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Human Resources Newsletter

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IN THIS ISSUE —

Supreme Court clarifies 'Duty to Accommodate'

In a unanimous judgment by the Supreme Court of Canada (the "SCC") in *Hydro-Quebec v. Syndicat des employees de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000* (SCFP-FTQ), [2008] S.C.J. No. 44, the Court overturned the decision of the Quebec Court of Appeal and affirmed the arbitrator's decision that the employer had fulfilled its duty to accommodate an employee with chronic disability-related absenteeism.

The employee, who suffered both numerous physical and mental disabilities had, as a result, a total of 960 absences from work between January 3, 1994, and July 19, 2001, the last 7 ½ years she was employed by Hydro-Quebec. Over these years, the employer adjusted her working conditions to attempt to best accommodate her limitations.

At the time of her dismissal on July 19, 2001, the complainant had been absent from work since February 8, 2001 and had been advised by her attending physician to stop working indefinitely. A psychiatric assessment that had been obtained by the employer concluded that the employee "*would no longer be able to work on a regular and continuous basis without continuing to have an absenteeism problem as in the past"*. The employer's letter of dismissal referred to her continued absenteeism, her inability to work on a regular and reasonable basis and the fact that no improvement was expected.

The employee grieved her termination and the arbitrator found that the factors that contributed to her conditions were beyond the employer's control and further accommodation would constitute undue hardship. Dismissing the grievance, the arbitrator concluded that the employer acted reasonably towards the complainant. The union sought judicial review of the arbitrator's decision.

The Superior Court affirmed the decision of the arbitrator and dismissed the application for judicial review. The union appealed that decision to the Court of Appeal.

Setting aside the Superior Court's decision, the Court of Appeal found that the employee was not totally unable to work and that the employer did not prove that it was impossible to accommodate her. The Court of Appeal held that the duty to accommodate must be assessed at the time of the decision to terminate, and in the circumstances, the arbitrator should not have only taken into account the prior absences of the complainant. The employer appealed this decision to the SCC.

The SCC focused on two aspects of the Court of Appeal's decision. It analyzed the concept of "undue hardship" in order to clarify the standard for assessing the employer's burden of proof for proving undue hardship, and it reviewed the time period that is relevant to the determination of whether the employer has fulfilled its duty to accommodate.

The SCC qualified the duty to accommodate test, stating that "*the test for undue hardship is not total unfitness for work in the foreseeable future*". The SCC held that the Court of Appeal erroneously interpreted the undue hardship test as requiring the employer to establish that it was impossible to accommodate the characteristics of the employee. To the contrary, the SCC highlighted that the employer is required to establish proof of undue hardship, which can be assessed in

terms of the financial costs of accommodation, the relative inter-changeability of the workforce and the prospect of substantial interference with the rights of other employees, amongst other considerations.

The SCC emphasized that, "*the employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work*".

The employee's inability to work for the reasonably foreseeable future, even though the employer made efforts to accommodate her limitations, was found to have prevented "*the fundamental obligation arising from the employment relationship*" and satisfied the test of undue hardship.

The SCC also clarified that an employer's duty to accommodate would be reviewed starting with the employee's first period of disability. The SCC found that, where an employee has been, and will continue to be consistently absent from work due to illness, and all means of past accommodation have not positively impacted the possibility of improved attendance, neither the employee nor the employer can disregard the past in assessing undue hardship. The arbitrator's decision was held to be correct in law, and the SCC set aside the decision of the Quebec Court of Appeal.

The definition of the undue hardship test that applies to an employer's duty to accommodate is important given the challenges that can occur when accommodating teachers, whose duties are somewhat prescribed by their professional role.

Arbitrator extends Code protection to commuting time

At issue in *Catholic District School Board of Eastern Ontario v. OECTA*, [2008] O.L.A.A. No. 459, was whether the Board had, *prima facie*, discriminated against the grievor on a ground prohibited by the *Human Rights Code*, and, if so, whether the Board had met its obligations to accommodate the grievor.

