald J.M., and David M. Beatty, *Canadian Labour Arbitration*, 3d ed. looseleaf (Aurora, Ontario: Canada Law Book, 2006) at para. 2:1410. Undoubtedly, for these reasons, OPSEU did not contend that the Board's decision was patently unreasonable. I do not think that it was either.

D. CONCLUSION

[72] The standard of review of the Board of Arbitration's decision that the collective agreement did not give it authority to award aggravated or punitive damages is patent unreasonableness. The Board's decision was not patently unreasonable. Accordingly, I would allow the appeal, set aside the decision of the Divisional Court, and dismiss OPSEU's application for judicial review.

[73] If the parties are unable to agree on the costs of the application for judicial review and of the appeal, they may make written submissions to the panel within thirty days of the release of these reasons.

RELEASED: May 4, 2006

"J.I.L."

Signed: "J.I. Laskin J.A."
"I agree: E.A. Cronk J.A."
"I agree: R.P. Armstrong J.A."