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Human Resources Newsletter

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Criminal Background Checks — The Current Dilemma

● by Jennifer Trépanier

Recently, many school boards have been experiencing difficulties recruiting employees in a timely manner due to recent complications in the criminal record check process. As a result, some boards have implemented a process which permits a prospective employee to commence work before receiving an original criminal record check.

The boards are generally using a form of employee declaration which confirms that the individual has not been convicted of an offence. The employee should also undertake to provide the board with the original record check as soon as possible. Further the offer of employment should be conditional on the receipt of a satisfactory criminal background check, and all employment ties will immediately end if this condition is not met.

Some boards have been experiencing challenges regarding the adjudication of positive background hits, notably having concerns of a lack of consistency in the decisions being made in this process.

In order to resolve this problem, some boards have modified their procedures to include factors which must be considered by the decision makers prior to making a decision regarding the status of a prospective employee (such factors may include consideration of employment history or likelihood of repetition of the offence). In our opinion, a school board is better to address these concerns by centralizing the decisions and by adequately training the decision makers regarding the process. If a board imposes the consideration of several factors on the process, it limits flexibility and exposes the decisions to challenge by a rejected candidate. In addition, some of the factors may not even be relevant to the determination to be made by the board in any event, which may lead to confusion, as well as making the decision more vulnerable to challenge.

It is also notable that certain police departments are requiring the training of board management personnel regarding the human rights implications regarding criminal background checks as a pre-condition to the signature of a protocol to permit vulnerable criminal background screening of prospective board employees. Boards should review their protocols with local police carefully to ensure that they are in compliance with their agreements with police.

The Ontario Education Services Corporation (OESC) continues to work to resolve the situation and resume service to boards as soon as possible. The OESC is the non-profit corporation jointly owned by Ontario school boards to assist with services such as providing efficient criminal background checks.

..... *French version*.....

Récemment, plusieurs conseils scolaires ont des difficultés à recruter de manière efficace à cause des complications dans le processus de vérification des antécédents criminels. Par conséquent, plusieurs conseils scolaires ont mis en place un processus qui permet à un candidat de commencer son travail avant d'avoir l'antécédent original.

Plusieurs conseils utilisent un formulaire de déclaration d'infraction qui indique que la personne n'a pas de condamnation criminelle. L'employé devrait également s'engager à fournir au conseil la déclaration originale sans délai.

De plus, l'offre d'emploi devrait être conditionnelle sur le reçu d'un antécédent criminel satisfaisant (et tout lien d'emploi va prendre fin immédiatement si cette condition n'est pas remplie).

Certains conseils semblent rencontrer des défis concernant l'adjudication des dossiers des antécédents, notamment des inquiétudes quant à la constance des décisions à cet égard.

Afin de régler ce problème, certains conseils ont rajouté dans leur processus des facteurs qui doivent être considérés avant de prendre une décision. (Ces facteurs pourraient inclure la considération de l'histoire d'emploi ou les chances de récidive).

Selon nous, un conseil pourrait probablement mieux traiter de ces inquiétudes en centralisant ces décisions et en offrant une formation adéquate à ceux qui prennent la décision.

Si un conseil impose la considération de plusieurs facteurs, il réduit sa flexibilité à ce niveau et sa décision devient plus vulnérable si c'est mis en doute par un candidat rejeté. De plus, certains des facteurs ne sont possiblement pas pertinents à la décision que le Conseil doit prendre, ce qui pourrait compliquer la situation, en plus de rendre la décision plus susceptible à un défi juridique.

Il est noté que certains bureaux de police insistent sur la formation des gestionnaires du conseil scolaire concernant les implications en droit de la personne par rapport à des vérifications criminelles. Il considère cette formation comme pré-condition à la signature d'un protocole pour permettre les vérifications criminelles pour le secteur vulnérable. Des conseils scolaires devraient revoir attentivement leurs protocoles avec la police afin d'assurer qu'ils sont en conformité avec leurs ententes ces protocoles.

La Corporation des services en éducation de l'Ontario (CSÉO) travaille encore afin de régler cette situation le plus vite que possible. La CSÉO est l'organisme sans but lucratif qui appartient aux conseils scolaires de l'Ontario dont la mission est de fournir des services efficaces tels que la provision des vérifications criminelles efficaces.

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Ontario Court of Appeal rules personal files on work computers private

In our Education Law Bulletin of March 2011, we reviewed *R. v. Cole*, [2011] ONCA 218. In *Cole*, the Ontario Court of Appeal considered the issue of whether a teacher has a reasonable expectation of privacy in the personal use of a work computer. The case is reviewed as an update.

FACTS

The appellant, Cole, a high school teacher with the Rainbow District School Board, was provided with a board-owned laptop by his school for use in teaching communication technology classes and in supervising a laptop program for students. As a member of the school's technology committee and a supervisor of the laptop program, he

retained domain administration rights, which meant that he could monitor and police the network; and he had the authority to remotely access the data stored on student computers connected to the school network. During the course of his duties, the appellant accessed a student's email account where nude photographs of another student were located and copied them onto the hard drive of his school-issued laptop.

One of the Board's computer technicians also had domain administration rights, as part of his responsibility for monitoring the school network. When a large amount of activity between the appellant's laptop and the school's server was identified during a routine system check, the technician remotely accessed the appellant's hard drive to perform a virus scan and verify the system's integrity. The technician accessed a hidden folder on the laptop's hard drive containing nude, sexually explicit images of a girl, who the technician believed was a student at the school.

The technician took a screen capture of the laptop to preserve the information identifying the appellant's name, the location of the pictures and some of the thumbnail pictures of the images. He confirmed that the girl in the photos was a student and reported it to the Principal.

The Principal's investigation included reviewing the appellant's hard drive and viewing the face of the student in the photographs. The Principal asked the technician to provide him with a copy of the screen shot and the photographs on a disc. The following day the Principal asked the appellant to hand over the computer and provide his password and contact information. The appellant did not provide his password, but advised the Principal that the technicians would not require the password to access the computer. One of the Board's technicians subsequently accessed and searched the appellant's laptop, and copied all temporary internet files, which were in the laptop's browsing history and contained large numbers of pornographic images, and placed them onto a disc.

The Principal and school board officials gave the laptop and the disc to the police, and advised the police officer that the laptop belonged to the school board. Although Board-owned, the Board's policy allowed teachers to have exclusive use and possession of laptops, with a private password, and allowed personal use and use at home during weekends and vacations. The Board's policy specified that there was to be no inappropriate content on the school computer, including sexually explicit material; that all data and messages generated on the Board's equipment were considered Board property; and that personal use was not to interfere with staff productivity or business activity. The Board's policy was silent with respect to the searches of computers as well as the issue of privacy, except as it related to email, wherein the Board's policy specified that the administrative team can open private email, if necessary, for system maintenance or in cases in which inappropriate use was suspected.

