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Human Resources Newsletter

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KC Launches Newsletters

Keel Cottrelle LLP is pleased to announce the launch of this Newsletter. The Newsletter will focus on Human Resources Law. The Newsletter will be published bi-annually. Suggestions or contributions for the Newsletter are welcome.

Keel Cottrelle LLP is also transitioning the existing Education Law Newsletter and Human Resources Digest from Edu-Law to Keel Cottrelle LLP. The Firm will publish the Education Law Newsletter and Human Resources Newsletter directly.

The Editors

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Production of Ontario Student Record

In *Toronto District School Board v. Elementary Teachers' Federation of Ontario (Brown Grievance),* [2006] O.L.A.A. No. 485, the Arbitrator ordered the partial production of a student's Ontario Student Record (OSR). The Elementary Teachers' Federation of Ontario ("ETFO") had sought the order on behalf of the grievor, as part of two grievances being heard by the Arbitrator involving the Toronto District School Board.

In the first grievance, ETFO asserted that the grievor was assaulted by a student and the Board had not provided adequate protection and had not disclosed to the staff that the student had a violent history. In the second grievance, ETFO claimed that the grievor was disciplined without just cause when the Board imposed a written disciplinary warning on the grievor for making an "*inappropriate homophobic remark.*"

Under the *Education Act*, an OSR is privileged, and can only be accessed by specific Board employees, the student and the student's parent/guardian, where the student is a minor. Further, the *Act* states that the OSR *"is not admissible in evidence for any purpose in any trial, inquest, inquiry, examination, hearing or other proceeding, except to prove the establishment, maintenance, retention or transfer of the record, without the written permission of the parent or guardian of the pupil or where the pupil is an adult, the written permission of the pupil*."

Pursuant to the Labour Relations Act, an arbitrator has the power to require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing. The arbitrator also has the power to accept oral or written evidence whether or not it is admissible in a court of law.

The Arbitrator referred to four arbitration decisions that concluded an arbitrator had the jurisdiction to direct the production of an OSR in appropriate circumstances and went on to examine whether this was a case in which the jurisdiction should be exercised.

ETFO argued that the OSR was relevant because the student had been involved in prior violent incidents, which might have been recorded. Secondly, ETFO asserted that, given the allegations that the grievor made inappropriate remarks, credibility might be significant and the contents of the OSR might be relevant to that issue.

The Arbitrator was satisfied that the student's behaviour in relation to the grievor's health and safety was relevant to the proceedings. However, he was not persuaded that an issue of credibility should give rise to an automatic right to production of an OSR.

The Arbitrator directed the Board to produce the student's OSR to the extent that it contained information related to events or behaviours prior to his arrival at the school that potentially posed health and safety concerns. The information was to be redacted to protect other students and was to be shared only with counsel, ETFO's litigation advisor and the grievor, and only for the purposes of the proceeding.

The privilege that attaches to OSRs means that very careful consideration must be given before an OSR is used or disclosed. In addition to the provisions in the *Education Act*, educators must also consider

whether the provisions of either the *Municipal Freedom of Information and Protection of Privacy Act* or the *Personal Health Information Protection Act* might also apply to the records contained in the OSR.

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No Re-litigation of Criminal Acquittals

In *Near North District School Board v. Ontario Secondary School Teachers' Federation, District 4 (Reinders Grievance), [2006] O.L.A.A. No. 506*, the Arbitrator held that the findings made by the trial judge in the Grievor's criminal trial could not be challenged in the labour arbitration. The Grievor had been discharged from his teaching job by the Board for incidents that constituted sexual harassment and other inappropriate conduct.

The Grievor was charged criminally with respect to allegations by a female student claiming that the Grievor had at different times kissed her on the cheek and touched her rear end with his hand. The criminal trial judge dismissed all charges, with Reasons. The subject matter of the criminal charges was related to two of the ten incidents that formed the basis of the Grievor's dismissal.

