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Human Resources Newsletter

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BC Court strikes down legislation limiting teacher bargaining

In a recent decision of the British Columbia Supreme Court, *British Columbia Teachers' Federation v. British Columbia*, [2011] B.C.J. No. 675 (B.C.S.C.), the Court struck down provisions in the British Columbia *Education Services Collective Agreement Amendment Act, 2004*, which restricted bargaining by teachers with respect to specific issues, such as class size, class composition and ratios of teachers to students. The legislation also allowed for school boards to consider void sections of existing collective agreements with respect to school calendars, hours of work and days of work in certain circumstances.

These provisions in the legislation were held by the Court to be contrary to the guarantee of the right to freedom of association in section 2(d) of the *Canadian Charter of Rights and Freedoms* and the provisions were struck down by the Court. However, the decision of the Court was suspended for 12 months to permit the legislature of B.C. to appropriately respond to the Court's declaration of invalidity.

Rather than identifying in education legislation what class size, class composition, school calendars, hours of work and days of work would be, the government left those decisions to school boards in consultation with parents and prevented teacher bargaining on such issues. The result of the B.C. Supreme Court's recent decision may mean that the next step in B.C.'s struggle with their teachers' unions will be legislation dictating such issues, thereby requiring both school board and teacher compliance.

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Teacher's freedom of expression reviewed

In *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Head Grievance)*, [2010] B.C.C.A.A.A. No. 32, an arbitrator considered whether a teacher, who was also a staff representative for the Union, could place a sign outside her classroom that read "Staff Representative". The principal removed the sign, and the Union filed a grievance as a result. The Union relied on the *Canadian Charter of Rights and Freedoms*, as well as the collective agreement, to assert that the teacher could place the sign outside of her classroom in the school hallway. The Employer relied on the *School Act*, R.S.B.C. 1996, c. 412, to argue that they were justified in removing the sign. The arbitrator allowed the grievance in relation to the issues under the *Charter*.

In September 2006, the grievor received a sign from the Union that read "Staff Representative" and she placed the sign on the wall outside of her classroom. There were two purposes for placing the sign outside of her classroom. The first purpose was to notify people in the school of her location. The second purpose was to express her pride in her Union.

There were two issues considered by the arbitrator. First, the arbitrator looked at the *Canadian Charter of Rights and Freedoms*. The arbitrator considered whether the posting of the sign was a protected form of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*, and if so, whether the limitation on freedom of expression could be justified under section 1. Second, the arbitrator considered the collective agreement and asked whether it provided support for the grievor to post the "Staff Representative" sign outside of her classroom.

The arbitrator considered whether section 2(b) of the *Charter* was engaged. The Employer

argued that the sign did not meet the established requirements for protection of expression under section 2(b) of the *Charter*. First, the Employer submitted that the Union was seeking access to a *particular* platform – the wall of a school hallway – for expression, which was inconsistent with longstanding authority from the Supreme Court of Canada. In the alternative, the Employer submitted the Union was attempting to use the school hallway walls as a forum to engage in free expression respecting union affairs. The Employer therefore submitted that the school hallway was not a public venue where an expression such as "Staff Representative" was protected.

The arbitrator noted that the Union and grievor were not seeking a new location within the school for their expressive activity. They were not trying to expand posting of signs to other walls or places in the school.

Further, the arbitrator found that there was a level of acceptance in the use of school hallways for posting signs.

The arbitrator considered whether the "Staff Representative" sign contained expressive content, and concluded that it did. The arbitrator maintained that the sign went beyond the communication of innocuous information and expressed the pride of the grievor in her responsibility to represent the members. Thus, the "Staff Representative" sign embodied protected expression since it reflected the grievor's identity as a Union representative.

Next the arbitrator considered the purpose and effect of the decision by the Employer to remove the "Staff Representative" sign. In considering the purpose, the arbitrator noted the school principal's authority and responsibilities under the *School Act*. The arbitrator concluded that the school principal has responsibility to ensure that the school hallways are safe and appropriate for education purposes. From this, the arbitrator held that the principal was attempting to control the physical consequences of putting materials in the school hallways when she removed the "Staff Representative" sign.

The arbitrator held that the removal created an inaccurate perception that the Staff Representative and the Union itself were excluded from the school. The principal had only removed the "Staff Representative" sign, and all other signs remained on the walls. The arbitrator held that the removal of the sign violated the grievor's freedom of expression under section 2(b) of the *Charter*.

Having found a violation of section 2(b), the arbitrator considered whether the limit on the freedom of expression was justified under section 1 of the *Charter*. The Employer had the onus of proving that the infringement on freedom of expression was justified.