Further, staff members, in contrast to students of the Board, were not required to sign an Acceptable Use Agreement (AUA) that regulated the use of laptops as well as all material saved on laptop hard drives. Instead of the formal documentation, staff members were advised by the Principal at several staff meetings that the rules that applied to students also applied to staff.

The police officer was aware of the Board's policies on personal use of laptops and was aware that teachers stored personal information on their computers. The officer, however, did not believe that the data belonged to the appellant and proceeded to view the discs to determine whether the photographs constituted child pornography. Without first obtaining a search warrant, the laptop was sent for analysis, and the appellant was subsequently charged with possession of child pornography and unauthorized use of a computer contrary to ss. 163.1(4) and 342.1(1) of the *Criminal Code*.

LOWER COURT DECISIONS

On a pre-trial application, the teacher sought to exclude the evidence obtained from his laptop and the discs on the grounds that his s. 8 (right to be free from unreasonable search and seizure) *Charter* rights had been breached. The trial judge agreed and excluded the evidence, finding that the police had infringed the appellant's s. 8 *Charter* rights because he had a reasonable expectation of privacy with respect to the laptop's hard drive. The trial judge determined that the appellant had a reasonable expectation of privacy in the contents of his laptop hard drive, as supported by the Board's policy that employees could load personal information onto their computer and have exclusive use of their computer, including on weekends and during summer holidays. Comparing the appellant's password to a key for a rented locker, the trial judge found that the appellant had privacy in the content saved on the laptop's hard drive.

On appeal, the appeal judge overturned the lower court's decision, concluding that the appellant had no reasonable expectation of privacy in his laptop and sent the matter back for retrial. The teacher appealed the decision to the Ontario Court of Appeal.

DECISION

On appeal to the Court of Appeal, the appellant submitted that both the technician's and the police officer's searches were a breach of s. 8 of the *Charter* and that the evidence should be excluded under s. 24(2) of the *Charter*.

The Court of Appeal allowed the appeal, concluding that the appellant had a reasonable expectation of privacy from state intrusion in the personal use of his work computer and the contents of his personal files on its hard drive.

With respect to the actions of the Board, assuming that the *Charter* applied to school boards, the Court of Appeal found that the teacher's expectation of privacy was not breached by the computer technician, the Principal or the school board.

The Court of Appeal found that the technician was acting within the scope of his duties with respect to a concern about a computer virus when he located the student photographs and thus, did not violate the appellant's modified privacy interest. The Court of Appeal stated:

"*On these facts, I am satisfied that the technician was accessing the appellant's lap top for the limited purpose of maintaining the network. The technician found the images in the course of his legitimate access to the computer. Therefore, the appellant had no expectation of privacy with respect to this limited type of action. Since there was no reasonable expectation of privacy with respect to the technician's actions, s. 8 of the Charter was not engaged.*

Having opened the file and discovered the sexually explicit photographs of someone he believed was an underage student, the technician acted reasonably in taking a screen shot, confirming that the girl was a student and contacting the Principal.".

Similarly, the Court of Appeal held that the Principal and school board officials acted reasonably pursuant to their obligations under the *Education Act* to protect students and provide a safe learning environment. The Court of Appeal found that:

"The Principal acted quickly to investigate a teacher's possession of sexually explicit photographs of a grade 10 student in his school. Searching the laptop to confirm the identity of the girl in the pictures, seizing evidence by making a copy of the images onto a disc and seizing the laptop computer from the appellant were all implicitly authorized by law: see s.265 of the Education Act and M.R.M. There is no suggestion that the law is not reasonable or that the search and seizures by the Principal were not carried out reasonably (R. v. Collins. [1987] 1 S.C.R. 265, at p.278). Therefore, there was no violation of s.8 of the Charter by the Principal."

With respect to the school board's actions, the Court of Appeal also commented that:

"While there was no longer any immediate threat to the school, its students or the school's computer network, the school board had an on-going obligation to take steps to ensure a safe and secure learning environment for its students and to protect the students' privacy rights. The search of the laptop and preservation of the evidence for an internal discipline matter was an obvious means to do so."

The Court of Appeal agreed with the trial judge that the police search of the laptop and the police seizure of the disc containing temporary internet files from the appellant's browsing history violated the appellant's s. 8 *Charter* rights. However, since the teacher had no privacy interest in the photographs themselves, as opposed to the presence of those photographs on the laptop, the delivery of the disc was not considered a search.

The appeal was allowed and the decision of the lower court was set aside. The Court of Appeal ordered the evidence of the disc containing temporary internet files and the laptop computer be excluded, under s. 24 of the *Charter* and remitted the matter back to the lower court for a new trial.

COMMENTARY

The following facts of this case may be distinguished from other cases involving privacy in the workplace: teachers had exclusive use of their password-protected laptops; were permitted to use their laptops for personal reasons and could take them home on weekends and vacations. School boards should consider requiring teachers and administrators to acknowledge in writing their duty to comply with acceptable technology use guidelines. As well, if staff members are permitted to use their technology for incidental personal use, consideration should be given to advising them that the school board will, nevertheless, retain the right to search the technology to ensure compliance with the acceptable technology use guidelines, including searching personal files that might be stored on the hardware. Many boards have implemented such changes, including clear statements that users of board technology have no expectation of privacy with respect to such use.

Tribunal confirms obligation to provide accommodations as part of the hiring process

In *Mazzei v. Toronto District School Board* (Board), [2011] O.H.R.T. D. No. 376 the Human Rights Tribunal of Ontario (Tribunal) recently determined that the Board discriminated against an applicant because of his disability contrary to sections 5 and 9 of the *Human Rights Code*, arising out of his application for a part-time caretaker position with the Board in November 2005.

The applicant has a non-verbal learning disability and has been diagnosed as Attention Deficit Disorder – Inattentive. As a result of his disability, he can get flustered and frustrated when placed under time restrictions and requires assistance with tests, including a longer time to complete the test and assistance with interpretation, and the use of a calculator for math questions.

The applicant was invited by letter to attend a literacy and numeracy screening test which consisted of reading and math skills testing and required a passing mark of 70%. A specific date and time was provided for the pre-screening test and stipulated that this was "*the only date and time available for the pre-screening test*" and that "*no exceptions will be made*".

The applicant, concerned about having to write the screening test due to his learning disability, contacted the Board and advised that he was an applicant for the part-time caretaker position and that he had a learning disability that required accommodation. The applicant stated that he needed: more time to write the test; in a separate room; someone to break down the questions for him; and that he required the use of a calculator for the math questions. The Board's Administrative Services Coordinator, responsible for hiring of the part-time caretaker position advised that the Board did not accommodate "*at this stage of the process*".

The Tribunal found that, despite some inconsistencies in the evidence of the applicant and the Board on the specific statements made regarding accommodation, the message to the applicant was that his needs arising out of his learning disability would not be accommodated at the testing session.

