Volume 4, Issue 1

March 2006

Human Resources Digest

Edu-Law Education H.R. Digest

Through arrangements with 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. —

UPCOMING
PROFESSIONAL DEVELOPMENT

. . .

March 30–April 1, 2006

OPSBA Labour Relations Symposium

Toronto, Ontario

. . .

May 19, 2006

Keel Cottrelle LLP
Special Education Session

Mississauga, Ontario

. . .

For information,
contact Robert Keel at
905-501-4444 or rkeel@keelcottrelle.on.ca

Edu-Law
Consulting Services Limited

Edu-Law is managed by
KEEL COTTRELLE LLP
Barristers and Solicitors
100 Matheson Blvd. E., Suite 104
Mississauga, Ontario, L4Z 2G7

Human Resources Digest —
Executive Editor—Robert G. Keel
Managing Editor—Nadya Tymochenko

IN THIS ISSUE:

CONSTITUTIONAL & HUMAN RIGHTS

Differential Treatment

Top-up for only adoptive parents upheld

The Ontario Secondary School Teachers' Federation (OSSTF) in **Ontario Secondary School Teachers' Federation v. Upper Canada District School Board, [2005] O.J. No. 4057,** brought an application for judicial review of an arbitration decision that found that the differential treatment set out in the supplementary unemployment benefit plan under the collective agreement with the Upper Canada District School Board was not discriminatory.

Under the collective agreement, an adoptive parent was eligible for a top-up of salary during the 10 weeks of parental leave, receiving the difference between employment insurance benefits and 60% of salary, as well as 60% of salary during the two-week qualifying period. There was no top-up available for biological parents during parental leave as it was determined to be too costly. Two secondary school teachers with the Board filed grievances to decide whether the supplemental unemployment benefit plan was contrary to the *Ontario Human Rights Code* and section 15(1) of the *Canadian Charter of Rights and Freedoms*.

In dismissing the grievances, the arbitration board concluded that the differential treatment was not discriminatory. The arbitration board, to support their finding, relied on the evidence that there were significant differences in the experiences of natural and adoptive parents in the period immediately after an adoptive child is brought home. In their analysis, the arbitration board applied the Supreme Court of Canada's reasoning in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

In upholding the decision of the arbitration board and dismissing the application, the court held that, with respect to the interpretation of the *Human Rights Code* or the *Charter*, the arbitration board is held to a standard of correctness since these are questions of legal interpretation. However, the court also stated that deference is owed to the arbitration board's findings of fact, and that those findings would only be overturned if there was no evidence upon which to base the findings.

The court held that the arbitration board did not err in applying the analysis used in *Law*, as there was a serious question to be tried; that is, whether the dignity interest of the claimants were engaged. In this case, the determination of the purpose of the supplemental unemployment benefit plan was of fundamental importance. The court found that the arbitration board made a key finding of fact when it stated that the expert evidence demonstrated special needs for adoptive fathers as compared to natural fathers when the new child is introduced to the home. The court held that it was not its role to interfere with those findings of fact, which were based on the evidence before the arbitration board.

The court noted that the benefit was targeted to adoptive parents who had special child-care needs. The provision was not one that disadvantaged or stereotyped an already disadvantaged group, because biological parents were not a disadvantaged group in Canadian society. In addition, the court commented that providing the benefit only to adoptive parents did not reflect negatively on the worth of biological parents nor did it reflect a stereotype that biological mothers have primary responsibility for child rearing. Moreover, the modest financial benefit in dispute was conferred by the majority upon the minority within the bargaining unit. As a result, the court concluded that, although the provision of the top-up for adoptive parents constituted differential treatment between adoptive and biological parents, the distinction drawn did not interfere with the essential purpose of section 15 of the *Charter*, because the distinction did not violate human dignity and, therefore, did not constitute discrimination in a substantive sense.

This decision and the court's analysis highlights the importance of findings of fact in human rights matters.

Key to the court's decision were the findings of fact made by the arbitration board, which indicated that the top-up was to compensate adoptive parents for their special child-care needs and the fact that adoptive parents are a minority within the bargaining unit.