The arbitrator accepted that the Employer's objective in removing the sign related to the school principal's authority under the *School Act* to manage school property.

In considering whether the sign's removal was proportional to the reason for removal, the arbitrator found that the Employer provided no policy or guidelines about what information could be placed on school walls. The objective for removing the sign was also unclear. There was an element of arbitrariness, since only the "Staff Representative" sign was removed. Thus, the limitation on the grievor's freedom of expression was not carefully designed to achieve the objective in question. The Employer had suggested the sign be placed on a staff room bulletin board, rather than outside of the grievor's classroom. However, the arbitrator concluded that while this would allow members of the Union to know where the representative was located, it would significantly minimize the expressive content of the sign. The arbitrator held there was no apparent balance between the presence of the "Staff Representative" sign and the Employer's removal of the sign.

After considering the proportionality test, the arbitrator concluded that the removal of the sign could not be reasonably and demonstrably justified under section 1 of the *Charter*.

The boundaries of freedom of expression within schools continue to be explored in arbitral and court decisions. Of significance in each case is the proportionality of the action taken to the result and limit on expression.

In many cases that are overturned, the facts considered by the decision maker do not demonstrate that a sufficient consideration of the right to express oneself and the purpose for restricting expression were made before a restriction was implemented. Analysis in such cases is key to defending the decision made.

Decision of HRTO unreasonable

In *Audmax Inc. v. Ontario (Human Rights Tribunal)*, [2011] O.J. No. 210, the Employer applied for judicial review of a decision from the Human Rights Tribunal of Ontario ("HRTO") that found the Employer discriminated against the employee, a Bengali-Canadian Muslim woman, on the basis of her ethnic origin and religion. The Employer cited issues of procedural unfairness, inadequacy of reasons, and the unreasonableness of the decision itself. The Court set the adjudicator's decision aside for being fatally flawed, and remitted the case to HRTO for a new hearing before a different adjudicator.

The employee had been hired as a probationary employee, and was dismissed before her probationary period had concluded. The employee alleged that during her employment, she was discriminated against due to her race, colour, ancestry, place of origin, ethnic origin, creed and sex. She claimed that this discrimination culminated in her dismissal.

The Employer denied these allegations. The Employer maintained that there was no discrimination against the employee, that they accommodated her religious attire requirements, and that she had been dismissed for cause.

The adjudicator found that the enforcement of workplace policies on dress code and use of the staff microwave were discriminatory against the employee on the basis of her ancestry, ethnic origin, creed and sex. The adjudicator also held that the Employer had failed to prove its allegations as to the non-discriminatory reasons for dismissing the employee. The adjudicator based that conclusion partly on an adverse inference from the failure of the Employer to call a particular individual, a consultant, as a witness.

The Court granted the Employer's leave to admit fresh evidence on the application for judicial review. The new evidence included two exhibits. The exhibits had been available to the adjudicator, but were not filed as exhibits at the HRTO hearing.

The first exhibit was a letter from the aforementioned consultant who had worked closely with the Employer for 13 years and shared office space with the Employer. The Employer had tendered the letter to the HRTO at the beginning of the hearing. The letter explained why the consultant was unable to attend the hearing and the substance of his proposed evidence. The Court found that the reasons provided by the consultant for his absence were relevant to whether or not the adjudicator should have proceeded with the hearing without offering other options to the Employer. The reasons were also relevant to determine whether it was appropriate to draw an adverse inference against the Employer for failing to produce the consultant as a witness.

The second exhibit was a photograph of a woman wearing a mid-thigh length top, leggings and sandals. At the hearing, the Employer had attempted to introduce the

photograph as a visual aid to explain to the adjudicator the type of clothing the employee had worn to work, which had prompted the meeting with her to discuss the office dress code. The adjudicator had refused to admit the photograph. The Court permitted the photograph to be filed in order to better understand its nature.

The Court held that the adjudicator breached principles of procedural fairness in the manner in which he handled the consultant's inability to testify at the set hearing dates.

The applicant Employer argued that the adjudicator should have considered other options for obtaining the consultant's evidence. The Court agreed. The adjudicator should have at least raised the possibility of an adjournment to allow the consultant to attend and testify. The Court held that, although an adjournment of the hearing would not have necessarily been granted, the failure to even consider it was unfair to the unrepresented Employer.

