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Human Resources Digest

Edu-Law launches H.R. Digest

Edu-Law is pleased to announce the launch of its **Education Human Resources Digest**. Through arrangements with the various Associations, it is hoped that this publication will be widely disseminated throughout the Education Sector. There is no charge for the Human Resources Digest and recipients are welcome to provide copies to colleagues. However, Edu-Law retains the copyright and does not consent to any changes or amendments to the content. Edu-Law welcomes submissions from any educator or Manager on relevant Human Resources cases. If you wish to publish a synopsis of a case, kindly contact either **Bob Keel (905-501-4444 / rkeel@keelcottrelle.on.ca)** or **Nadya Tymochenko (905-501-4455 / ntymochenk@keelcottrelle.on.ca)**. The Editors and Contributors hope that you will find the Digest helpful. Edu-Law also welcomes any comments or suggestions with respect to the format or content of the Digest. —

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SCHOOL BOARDS: TEACHERS

Actions Constituting Strike

Boycott of new positions of responsibility constitutes strike

In *Toronto District School Board v. Ontario Secondary School Teachers' Federation, District 12* (February 3, 2003) O.L.R.B., the Ontario Labour Relations Board ("OLRB") held that the Ontario Secondary School Teachers' Federation's ("OSSTF") boycott of the School Board's new Positions of Responsibility model ("POR model") constituted a strike pursuant to subsection 277.2(4) of the *Education Act*.

The School Board decided to alter its POR model for the start of the 2003-2004 school year, replacing department heads with curriculum leaders and assistant curriculum leaders. The School Board notified existing department heads that their POR models would cease at the end of the 2002-2003 school year and posted the new POR models that would apply in September 2003. The OSSTF was not happy with the new model and claimed that it was a cost-saving exercise, which would have the effect of reducing the number of department heads by half. The OSSTF referred a grievance to arbitration concerning how the Board allegedly violated various provisions of the Collective Agreement by introducing the new POR model scheme. The OSSTF also brought a complaint to the OLRB alleging that the School Board violated the "freeze" and other provisions of the *Labour Relations Act*, 1995, S.O. 1995, c. 1. In addition, the OSSTF called upon its members to boycott the POR process by refraining from applying for any of the new POR models. The call was successful, with the result that insufficient numbers of teachers applied

for the new PORs, and others who applied withdrew their applications. In response, the Board brought an application to the OLRB alleging that the OSSTF's call for a boycott constituted a strike. At the time of the OLRB hearing on this matter, the OSSTF's grievance arbitration and OLRB application were still pending.

The parties before the OLRB agreed to first address the issue of whether the conduct of the OSSTF constituted a strike on the understanding that a finding that the conduct did not amount to a strike would result in the Board's unlawful strike application being dismissed. The OLRB stated that a finding that the OSSTF's conduct constituted a strike would then require a further hearing to determine whether the OLRB would exercise its discretion under s. 100 of the Act to declare the OSSTF's conduct an unlawful strike requiring appropriate ancillary relief.

The OLRB analyzed the definition of "strike" under subsection 277.2(4) of the *Education Act*:

Strike

(4) For the purposes of subsection (1),

(a) the definition of "strike" in section 1 of the Labour Relations Act, 1995 does not apply; and

(b) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed to curtail, restrict, limit or interfere with the operation or functioning of one or more school programs, including, but not limited to programs involving co-instructional activities, or of one or more schools including, without limiting the foregoing,

(i) withdrawal of services,

(ii) work to rule,

(iii) the giving of notice to terminate contracts of employment.

The OSSTF argued that the definition of strike under the *Education Act* is more narrow than the definition under the *Ontario Labour Relations Act, 1995*, and should be interpreted as such. The Board argued that the strike definition in the *Education Act* merely mirrors the definition in the *Ontario Labour Relations Act, 1995* in a manner that is appropriate for education. The OLRB reviewed the decision of *Re Halton Board of Education and Ontario Secondary School Teachers' Federation, District 9, (1978) 17 L.A.C. (2d) 279*, in which the board of arbitration found that a "positions of responsibility embargo" did not amount to interference with the operation of a school program. However, it did constitute activity designed to interfere with the operation or functioning of schools and therefore was an illegal strike.

The OLRB held that the legislature did not intend to impose a narrower test under the *Education Act* and that differences in wording under the two definitions does not warrant the application of a different standard. It stated that:

The wording of the "strike" definition in the Education Act is inclusive, and plainly not exhaustive. It "includes" any action or activity by teachers designed to affect schools or school programs.