At the start of the Arbitration hearing, the Ontario Secondary School Teachers' Federation District 4 sought an order precluding the Board from re-litigating the findings of fact and law of the trial judge on the basis that it would constitute an abuse of process. OSSTF did concede that where the trial judge concluded that a fact had not been proven beyond a reasonable doubt, the Board could seek to establish that same fact in the arbitration.

In reviewing the issue of whether the findings of the Judge could be challenged in the arbitration hearing, the Arbitrator acknowledged that the Board raised legitimate concerns. The Board had argued there were different parties, different processes, and different issues in the arbitration than had been before the court; the parties to the arbitration had not participated in the criminal trial; the standard of review in the arbitration would be on a balance of probabilities rather than beyond a reasonable doubt; many more witnesses would testify in the arbitration than at the criminal trial; and lastly all ten issues that were raised before the board of trustees would be the subject of the arbitration, compared to only two raised at the criminal trial.

Despite these arguments, the Arbitrator denied re-litigation of the findings before the criminal court for the following reasons: re-litigation would not likely yield a more accurate result; if re-litigation resulted in the same factual conclusions, it would have caused a waste of resources and money, as well as potential hardship for some witnesses; and a different result in the subsequent proceeding on the same issue would undermine the entire judicial process, its authority, credibility and finality. The Arbitrator noted that each of these factors equally applied to an acquittal and a conviction. The Arbitrator also held that evidence placed before the Judge could be tendered in the arbitration, so long as it was arguably relevant to some issue other than the finding of the criminal court.

The Arbitrator came to the decision not to allow re-litigation of the criminal acquittal by applying case law regarding criminal convictions. Given that the standard of proof in criminal matters is higher, it is possible that on a balance of probabilities the arbitrator could find that there was sufficient evidence to uphold the termination, despite the decision of the criminal court. As well, in the present case, there were additional instances and evidence that would be considered by the arbitrator.

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Custodians Not Essential Service

In *Canadian Union of Public Employees, Local 1253 v. New Brunswick (Board of Management)*, [2006] NBJ No. 429, CUPE's

application for judicial review was heard by the New Brunswick Court of Appeal due to scheduling difficulties in the lower court. CUPE appealed a decision of the New Brunswick Labour and Employment Board in which it was held that custodians responsible for cleaning schools provided an "essential service" and therefore, should have their right to strike curtailed. The Court of Appeal set aside the Labour Board's decision and sent the matter back to the Labour Board.

The decision was made pursuant to s. 43.1 of the New Brunswick *Public Service Labour Relations Act*, which empowers the Labour Board to designate employees who are precluded from participating in strikes on the basis that they perform an "essential service". Amendments made to this provision in 1990 meant that the Labour Board could be asked, pursuant to s. 43.1, to make three separate determinations: first, which services are necessary "*in the interest of the health, safety or security of the public*" if there was no clause in the collective agreement specifying which employees perform essential services; second, what level of service should be provided during a strike if the role was found to be an essential service; and third, which members of the bargaining unit should be prohibited from striking. The Labour Board concluded that school custodial staff provided an essential service and their right to strike should therefore be limited. The Union sought judicial review of this decision.

The Court examined the applicable standard of review and, based on its analysis under the functional and pragmatic approach and applicable jurisprudence, concluded that the standard should be patent unreasonableness. After reviewing the case law defining "essential service", the Court outlined the reasons for its finding that the Labour Board's decision was patently unreasonable.

The Court stated that firstly, the Labour Board operated on a false assumption when it concluded that, because there was no requirement for schools to close in the event of a strike and because students were obliged to attend school, the schools would have to remain open if the custodians went on strike. The Court found that the legislation empowered the Minister to close schools if necessary. The Court also pointed out that if schools must remain open because children have an unqualified right to obtain an education, teachers' right to strike would also be nullified, which is not the case.