Instead, the Administrative Services Coordinator proposed that the applicant attend the session and write the test and see how he did and, if he did not pass, then the Board could consider further steps to accommodate his needs. This was not acceptable to the applicant who wanted specific accommodations at the time of the test and believed he was being "set up to fail".

Four days prior to the official testing date, the applicant offered to provide medical documentation to support his disability and needs, and the Board agreed to accept and review this documentation with regard to next steps. Later the same day, however, the applicant decided to withdraw his application because he believed he was being set up to fail.

The Tribunal found that the applicant experienced prima facie discrimination because of his learning disability in relation to the application process and the Board failed to take appropriate steps to accommodate the applicant's needs.

The Tribunal noted the Board's own guidelines on accommodation for persons with disabilities recognized that the accommodation process is a joint process between a prospective employer and the person seeking accommodation, however, concluded that in the instance, the Board failed to meet that duty. Given the applicants needs, the Board should have, and did not, request more information about the nature of the applicant's learning disability and the needs for accommodation that arose as a result. The Tribunal found that the recommendation that the applicant attempt to write the test and see how he did was not an appropriate response, collectively constituting discrimination in respect of employment against the applicant due to his disability, in violation of sections 5(1) and 9 of the *Code*.

The Tribunal did, however, recognize that a second opportunity for accommodation arose when the applicant offered to provide medical documentation to support his request for accommodation, which the Board advised it would accept and review, but the applicant decided not to follow through and withdrew from the competition. Acknowledging the applicant's withdrawal from the competition was his responsibility, the applicant was not entitled to compensation for loss of his opportunity to compete for the position.

Compensation for injury to his dignity, feelings and self-respect in the amount of $7,500.00 was awarded as well as an order that the Board, through its Employment Equity Office and/or Human Rights Office, distribute a copy of the Board's guidelines of accommodation to all Managers in the respective department and an order to include information about the Board's willingness to provide accommodation for *Code*-related needs in letters to job applicants for positions in that department.

This case confirms the need to provide accommodations as part of the hiring process.

Arbitration confirms obligation to provide digital hearing aid

The refusal to reimburse an employee for the purchase of personal bodily assistive devices as part of an accommodation request was the subject of a recent policy grievance in *Thunder Bay Catholic District School Board (Board) v. Ontario English Catholic Teachers' Association (OECTA)*, [2011] O.L.A.A. No. 300.

Specifically, the grievance raised the question of whether the Board had an obligation to pay for or contribute to the costs of digital hearing aids and related expenses for a teacher with a severe hearing disability in an appropriate case to fulfill its duty to accommodate the employee under the collective agreement, *Human Rights Code* and/or other legislation; or whether its obligation was satisfied by making reasonable changes to the workplace and/or methods of performing the work short of undue hardship.

The grievor was a teacher with almost 20 years of employment with the Board and consistently positive performance appraisals throughout, who had a severe hearing disability. The Union argued that despite various accommodations made by the Board over the years to accommodate the grievor, including changes to the workplace

and the purchase of equipment for the hearing impaired, the grievor's hearing disability became progressively worse such she was unable to complete the essential duties of her job as a special education teacher without requiring a digital hearing aid in at least her functioning right ear.

The Board argued that it maintained an accommodation policy that did not consider personal bodily assistive devices, such as hearing aids, among the items it was required to provide or contribute to the costs of maintaining for an employee in fulfilling the Board's obligation to reasonably accommodate the employment of a teacher with a physical disability. The Board also argued that, in this instance, the procedures and physical changes to the workplace that were made for the grievor were sufficient to satisfy its duty to accommodate her in her employment. The Board did not, however, argue that it would be undue hardship to provide the reimbursement, if the Arbitrator found it to be an accommodation required by the *Code*.

Further, the Board submitted that, even if it was found to be an accommodation required by the *Code,* the use of the digital hearing aid by the grievor would occur both during her working day as well as in her day-to-day life, and that the grievor would receive a substantial personal benefit for which the Board should not be held solely financially responsible.

The Arbitrator disagreed, in part, allowing the grievance and returning the policy to the Board to be modified to eliminate the current restriction on the scope of accommodation measures which it could consider, to include the provision of personal bodily assistive devices appropriate in the circumstances of each case. In this instance, the evidence confirmed that the use of a digital hearing aid in at least her functioning right ear was the only viable option enabling the grievor to fulfill the fundamental requirements of her job, and in the absence of a claim by the Board of undue hardship to that form of accommodation, the Board was in breach of the *Code* for failing to provide appropriate accommodation.

Arbitrator Luborsky also highlighted, however, that "*it will only be in those situations where changes to the methods of performing the work and/or to the physical work environment are reasonably insufficient for the teacher to fulfill the essential duties or responsibilities imposed by a workplace standard, and where personal bodily assistive devices are an available accommodative option, that the obligation to consider that option might even arise, without limiting the abilities of the parties in their cooperative search for accommodation to go beyond what may be minimally necessary*."

With respect to the costs for such accommodations, the Arbitrator agreed that the grievor would receive substantial personal benefit from the personal bodily assistive device and that the full costs of the digital hearing aid need not be borne by the Board alone. The question of quantum of damages and the allocation of financial responsibility as between the grievor and the Board relating to the costs of the hearing aid were remitted back to the parties for resolution.

Arbitration decision sheds light on interpretation of the TPA process

In *The Toronto District School Board v. Ontario Secondary School Teachers' Federation – District 12, (Gusita Grievance)*, 2011 CanLII 50235 (ON LA), an arbitration board upheld the termination of a teacher following three unsatisfactory teacher performance appraisals (TPA). The Union challenged the decision on numerous grounds, including allegations that: the Principal was not a competent evaluator; prior positive evaluations called into question the conclusion that the teacher's performance was now unsatisfactory; there was inappropriate use of parental and student input relied upon in the evaluations; and, on the grounds of arbitrariness and bias.

The arbitration board first considered the issue of whether the school board was required to demonstrate just cause to uphold this termination (typically the TPA framework is considered to be a non-disciplinary process and therefore there is no requirement to demonstrate just cause). However, in this case, the applicable collective agreement provided that no employee could be dismissed without just cause, including a discharge for incompetence.

The arbitration board found that the collective agreement required just cause for a termination in the TPA context. That being said, the arbitration board held that, given that the TPA process was so highly regulated by the law and the board's additional procedural requirements, the standard of review needed to reflect respect for this highly controlled scheme. Therefore, the arbitration board concluded that it would not substitute its own evaluation of the teacher's performance for that of the evaluators, nor would the arbitration board consider that any act beyond the prescribed process should have been taken to ensure due process and fairness.

In effect, to determine whether there was just cause, the arbitration board would review: (1) whether the essential elements of the TPA process were followed; (2) whether the essential elements of fairness built into the TPA process were applied; (3) whether the evaluators carried out the appraisals without discrimination, arbitrariness or bad faith; and, (4) whether the three evaluations were reasonable and based on supporting facts.