The OLRB then analyzed the purposes and effect of the boycott. It held that its primary purpose was to compel the Board to bargain with the OSSTF over its proposed changes to the POR positions and that this purpose was not to curtail, restrict, limit or interfere with the operation or functioning of a school or a school program. However the boycott had a secondary purpose, which was to prevent the Board from introducing its new POR system until its implementation had been agreed with the OSSTF. The OLRB held that the impact of the boycott was that it prevented the Board from taking the steps it considered necessary to have the new system in place by the beginning of September, 2003. It reviewed the role of PORs and determined that they have an influence on the arrangements under which the curriculum and courses of study are given to the students and that the presence of a POR therefore constitutes a part of the operation or functioning of school programs and of schools. The OLRB concluded that:

A failure by the board to put in place its new POR system will have some, albeit limited, impact on the manner in which school programs are delivered, and on the manner in which schools are organized. Leaving aside any question of the board's entitlement to introduce the POR system in the manner it has, for the purposes of disposing of the limited question I am asked to determine whether, any interference, however partial, with the operation of the school programs is contemplated in the definition of "strike" in the Education Act. By requiring its members not to apply for the new POR positions which have been posted, I find that the Federation intends to limit or interfere with the functioning of the board's school programs and schools.

The OLRB held that, based on its findings, the OSSTF's call to boycott the posting of the new PORs constituted a strike. On February 11, 2003, the OLRB delivered a subsequent decision in which it ordered that, while the results of the arbitration are pending, the OSSTF shall not prevent its members from applying for Positions of Responsibility and ordered that the OSSTF issue a President's Memorandum. The OLRB applications were then adjourned sine die.

Toronto District School Board v. OSSTF District 12 (February 3, 2003) (O.L.R.B.)

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Constitutional

B.C. Court of Appeal upholds psychiatric exams for teachers

The British Columbia Court of Appeal recently held in *British Columbia Teacher's Federation and Vancouver Teacher's Federation v. The Board of School Trustees of School District No. 39 and the Attorney General of British Columbia*, that a mandatory psychiatric examination of a teacher, pursuant to B.C.'s *School Act*, does not infringe either sections 7 or 8 of the *Canadian Charter of Rights and Freedoms*. However, the strong dissenting opinion in the decision suggests that this case will likely be appealed to the Supreme Court of Canada.

The teacher in question was employed by School District

No. 39, and had been exhibiting strange behaviour that caused the school board concern. She was prone to absenteeism and unable to maintain a professional relationship with her supervisor and work colleagues, and refused to provide her address and telephone number to her employer. As well, she failed to submit her time sheets in a prompt manner. She also sent bizarre correspondence to her school administration accusing them of stalking her and releasing information about her to third parties.

The school board was unaware at the time that the teacher was being pursued by creditors and was deeply in debt. The board wrote a letter seeking the advice of Dr. Hunt, stating that they were concerned about the teacher's ability to meet the needs of the board and her ability to educate students. Dr. Hunt referred the matter to the school medical officer, who stated that the teacher may be suffering from a physical, mental or emotional disorder, and advised the board to require the teacher to undergo a psychiatric examination pursuant to section 92(2) of the *School Act*. Under that section, the board is authorized to require that an employee undergo an examination by a medical practitioner on the advice of the school medical officer. If the employee fails without reasonable excuse to take the examination within 14 days of receiving notice from the board, the board may summarily dismiss the employee. The teacher in question refused to take the examination and, consequently, her employment was terminated.

The Vancouver Teacher's Federation and the British Columbia Teacher's Federation challenged the validity of section 92(2) of the *School Act* on the basis that a mandatory psychiatric examination violates sections 7 and 8 of the *Charter of Rights and Freedoms*.

Section 7 provides that everyone has the right to life, liberty and security of the person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice.

Section 8 provides that everyone has the right to be secure against unreasonable search and seizure.

The majority of the British Columbia Court of Appeal held that section 8 was not applicable to the facts of this case because there was no search and seizure to speak of. The majority was not prepared to find that a psychiatric examination was analogous to a physical search and seizure.

The majority also held that section 7 of the *Charter* was not engaged. The majority found that the teacher was not forced to undergo the psychiatric examination; she had the choice not to take the exam. The consequence of such a choice was dismissal; there were no additional sanctions or penalties. The majority reviewed the case law and held that section 7 does not protect the right to exercise a chosen profession, therefore, section 7 had no application in this case.

In *Godbout v. Ville de Longueuil*, [1997] S.C.R. 844, the Supreme Court held that an individual's choice of domicile was protected by section 7 because it is an inherently personal and autonomous choice that goes to the core of what it means to enjoy individual dignity and independence. The Teacher's Federations argued that this case should be expanded to include an individual's employment. Instead, the majority adopted a cautionary approach that section 7 should not become a residual right which envelopes all of the legal rights in the *Charter*. The majority concluded that the right to any specific employment is an economic matter that does not fall within the purview of section 7. The court commented that mandatory medical examinations were not uncommon in the employment context and that, in such cases, there is a balancing of interests that must be achieved. Where disagreement arises, these issues are to be resolved by grievance-arbitration. To invoke section 7 would be overshooting the purposes this section was designed to protect.