The Employer had a workplace environmental sensitivity policy. The policy included restrictions on using the microwave to reheat foods that had a strong odour and could affect individuals with food allergies. The employee alleged that she was discriminated against in regards to the microwave policy, based on her race, ancestry, ethnic origin and place of origin. The adjudicator held that there was discrimination, but the Court found that this finding was unsupported by any factual findings. The Court found that the adjudicator found discriminatory enforcement of the microwave policy, despite finding that the employee was not directly targeted for enforcement. The adjudicator's reasons did not disclose a rational basis for his conclusion that there was discrimination against the employee in regards to the microwave policy. The reasons did not provide a basis for the decision and did not permit meaningful appellate review, and therefore constituted a breach of the principles of procedural fairness and natural justice.

The adjudicator also found that the employee had been discriminated against in respect of the office dress code. As an observant Muslim woman, the employee adhered to the principle of modest dress and behaviour and wore a *hijab* to cover her hair. The employee alleged that the Employer discriminatorily singled her out for corrective action regarding her mode of dress. The Court held there was no logical reasoning that could lead to the conclusion that conforming to the Employer's business dress code would conflict with the employee's religious beliefs. Nor did the reasons disclose any basis for finding that the Employer's imposition of discipline with respect to the dress code was connected in any way to the employee's race or religion. The adjudicator did not make a finding as to what the employee was wearing on the date in which the Employer met with the employee to raise concerns about her clothing. The Employer asserted that the employee had worn a tight short skirt and leggings, but the adjudicator preferred the employee's evidence that she would not wear such an outfit as an observant Muslim woman. However, the adjudicator did not provide reasons for rejecting evidence of the Employer, or for accepting the employee's evidence.

In regards to the termination of employment, the adjudicator found that the employee's ethnic and/or religious background was a contributing factor in her termination. The adjudicator found that the Employer had failed to establish non-discriminatory grounds for terminating the employee's employment. The adjudicator drew a negative inference from the failure of the employee's witness to testify and, as a result, concluded that the suspicions about the employee that may have established cause for dismissal were unproven.

The Court held that it was incorrect in law and unreasonable on the facts to draw an adverse inference in the circumstances. The Court concluded that because the adverse inference with respect to the consultant was so pivotal to the adjudicator's conclusion that the

employee's dismissal was discriminatory, the adjudicator's decision could not be supported.

The Divisional Court was very critical of many of the adjudicator's findings of fact, which led to the adjudicator's conclusions regarding various allegations of discrimination. It is unknown whether this matter has since been settled or whether the Applicant will continue to pursue her complaints before the HRTO again.

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Placement of teacher on medical leave despite refusal of IME upheld

In *Peel District School Board v. Ontario Secondary School Teachers' Federation District 19 – Peel* (Gilinsky Grievance), [2010] O.L.A.A. No. 641 (Carrier), the assignment of grievor to medical leave by the Peel District School Board (the "Board") was upheld.

The grievor had been a teacher with the Board for ten years. He had previously been disciplined for inappropriate conduct. When inappropriate conduct re-occurred, he was suspended with pay and benefits and urged to undergo an Independent Medical Examination ("IME"). The Board believed that his conduct was related to an underlying medical condition. When the grievor refused, the Board sent information to an Occupational Psychiatric Consultant, who recommended that the grievor undergo an IME and advised that the grievor should be considered a potential safety risk to himself and others. The Board again requested that the grievor undergo an IME. The grievor again refused, so the Board put him on medical leave.

In a preliminary award, the arbitrator ordered that the grievor undergo an IME. The grievor, with the advice of representatives of the Ontario Secondary School Teachers' Federation and counsel, had agreed to the order.

The grievor sought reinstatement to his teaching position and reimbursement of sick leave credits. He also challenged the medical report, alleging that the psychiatrist had misconstrued information the grievor had provided and improperly diagnosed him, and that he had undertaken the IME under protest and without providing informed consent.

The arbitrator noted that, with respect to the preliminary award, the grievor had been well represented by OSSTF. The arbitrator determined he did not have jurisdiction to review his decision in the interim award.

OSSTF selected the psychiatric consultant and provided the necessary information to the doctor. The grievor was diagnosed with Aspergers' Disorder and schizoid and schizotypal personality disorder. The prognosis did not indicate any significant improvement. In addition, he was found to be incapable of performing the duties of his job due to his psychiatric diagnosis. He was, however, not found to pose any immediate physical risks to himself or others.

The arbitrator found that the grievor had engaged in unprofessional and unbecoming conduct, including public criticism of the principal. Further, the grievor's self image was related to his medical diagnoses: he believed that his behaviour was not problematic.

The arbitrator held that the grievor's medical condition impeded his ability to perform all aspects of his job as a teacher and that, due to the poor prognosis for change, accommodation of the condition was neither indicated nor warranted. The arbitrator held that the Board had not acted inappropriately in suspending the grievor and urged the grievor to access long term disability benefits. The fact that he had not yet done so did not result in liability to the Board. The Board and OSSTF were urged to assist the grievor to

access long-term disability benefits, including retroactive benefits if possible.