Regarding potential irregularities in the TPA process, the arbitration board held that errors of a relatively minor nature which do not undermine the integrity of the evaluation process or raise significant doubt about the validity and reliability of the Overall Performance Ratings, would not function to negate a finding that there had been due compliance with the TPA process.

The arbitration board further rejected the Union's arguments regarding the alleged flaws in the TPA process, and concluded that the board acted properly (procedurally and substantially) in giving the teacher three unsatisfactory performance ratings. Any flaws were minor in significance and did not adversely impact the reliability, veracity or integrity of the process or the assessments and conclusions. Further, the three unsatisfactory ratings were reasonable and based on supporting facts.

In respect of the argument regarding the existence of prior satisfactory evaluations, the arbitration board made reference to other past teaching evaluations which offered mixed reviews of the teacher's performance, and served to undermine the Union's argument in this regard.

Regarding the allegations of inappropriate parent/student input, the arbitration board held that the informal method used to address parental feedback (and addressed with the teacher), was consistent with the legislated TPA provisions and the TDSB process. The teacher was further provided an opportunity to respond to the complaints relied upon by the evaluator in the TPA process.

The arbitration board concluded that where there were differences between the evidence of the teacher and the board representatives, the arbitration board generally preferred the evidence of the board representatives.

The arbitration board further found that the evaluations were done in good faith and without discrimination, arbitrariness, bias, collusion, undue influence, manipulation, unfairness or ill will. Consequently, the Superintendent and Principal were required to recommend the termination to the board, and the board had just cause to terminate the teacher.

This case confirms the complexity of the TPA process, but also that where a board follows the process and confirms substantive competency issues, the termination will likely be upheld.

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Arbitrator confirms Union's right to represent board staff during informal investigation

In *Toronto District School Board v. Canadian Union of Public Employees, Local 4400 (Representation Grievance)*, [2011] O.L.A.A. No. 64, the arbitrator held that the Union had a right to represent employees during an informal investigation process as such a process can reasonably be anticipated to result in disciplinary action. The Union was also successful in preventing the employer, the Toronto District School Board, from using a waiver form in the process through which employees were asked to waive their right to Union representation.

The facts that led to this grievance involved a particular instance where the Union was not present in the information resolution procedure because the employee elected not to have a Union representative by signing a waiver presented to him by management. The Union discovered that the employer's information process had taken place without its knowledge or involvement and that the employee had signed a waiver form. The Board claimed that this was normal practice and that the employee was advised that at any time if the employee wanted Union representation, the meeting would stop and Union representation would be arranged before the meeting reconvened.

The Union claimed that it was entitled to be notified of any interviews with employees and to have a representative sit in on the interview, irrespective of whether the employee wanted a Union representative. It also challenged the validity of the waiver

form that the Board offered the employees to sign during the informal process. In the alternative, the Union argued that the Board was estopped from ceasing the consistent practice of always including a Union representative in the informal process.

In particular, the Union and the Board disagreed over the application of two provisions in the collective agreement. The Union argued that Article K.2 applied to the information process which stated that any employee "*interviewed concerning any matter that might reasonably be anticipated to result in disciplinary action to the Employee shall have the right to 2 representatives designated by the Union present. Where feasible, 48 hours notice is to be given and union representatives must be present*".

The Board on the other hand argued that only Article H.6 applied to the informal process which stated that "*employees <u>may</u> be represented by… a Union representative… on matters relating to Return to Work and Accommodation … and matters relating to Harassment. The Union shall notify the Employer, in writing, of the names of the … appointed representatives … The Employer shall not be required to receive any such representative until it has been notified by the Union of the appointment*".

The Board had a Workplace Harassment Policy which provided procedures for resolving workplace harassment complaints: informal resolution and formal complaint resolution. The Board argued that there was a distinction between formal and informal harassment investigations in that in an informal meeting there is no reasonable anticipation of discipline for the employee. It argued that while the employee should be offered Union representation, there is no need for the Union to be independently notified on the informal meeting and that the Union cannot have a representative present, unless the employee requests it. In addition, the Board argued that an employee should be allowed the discretion to not have a representative present as he or she may be embarrassed by what has occurred and may want to keep the circumstances of the informal investigation to themselves.

However the Union contended that there is always the risk of discipline for the employee in a harassment complaint, even if the informal process is used. Therefore, it was possible for an employee, particularly in the context of a harassment complaint, to "reasonably" anticipate that the matter will "result in disciplinary action" as contemplated in Article K.2.

In addition, the Union was concerned that the employees were too readily invited to sign the waiver. An employee, facing possible disciplinary action if the informal process failed, was at risk of making concessions in the process that might be unwise or excessive in order to avoid possible disciplinary consequences. The Union argued that a Union representative should be present to prevent this and to protect the employee's interests. In addition, the Union argued that it had its own interests that required it to be involved in the informal process. It needed to know what resolutions were being achieved in case an employee inadvertently waived a benefit under the collective agreement or undertook an obligation that is not permissible under the collective agreement. This would affect the Union's responsibilities in the event of redeployment and the Union

needed to know the nature of the resolution reached in the informal process to apply its rights comprehensively under the collective agreement.

The Union's alternative argument in this policy grievance was that the Board is estopped from relying on the strict language of the collective agreement because, by conduct, the employee had represented to the Union that it would always have Union representation at the informal meetings on harassment complaints and that the Union had relied on that representation to its detriment in that it had the lost the opportunity to bargain a change to the collective agreement, which, had the Union known of the change of practice, it could have exercised.

In making a decision, the arbitrator had to consider whether Article K.2 applied to the Board's informal process, despite the express provisions in the Board's Work Harassment policy that "*information obtained during an informal resolution will not be introduced as evidence in any subsequent formal proceeding*". The arbitrator also had to consider whether the provision in Article K.2: "*called before the management to be interviewed concerning any matter that might reasonably be anticipated to result in disciplinary action to the Employee*" applied to the informal process under the Board's Workplace Harassment policy.

The arbitrator considered the fact that the Board's Workplace Harassment policy encouraged Union representatives to be involved and that the policy did not in any way detract from the right of the Union to have representatives involved. On the contrary, the policy was clear that the informal process required the presence of union representatives who are considered to be an intrinsic part of the process of informal resolution.

Consequently, it was held that an employee in the bargaining unit must have a Union representative present in the informal harassment process to ensure that the employee understands the full implications of any agreement concluded, particularly the risk of future discipline if the employee does not cease the offending conduct. Therefore, the provisions of both Articles H.6 and K.2 were held to apply as they both addressed different considerations. The grievance was upheld and the Board was found to be precluded from making use of the waiver form during the informal process under its Workplace Harassment policy.

Boards should be careful not to overstep the boundaries with respect to Union representation. In particular, encouraging employees to waive rights under the impression that doing so will assist them in obtaining a more favourable result is likely to be looked down upon by arbitrators.