—

Leaves of Absence

Policy requiring medical retirement after 2-year leave prima facie discrimination

In **Sketchley v. Canada (Attorney General),[2005] F.C.J. No. 2056,** the Federal Court of Appeal agreed with the trial judge's conclusions that the Canadian Human Rights Commission made errors in finding no *prima facie* discrimination with respect to the policies and practices of the Treasury Board and of Human Resources Development Canada respecting medical leaves.

The complainant was a full-time employee of Human Resources Development Canada ("HRDC") when she was diagnosed with chronic fatigue syndrome and fibromyalgia. She switched to part-time work in 1990, but eventually went on full-time medical leave without pay in 1994. In 1997, pursuant to communications with its insurer, the employer told the complainant that she would either have to take medical retirement or resign. The employer's position followed a Treasury Board policy that required that a termination date for medical leave be determined after two years. There was no such policy for other unpaid leaves. The complainant requested an additional year off, and the employer responded by requesting that the employee provide medical evidence that she would be able to return to work within a reasonable period of time. Eventually she took a medical retirement, but took the position that it was coerced.

The employee filed a complaint with the Commission alleging that the Treasury Board policy was discriminatory in that it required disabled employees to provide a definite return date for work, and that HRDC had discriminated against her by failing to accommodate her disability and by forcing her to retire. Based on an investigator's report, the

Commission dismissed the complaints, refusing to recommend them for an inquiry before the Tribunal on the basis that the complainant had not made out *prima facie* discrimination. The complainant was successful on her application for judicial review to the Federal Court. The employer appealed to the Court of Appeal.

The first issue examined by the Federal Court of Appeal was whether the lower court judge erred in law by treating the investigator's report as the reason for the Commission's decision. The Court of Appeal dismissed this ground of appeal. Citing case law establishing that investigators are not "independent witnesses" before the Commission, the court held that investigative flaws may be significant enough to require a court's intervention where it would otherwise defer to the Commission's expertise.

After discussing the standard of review applicable to the Commission's powers to dismiss complaints more generally, the court moved on to review the trial judge's conclusions with respect to the standard of review to be applied. With respect to the complaint against the Treasury Board, the Court of Appeal held that the standard of review should be correctness. With respect to the complaint against HRDC, the Court of Appeal agreed with the lower court's conclusion that, since the question was whether or not the Commission properly investigated the complaint, the issue was one of procedural fairness.

The Court of Appeal applied the standard of correctness to review the Commission's dismissal of the complaint and agreed with the lower court's conclusion that there were, in fact, two grounds of differentiation in the Treasury Board's policy on leave without pay for medical reasons sufficient to ground a *prima facie* case. The first ground was that the policy differentiated between those who took leave without pay because of medical disability and those who took leave without pay for other reasons. The second ground of differentiation related to the employer's requirement to name a return date. The Court of Appeal agreed with the lower court's conclusion that the Commission had erred in finding that there was no *prima facie* discrimination and that the Commission subsequently failed to undertake a *bona fide* occupational requirement analysis.

The Court of Appeal then turned to the issue of procedural fairness and whether or not the Commission's investigation was flawed. After concluding that the Commission owed the complainant a duty of fairness, the court cited the factors set out in the leading cases. The Court held that deference must be given to administrative decision-makers to assess the probative value of evidence and to decide whether to investigate further, and that judicial review was only warranted where unreasonable omissions were made. The Court of Appeal found that the alleged deficiencies in the investigation (the failure to investigate the question of accommodation; the failure to explore whether an exception to the Treasury Board policy was appropriate; and, the failure to interview other public servants on medical leave without pay whose leaves were longer than the complainant's) had crossed the threshold and resulted in a breach of the complainant's right to fairness.

The Court of Appeal sent the matter back to the Commission for investigation by a different investigator and further consideration in light of the reasons outlined in its decision.

—

SCHOOL BOARDS: COLLECTIVE AGREEMENTS

Scope of Arbitrator's Jurisdiction

SCC denies leave to appeal decision upholding arbitrators' jurisdiction to enforce statutory class sizes

The Supreme Court of Canada in **British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn, [2005] B.C.C.A. 92** denied leave to appeal the B.C. Court of Appeal's decision regarding an arbitrators' jurisdiction to enforce statutory class-size limits. The Court of Appeal decision was discussed in the October 2005 issue of the *Human Resources Digest* (Vol. 3, Issue 3).