The dissent in this case would have found that both sections 7 and 8 of the *Charter* were violated, and remitted the case back to the arbitrators to determine whether or not the violations could be justified under section 1 of the *Charter*.

With respect to section 8 of the *Charter*, the dissent analyzed the issue of whether the provisions under section 92(2) of the *School Act* amounted to a consent to the search and seizure, given that teachers had a choice not to undergo the examination, with the consequence of dismissal. The dissent found that, under such circumstances, there could not be a meaningful consent. The dissenting judge relied on the decision in *Godbout v. Ville de Longueuil*, where an employee had to comply with a municipal residence requirement or lose their employment.

The dissenting judge then undertook a section-1 analysis of the offending provision. She found that section 92(2) of the *School Act* was not reasonable because the provision did not state the criteria that the school medical officer would apply in a decision to recommend that an examination be ordered:

In my view, if the criteria which school medical officer was required to apply under section 92(2)(b) in determining whether to recommend that a teacher undergo a psychiatric examination were whether the teacher's physical, mental or emotional health represented a real risk of danger to the health and welfare of the students, I would have no difficulty in finding that those were sufficiently specific and valid criteria to guide the school medical officer in making his recommendation. The problem is that section 92(2)(b) does not state any criteria to assist the school medical officer in making his critical recommendation to the Board. At best, it requires the school medical officer to make his recommendation based on general concerns about the physical, mental or emotional health of the teacher …

In my view, the absence of clear and specific criteria upon which the school medical officer must base his recommendation to the Board is a fundamental flaw in the legislation which leads inexorably to the conclusion that the search mandated by ss. 92 (2)(b) and (3) is unreasonable.

With respect to section 7 arguments, the minority judge disagreed with the majority that the choice imposed on the teacher by section 92(2)(b) and (3) of the *School Act* was fundamentally about economic interests. Rather, she found that the choice was about privacy interests. She found that the choice in this case was analogous to the choice in the *Godbout* decision regarding the choice of one's domicile, which the court found was protected by section 7 of the *Charter*. Accordingly, she found that it is not the loss of employment which engages the teacher's section-7 interest in liberty but, rather, the basis upon which her employment was terminated. Accordingly, the minority judge found that the teacher's liberty interest under section 7 was infringed by the

state mandating that she forego her right to personal and psychological integrity or forfeit her means of livelihood.

The minority judge would have referred the case back to the arbitrator to determine whether the violations of sections 7 and 8 of the *Charter* were justifiable under section 1 of the *Charter*.

Ontario does not have provisions similar to those set out in the B.C. legislation. Nevertheless, the dissent focus on privacy rights is both interesting and timely, given that the Ontario Government is expected to table a Privacy Bill in the near future.

British Columbia Teacher's Federation and Vancouver Teacher's Federation v. The Board of School Trustees of School District No. 39 and the Attorney General of British Columbia (2003), B.C.C.A. 100

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Human Rights

Teacher sues for discrimination based on Acadian-Canadian heritage

In *LeBlanc v. York Catholic District School Board et al.* (2002), 61 O.R. (3d) 686 (Ont. S.C.J.), a former teacher of the York Catholic District School Board (the "Board"), brought an action against the Board, the Ontario Labour Relations Board ("OLRB"), and his union, the Ontario English Catholic Teachers' Association ("OECTA"), claiming that he was a victim of discrimination in employment, leading to his dismissal on the basis of his Acadian-Canadian heritage. The action was dismissed on the ground that the court did not have jurisdiction over the subject matter of the action because the allegations fell squarely within the exclusive jurisdiction of the OLRB.

Following his dismissal from the Board, the teacher pursued several grievances through his union, OECTA and several proceedings before the OLRB without success. His allegations included a claim against the Board for discrimination based on his Acadian-Canadian heritage, a claim against OECTA for failing to meet its obligations with respect to his grievances and a claim that the OLRB acted unjustly towards him due in part to a systemic bias in Canada against Acadian-Canadians.

The defendants did not file their statements of defence within the required time period, however they brought a motion to strike out the teacher's statement of claim on the grounds that it disclosed no reasonable cause of action, that the court had no jurisdiction over the subject matter of the action, and that the action was frivolous or vexatious or was otherwise an abuse of the process of the court. The defendants' motion was granted on the ground that the court did not have jurisdiction in the matter as the claims fell squarely within the exclusive jurisdiction of the OLRB, having regard to the nature of the grievance and arbitration procedures provided for in the collective agreement between OECTA and the Board. The teacher, who represented himself in the action, did not attend the defendants' motion to have the action dismissed and the decision was made in his absence. The court dismissed the teacher's motion to have this decision set aside as it was clear that the teacher had received notice of the motion and his failure to attend was not due to an accident or mistake.