The grievor began her teaching career in 1998 as an elementary school teacher, but earned qualifications to teach business, and later math, at the secondary school level. The grievor began teaching high school at St. Michael Catholic School in the spring of 2001. She was transferred to another high school, St. Mary Catholic School, where she began teaching in September 2003. At the time of the grievance, the grievor remained a teacher at St. Mary.

In 2004, the grievor was involved in a car accident, and did not fully recover from the injuries she sustained in the collision. She argued that the commute from her home to St. Mary Catholic, a 45-minute drive each way, exacerbated her injuries and made full recovery impossible. The grievor requested a transfer to St. Michael Catholic School because it would shorten her commute from 45 minutes to 8 minutes each way. She made transfer requests in May 2005, June 2005, February 2006, and March 2007. The transfer requests made in 2005 were made past the deadline for such requests and the grievor acknowledged this fact. The Board did not respond to the transfer requests of 2005.

Rather than offer her a position at St. Michael's in response to both the

request of 2006 and 2007, the Board offered the grievor a position at Holy Cross Elementary School. The grievor did not accept the position at Holy Cross because she considered herself to be a secondary school teacher, not an elementary school teacher. Instead, she filed a grievance, alleging the Board had failed to accommodate her disability.

The Board took the position that there had been no discrimination and that, even if there had been *prima facie* discrimination, offering the grievor a position at Holy Cross Elementary had satisfied the Board's obligation to accommodate the grievor. The Board also argued that it was unnecessary to consider whether the grievor's specific accommodation request would constitute undue hardship, because there was no discrimination. The position of OECTA, on behalf of the grievor, was that there was *prima facie* discrimination on the ground of disability, the accommodation offered by the Board was not reasonable and the grievor's solution would not cause the Board undue hardship.

In making the determination, the arbitrator considered several provisions of the collective agreement, as well as the disability related provisions of the *Code*. The arbitrator found that the issues to be determined were: (a) whether or not the grievor had a disability within the meaning of the *Code*; (b) whether the Board had *prima facie* discriminated against the grievor on the ground of disability; and finally, (c) if *prima facie* discrimination was established, whether the Board met its obligations to accommodate the grievor by offering her a transfer to an elementary school.

There was sufficient evidence for the arbitrator to determine that the grievor had a disability protected by the *Code*. Further, the grievor's recovery was made more difficult as a result of her commute to work.

In contemplating whether the Board had *prima facie* discriminated against the grievor on the ground of disability, the arbitrator considered the manner in which the Board responded to the grievor's requests for transfer, as well as whether or not the commute to school was sufficiently related to the grievor's work to fall within the scope of protection against discrimination. The arbitrator was highly critical of the Board's response to the grievor with respect to her transfer requests and found that the Board's responses constituted discrimination.

The arbitrator then went on to set out the minimal procedural response to a request for accommodation, including acknowledging receipt of the communication that a disability exists and where necessary, asking for clarification about the employee's abilities and restrictions in a timely manner. The arbitrator also noted that written communication, rather than oral communication, would reflect a serious approach to the problem. The arbitrator concluded that, in this case, *prima facie* discrimination was made out simply on the basis of the Board's response to the grievor's request.

The arbitrator then turned to the question of whether or not the commute to work was sufficiently work-related to fall within the scope of human rights protection. The arbitrator found that the commute was a contextual factor that should be taken into account when assessing whether work location requirements are discriminatory. In looking at the facts of the grievor's circumstances, and with emphasis on the clear medical evidence, the arbitrator

found that the grievor's commute was a pre-condition to her ability to work and that it was necessarily incidental to her work. As a result, in the grievor's circumstances, *Code* protection with respect to her commute was available to the grievor.

Having determined that the Board *prima facie* discriminated against the grievor on a procedural level and that the grievor's commute was an activity related to employment, the arbitrator went on to consider whether or not the Board met its obligation to accommodate the grievor by offering her a position at an elementary school close to her home. It making the determination, the arbitrator found that the Board had failed to take into account the grievor's skills, capability and potential for contribution to the workplace. The grievor's skill set was well suited to teaching high school. By offering her a position at an elementary school, the Board disregarded the particular characteristics of the grievor. The arbitrator concluded that the offer of a position at an elementary school was not a reasonable accommodation. As the Board had failed to provide any evidence that the accommodation sought by the grievor would constitute undue hardship for the employer, the grievance was allowed.