In 2002, the B.C. Government removed class size from the scope of collective bargaining and legislated new limitations. The BCTF brought a grievance before a labour arbitrator on the ground that the statutory class-size limitations had been exceeded. The arbitrator concluded that the matter was outside of his jurisdiction as a result of the legislative amendments. The BCTF appealed to the Court of Appeal, which held that the issue of class size was still an integral part of the employment relationship and, therefore, was within the scope of a labour arbitrator's jurisdiction.

The Supreme Court refused leave, in effect, approving the Court of Appeal's decision.

—

Management or Bargaining Unit

'Manager of Special Education' not a principal position

In **Ontario English Catholic Teachers' Assn. v. Huron-Superior Catholic District School Board (Bargaining Unit Grievance), [2005] O.L.A.A. No. 308**, a grievance filed by OECTA, the arbitrator concluded that the renamed position of Program Principal of

Special Education at the respondent Board was a teacher position and, therefore, ought to be included in the bargaining unit. In coming to this conclusion, the arbitrator disagreed with the Board's position that the job should be excluded from coverage under the collective agreement because it was a management position to be held by a Principal.

The "Coordinator of Special Education" position was held by one individual for fourteen years and, throughout his tenure, he was a member of the bargaining unit. The job involved working and managing the Special Education office and its staff and coordinating the provision of special education services in schools. The position was system-wide. Upon his retirement, the title of the position was changed to "Program Principal of Special Education" and the Board excluded it from the bargaining unit.

The union grieved the change on the basis that the Board violated the collective agreement by hiring a non-union person for a teaching position. The arbitrator was asked to determine whether the position was a management position, as argued by the Board, or a teacher position that should be part of the bargaining unit and included in the Collective Agreement's Recognition Clause.

The witnesses gave considerable evidence about the nature of their work. The arbitrator divided their evidence into nine categories: management and administration of the Special Education Department; reporting relationships; the hiring and selection of staff of the Department; the hiring, placement and transfer of staff assigned to the schools; supervisory authority in respect of the Department; supervisory authority in respect of school based staff; interaction with Principals; interaction with Supervisory Officers; and, program responsibilities.

After summarizing the evidence, the arbitrator examined the relevant provisions of the collective agreement and the sections of the *Education Act* and its regulations that address the role and duties of Principals in the Ontario education system. The arbitrator found that a Principal's duties are performed for and in respect of a specific school and that a system wide special education program did not constitute a school.

After concluding that the position of "Program Principal of Special Education" was not captured under the meaning of "Principal" in the *Education Act*, the arbitrator then considered whether the position fell within the Recognition Clause of the Collective Agreement.

The arbitrator held that since the current Program Principal was a member of the Ontario College of Teachers and was determined not to be acting in the capacity of a Principal as defined in the *Education Act*, the position was *prima facie* that of a "teacher" and, therefore, covered by the Recognition Clause of the Collective Agreement. Further, according to on the arbitrator's analysis, the duties performed within the position were provided in a "teaching capacity, broadly defined".

Finally, the arbitrator addressed the cases cited by the Board supporting its position that the Program Principal was excluded from the collective agreement. The Board cited the unreported arbitration decision of *Ottawa-Carleton District School Board v. Ontario English Catholic Teachers' Association* (2000). This decision defined the "mischief" that the *Labour Relations Act* attempts to avoid with subsection 1(3)(b), which excludes from the definition of "employee" for the purposes of the *Labour Relations Act* an individual *"who in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations..."*. The arbitrator in the *Ottawa-Carleton DSB* case concluded that the purpose of s. 1(3)(b) was to prevent people from being placed in a conflict of interest between their role as managers and their inclusion under collective agreements. Applying this reasoning, Arbitrator Watters decided that, based on the evidence of the witnesses, there was no indication that there was a danger of such a conflict of interest arising in these circumstances.

For these reasons, the arbitrator concluded that the position of Program Principal of Special Education was part of the bargaining unit and that the current individual occupying the position was a teacher and not a Principal.

This decision has potentially wide reaching effects as many school boards currently have system-wide positions held by Principals, rather than teachers. It is possible that many of these positions might not be managerial nor within the scope of a Principal's duties.