At the same time that the motion to dismiss was pending, the teacher obtained default judgment against the defendants for failing to file their statements of defence within the required time period. The court set aside the default judgment, finding that in bringing their motion to dismiss, the defendants had taken steps to defend the action. Justice Blair commented that he was persuaded that the defendants had at least a reasonable defence, although it was not necessary in this case for them to establish a good defence on the merits.

Although this decision deals largely with procedural matters and does not assess the merits of the teacher's claim, it provides authority for the exclusive jurisdiction of the OLRB in such matters.

LeBlanc v. York Catholic District School Board et al. (2002), 61 O.R. (3d) 686 (Ont. S.C.J.)

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Employment Standards / Human Rights

Teacher not guaranteed same subjects on return from maternity leave

In *Toronto District School Board v. Elementary Teachers' Federation of Ontario (Vuong Grievance)*, [2003] O.L.A.A. No. 141, an Ontario arbitrator ruled on whether a teaching assignment assigned upon return from maternity leave must include the same subject. Ms. Vuong, a member of the ETFO, grieved that the teaching assignment she received upon her return from maternity leave breached article C.2.1 of her collective agreement, which incorporated the requirements of the *Employment Standards Act* into the collective bargaining agreement.

Ms. Vuong had been employed by the board since 1996 and was transferred to Parkdale Public School in 1997 where she was assigned to teach grades 7 and 8 French on a full-time basis. Since her certification as a teacher, Ms. Vuong had always taught French. However, after returning from her maternity leave in March of 2002, Ms. Vuong was assigned the position of Senior Science teacher for the remainder of the school year.

Ms. Vuong argued that the Senior Science assignment breached the provisions of the *Employment Standards Act* regarding return to work. The power to assign classes and subjects to teachers is given to principals under section 265(1)(e) of the *Education Act*. More importantly, teachers are required to teach diligently and faithfully the classes and subjects assigned to them to the best of their abilities under section 264(1) of the *Education Act*.

The process in assigning yearly positions began in February with the principal providing each teacher with a form asking them to list their preferred teaching assignments from 1 to 3. Vuong first gave evidence that she was not given a form in February of 2001, just prior to her leave; however, during cross-examination, Vuong retracted her statement and testified that it was possible that she received the form, but simply forgot to fill it out because she was preparing for her maternity leave. Vuong had been under the impression that since she had always taught French, she would continue to do so upon her return from her maternity.

On April 10, 2001, the principal, who had received nothing from Vuong, mailed a letter to Vuong indicating that once she returned from her maternity leave, she would be assigned Senior

Science for the remainder of the school term. Upon reading the letter, Vuong protested complaining that she was not comfortable with the assignment and would not know how to handle it. The principal replied by informing Vuong that, as a result of her not filling out her preference form, and changes that were necessary at the school which resulted in fewer French courses for the next year, there were no other alternatives.

During Vuong's cross-examination, she agreed that Parkdale had six qualified French teachers with only two available positions. The principal testified that, were it not for the staffing pressures, she would have left Vuong in her position of teaching Senior French.

The arbitrator first examined the issue of whether there had been a violation of Article D.7.6 of the collective agreement.. Vuong had not been "consulted" as required by article D.7.6 and, after reviewing all of the evidence, the arbitrator concluded that the terms of article D.7.6 had not been complied with. Vuong was assigned a specific teaching duty in the absence of the required consultation with her principal. Article D.7.6 requires "consultation", particularly in circumstances where a teacher is away on maternity leave and is to receive a new subject for which she has not expressed a preference. The arbitrator was of the view that the principal had an obligation to telephone Vuong and discuss the matter before the assignment was given.

The next issue examined involved whether there had been proper compliance with the *Employment Standards Act* ("ESA"). The ESA requires that:

"The employer of an employee who has taken pregnancy leave or parental leave shall reinstate the employee when the leave ends to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not."

The arbitrator had to determine whether "the position the employee most recently held" meant the same subjects the employee was teaching. The arbitrator considered many factors, including the duties and responsibilities previously performed, wages and benefits paid, as well as the location, hours and conditions of work.

The evidence that was brought forth at the arbitration made it clear that Vuong had a general Ontario certificate which entitled her to teach the entire range of subjects at the intermediate and senior levels, other than those subjects for which special qualifications are required. The arbitrator concluded Vuong was qualified to teach the entire range of non-specialist subjects, and that the principal, under the *Education Act*, had the right to assign subjects for an academic year to a teacher. Moreover, it was concluded that, not only does a principal have the right to assign subjects, but that those assigned subjects may also be changed because of particular needs at the beginning of an academic year.

The arbitrator commented that to allow Vuong to return to exactly the same subjects she was teaching when she went on maternity leave would provide a teacher who goes on maternity leave with greater rights than a teacher who has not. Moreover, such a requirement would impair a principal's right to make appropriate class assignments for an academic year.

A teacher can be assigned any non-specialist subject on return from leave or from year to year. There is no guarantee to any teacher that he/she will continue to teach a subject, even one for which they have special qualifications.