Board's unjust transfer of teacher held to be an improper exercise of management rights

In *Greater Essex County District School Board v. Elementary Teachers' Federation of Ontario (Strom Grievance),* [2011] O.L.A.A. No. 259, the issue was whether a Principal had unjustly disciplined a teacher by initiating an administrative transfer of the teacher to another school without just cause for discipline.

The grievor in this case, began working at Begley Public School in the 2003-2004 school year. He had requested the transfer because he knew the Principal at the school, from working with her at another school and had had no difficulties working with her in the past. Unfortunately, a two-year long series of events beginning in the 2004-2005 school year gave rise to the eventual administrative transfer of the grievor initiated by the Principal. This case was particularly complicated as the arbitrator had to consider several conflicting testimonies in order to determine, based on credibility, which evidence to accept. The events that eventually led to the transfer are summarized below.

During the 2004-2005 school year, a high needs student referred to as "A" was enrolled in the grievor's class. "A" was a difficult student and the Principal alleged that one of the reasons for the administrative transfer was that the grievor had a harsh manner towards "A" and frequently yelled at him and removed him to a desk in a hallway on almost a daily basis. Upon examining other testimonies, the arbitrator found that the grievor did not in fact yell at "A", even if he may have been frustrated with him at times. The Principal's evidence on this point was rejected as being self-serving and an attempt to justify her decision to transfer the grievor.

On November 22, the Principal conducted an observation visit to the grievor's class in connection with the established evaluation process mandated by the Ministry. The result of that observation was that the grievor received a satisfactory rating. The Principal claimed that although she had not expressly stated so in the evaluation, she told the grievor verbally that some of her expectations were not met. She further testified that she had made several visits to the class and she observed that during the visits the grievor did not offer differentiation of instruction to meet different students' learning needs. However, the Principal did not make any notes about these observations on any of the occasions.

A relevant event that is discussed in much detail in the case is the cookie exchange that took place in December 2004. The cookie exchange was an opportunity for teachers to participate in baking cookies for each other. The Union alleged that one of the teachers had disclosed the grievor's sexual orientation at this event which was then overheard by the Principal. This was a relevant incident because one of the Union's allegations was that the Principal, an observant Muslim, had changed her attitude towards the grievor as a reaction to learning the grievor's sexual orientation. The Union alleged that it was at the cookie exchange that the Principal first learned of the grievor's sexual orientation and as a result changed her attitude towards him. However, the Principal denied knowledge of the sexual orientation prior to the filing of the grievance and the arbitrator found that he could not conclude on a balance of probabilities that the union had satisfied its evidentiary onus to prove that the Principal had in fact heard the remark at this particular event. The grievor testified that his relationship with the Principal, which he characterized as positive up to that point began to change soon after this event. The grievor felt that the Principal was no longer comfortable talking with him and he could not account for the difference.

The next incident was related to the chess tournament. The grievor coached the chess

club and in February had to miss a day at school in order to be present at the tournament. Upon discussing this with the Principal, he was advised to contact other teachers to take his students for the day. The grievor did just that and also sent work for the students to do that day. On the day of the tournament, the grievor took the children to the various classrooms before he departed. The next day the Principal called him to the office and advised that the teachers had complained to her that he had not provided sufficient work for the students, but when the grievor followed up the complaint with the teachers they all denied that they had complained to the Principal. In her testimony, the Principal also claimed that a student had come to the office indicating that there was no teacher in class and that she had to personally take all the students in the grievor's class to other classes. The arbitrator did not accept the Principal's testimony as credible, as it was inconsistent with that of the other teachers and also not reasonably probable given the circumstances.

There was also a bussing incident in February of 2005. During the construction of the new facility for the school, students were bussed to an alternate school every morning. One day the grievor heard the Principal yelling at his students telling them it was too early for them to have been released. In her view, the grievor had improperly released all of his class into the hall. Another teacher's class was also in the hall however that teacher was not confronted. This incident was also cited as one of the factors for the grievor's transfer by the Principal. Regardless, on March, 2005 when the Vice Principal conducted a class room observation for the grievor, the result was once again satisfactory.

In the following school year of 2005-2006, the Principal and the grievor reached another point of conflict at the monthly division meetings. The Principal asserted that the grievor and another teacher were a disruptive influence at the meetings and were disrespectful to her. Furthermore, at the EQAO meetings both the grievor and the other teacher expressed opposition to what the Principal asserted was a school board-wise strategy to raise EQAO scores. Both the grievor and the other teacher claimed that the opposition was not personal, rather they were opposing the strategy that they were being asked to carry out in their classes. The grievor testified that he was called into the Principal's office a month after this meeting where she accused him of being disrespectful during the meeting and told him that if it ever happened again he would be "*written up*".

The final incident, the administrative transfer meeting, took place on February 28, 2006. At the meeting, the grievor brought the other teacher as his union steward. Both the Principal and the Vice-Principal were also present. The Principal began the meeting by informing the grievor that she was requesting an administrative transfer for him. The arbitrator accepted both the grievor's and the other teacher's testimony that the only response by the Principal in return for reasons for the transfer was that the grievor "needed a change" and "needed to grow professionally".

In her testimony, the Principal stated that this was the first time she had initiated an administrative transfer. She alleged that the grievor would not take direction from a woman of colour and that this was a factor in her decision to administratively transfer him. In addition to the incidents already

described above she also claimed that the grievor's attendance was a factor. However, upon examining the evidence the arbitrator concluded that the grievor's absences were due to migraines and this was corroborated by reliable documentation.

In making its submissions the Union argued that the Principal had abused the right to administratively transfer a teacher, and that management rights had been exercised improperly and in an arbitrary manner. Furthermore, the Principal had taken into account inappropriate considerations, including the grievor's sexual orientation, in reaching her decision and as such the transfer was without just cause. The Union alleged that the grievor was entitled to have his name cleared and urged the arbitrator to send an unambiguous signal that the Principal's behaviour would not be tolerated.

In response, the Board argued that the Union's analysis was based on inductive reasoning and that the driving allegation was discrimination on the basis of sexual orientation. However, since there was no proof of that assertion, there was no grievance. The Board instead argued that the basis for the administrative transfer was the lack of chemistry between the grievor and the Principal and that the Principal's decision was a proper use of the authority. There was nothing in the collective agreement which required management to act fairly or reasonably and the arbitrator could not imply such a term.

Before making the decision, the arbitrator found that the appropriate standard of proof was a balance of probabilities. With respect to onus, the Board was found to bear the onus of establishing just cause for discipline and for the penalty imposed. However, since the Union was also alleging that the transfer was arbitrary, discriminatory, an improper exercise of management rights and based on the grievor's sexual orientation, the Union would bear the ultimate burden of proof although the evidence may require the Board to justify the decision to administratively transfer the grievor through credible evidence.