This case reiterates the notion that employers must respond to requests for human rights protection seriously and without delay. While a commute to and from work will not always be regarded as an activity related to employment protected by the *Code*, the individual contextual circumstances of each case must be considered. Finally, in determining what accommodation to offer an employee, an employer must consider the employee's skills, capability and potential for contribution.

Arbitrator clarifies employers' right to medical information

British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Law Grievance), [2008] B.C.C.A.A.A. No. 126, provides employers and Unions with more guidance about how to strike a balance between an employee's rights to privacy and the employer's need for information to properly administer the sick leave provisions of a collective agreement. Where the employer has suspicions about an employee's illness and the circumstances surrounding a request for sick leave, it is incumbent on the employer to request in clear and unequivocal terms the medical information that the employer needs to address its concerns.

The facts of this case provide important context for the arbitrator's decision, especially since medical information was provided by the employee and the employer took steps to be compassionate to the employee's circumstances and to address its concerns about the medical information provided. However, the arbitrator decided that the employer had not taken enough steps or appropriate steps to address its concerns and ordered that the employee be made whole for the time he was on unpaid leave.

The grievor was a secondary math teacher. He had been employed by the Quesnel School District since 1979. The issue in dispute was the District's decision to deny the grievor's request for an extended sick leave for the fall semester (Sept. 2005 – Feb. 2006). Instead, the School District granted him an unpaid personal leave for the time requested.

The circumstances prior to the grievor's request for extended sick leave factored heavily in the District's decision to deny the request. In April 2004, the grievor's mother, who had lived in England, died. He went to England for the normal bereavement leave covered by the collective agreement. While there, he discovered that his father was suffering from Lou Gehrig's disease. Following the bereavement leave, the grievor returned to his teaching duties in B.C. and finished the semester.

In August 2004, the grievor applied for an unpaid leave of absence to provide full-time care for his father in England from September 7, 2004 – January 31, 2005, or until such time as his father no longer required care. His request letter also indicated that he might apply for supply teaching positions while in England, if his time and/or energy permitted. On September 7, 2004, he wrote to the District again and requested that his unpaid leave of absence be changed to a paid medical leave. He provided a doctor's note which stated: "*This teacher needs to have a leave of absence because of personal stress for his own well being – time to be determined*." The arbitrator described this note as "cryptic". At arbitration, the grievor testified that when he went to see his doctor, he was not coping as well as he thought, and he was having difficulties sleeping and concentrating on his teaching duties.

The District granted the grievor's request for a paid medical leave. However, the District's evidence was that, at that time, it did not believe it could question the request.

In February 2005, the grievor returned to his teaching duties. At the hearing, he testified that, initially after he returned to teaching, he thought he was coping well and felt that his father's needs were being taken care of in England. However, he testified that, near the end of the semester, he discovered he was not as emotionally well as he had assumed and gave an example of being very emotional in a student session on drinking and driving. No concerns were brought to the District's attention during this semester. On June 21, 2005, the grievor applied for extended medical leave. He also submitted a doctor's note, dated June 20, 2005, which stated: "*This teacher needs a medical leave of absence for stress. Duration of expected leave: approximately 6-10 months*". The District requested that the grievor have his doctor complete an extensive medical form.

At arbitration, the grievor testified that the recommended course of treatment was for him to return to England to care for his father in order to best alleviate the source of his stress.

He left for England after applying for extended medical leave, but before he knew whether the leave was granted. The District questioned the legitimacy of his claim and wrote him a lengthy letter dated July 15, 2005. The letter acknowledged his difficult circumstances, and that he was a valued employee. The letter also denied his extended medical leave request, but offered him an unpaid personal leave for compassionate reasons instead and the District indicated that, if the alternative proposed was not satisfactory to him, it required a meeting with him to address the issues in its letter.