Toronto District School Board v. Elementary Teachers' Federation of Ontario (Vuong Grievance), [2003] O.L.A.A. No. 141

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Collective Agreements

Changes to length of instructional day breaches collective agreement

In *Newfoundland and Labrador Teacher's Assn. v. Avalon East School District No. 10*, [2003] N.J. No. 18 (Nfld. & Lab. S.C.T.D.), the Newfoundland and Labrador Supreme Court held that the Avalon East School District No. 10 (the "School District") breached the Collective Agreement with the Newfoundland and Labrador Teacher's Association ("Teacher's Association") when it made changes to the number of instructional hours in certain primary schools as a result of a provincially-mandated reorganization of the school system.

In December of 1997, the *Schools Act*, 1997, S.N. 1997, c. S-12.2 received Royal Assent. This legislation facilitated a major reorganization in the provincial school system, moving the system from one based on religion to a non-denominational system encompassing the concept of neighbourhood schools. As a result, the School District became responsible as a single board for schools that had been operated by different systems and different boards with different lengths of instructional days. In September of 1999, in order to achieve consistency, the School District made the decision to establish a five hour minimum instructional day for primary students in schools under its jurisdiction.

Prior to making this decision, in July of 1998, the Provincial Government, the Newfoundland and Labrador School Board's Association and the Teacher's Association signed a Collective Agreement covering the period from January 1, 1996 to August 31, 2001. The Collective Agreement included Schedule E which provided that the employer could not alter conditions as they currently exist for teachers with respect to: (a) the length of the instructional day for students; (b) the hours of classroom instruction for teachers; and (c) the length of the workday for teachers.

The School District's imposition of a five hour minimum instructional day did not increase the actual work day for anyone; however, for a number of teachers, the instructional day was increased, leaving less time available for other activities such as class preparation. Teachers at seven schools elected to file grievances, asserting a breach of Schedule E of the Collective Agreement. They requested that the schools subject to the grievance return to the previous instructional day length. The arbitration board denied the grievances upon applying the common law doctrine of frustration, finding that the application of Schedule E had been frustrated by events beyond the control of the School District.

Upon judicial review, the Court held that the arbitration board had erred in its application of the doctrine of frustration. The Court held that as the Collective Agreement had been signed prior to the restructuring and reorganization of the school system, at a time when the legislative changes were already in place, then the difficulties in complying with Schedule E were self-induced and the doctrine of frustration

was inoperable. The Court found that there had been a breach of the Collective Agreement and remitted the matter back to the arbitration board to determine the appropriate relief to be granted. The arbitration board then declared that although there had been a technical breach of the Collective Agreement, there was no remedy available to the grievors since changing the length of the instructional day for one group of teachers would force the School District to be in breach of the same provision of the Collective Agreement for another group of teachers.

This decision resulted in a second application for judicial review. On hearing this second application, the Court held that the arbitration board had once again made its ruling based on the erroneous view that the School District had no choice but to breach Schedule E. The Court stated that:

The decision of the [School District] to institute a uniform instructional day, while no doubt eminently reasonable and defensible in its own right, was [a School District] decision taken in the full knowledge of the collective agreement constraints. In any event, neither of these factors, accurate or not, is of any relevance to an issue of contractual interpretation.

The Court also found that the arbitration board erred in concluding that Schedule E of the Collective Agreement conferred a benefit on a teacher by teacher basis. This interpretation contradicted a 1995 arbitration award, "the Burin decision" as well as evidence that teachers had routinely moved to schools with different instructional hours and no grievance had ever been filed simply on the basis of the changed hours for a particular teacher. The Court concluded that it was patently unreasonable of the arbitration board to find that the Collective Agreement had been breached, but refuse to offer a remedy:

Having already declared a technical breach, but with no remedy available, the board appears to be saying that Schedule E should either be ignored, modified or be determined unenforceable. It is not for an arbitration board to interfere with clauses in a collective agreement. The board's role is to interpret and apply the agreement reached by the parties; it cannot alter, amend or ignore provisions of the agreement.

Although the question of a remedy is clearly one within the core jurisdiction of the arbitration board, to countenance a clear breach of the collective agreement but to refuse any effective remedy is, in all of the circumstances and, because of the reasons offered by the board, both patently unreasonable and improper exercise of the jurisdiction of the board.

The Court ordered that the arbitration board's award be set aside and that the grievances be submitted to a newly and differently constituted arbitration board to consider the grievances afresh, including the issue of whether or not there has been any breach of the Collective Agreement.

This decision should be kept in mind when negotiating Collective Agreements at a time when legislative changes are pending.

Newfoundland and Labrador Teacher's Assn. v. Avalon East School District No. 10, [2003] N.J. No. 18 (Nfld. & Lab. S.C.T.D.)