Mental health issues pose significant challenges for school boards. An employee's failure to co-operate in the accommodation or resolution process can often be symptomatic of their condition.

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Teacher may access sick leave to prevent illness where accommodation not available

In *Waterloo Catholic District School Board v. Ontario English Catholic Teachers' Association* (Sick Leave Grievance), [2011] O.L.A.A. No. 55 (Carrier), the issue before the arbitrator was whether there were any circumstances in which sick leave would be available to a teacher who was not ill or sick but whose attendance at work would likely cause illness or sickness. There was no specific factual situation before the arbitrator.

The arbitrator framed the issue as one of accommodation, finding that, if a teacher had an underlying disability that resulted in a medical risk if he or she attended work and there was no way that the risk could be reduced or eliminated through an accommodation, then access to sick credits could be an alternative. The arbitrator based his decision on the specific wording of the collective agreement in question, finding that an absence from work in such circumstances, while not the direct result of a disability, did fit into the requirement that the absence be "*caused by sickness … physical and /or mental disability*", thus bringing it within the ambit of the collective agreement.

The arbitrator applied his findings to two fact scenarios from previous arbitral decisions that counsel had presented, substituting teachers as the grievors. In the first scenario, if a teacher were absent from work due to an allergen in a classroom that would have a significant impact on his or her health, the teacher would be able to access sickness benefits, as the absence would be the result of the physical disability. In the other fact scenario, if a pregnant teacher, who did not have immunity to rubella, which could cause serious illness to her and potentially serious long term consequences for the fetus, might become infected if working, the teacher would have access to sickness benefits, if no other accommodation were available. The arbitrator considered a lack of immunity to rubella to be a physical disability.

The arbitrator concluded that in order for a teacher to be entitled to access sickness benefits although not presently sick, several elements must be present:

1. The teacher must suffer from some underlying physical and/or mental disability;

2. Although presently dormant that disability, due to present circumstances in the school or classroom, could create a significant medical risk to the teacher;

3. Accommodation to significantly reduce or eliminate the risk is not available;

4. Although not currently sick, a teacher absent in these circumstances may have access to his or her sickness credits. [para. 27]

This decision confirms that sick leave can be used as a form of accommodation, if no other accommodation is available.

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Reinstatement of CYW convicted of sexual assault

The termination of a child and youth worker following a finding of guilt for sexual assault was the subject of an individual grievance in *Toronto District School Board (TDSB) v. Ontario Secondary School Teachers' Federation (OSSTF), Professional Student Services Personnel Unit, District 12 (Moursalien Grievance)*, [2010] O.L.A.A. No. 493.

The grievor was employed by the Board for approximately ten years as a child and youth worker working with students with special education needs. Throughout his employment, the grievor had no discipline record and was regarded as a good, reliable and diligent employee.

In January 2008, the grievor was suspended with pay after he was found guilty of sexual assault and sentenced to a conditional discharge and two years' probation. Other conditions of the sentence were that the grievor must be placed on the sex offender registry and must inform his school principal of his probation. The grievor's suspension was to last while the Board investigated the incident.

During the investigation period, the Board obtained a copy of the sentencing transcript in July 2008 and a copy of the trial transcripts in late March 2009. Following the review of both records, the Board decided to terminate the grievor's employment finding the grievor's off-duty conduct, his conduct during the police investigation and at the trial, his conditional discharge and probation, to be incompatible with his continued employment as a child and youth worker for the Board, effective April 1, 2009.

The grievor disputed the termination arguing that the Board did not have just cause. The Board argued that the decision to terminate the grievor was just and was founded on a number of considerations including: the apprehension of risk from the grievor to the youth he worked with; the impaired moral authority of the grievor among staff, students and the school community; the grievor's failure to admit full responsibility for his conduct and the damage to the Board's reputation.

The Union argued that the Board's investigation from January 2008 to April 2009 was unreasonably delayed and contested each of the Board's justifications for the grievor's termination. The Union also argued that the Board did not sufficiently explore the actual risk the grievor was to students, staff and parents and did not request an independent medical examination of the grievor before deciding to terminate him.

The arbitrator completed an analysis of the grievor's off-duty criminal actions; his exemplary employment history, the type, character and nature of the work; as well as the Board's actions in investigating the grievor's conduct. With respect to the criminal trial, the arbitrator noted that the conduct that the grievor was found guilty of did not occur at the workplace, was not during working hours, and involved an adult with no connection to the Board. The arbitrator noted, however, that an employer in the education sector, such as a school board, needs to satisfy a lower threshold for off-duty conduct than in other industries because the employee is entrusted with the care and safety of young children (para. 68).