The grievor responded in writing to indicate that he would be available to meet on or after August 8, 2005. In the meantime, the Union filed a grievance on his behalf. The grievor met with the District representative on August 24, 2005,

but nothing was resolved, and he returned to England on an unpaid leave of absence. The arbitrator found that the District did not vigorously pursue the issues with the grievor in this meeting.

The grievor testified that, in December 2005, he felt well enough to resume his teaching duties in January 2006, which he did. When his father died in January 2006, the grievor returned to England for four days for the funeral and then resumed his teaching duties. In 2007, after his return to teaching in 2006 and as the grievance proceeded through the grievance procedure, he provided the District with another note from his doctor that indicated he suffered from "an anxiety disorder with depression" in 2005 and which outlined the treatment prescribed. He continued to teach at the time of the arbitration.

The arbitrator held that the District had the right to make inquiries beyond the extensive medical form. While the arbitrator ultimately found that the District did not pursue its concerns in clear and unequivocal terms, the District's letter clearly outlined the information in the District's possession and its concerns about the circumstances of the grievor's request. However, the arbitrator agreed with the Union that, when the District enunciated its concerns, it focused on the cause of the illness, rather than the illness itself. The arbitrator also found that the District did not pursue its interests fully enough at the in person meeting in August 2005 to satisfy its self of the bona fides of the disability.

As such the arbitrator held that, *"the District did not have enough information to deny the extended medical leave request. There were a number of available options: have Mr. Law pursue certain questions with his physician; review the need for an independent medical opinion, with the agreement of the Union"*, or it could have *"granted the leave for a certain period of time and then requested an update on the medical information"*.

As stated in the introduction, the District was ordered to make the grievor whole for the time he was on unpaid leave in the first semester of the 2005/2006 school year.

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Age itself not suggestive of vulnerability

Dufferin-Peel Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Elementary and Secondary Occasional Teachers' Unit) (Age Discrimination Grievance), [2008] O.L.A.A. No. 508, is a preliminary award in an ongoing case in which the Ontario English Catholic Teachers' Association (Elementary and Secondary Occasional Teachers' Unit), alleged that the Dufferin-Peel Catholic District School Board has violated both the Collective Agreement and the *Human Rights Code* on the basis of age when it expresses a preference for hiring new teachers for long-term occasional positions rather than retired teachers.

The context giving rise to the Union's grievance relates to the requirement under the *Education Act* for School Boards in Ontario to operate within a balanced budget. In this case, the Board was in a deficit situation. As one way to reduce costs, the Board issued a directive that, when hiring teachers to fill long term occasional positions, preference was to be given to "new teachers, at a lower grid salary" instead of hiring from the pool of retired teachers. Under the Collective

Agreement, teachers' salaries were calculated considering both years of experience and credentials. As a result, in most instances, teachers who are just entering the profession would be lower on the grid.

When filling a long-term occasional position the Board considered a number of factors related to the nature of the position to be filled and the profile of available teachers, such as: the subject matter to be taught; the location and nature of the school; the availability of the respective teachers; and the teachers' expertise in the subject matter, their qualifications and/or their experience.

Before a hearing on the merits of the grievance began, the Union and the Board identified an issue that they wanted resolved before calling any evidence. The arbitrator heard legal arguments and issued a Preliminary Award. The Preliminary Award did not determine any factual or other legal issues relating to the merits of the case.

The Union and the Board asked the arbitrator to determine what the Union had to do to establish a *prima facie* case of discrimination following which the burden of proof or justification would shift to the Employer. The parties raised this Preliminary Issue because the parties took different positions on the application of the legal test to establish a *prima facie* case of discrimination.

The Board argued that before the onus shifts to the Board to defend its actions, the Union must show how the Board's directive to give preference to newer teachers imposes a burden or withholds a benefit from older teachers in a way that violates their dignity.

The Union's position was that they should only have to show differential treatment on a prohibited ground in order to establish a *prima facie* case of discrimination.