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Court lacks jurisdiction to hear defamation action against school employees

In *Haight-Smith v. Neden*, [2002] B.C.J. No. 375 (B.C.C.A.), the British Columbia Court of Appeal dismissed an appeal of the trial court's ruling that a former teacher's claims against School District employees had to be dealt with under the Collective Agreement.

The Appellant was an elementary school teacher who taught for over 30 years before retiring. She had a litigious history with the School District going back several decades. The present action began with comments made by the Appellant at a school staff meeting. After the meeting, the Superintendent of Schools received a telephone call from a staff member complaining that she felt the comments made by the Appellant were intimidating. The Superintendent conducted an investigation in which he interviewed various employees at the school and reviewed notes prepared by the School Principal. Some of the interviewees subsequently signed statements prepared by the Principal from his notes. As a result of this investigation, the School District resolved to suspend the Appellant for four months. The Appellant retired from teaching the following year.

The Appellant brought an action against the School Principal, Vice-principal, other teachers and staff members, as well as the Superintendent and assistant Superintendent of the School District for defamation, negligence, malice and arbitrary treatment, based on their respective roles in the aforementioned investigation. At the relevant time, the Appellant was governed by a Transitional Collective Agreement, which provided that any disciplinary sanctions taken against a harasser must be done in accordance with the Collective Agreement. The Collective Agreement provided for a final and conclusive settlement of any dispute by way of a three-step grievance process.

With respect to the issue of jurisdiction, the Court of Appeal relied on the Supreme Court of Canada's decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. In *Weber*, the Court held that if the essential character of a dispute arises from the interpretation, application, administration or violation of the Collective Agreement, then the dispute must be dealt with by the dispute resolution process provided in the Collective Agreement and labour relations statutes and not by litigation in the courts.

In applying the *Weber* test to the Appellant's action, the Court determined that the "essential character" of the dispute did arise under the Collective Agreement. All of the alleged defamatory statements related to the Appellant's character, history and capacity as an employee. All were made by someone whose job it was to communicate a workplace problem. Similarly, all of the comments were made to persons who would be expected to be informed of workplace problems, including parents and students who dealt directly with the Appellant in the workplace. As a result, the Court concluded that the trial judge was correct in dismissing the Appellant's claims on the ground that the court does not have jurisdiction to deal with them.

However, three of the Respondents were not members of the same Union as the Appellant. They were the school secretary, support worker and custodian. The trial judge

found that the Appellant's claims against them fell under the rubric of qualified privilege. The Appellant argued that the Respondents were motivated by malice, which vitiated the privilege. The Court of Appeal summarized the defence of qualified privilege as follows:

Qualified privilege is extended to the maker of a statement on an occasion of duty where the statement is made for the purpose of fulfilling the duty, and not for any other, improper purpose. Thus, malice in this context is not restricted to the notion of spite or ill-will; an indirect or wrong motive will constitute malice. The maker of the statement must have an honest belief that the statement is true.

The trial judge had found that there was no malice on the part of the three Respondents. The Court of Appeal held that this finding was reasonable and therefore concluded that the trial judge was correct in deciding that the Appellant's claims against the three Respondents was protected under the defence of qualified privilege. The Court concluded that the trial judge made no error in dismissing the Appellant's action on the grounds that the Court had no jurisdiction to hear the Appellant's claims against the Respondents who were covered by the Collective Agreement, and that the other Respondents were entitled to the protection of the defence of qualified privilege. The appeal was dismissed. The Appellant's appeal to the Supreme Court of Canada was dismissed with costs on November 21, 2002.

Haight-Smith v. Neden, [2002] B.C.J. No. 375 (B.C.C.A.)

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Dismissal

Probationary teacher discharged for email criticizing management

In *Centennial College of Applied Arts and Technology v. Ontario Public Service Employees Union, Local 558*, the Ontario Labour Arbitration Board ("OLAB") dismissed a probationary teacher's grievance after finding that the College did not act in bad faith in terminating his employment for writing an inflammatory email denouncing the administration of his department.

The grievor had been a teacher in the College's paramedic program for 17 months at the time of his dismissal. Over the course of his employment, the grievor became increasingly frustrated with the lack of resources in his department and with what he believed amounted to staff being forced to "steal" resources and equipment from local ambulance services. In addition, the grievor was upset with the way his department had handled the discipline of two students in the program. He believed that the student who was guilty of the more serious academic misconduct received more lenient treatment than the other student. Further, the grievor was frustrated by the fact that he was not receiving quarterly performance appraisals, as required by the Collective Agreement. In reaction to these frustrations, the grievor composed an email to his department coordinator and another teacher in his department, in which he harshly criticized the College administration regarding the lack of resources for his program and the discipline of the two students. In discussing the student discipline issue, the grievor referred to one student as "lazy and dishonest" stating that she had "gotten away with fraud" and made an analogy that referenced Karla Homolka. In addition, the grievor stated that he would no longer "borrow" equipment from the local ambulance services for use in his program and that he intended to encourage other staff to do the same.