The first issue that the arbitrator had to determine was whether the administrative transfer was based on the grievor's sexual orientation. The abitrator found that in the face of dramatically conflicting testimony, it was not clear whether or not the Principal had in fact discriminated against the grievor on the basis of sexual orientation. There was conflicting evidence as to whether or not the Principal had learned of the grievor's sexual orientation from the cookie exchange event. The arbitrator concluded that ultimately, only the Principal can truly know her rationale for recommending the administrative transfer and thus there was not enough evidence to conclude that the administrative transfer was based on the grievor's sexual orientation.

The second issue that the arbitrator considered was whether the administrative transfer constituted unjust discipline. Upon considering the totality of the evidence on the merits in determining the proper characterization of the grievor's transfer, the arbitrator held that the appropriate standard of proof was that if the transfer was found to be disciplinary, then the Board had the onus of establishing just cause for discipline and for the penalty imposed. The arbitrator found that the motivation of the Board was critical in discerning the true

nature of the decision at issue as disciplinary or merely administrative.

The Principal had listed the grievor's negative attitude, his interaction with others, the grievor's failure to adopt the Principal's recommendations, the bussing incident, the chess tournament, the grievor's conduct at the divisional meetings, his response to the EQAO initiative, concerns with the grievor's interaction with other special needs students, teaching style, and attendance as factors for recommending the transfer. Upon an analysis of each of the reasons provided, the arbitrator found that the Principal intended to punish the grievor for what she regarded as insubordination and other misconduct. Therefore the decision to transfer was in fact a decision to impose discipline.

In considering whether the Board had proven just cause, the arbitrator found that the Principal's failure to act in a timely fashion was inconsistent with the concept of just cause for discipline. An employer could not ignore culpable conduct only to subsequently rely on that conduct in seeking to uphold discipline imposed much later. In addition, the arbitrator found that the legislative scheme did not contemplate a disciplinary response to deficiencies in teaching performance. Also relevant to the just cause issue was the way in which the Principal's decision was communicated to the grievor. The Principal's refusal to give reasons, contemporaneously for such a serious decision, either verbally or in writing, called into question the bona fides of reasons given much later. Thus, the arbitrator found that the administrative transfer was determined to be disciplinary in nature and that there was no just cause for that discipline so that the administrative transfer could not stand.

The last issue considered by the arbitrator was whether the administrative transfer was arbitrary, discriminatory and an improper exercise of management rights. In examining the wording of the management rights clause, the arbitrator found that the Board was to manage schools in accordance with laws of Ontario and that any transfer would be subject to the provisions of the Agreement expressly governing the exercise of those rights and subject to the right of any teacher to lodge a grievance. The arbitrator then held that it was contrary to the law of Ontario for a school board to exercise its management rights in a manner that undermined the statutory and regulatory scheme for performance appraisals. Despite having received two satisfactory performance appraisals, the grievor had been subject to an administrative transfer. The arbitrator found that the reasons cited by the Principal for the transfer were arbitrary and that there was no rational basis for grounding her decision on the grievor's teaching performance.

In granting a remedy, the arbitrator stated that a declaration was a usual remedy in such circumstances. Reinstatement to the grievor's original position was not an option as the grievor had already stated that he no longer wanted to return to the school. Thus, a remedy in the form of a posting was considered to be appropriate as it would be responsive to the harm suffered by the grievor due to the wrongful administrative transfer. The posting would demonstrate, in the precise location where the wrong arose, that the grievor was blameless and that he was subject to unjust discipline and arbitrary

conduct by the Principal in an improper exercise of management rights. The Board was thus directed to post copies of the posting on notice boards and the Union and Board were directed to promptly forward an electronic copy of this award to any individual teachers and staff at Begley who requested a copy.

This case is significant for employers and suggests caution in the exercise of management rights. Decisions may not be upheld in the face of conflicting evidence. In considering whether discipline is warranted, arbitrators will consider the totality of credible evidence.

This case also indicates the possible complexity of what might otherwise seem to be an administrative matter.

Alberta Court of Appeal overturns decision to award full-time contract to part-time teacher

In *Bruse v. Calgary School District No. 19*, [2011] A.J. No. 679, the Alberta Court of Appeal overturned the decision of the Board of Reference ("the BoR") to award a part-time teacher, Clara Bruse, with a one-year probationary contract on a full-time basis even though she was originally only a part-time teacher.

Bruse had originally been hired by the Calgary Board of Education ("CBE") in 2005 on a part-time probationary contract for the 2005-2006 school year. By agreement with the school's Principal, Bruse's teaching days were Tuesdays and Thursdays. In order to meet her expenses, Bruse took up other teaching positions for the balance of the week, the result of which was that she was employed five days a week by three different employers.

Eventually there was a conflict between the Principal and Bruse because the Principal insisted that Bruse should attend some professional development days and all parent teacher conferences regardless of whether the activities were scheduled on Bruse's teaching days. Bruse on the other hand maintained that she was unavailable to attend on her non-teaching days unless special arrangements were made in advance. The Principal tried to compel Bruse to attend by engaging area administrators. On two occasions, the chief Superintendent of the CBE suspended her for one day, with pay, for failing to comply with an order of the CBE to attend activities on her non-teaching days. The Principal also noted Bruse's non-compliance in two performance evaluations and on the basis of this non-compliance advised that she would not be recommending Bruse for another contract with the CBE.

The BoR found that it was communication problems that led to this conflict. The Principal had failed to ask all the questions she should have and to clearly describe her expectations to Bruse during her interview. Likewise, Bruse should have been more frank about her other employment. However, in applying the modern method of interpretation, the BoR found that the substance of Bruse's contract was that she should work on Tuesdays and Thursdays and thus there was no requirement per se that she perform her duties outside of her contract commitment.

Therefore the BoR held that the Principal's orders were not lawful orders justifying

suspension as the Principal had no authority to direct Bruse to attend events and activities at the school on days that she was not assigned to teach there. In crafting a remedy, the BoR considered its authority under s. 138 of the *School Act* to arrive at a resolution to best solve the difficulties between the parties. It found that, on the evidence before it, Bruse could become a valued teacher with CBE and she would be an appropriate candidate for reinstatement. The BoR then directed CBE to offer Bruse a one-year probationary contract on a full-time basis as a music specialist.

In reviewing the BoR's decision, the Court of Appeal had to consider whether there was sufficient justification, transparency, and intelligibility to the BoR's selection of remedy in this case. The Court found that although s. 138 of the *School Act* afforded the BoR broad remedial powers, including the authority to make any order it considers just in the circumstances, the powers did not "*grant the Board carte blanche*". But as long as the BoR followed the processes in Part 5 of the *School Act*, it could order reinstatement. Thus, the type of remedy selected by the BoR was found to be rational, in that it sought to impose an effective remedy to allow for re-evaluation in circumstances where the wrongful suspensions may have clouded Bruse's opportunity for re-employment. However, the Court also found that there was no rational basis for ordering a full-time probationary contract for one year, when all that Bruse originally had was a part-time probationary contract for one year.