The Board argued that in cases of alleged age discrimination, "age itself presents no obvious disadvantage *per se*" as it does in a disability case. As a result, the Union should be required to show disadvantage before the Board is required to justify its conduct.

The arbitrator held that: "*This is not a case where the discrimination is obvious. While the difference in treatment is clear and admitted, the affront to dignity is not as obvious as where one has to consider exclusions or disadvantages imposed on the basis of disability, race or place of origin. In the case at hand, the consideration of age is just one indirect factor that arose out of the School Board's hiring directive. Further and perhaps more importantly, age, per se, in this context, does not suggest vulnerability. Therefore, to be consistent with the purpose of the Human Rights Code it is appropriate to require the Union to establish not only differential treatment, but also that the treatment raises issues concerning the dignity of the individuals or that they have been subjected to disadvantage as a result of the School Board's actions. Once this is established, it creates the prima facie case of discrimination that shifts the evidentiary onus of justification over to the Employer*".

It should be noted that, in addition to disability, the arbitrator considered differential treatment based on race and place of origin to also pose obvious affronts to dignity.

We will continue to monitor this case and its outcome.

Teachers' right to and method of expression upheld

The right to freedom of expression, as protected under section 2(b) of the *Canadian Charter of Rights and Freedoms*, in public schools was the centre of a recent grievance in *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Pamphlet Grievance)*, [2008] B.C.C.A.A.A. No. 51.

In the case of School District No. 5 (Southeast Kootenay), the Union, British Columbia Teachers' Federation, decided to prepare a pamphlet, which could be distributed by teachers to the parents of the Grade 4 and Grade 7 children opposing the use of the Foundation Skills Assessment in schools. The pamphlet, sent in a sealed envelope addressed to the parent(s), also provided a form letter that parents could complete and return to the school requesting that their child(ren) be excused from the Assessments.

The Assessment is a series of standardized tests in reading comprehension, writing and math, were written once a year by Grade 4 and Grade 7 students in all of British Columbia's publicly funded schools. The test results are used by schools and school districts to plan educational programming for students and to assist schools to identify foundational skill strengths and weaknesses.

The Federation opposed the use of the Assessment alleging, amongst other things, that the reliance on standardized tests was not a fair and accurate view of what occurred in schools; did not recognize the individual needs of students; and did not help teachers teach.

The Federation commenced various initiatives to communicate its position on the Assessment including sending letters to the Minister of Education, placing advertisements in local newspapers, giving directions to its members not to supervise the administration of the Assessment, and discouraging its members from volunteering to mark the assessments.

Concerned with the political nature of the pamphlet, the District decided not to permit its Grade 4 and Grade 7 teachers to use its internal mail delivery system to send the pamphlet home with students for their parents to read.

As a result, the Federation filed a grievance alleging that the restriction placed on its members violated their right to freedom of expression guaranteed by the *Charter* and that the restriction was not justified. The Federation argued that the pamphlets outlined concerns that teachers had with the Assessment, and as such, conveyed expressive content protected under s. 2(b) (freedom of expression) of the *Charter*, and that the Board's decision to restrict its members from sending the pamphlet home with students was a violation of the teachers' freedom of expression rights.

The District responded indicating that it did not object to its teachers distributing the pamphlets directly to parents while on school grounds; it only restricted the use of its students to send the pamphlets home. The District was concerned about the potential for confusion if teachers were permitted to send a message home with students that was contrary to the Board's position and Ministry objectives. Further, the Board argued that teachers' freedom of expression rights did not contain a positive obligation on the District to assist by

providing a forum to convey their message.

Following a review of jurisprudence on freedom of expression and the general practice of sending home educational information with students, the arbitrator concluded that the teachers' concerns expressed in the pamphlet fell clearly within the forms of expression protected by section 2(b) of the *Charter*. Further, the arbitrator found that, while the Board had the right to control the information sent home to parents by students in its schools, it had been a long standing practice for teachers to communicate with parents on matters pertaining to education by delivering messages using students.