The College responded to the email by terminating the grievor's employment with 90 days' pay in lieu of notice. Pursuant to the Collective Agreement, the grievor was considered to be a probationary employee and could be released upon at least 90 days' written notice. The teacher's Union grieved the dismissal alleging that it was a bath-faith release and an unjust discharge. The Union conceded that the grievor's conduct was culpable, but argued that the motivation behind the email was justified and that a lesser penalty was appropriate in the circumstances. The Union argued that the release was in bad faith due to the College's failure to interview the grievor regarding the email prior to his dismissal. It was also argued that the College's failure to provide the grievor with quarterly performance appraisals was further evidence of bad faith. The College admitted that it had no concerns about the grievor's teaching abilities and that the dismissal was based solely on the email and was in no way related to the grievor's classroom performance.

It was accepted by all the parties that the appropriate test in the case of a probationary employee is whether or not the employer acted in bad faith. Just cause need not be established. The OLAB held that the College's actions in this case did not amount to bad faith. The failure to provide the required performance appraisals was not relevant as the grievor's termination was not based on his teaching performance. The OLAB stated that the Union's argument on this point might have been persuasive if this had been a case involving the discharge of a permanent employee where the College would have to establish just cause and where progressive discipline is expected and mitigating factors are to be taken into consideration. Although the OLAB criticized the College's failure to interview the grievor regarding the email, it held that although this was "poor practice", it did not amount to bad faith. The OLAB defined "bad faith" as "a failure to abide by the positive obligations on the employer with respect to the treatment of probationary employees under the Collective Agreement". The OLAB held that the College was not under any contractual obligation to interview the grievor and there was no evidence that, even if it had, the result would have been any different. The reasons for the termination were not based on the perceived inaccuracies of the grievor's comments, but rather on the way in which the criticisms were articulated in the email.

Although the OLAB stated that it is important to respect freedom of speech and cautioned employers against "taking any action that would stifle healthy discussion", it held that, in this case, the grievor's remarks "went beyond the bounds of propriety" and, in addition, certain comments suggested that the grievor would no longer cooperate with some College practices and would encourage others to follow suit. The fact that the grievor had committed actions that were worthy of discipline was an important factor in determining the absence of bad faith or any improper motivations against the grievor.

In dissent, S. Murray commented:

It is an act of discrimination against probationers to release a

probationary employee without educating the newly hired as to the policies of the institution, the guidelines of the Ministry and the regulations under the applicable Act. This should have been accomplished through the application of the performance review regime required by the collective agreement.

Finally, it is an act of bad faith to require an employee to work in what he believes is a setting of unlawfully obtained equipment and release him for threatening to expose the practice by writing an email that suggests he will ask his fellow workers to withdraw from the practice of illegal procurement.

Board Chair, P. Knopf, responded to these comments:

But most importantly, [the grievor] was not terminated for what he thought or for his vocalization of his views. He was terminated because of the admittedly inappropriate nature and contents of the email. The collective agreement allows management to terminate a probationary employee who demonstrates unsuitability through culpable conduct. In a nutshell, that is what has happened in this case.

The decision is important in highlighting the differences between probationary and permanent employees with respect to discipline and termination.

Centennial College of Applied Arts and Technology v. Ontario Public Service Employees Union, Local 558 (Robertson Grievance), [2003] O.L.A.A. No. 156 (O.L.A.B.)

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Termination a nullity where all information not shared

In *Hache v. Lunenburg County District School Board* (2003), N.S.J. No. 78, the Nova Scotia Superior Court was asked to quash the Lunenburg County District School Board's decision to discharge Alfred Hache on the ground that improper notice was provided prior to the meeting held regarding the recommendation for dismissal. At the time of his dismissal, Mr. Hache was a teacher who had been employed by the Board for approximately 27 years. The reason for Mr. Hache's dismissal stemmed from a number of his former students coming forward and making allegations that he had sexually assaulted them.

The first allegation became known to the Lunenburg County District School Board on August 30, 1995, when one of Mr. Hache's former students filed a formal complaint with the Royal Canadian Mounted Police alleging that Mr. Hache had sexually assaulted him while he was a student. The Board commenced an immediate investigation into the matter. During the investigation, an interim report was presented to the Board. After receiving and reviewing the report, the Board gave notice to Mr. Hache of his immediate suspension. The investigation continued and, on November 21, 1995, a further report was prepared and received by the Board.

Copies of the reports were forwarded to Mr. Hache for his inspection and review approximately two weeks prior to the meeting of the Board to decide the issue of his employment. During the meeting of the Board, the Board determined that the behaviour exhibited by Mr. Hache was so reprehensible and irreparable that the only resolution available was to discharge him.