Although the Board was found to have legitimate concerns and grounds for suspicion, and investigated without delay despite time spent waiting for the court transcripts, the Board had no clear evidence that there was a likelihood of the grievor repeating his behaviour in the workplace and

therefore lacked just cause to conclude that he constituted a danger to students, staff and parents. As the delay was no fault of the Board, the grievance regarding the lengthy suspension was dismissed.

The Union's argument that the Board did not ask for an independent medical examination before terminating the grievor, was of importance, as the medical evidence at trial supported the finding that the grievor was unlikely to re-offend; was a very low risk of danger to children under his care; and was fully able to resume his duties without restrictions. As a result, the Board was ordered to reinstate the grievor without loss of seniority or service, but with no compensation.

The decision of the arbitrator is curious in that a CYW's role is to influence students regarding positive decision making and good choices. Clearly the greivor's choices could not demonstrate the requisite moral authority to guide student decision making.

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Overturning dismissal of custodian who had sexual relations with a student of the board reasonable

In *Cape Breton – Victoria Regional School Board v. Canadian Union of Public Employees, Local 5050*, [2011] N.S.J. No. 34 (Oland, Fichaud, Farrar), the Nova Scotia Court of Appeal dismissed the Cape Breton-Victoria Regional School Board's (the "Board") appeal of the judicial review decision of the Supreme Court of Nova Scotia.

The Board had terminated the employment of a custodian who had sexual relations with a fifteen year old female student of the Board. The student was not a student of a school that the custodian was assigned to, and they did not meet on Board property. The arbitrator had allowed the grievance, overturned the dismissal, and substituted a three month suspension for conduct unrelated to the relationship with the student. The arbitrator found there was little or no nexus between the sexual relations with the student and the reputational interest of the Board. The relationship was not related to the custodian's employment.

The Supreme Court dismissed the application for judicial review, having determined that the decision of the arbitrator was within the set of reasonable outcomes.

The Board appealed the decision of the Supreme Court to the Court of Appeal. The Board argued that the judge had, first, erred in choosing reasonableness as the standard upon which to review the arbitrator's interpretation of the Nova Scotia *Education Act*, S.N.S. 1995-96, c. 1, and, secondly, incorrectly applied any standard of review in finding that the arbitrator had reasonably interpreted legal tests applicable to the sexual conduct of the custodian with respect to the student.

Section 40(1) of the *Education Act* outlined the duties of support staff, including to maintain an attitude of concern for the dignity and welfare of each student, and to respect the rights of students. The Board had argued that these duties applied to all students of the Board and not just to students of the schools at which the custodian worked.

In determining the first issue, the Court of Appeal applied the correctness standard to find that in applying the reasonableness standard to the review of the arbitrator's decision, the judge had applied the correct standard of review. The role of the arbitrator was characterised thus:

The arbitrator's mandate, into which s. 40(1) [with respect to the duties of support staff] *dovetails, was to apply principles of arbitral jurisprudence to determine whether there was just cause for dismissal within the meaning of the collective agreement. That is a labour arbitrator's core function, and within the court's zone of deference, attracting a reasonableness standard of review…Section 40(1) is "closely connected" to the arbitrator's function in this grievance…*[para. 25]

With respect to the reasonableness of the arbitrator's decision, the Court of Appeal found that the decision to overturn the discharge fell within the range of reasonable outcomes. The arbitrator had balanced the reputational interest of the Board with the privacy interest related to off-duty conduct of the grievor in accordance with arbitral principles and the arbitrator's analysis was understandable and transparent.

This case highlights the deference provided to the decisions of arbitrators, who because of the nature of the arbitration process are anticipated to have been chosen by the parties for their experience and knowledge of labour relations issues in the particular area of labour law.

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Psychological tests for current administrators contrary to collective agreement

A school board's use of a series of psychological tests as a tool in the selection process for principals, assistant principals and incumbent principals was recently reviewed by a panel of arbitrators in *Calgary Board of Education v. Alberta Teachers' Assn. (Leadership Potential Assessment Grievance),* [2010] A.G.A.A. No. 52.

In 2008, the Calgary Board of Education (the Board) recognized an urgent need for succession planning at the Board's administrative level. In response, the Board imposed on all teachers with administrative designations, such as current principals and assistant principals, as well as those who wished to obtain such designations in the future, a leadership potential assessment (LPA) used to determine innate potential and learned behaviour. The LPA process was instituted to assist the Board to determine leadership potential and how that individual's potential might change over his/her career. The Board decided to administer the tests to incumbent principals and assistant principals, without advance warning, at meetings in June 2008.