Therefore the Court allowed the appeal to a limited extent and varied the relief granted by the BoR so that it would provide Bruse with a one-year probationary contract on the same terms as the previous probationary contract. Specifically, the probationary contract was to offer the respondent a job to teach music classes on a part-time basis, two days per week.

The Court's intervention with the BoR's decision is an indication that remedies granted in such situations should attempt to reinstate the party that has suffered harm or loss to their original position as opposed to placing them in a higher position than they would have been if the harm had not taken place. The case also reflects how matters can become complex and subject to several challenges up to and including Court.

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Arbitrator finds board failed to take reasonable precautions to ensure staff health during construction performed on school premises

In *Greater Essex County District School Board v. Elementary Teachers' Federation of Ontario (Collective Agreement Grievance)*, [2010] O.L.A.A. No. 597, the arbitrator issued a declaration that the Board did not take every reasonable precaution when it failed to ensure that the grievors were kept "healthy at work".

This group grievance arose as a result of complaints from seven teachers and other affected members working at Glenwood Public School. In early October of 2006, a contractor engaged by the Board commenced work on certain washrooms and dressing rooms, which can loosely be described as gutting and refitting those

washrooms and dressing rooms which were adjacent to the school gym. The area where the work was being done was either adjacent to or in close proximity to several classrooms which were being used for instructional purposes by at least some of the grievors. The work involved at least some periods when masonry saws were being used in a school hallway and there was a great deal of dust generated by the work along with fumes and noise.

One of the grievors, engaged in a work refusal because of the deleterious effects that she considered the construction was having on her health. Following the work refusal, the parties engaged in the appropriate steps as mandated by their collective agreement and legislation: the Ministry of Labour was notified, an order was issued, steps were taken to comply with the order and no charges or other action was taken against the Board.

After November 8th barriers were erected to seal off the area where work was being performed, hepa filters were installed and the work was performed on weekends when the school was not occupied. Eventually the work ended on or about December 8, 2006.

Prior to determining the merits of the grievance, the arbitrator had to consider whether or not the grievance could move forward on the basis of a non-suit motion where the parties and the adjudicator would act on the assumption that all of the evidence put forward by the party bearing the onus (in this case the Board) was true and then decide whether there was any evidence upon which the case could said to be proven. Upon considering the Board's arguments, the arbitrator decided that the submissions that were made by the Board were not appropriate for a non-suit motion and decided that the matter was to be determined on its merits. The Union was provided with a right of reply to the Board's arguments.

At issue was also whether Article 20.01 of the collective agreement precluded the arbitrator from determining the matter. The Article stated that "*[a]ll disputes shall be resolved pursuant to the Occupational Health and Safety Act [OHSA] where applicable*". Section 25 (2)(h) of the *OHSA* provides that every employer "*shall take every precaution reasonable in the circumstances for the protection of a worker*" and the *OHSA* also provides mechanisms for determining whether it has been complied with. Upon examining past case law, the arbitrator held that the Arbitration Board did in fact have jurisdiction under the collective agreement to hear and determine a difference between the parties regarding an alleged violation of an obligation under the *OHSA*, that Article 20.01 could not be read as making provisions of the collective agreement non-arbitrable, and that the substantive provisions of *OHSA* were to be considered to be implicit in the collective agreement.

Turning to the issue of whether or not there was a breach of the collective agreement, the arbitrator considered the teacher's evidence which was the most comprehensive with regards to the conditions during construction and the effect it had on her and her classroom. In particular, she ended up suffering from a variety of allergies, and her reaction to the dust generated by the construction was severe enough to cause her to miss work on occasion and to react adversely while at work. The report from the Ministry of Labour's investigation supported the

reasonable conclusion that the situation could have been prevented or ameliorated if some reasonable steps had been taken when the work started. In particular, the arbitrator found that the dust was by all accounts unusual and pervasive. The arbitrator also found that given the potential for adverse health effects on employees and given the relatively simply ways in which the matter was remedied, the failure of the Board to ensure that the contractor performed the work in a manner which would minimize, if not prevent, those effects was a failure to take every precaution reasonable in the circumstances for the protection of a worker. The Board was held responsible for the actions of the contractor working at its premises and under its direction and therefore it was held to have breached the collective agreement.

Lastly, the arbitrator had to determine what remedies were available for the breach. The arbitrator rejected the Union's assertion that an award should be made that would require that sick banks of the teachers be reimbursed for the time they were off work by reason of illness due to the effects of the construction even though there was no *Workplace Safety and Insurance Act* (*WSIA*) claim made for the absence or where a claim was made but not allowed under the *WSIA*. The arbitrator held that to award such a remedy which would reimburse an employee's sick bank for the reasons sought by the Union would be awarding a remedy for the consequences of a compensable illness. Instead, the arbitrator held that all the illnesses suffered by the grievors were the sort of illnesses that would be compensable under the *WSIA*, if proven, and should be dealt with under the *WSIA* by the appropriate bodies designated by that statute. The arbitrator proceeded to issue a declaration that the employer in this case breached its obligation to provide a safe and healthful environment for its employees and to take every precaution reasonable in the circumstances for the protection.

Although not specifically mentioned in the arbitrator's decision, it is probable that the students in the classrooms were also affected by the dust and fumes generated from the construction. In failing to take reasonable precautions to protect both the teachers and the students from the effects of the construction work, the Board was possibly exposed to many claims not just from teachers, but students, parents and even community members. School Boards should be cognizant of the potential for serious illnesses and injuries that may result from situations where construction work is being performed on school premises. For example, the Board in this case could have ensured that the contractor took steps to seal the construction area and/or relocated the teachers and students that were being affected by the construction, to other classrooms or even temporary portables for the duration of the construction.

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Arbitration does not support age discrimination

In *Newfoundland and Labrador Teachers' Association v. Easter School District (White Grievance)*, [2011] N.L.L.A.A. No. 5, the grievor alleged that he had not been selected for administrative roles in the 2009-2010 school year because he was discriminated against on the basis of age and proximity to retirement. The Easter School District (the "School District") submitted that it selected candidates who were best suited to the position.

The grievor had extensive experience as a teacher with the School District, as well as with the local university. He had received a Master of Education Degree in teaching and Learning as well as a Doctorate of Education. He had been Assistant Principal at Queen Elizabeth Regional High School in the 2008-2009 school year, in a one year contract position, and his evaluations were good. The Principal testified that he had done a good job and supported his application for the position for the following year.

Evidence presented to the arbitration board was that the candidate selected was the best candidate for the job due to his strength in instructional leadership, which was a need identified with respect to the school.

The basis for the grievor's claim of age discrimination was a discussion he had with the Assistant Director of Education after he learned he had not been selected for the position, as he was very upset. The Assistant Director indicated that the School District was concerned about succession planning for the various schools, and there was some concern that the Principal was seeking a transfer and that the grievor might retire. He also noted that the grievor should have stressed more of his instructional leadership strengths in the interview. The Assistant Director provided testimony about this conversation as well, indicating that he did not know whether the grievor was eligible to retire and did not believe he had discussed succession planning as a reason for the selection. He did indicate that the grievor's achievement in instructional leadership in the previous year had been lacking.