The November 21st supplemental report prepared as a result of the further investigation, and relied on by the Board, made brief references to statements of at least six alleged victims. However, the completed interim and supplemental reports only discussed particulars regarding five complaints. More importantly, the Board had access to information relevant to the sixth complaint, but had failed to disclose this information to Mr. Hache prior to the meeting regarding his termination.

Section 34(5) of Nova Scotia's *Education Act* requires that a teacher receive written notice of all complaints prior to any meeting regarding discharge.

The Court determined that the Board had failed to provide notice with respect to the sixth complaint and, that by not giving the statutorily required notice of the sixth alleged complaint, the Board failed to discharge its duty prior to terminating Mr. Hache.

The Court held that Mr. Hache was entitled to the prescribed notice required by the *Education Act* and failure to follow the procedure established by the Act resulted in a discharge which was invalid. Therefore, the discharge of Mr. Hache was considered to be a nullity.

The Court chose not to decide whether the five alleged cases of abuse were sufficient to uphold the decision to terminate, despite the procedural error.

It is not known how the Court would have reacted if the Board investigators had decided to rely on only one or two of the Complaints on the basis that the behaviour with respect to the incidents were sufficient to require termination. It is not clear if the Board had relied only on those Complaints for which Mr. Hache was provided notice this result may have been avoided. Nevertheless, it is always recommended that all information be shared prior to a recommendation for termination to avoid just such a result.

Hache v. Lunenburg County District School Board (2003), N.S.J. No. 78 (N.S. Sup. Ct.)

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Employment Insurance

Teachers with continuous employment not entitled to E.I. for summer months

In the recent decision of *Oliver v. Canada (Attorney General)*, [2003] F.C.J. No. 316 (F.C.A.), the Federal Court of Appeal upheld the decision of an Umpire under the *Employment Insurance Act* with respect to 72 Alberta teachers who claimed entitlement to employment insurance benefits during the summer months. The claimants were all qualified teachers who had probationary contracts of employment running from September 1998 to June 30, 1999. These were fixed-term contracts under Alberta's *School Act*. The applicants were paid for 12 months despite their 10-month contracts. They received the salary payments for the July and August periods at the end of June. In all cases, the teachers were re-employed for the following school year. In most cases, the teachers had entered into new contracts for the following school year prior to the termination of the 1998-1999 contracts, while others

signed new contracts shortly after the termination date.

The Umpire determined that the teachers were not entitled to benefits provided by paragraph 33(2)(a) of the *Employment Insurance Regulations*, SOR/96-332, which reads as follows:

33(2) A claimant who was employed in teaching for any part of the claimant's qualifying period is not entitled to receive benefits, other than those payable under sections 22 and 23 of the Act, for any week of unemployment that falls in any non-teaching period of the claimant unless

(a) the claimant's contract of employment for teaching has terminated;

(b) The claimant's employment in teaching was on a casual or substitute basis; or

(c) The claimant qualifies to receive benefits in respect of employment in an occupation other than teaching.

The teachers brought an application for judicial review of the Umpire's decision on the grounds that the Umpire misinterpreted the meaning of "terminated" in section 33(2)(a) and that he relied on irrelevant facts, namely that the teachers received employment benefits over the non-teaching period, so as to conclude that the contracts were not terminated.

The majority of the Federal Court of Appeal supported the Umpire's decision, finding that the decision was in line with both the applicable jurisprudence and the legislative intent behind section 33. The court stated that:

... both are based on the clear premise that, unless there is a veritable break in the continuity of a teacher's employment, the teacher will not be entitled to benefits for the non-teaching period.

The court found that there was continuity of employment with regard to those teachers who had their contracts renewed before their probationary contracts expired. As for those contracts that were renewed shortly thereafter, there was no real gap in employment since the claimants, who were completing a school year, were hired for a new school year, which obviously overlaps with or immediately follows the previous one. The court held that there was no loss of income as the teachers were paid for 12 months over the 10-month period, and they received continued benefits over the summer months. As a result, the teachers were not unemployed for the purposes of the Act and were not entitled to employment insurance.

In dissent, J.A. Malone argued that, based on the ordinary meaning of the word "terminate" in section 33(2)(a), the fact that the teachers' contracts had a set termination date was sufficient for them to qualify under the exemption. J.A. Malone admitted that the result flowing from his analysis was anomalous and would mean that temporary teachers working the equivalent of full-time teachers who were re-hired for a subsequent teaching term would receive employment insurance benefits, while full-time teachers would not. He admitted that he did not believe that this was Parliament's intent; however, he argued that the court was bound to apply the legislation as it read and that it was up to the legislature to make any amendments necessary to bring the legislation in line with its intent.

When instituting contracts for probationary or temporary employees, it is essential that employers consider the potential impact of various legislation, including the *Employment Insurance Act*.

Oliver v. Canada (Attorney General), [2003] F.C.J. No. 316 (F.C.A.)

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