The Union raised a number of concerns with the use of the LPA regime, including: the need for objective indicators of leadership potential; whether the Board of Trustees supported the initiative; the cost; whether incumbents should be required to take the LPA; the weight given to the results of the LPA for the applicants; as well as, concerns about privacy and consent. The Union filed a grievance arguing that the use of the tests did not comply with the collective agreement.

The Board acknowledged the Union's concerns, and agreed to suspend the LPA process until the appropriate consents and privacy issues were addressed in compliance with the Alberta *Freedom of Information and Protection of Privacy Act.* The Board indicated, however, despite these concerns, the LPA regime was within its management rights under the collective agreement.

The Union filed an amended grievance in 2009 seeking an Order requiring the Board to cease and desist from imposing the LPA

on current Board administrators in contravention of the collective agreement, and to recover and destroy any information or records in the Board's possession as a result of the process and to refrain from using such methods in the future.

Following a review of the relevant collective agreement provisions, wherein it provided the Board with the right to consider "ability" and "merit" in making promotion decisions, the panel allowed the grievance in part. The panel highlighted the long-established right of an employer to require applicants to undergo testing in order to measure the abilities for a particular job that are relevant, reliable and administered fairly. In the current circumstances, the LPA testing provided relevant data about a candidate's attributes and fell within an acceptable range of reasonableness. Thus, the LPA process, as it applied to the initial selection of applicants, was found to be appropriate and within the terms of the collective agreement.

The administration of the LPA test with respect to incumbents, however, was found to be unreasonable, and as a result, was a breach of the collective agreement. The panel found that the Board was not entitled to use the results of the tests administered to any incumbent who did not provide a consent form and the results were to be destroyed. The collective agreement had provisions for the evaluation of incumbents which were reasonable and were to be used in the absence of the LPA regime.

This decision highlights concerns regarding psychological profiling and would arguably not have extended to prospective candidates without explicit consent in Ontario given the provisions of the *Personal Health Information Protection Act*.

Board violated collective agreement by assigning teachers to reading program

In *Toronto District School Board v. Ontario Secondary School Teachers' Federation District 12* (Workload Accord Grievance), [2010] O.L.A.A. No. 651 (Devlin, Riddell, Hopkins), the arbitration board held that the scheduling of a reading program contravened the provisions of the collective agreement.

Teachers at Danforth Collegiate and Technical Institute had been required to participate in the Drop Everything and Read program (the "DEAR Program"), which was scheduled for twenty minutes daily. All teachers and students read materials not related to the curriculum and teachers assisted students with reading, if necessary. The DEAR program was scheduled in addition to the four instructional periods each day.

The arbitration panel considered the provisions of the collective agreement with respect to timetables and workloads, and concluded that the DEAR program was not a teaching assignment pursuant to the collective agreement, and that it was not within the definition of supervision in the collective agreement. The panel noted that there was no provision under the collective agreement that would have permitted the Board to schedule the teachers' time in the same manner as assignment to the DEAR program; therefore, the panel concluded the program violated the collective agreement.

The panel dismissed the Board's argument that OSSTF was estopped from challenging the assignment of teachers to the DEAR program since the OSSTF had not made any representations that it intended not to rely on its rights under the collective agreement.

The DEAR program had been removed four months following the filing of the grievance. The panel held that the appropriate remedy would be more than a declaration of violation of the agreement, but remitted the matter to the parties to resolve. The Board nominee, Riddell, dissented with respect to remedy.

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Preparation time to be reinstated

The issue of whether a school board could unilaterally cancel a teacher's assigned preparation time without any further obligation to the teacher was the focus of a recent grievance in *Ontario North East District School Board v. Elementary Teachers' Federation of Ontario (ETFO) (Prep Time Grievance)*, [2010] O.L.A.A. No. 627.

When two teachers were required to attend a Professional Learning Community (PLC) meeting which was scheduled to run during their scheduled preparation time, and they were advised that the preparation time lost as a result of their attendance at the PLC would not be paid back, two individual grievances were filed.

The union argued that the relevant provisions of the collective agreement included a clear teacher entitlement to a specified minimum amount of preparation time within each five-day instructional cycle, as well as provisions that addressed the rescheduling of missed preparation time. Despite the fact that rescheduling the lost preparation time was not an option, given that the school year during which the grievance was filed was now over, the union was concerned with a proper remedy for the individual grievors that would include a prospective impact. Specifically, the union sought a finding that the Board's policy was contrary to the collective agreement by refusing to allow teachers to decline attendance at PLC meetings at least for the portion of the meeting that overlapped with their scheduled preparation time. The Union also requested that the Arbitrator direct the Board to refrain from similar violations of the collective agreement in the future.