—

Leaves of Absence

Board did not have grounds to revoke leave of absence

In **Simcoe County District School Board v. Elementary Teachers' Federation of Ontario (Hughes Grievance), [2005] O.L.A.A. No. 642** the arbitrator examined the issue of whether the School Board had the authority to grant a leave of absence and then rescind or revoke it.

An elementary teacher with the Simcoe County District School Board brought a grievance against the Board for revoking, or rescinding, the leave of absence it granted to her.

The grievor had applied to the Board for a two-year leave in order to assume the position of Vice-President, Long Term Disability Plans with the Insurance Trustee Committee, which monitors under a joint trust agreement the various insurance plans that provide benefits to the employees of the Board. The Board consented to the grievor's request with the understanding that the grievor would also be continuing her role as a Trustee with the Insurance Trustee Committee.

The grievor submitted a subsequent request for the Board to assume responsibility for the salary of her new position at an annual salary that was $15,961.00 greater than her regular teaching salary under the collective agreement. The Board informed her that it was not Board policy to remunerate teachers on secondment beyond the salary that would normally be payable, and indicated that it would not do so in her case. The Board did, however, grant the two-year leave.

The Insurance Trustee Committee subsequently contacted the Board to inform it that the grievor had entered into an employment agreement. The Board learned that the grievor resigned from her position as Trustee in order to concentrate solely on her new role.

The Board took the position that the grievor's resignation constituted a fundamental change to the nature of the relationship between the Insurance Trustee Committee and the grievor, which warranted the revocation of the secondment, because the grievor's role as Trustee had been a fundamental reason for the secondment. The Board indicated that its policy was that leaves could not be granted to enable employees to seek out or assume alternate employment; rather, if employees sought to pursue alternative employment outside the Board, they were required to resign from their position. The Board believed the grievor had misrepresented her intention in order to secure the leave needed for employment with the Insurance Trustee Committee.

The Elementary Teachers Federation of Ontario argued on behalf of the grievor that no fundamental change had taken place to warrant the revocation of the leave since leave had been granted to allow the grievor to assume the role she had in fact assumed.

The arbitrator defined the issue as whether or not there had been a fundamental or significant change in circumstances following the granting of the secondment to warrant the revocation of the leave.

Upon examination of Article 27.01(b) of the Collective Agreement, which addressed the terms and conditions of employment, the arbitrator determined there was nothing that permitted the Board to revoke its previous consent. The Collective Agreement was to be read broadly and, as such, any employee on leave might sign an employment agreement specifying different terms and conditions of employment from those of the Board. Further, the Board's notice to the Federation with respect to its policy not authorizing leaves to employees for the pursuit of alternative employment post-dated the granting of the grievor's secondment and therefore could not be cited as a valid reason to revoke the secondment.

The arbitrator concluded that the grievor did not create or cause a fundamental change to the circumstances of the secondment so as to permit the Board the option of revoking its previous consent to the leave. The arbitrator found that there was no additional cost to the Board for the top-up Ms. Hughes was to receive to her salary, and Ms. Hughes' decision to step down as Trustee did not allow the Board to revoke the secondment. Thus, the arbitrator ordered the Board to reinstate the grievor's leave.

—

Edu-Law

EDU-LAW CONSULTING SERVICES LIMITED

c/o Keel Cottrelle llp
100 Matheson Blvd. E., Suite 104
Mississauga, Ontario
L4Z 2G7

Phone: 905-890-7700
Fax: 905-890-8006
Email: rkeel@keelcottrelle.on.ca

www.keelcottrelle.com

EDU-LAW CONSULTING SERVICES LIMITED provides a full range of professional development for educators, and offers Negotiation and Mediation Training Programs. In addition to this Human Resources Digest, Edu-Law publishes the Edu-Law Newsletter. Edu-Law is managed by members of KEEL COTTRELLE LLP. For any information with respect to EDU-LAW or the services provided by KEEL COTTRELLE LLP, please contact **Bob Keel** at **905-501-4444**, or by email at **rkeel@keelcottrelle.on.ca**, or visit our website **www.keelcottrelle.com**.

Contributors — The articles in this Digest were prepared by Catrina Duong, Kim Ferreira, Rosslyn Young and Nicola Simmons, who are associated with KEEL COTTRELLE LLP.