The absolute ban by the District was not a minimal impairment of the right, for example, the arbitrator identified a district in which the teachers' concerns were sent home with students along with a letter from the District's Superintendent of Schools.

The District was ordered to remove the restriction and to not interfere in this manner with its teachers' freedom of expression in the future.

The freedom of expression rights that have been recognized for teachers while performing their duties have been related to education matters. Arbitrators and Courts have consistently reviewed rights in light of the minimal impairment test applied in *Charter* cases to ensure that rights are restricted as minimally as possible. School boards thinking of restricting expression should ask whether or not there is another way to protect the interests of students that does not impact the right to expression.

SERTs to perform only direct monitoring, not indirect

A workload grievance was at issue in *Halton Catholic District School Board v. Statutory Members of the Ontario English Catholic Teachers' Assn. (Special Education Workload Grievance),* [2008] O.L.A.A. No. 230. The Union argued that the Board had violated the workload provisions of the 2004-2008 collective agreement by increasing the workload of Special Education Resource Teachers. In prior agreements, SERTs, and various other teachers were classified separately and each was provided with distinct workload provisions. The 2004-2008 collective agreement removed these distinctions. This change made it possible for Schools to assign SERTs to supervision and on-call duties. Under previous collective agreements, SERTs had, like all other teachers, taught 3 courses. However, rather than being provided with a preparation and plan/on-call period as classroom teachers were, most SERTs were given a stand-alone monitoring period for pupils on their case load.

In previous collective agreements, preparation and plan/on-call periods were used by teachers to prepare and plan lessons, as well as carry out other activities integral and supplementary to their teaching activities, this included supervision and monitoring duties, which were limited each week and semester.

Beginning in September 2005, the Board assigned SERTs preparation and plan/on-call periods rather than stand-alone monitoring periods. For some teachers, the change, which included supervision and on-call duties, led to an

increase in their workload because they continued to need to monitor the students in their caseload but had also been given on-call and supervision duties.

The Union argued monitoring duties should not have been characterized as preparation and planning duties, but rather as course equivalent duties.

The arbitrator examined the ways in which various types of work were categorized in the collective agreement and drew a distinction between direct and indirect monitoring. In the analysis of the collective agreement, the arbitrator concluded that three categories of work assignments were covered by the agreement: course (credit or credit equivalent); supervision/on-calls; and preparation and planning time. The arbitrator found that these categories were both exhaustive and mandatory in the assignment of teachers' work. In considering the nature and function of preparation and planning periods, a limited number of which may be used for on-calls and supervision duties, the arbitrator emphasized that the purpose of those periods was to provide teachers with time to do work related to the teaching of courses and fulfillment of other duties properly allocated on the teachers' timetables. Furthermore, the arbitrator indicated that, "*Preparation and planning time was not intended to be used for additional assignments that were not otherwise made under the terms of the agreement. Thus in order to cover monitoring duties in the preparation and planning category, monitoring would have to serve the purpose of facilitating the fulfillment of a SERT's other properly assigned duties, rather than be an additional duty*".

In order to classify monitoring duties, the arbitrator distinguished between direct and indirect monitoring by SERTs. The arbitrator found that direct monitoring was the monitoring of students who were enrolled in courses taught by SERTs or in courses where SERTs provided in-class support. The arbitrator concluded that this type of monitoring could be properly classified as preparation and planning and might include a course component.

The arbitrator found that indirect monitoring was the monitoring of students not enrolled in any course the SERT was teaching or to whom the SERT was providing in-class support. The arbitrator found that indirect monitoring could not be classified as a course or course equivalent, nor could it be categorized as preparation and planning time.

The arbitrator's findings led to the conclusion that activities that constituted indirect monitoring were not covered or contemplated by the collective agreement. As a result, the assignment of any indirect monitoring duties was improper under the agreement. The activities of SERTs that could be categorized as direct monitoring were properly allocated to the course and preparation and planning components of the workload.

This case illustrates that it may not be possible to properly assign certain duties if these duties are not explicitly contemplated in a collective agreement and/or cannot fit appropriately into workload categories that exist in the agreement. — **KC LLP** —

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