The Board argued that the assignment was proper, as it retained the power to cancel preparation time by assigning other legitimate duties to a teacher. The Board also argued that, in accordance with the collective agreement, the only missed preparation time it was obligated to reschedule was in limited circumstances, such as when a teacher is required to provide instruction during his/her scheduled preparation time for an absent teacher, which was clearly outside of the current circumstances.

Following a review of recent arbitral jurisprudence on the issue of preparation time, the arbitrator noted that, in general, the cases highlighted a school board's legitimate authority to require attendance at a meeting, such as a PLC; however, any preparation time lost, as a result of a board direction, had to be rescheduled.

In this circumstance, although the newly negotiated language clearly restricted the obligation to reschedule preparation time to specific circumstances, not including the case at bar, the Board erred by not making any effort to provide the required number of preparation time minutes at another time.

Allowing the grievance, the Arbitrator concluded that the Board acted contrary to the provisions of the collective agreement when it required the two teachers to attend the PLC meeting during their assigned preparation time without taking any steps to make certain that the required minimum number of preparation time minutes continued to be provided. The collective agreement provided a clear entitlement to preparation time and any derogation from that entitlement would require clear language expressly stating so.

The arbitral jurisprudence regarding preparation time is establishing parameters when the teacher may be otherwise scheduled, and the time for preparation rescheduled.

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Meet-the-Teacher night a mandatory meeting

An arbitrator considered whether teacher attendance at Meet The Teacher Night was mandatory in *British Columbia Public School Employers' Assn. v. Greater Victoria School District No. 61 (Schreck Grievance)*, [2010] B.C.C.A.A.A. No. 12. The Union asserted that the event should be considered an extracurricular activity, as defined by the Collective Agreement, with attendance thereby voluntary. After considering the Collective Agreement and legislative provisions, the arbitrator dismissed the grievance and held that Meet The Teacher Night did not fall within the definition of extracurricular activities found in the Collective Agreement.

In an email dated September 14, 2008, the grievor advised the principal that he was not planning to attend Meet The Teacher Night. The grievor expressed his view that participation in Meet The Teacher Night was voluntary and that he was unaware of any provision in the Collective Agreement, *School Act* or any other legislation that required his attendance. The grievor explained that he did not believe that Meet The Teacher Night was an effective use of his time. In response, the principal asserted that attendance was mandatory. He classified Meet The Teacher Night as a meeting and pointed to BC School Regulation 4(1)(k) which provided that a duty of a teacher is to attend all meetings or conferences called by the principal or superintendent of schools.

The arbitrator reviewed the article in the Collective Agreement dealing with extra-curricular activities. Extra-curricular activities were said to include *"a wide range of athletic, cultural, service and recreational activities that are beyond the professional prescribed and locally developed curricula of the school and which are beyond the regularly prescribed hours of instruction."* Evidence was tendered indicating that Meet The Teacher Night was not discussed when the definition of extracurricular activities was broadened in the Collective Agreement to include non-athletic activities.

The evidence provided by the Employer's witness was considered, despite the Union's objection. The arbitrator held that it was clear from the witness's evidence that the expansion of the extracurricular activities language centred around activities that were student focused.

The arbitrator also addressed the School Calendar Regulation, which gave the Employer authority to shorten the school day by one hour and to schedule Meet The Teacher Night in the evening. The Union argued that the regulation did not apply to Meet The Teacher Night since the regulation applied to facilitate parent-teacher interviews that relate to student progress reports, and Meet The Teacher Night did not relate to student progress reports. The arbitrator held that the Union was estopped from relying on that argument since the Employer had relied on this authority for years, without opposition from the Union.

Finally, the parties had treated Meet The Teacher Night as if it was mandatory for many years, and the arbitrator concluded that the Employer could rely on the Union's silence on the issue to support its position.

Estoppel arguments are often relied upon by parties and decision makers in arbitration matters. Therefore, school boards should

always consider the potential impact of decisions that are exceptions to or not formally addressed in the Collective Agreement.

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Technology trainers not board employees

In *Ottawa-Carleton District School Board v. Ontario Secondary School Teachers' Federation, District 12*, [2010] O.J. No. 4142 (Reilly, Swinton, Heeney), the Divisional Court overturned the decision of the arbitrator on judicial review. The issue before the arbitrator had been whether certain individuals were employees of the Ottawa-Carleton District School Board (the "Board") or independent contractors.