Second, the Court disagreed with the Labour Board's reliance on two earlier Labour Board decisions in which teaching assistants and student attendants were designated essential service providers. According to the Court, the Labour Board's reliance on these decisions was misplaced, as the duties of school custodians were different from those of teaching assistants and student attendants and their absence would have a different impact on a student population.

Finally, the Court concluded that the broad question posed by the Labour Board was not mandated by s. 43.1. The Court framed the Labour Board's question as "*whether custodians are required to perform duties that may impact the health of the public*", and concluded that the answer to this question would obviously be 'yes', since dirty and ill-maintained schools could pose a health risk. The Court reframed the question as follows: "*What is the ultimate impact on the public interest if the employer is no longer able to provide the service which custodians offer*?" The Court held that it was necessary to approach the issue through this narrow lens in order not to render the right to strike illusory. The Court noted that when the Labour Board had examined the essential service question in other matters, it had employed the narrower approach and that this panel's broad approach to the designation issue was unprecedented.

The Court allowed the judicial review and sent the matter back to the Labour Board on the understanding that the school custodians did not perform an essential service.

This decision of the Court addresses what became an odd circumstance in New Brunswick, namely the fact that custodians were considered an essential service for the

purposes of students attending school, but teachers were not.

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College of Teachers' Order to disclose documents subject to privilege reversed

In *York Region District School Board v. Ontario College of Teachers*, [2007] O.J. No. 286 (Div. Ct.), the York Region District School Board applied for judicial review of a decision of the Discipline Committee of the Ontario College of Teachers. The Committee, in its hearing of a discipline proceeding against a teacher who had been employed by the Board, ordered the Board to produce to the teacher ten documents that had been prepared for the Board by the Board's legal counsel, which had been inadvertently disclosed to the College's Investigations Committee. The Board had dismissed the teacher and the teacher had grieved the dismissal.

The Divisional Court found that the disclosure to the College was inadvertent because the staff person who disclosed the documents did not have the authority to waive solicitor-client privilege and was not aware and did not understand that the documents were protected by solicitor client privilege.

Upon discovery of the disclosure, legal counsel for the Board requested that the documents be returned and that they not be produced to anyone, as they were privileged. Legal counsel for the College refused to return the documents but did advise that the Investigations Committee would not produce the documents to the Discipline Committee unless ordered to do so by the Discipline Committee or with the consent of the Board.

The Discipline Committee heard a production motion and, despite finding that the documents were protected by solicitor client privilege, that they had been disclosed by an employee who did not have the authority to waive that privilege, and who did not know that the documents were privileged, ordered that the documents be produced. The reason for release given by the College was that otherwise the Board could gain an advantage against the teacher, presumably in separate proceedings from those of the College, since the Board would have no legal standing in the College proceedings and would not be a party.

The standard of review applied by the Divisional Court was correctness. The Court noted that neither the Discipline Committee's Rules of Procedure nor the *Statutory Powers Procedure Act* provided for the making of an order requiring the disclosure of privileged documents. In addition, a previous decision of the Court held that privilege is not waived if a decision maker lacks the authority to disclose the documents.

The Divisional Court noted that the Court should only examine privileged documents to determine whether they should be disclosed in cases "*where core issues going to the guilt or innocence of the accused are involved, there is a genuine risk of a wrongful conviction and disclosure is required that could raise a reasonable doubt as to guilt*" (para. 18). The Court found that this threshold was not met in the present case.

The Court concluded that the Discipline Committee, the teacher and the prosecution would not be prejudiced by non-disclosure of the documents. All the facts to be relied on by the prosecution were available through other documents.

The Court ordered that since the documents had been disclosed to the prosecutor and not the Discipline Committee, a new prosecutor and prosecution committee should be constituted and should determine whether the prosecution should proceed.

The decision of the Court not to release the documents to the teacher respects the importance of the legal principle of solicitor-client privilege. **KC LLP**

Professional Development Corner

KEEL COTTRELLE LLP provides a full range of professional development, including conflict resolution and mediation.

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