The grievor subsequently applied for four other administrative positions unsuccessfully. The Assistant Director indicated that age or proximity to retirement had not factored into the Board's decision with respect to selecting candidates. He also indicated that eight school administrators hired that year were the same age or older than the grievor. Other witnesses for the School District testified to the same effect.

In reviewing a decision of a selection committee for a position with the School District, the arbitration panel must determine whether there was "*evidence of arbitrariness, discrimination, bias and/or bad faith, or an indication that the employer's judgement was unreasonable in some basic and significant respect*" (citing Brown and Beatty). The arbitration board found that the process followed by the selection committee was done in good faith and was neither unreasonable nor arbitrary. It was not for the arbitration board to substitute its opinion with respect to suitability, competence or qualifications of a candidate for that of the selection committee, so long as the decision was made in good faith and was not unreasonable or arbitrary. In addition, the selection committee had not considered irrelevant factors or failed to consider relevant factors in reaching its decision. As a result, the selection process dictated by the collective agreement was followed.

With respect to whether the School District discriminated against the grievor on the basis of age and proximity to retirement, the arbitration board applied the following criteria: "*a) The Complainant was qualified for the particular employment; b) The Complainant was not hired; and c) Someone no better qualified but lacking the distinguishing feature which is the gravaman of the human rights complaint subsequently obtained the position*". The arbitration board found that the first two criteria were met. With respect to the third criteria, the arbitration board found that there was not a considerable difference in age or proximity to retirement between the grievor and any of the candidates who were hired. As a result, a

prima facie case of discrimination was not found. Regardless of this finding, the arbitration board went on to consider whether there had been discrimination on any ground listed in the collective agreement in the School District's decision not to hire the grievor for any of the positions to which he applied, and found there was no discrimination in the selection process.

The arbitration board also found that reference by the Assistant Director to succession planning and the stability of the school did not indicate that the age or proximity to retirement of the grievor were factors considered in the selection of the successful candidates for the positions. Succession planning referred to training teachers in order to recruit them for administrative roles and to ensure that all members of the administration team could operate the school.

In denying the grievance, the arbitration board found the Collective Agreement had not been violated and the grievor had not been discriminated against.

Court requires OCT to provide reasons for interim order

An interim order of the Executive Committee of the Ontario College of Teachers (the College) to suspend a teacher's teaching Certificate (Certificate) pending the resolution of a complaint by the College's Discipline Committee was the subject of a recent application for judicial review in *Aris v. Ontario College of Teachers*, [2011] O.J. No. 1400, 2011 ONSC 1202 (Div. Ct.).

The applicant, a grade one/two teacher with the Thames Valley District School Board (the Board), was arrested and charged in September 2009 with one count of possession of child pornography contrary to s. 163.1(4) of the *Criminal Code*. His bail conditions prohibited him from attending at any school or holding a position of trust for a child under the age of 14, thus significantly restricting his ability to work as a teacher. Further, his employment contract prohibited him from taking a teaching position with any employer other than the Board.

The Board immediately removed the applicant from classroom work, placing him on paid home assignment as required by the *Education Act*; notified the College of the outstanding charge and advised that it had suspended the applicant with pay and assigned him to home duties.

The College Registrar formally lodged a complaint against the applicant on February 24, 2010, alleging that the applicant had acted in an inappropriate and unprofessional manner and failed to maintain the standards of the profession when he was found to be in possession of child pornography, and that in so doing he contravened the laws which raised the issue of the member's suitability to hold a Certificate.

On May 4, 2010, the applicant was committed to stand trial for the criminal charges and a trial date was set for February 2011.

When the College was informed of the applicant's arrest, it assigned an investigator who eventually received information from the London Police Service on the nature of the charges and evidence, including that the police had identified three videos and over 100 photographs in the teacher's possession that were believed to constitute child pornography.

In August 2010, the College investigator informed the applicant's counsel that the complaint would be proceeding to the Executive Committee for a determination of whether it ought to be referred to the Discipline Committee and whether an interim suspension of the Applicant's teaching certificate would be

appropriate. The applicant was provided with an opportunity to provide written submissions.

In September 2010, the applicant was informed that the Executive Committee issued an order referring the complaint to the Discipline Committee and directing the College Registrar to suspend the applicant's Certificate pending the outcome of the complaint. The interim order did not provide written reasons for the decision.

As a result of the interim suspension of the teacher's Certificate, and the *Education Act*'s restriction on the appointment of an individual whose Certificate has been suspended or revoked, the Board was required to suspend the applicant's pay. The applicant sought judicial review of the Executive Committee's decision.

The application raised two interesting issues: (1) whether the Executive Committee breached its duty of procedural fairness by failing to provide reasons for its decision; and (2) whether the Executive Committee arrived at an unreasonable decision when it imposed the interim suspension in the interim Order.

With respect to the issue of reasons, the Court reviewed whether the duty of procedural fairness required the Executive Committee to explain the basis or rationale for its decision through the inclusion of reasons. The College argued that there was no duty to give reasons when the reasons for the determination were obvious from the review of the issues. The Court disagreed finding that fairness required that an individual, who loses his qualification to practice his profession through a suspension of his Certificate, whether on an interim or indefinite basis, is entitled to an explanation for that reason. The Court did acknowledge, however, that where an order is interim, less is needed to satisfy the requirement that there be sufficient reasons.

The Court noted that without reasons, the Executive Committee gave no indication that it considered the various existing controls in place, such as his bail conditions and suspension to home with pay, nor did it explain why a suspension was necessary in addition to the existing measures, which at the time of the Executive Committee's decision, had been in effect for a year without incident.

On the issue of whether the interim order was unreasonable, the Court applied a standard of reasonableness, and considered whether the decision was outside the range of possible, acceptable outcomes. The Court recognized that the Executive Committee had some evidence of risk to students, including the criminal charge and the evidence provided by the London Police Service. However, s. 29(3)(b) of its enabling act, the *Ontario College of Teachers Act, 1996*, required the Executive Committee to determine that, as of the time of the hearing, the applicant's conduct continued to expose or was likely to expose students to harm or injury.

Again the Court disagreed with the Executive Committee's decision, concluding that the restrictive bail conditions and assignment to home with pay evidenced sufficient existing controls on the likelihood of exposure to harm or injury of any student. The Court found that a suspension of his Certificate was not required in order to protect students, and that the decision did not fall within the range of reasonable outcomes. The Court granted the application and set aside the interim order of the Executive Committee.

It will be interesting to see how the College changes its procedures and what impact this might have for boards (for example, the continuation of salary pending the outcome of a criminal matter).

— KC LLP —

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