The individuals in question had been hired, pursuant to an Industry Canada program, by the Ottawa Centre for Research and Innovation ("OCRI") to train teachers in the use of technology and the integration of technology into the school curriculum. At the end of the Industry Canada program, the Board continued to fund the program.

OCRI hired, trained and placed individuals in various schools of the Board and in the Board's head office. The individuals were mainly recruited from teachers' colleges, though being a teacher was not a requirement for the job. Their duties did not including teaching students, and they were instructed to leave the room should they be left alone with students.

The Ontario Secondary School Teachers' Federation (the "Union") argued that the individuals were employees of the Board and not independent contractors, and that they were teachers and were therefore, in the bargaining unit.

In their strongly worded decision, the Divisional Court held that the decision of the arbitrator, which found that the individuals in question were employees of the Board and were teachers and therefore, members of the bargaining unit, was unreasonable. The arbitrator had applied the common law test to determine whether the substance of the relationship rendered it one of employer-employee, or one of independent contractor. The Divisional Court held that the arbitrator's finding that the criterion in the test pointed to the Board as employer was contradicted by the arbitrator's own findings of fact. The Divisional Court also found that the arbitrator had erred in his reasoning in finding that the individuals had intended to become employees of the Board by signing contracts with OCRI. The individuals may have desired to become employees of the Board, but that did not equate to it being their intention upon signing the contract. The Divisional Court found this to be a fatal flaw in the decision.

The Divisional Court also held that the arbitrator made a fatal error in finding that a *bona fide* independent contractor would not require training, which was offered by OCRI to its employees.

Finally, the Divisional Court found that the OCRI employees were not required to be teachers as a condition of their employment with OCRI, and therefore, were not acting as teachers.

The grievance was remitted to a different arbitrator for re-hearing.

In determining whether or not a relationship is an employment relationship or one of service provider there are many factors to be considered, including how instructions are provided regarding tasks and reporting structures, which often signal the level of independence an individual has to perform their duties.

Significant independence is one factor leading to a conclusion that the individual is not an employee.

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Personal email not subject to privacy legislation

An application for judicial review of a decision of the Information and Privacy Commissioner (IPC) on the issue of whether a government employee's personal emails are subject to disclosure under freedom of information legislation was recently heard by the Superior Court of Justice, Divisional Court in *Ottawa (City) v. Ontario (Information and Privacy Commissioner)*, [2010] O.J. No. 5502.

The City of Ottawa permitted incidental personal use of its email system by its employees, subject to conditions such as security breaches and network management reasons when searches were permitted. One of the City's solicitors, Mr. O'Connor, volunteered on the Board of Directors of the Children's Aid Society (CAS) and used his work email address to send and receive emails relating to his CAS volunteer work. Although his personal emails were segregated in a separate file folder, they were stored on the City's email server.

In October 2007, the City received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* seeking disclosure of all "emails, letters and faxes" sent or received by the City's solicitor, Mr. O'Connor. The City of Ottawa denied the request stating that the communications sought did not relate to Mr. O'Connor's duties as City Solicitor; and were personal emails not within the City's "custody of control" within the meaning of *MFIPPA*. The individual appealed the City's decision to the IPC.

On appeal, the Information and Privacy Commissioner held that personal emails sent by a city employee via a government email account were subject to freedom of information legislation and therefore, were subject to disclosure to members of the public. The City of Ottawa sought judicial review of the Commissioner's decision.

Central to the application for judicial review was the Court's interpretation of custody and control as prescribed in s. 4(1) of *MFIPPA* which provides that "*every person has a right of access to a record or a part of a record in the custody or under the control of an institution*" subject to limited conditions.

As the issue was a jurisdictional question of whether the *MFIPPA* has any application to personal emails, the Court determined that this was a legal question of broad significance that attracted the correctness standard. Applying the correctness standard, the Court recognized that, although the Commissioner's purposive legal approach in determining the meaning of "custody and control" was a correct one, the Commissioner fell short in the analysis of what the terms mean in relation to the subject documents.

Taking a purposive approach to the analysis of the words "custody and control", the Court noted that the purpose of freedom of information legislation in Ontario was to enhance democratic values by providing citizens with increased access to government information.

Thus, the Court allowed the application, concluding that personal emails do not fall within the scope of *MFIPPA* and confirmed the City's decision to deny the access request. The communications between CAS and the City's solicitor had no connection whatsoever to the functioning of government or the affairs of the City of Ottawa and therefore, had no connection to anything *MFIPPA* was intended to encompass. The Court highlighted that no distinction should be made between personal communications stored in paper form as opposed to personal employee emails, the former not being subject to disclosure simply by virtue of their presence in a government office.

— KC LLP —

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