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Human Resources Newsletter

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IN THIS ISSUE —

Supreme Court recognizes an existing, but diminished, reasonable expectation of personal privacy in work computers

In *R. v. Cole*, 2012 SCC 53, the Supreme Court of Canada (SCC or the Court) affirmed their holding in an earlier decision of the SCC that Canadians may reasonably expect privacy of the information contained on their own personal computers and extended this principle to personal information on work computers, with the caveat that personal use must be permitted or reasonably expected.

Mr. Cole, a high-school teacher, was also responsible for policing students' use of laptops on the school's network. This position gave him access to the hard drives on students' laptops. He was given a laptop by the school for this purpose. Mr. Cole's use of the laptop was governed by the School Board's Policy and Procedure Manual (Policy). Under the Policy he was permitted to use the laptop computer for incidental personal purposes. The Policy stipulated that teachers' email correspondence would remain private but would be subject to access by school administrators if specified conditions were met, and that *"all data and messages generated on or handled by board equipment are considered to be the property of the [school board]"*. Mr. Cole used the computer to browse the internet and stored personal information on the computer's hard drive.

While performing maintenance activities, a School Board technician found a hidden folder containing nude and partially nude photographs of a female student. The technician notified the Principal, and was instructed by the Principal to copy the photographs to a compact disc (CD). The Principal seized the laptop, and other school board technicians copied the temporary Internet files onto a second CD. The laptop and both CDs were handed over to police. Police reviewed the materials and created a mirror image of the hard drive without seeking a warrant first.

The Crown relied on the evidence found on the laptop to charge Mr. Cole with possession of child pornography and unauthorized use of a computer, contrary to sections 163.1(4) and s. 342.1(1) of the *Criminal Code*.

The Trial Judge excluded all of the computer material pursuant to sections 8 and 24(2) of the *Canadian Charter of Rights and Freedoms* (*Charter*). Section 8 sets out that everyone has a right to be secure against unreasonable search or seizure. Section 24(2) provides that: *"where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".*

The Summary Conviction Appeal Court (SCAC) reversed the decision of the Trial Judge, finding there was no breach of s. 8 of the *Charter* because Mr. Cole had no reasonable expectation of privacy in his work laptop.

The Ontario Court of Appeal (ONCA) set aside the decision of the SCAC and held that the disc containing temporary Internet files, the laptop, and the mirror image of its hard drive were to be excluded as evidence because Mr. Cole had a continuing reasonable expectation of privacy in those materials and they were improperly searched by the police. (The Decision of the Ontario Court of Appeal was reviewed in "Ontario Court of Appeal rules personal files on work computers private", Keel Cottrelle LLP Human Resources Newsletter, October 2011.)

The Appeal to the SCC raised three issues:

(1) whether the ONCA erred in concluding Mr. Cole had a reasonable expectation of privacy in his employer-issued work computer;

(2) whether the ONCA erred in concluding that the search and seizure by police of the laptop

and the disc containing the Internet files was unreasonable within the meaning of s. 8 of the *Charter;* and,

(3) whether the ONCA erred in excluding the evidence under s. 24(2) of the *Charter*.

The SCC held that *"computers that are reasonably used for personal purposes – whether found in the workplace or the home – contain information that is meaningful, intimate, and touching on the user's biographical core*". Therefore, vis-à-vis the state, everyone in Canada is entitled, constitutionally, to expect privacy in personal information of this kind.

The SCC further held that *"privacy is a matter of reasonable expectations. An expectation of privacy will attract Charter protection if reasonable and informed people in the position of the accused would expect privacy".* The Court found that: *"the more personal and confidential the information, the more willing reasonable and informed Canadians will be to recognize the existence of a constitutionally protected privacy interest."*

The SCC explained that the context in which the personal information is placed on an employer's computer is significant and the policies and practices of a workplace are relevant to the analysis. The Court held, however, that written policies are not determinative of the issue. Regardless of the policies, *"one must consider the totality of the circumstances in order to determine whether privacy is a reasonable expectation in the particular situation".*

In this analysis, the SCC considered the following facts:

- that the Board owned the laptop (and Board policy stated that the Board owned *"all data and messages generated on or handled by board equipment"*);
- that there were workplace policies and practices in place in the school with regards to technology; and
- that Mr. Cole had been put on notice that the privacy employees may have expected in their files was limited by operational realities of the workplace.

The SCC held that although these operational realities may diminish an individual's expectation of privacy in a work computer, they do not remove the expectation altogether.

The SCC concluded that the *"totality of the circumstances"* supported the objective reasonableness of Mr. Cole's subjective expectation of privacy.

The SCC agreed with the ONCA that the police infringed Mr. Cole's rights under s. 8 of the *Charter*. The Court found that Mr. Cole rightly expected a measure of privacy in his personal information stored on the laptop, and that this expectation was reasonable. However, the Court found that this expectation was a *diminished expectation of privacy* in comparison with a privacy interest involving a personal computer searched and seized in a person's home. Although diminished, the Court found that this reasonable expectation of privacy was still protected by s. 8 of the *Charter*, which meant it could only be subject to state intrusion based on the application of a reasonable law.

The SCC agreed with the ONCA that the Principal had a statutory duty under section 265 of the *Education Act* to maintain a safe school environment and thus had a reasonable power to seize and search a school board-issued laptop where the Principal believed on reasonable grounds that the hard drive contained inappropriate photographs of a student.

The Court found that the Crown did not raise any law which would authorize the police to conduct a warrantless search of Mr. Cole's work laptop. Importantly, the Court held that *"the lawful authority of his employer – a school board – to seize and search the laptop did not furnish the police with the same power. And the school board's 'third party*

consent' to the search was of no legal consequence."

Despite these findings, the Court held that it would **not** exclude <u>any</u> of the unconstitutionally obtained evidence under s. 24(2) of the *Charter.* The Court wrote that determining whether evidence should be excluded under s. 24(2) requires a balancing assessment involving three broad inquiries: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits.

In answering the first question, the Court found that the police officer did not knowingly or deliberately disregard the warrant requirement, as the law governing privacy expectations in work computers was still unsettled. Further, the Court found that the police officer did not act negligently or in bad faith; instead he was alert to the possibility that the hard drive contained private or privileged information. Finally, the Court held that on undisputed evidence, the conduct of the officer was not an egregious breach of the *Charter.*

In dealing with the second question the Court found that because of Mr. Cole's diminished reasonable expectation of privacy and its finding that the evidence would likely have been obtained through a warrant, Mr. Cole's *Charter*-protected interests were not greatly impacted.

The Court phrased the third question as *"whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion".* The Court held that the evidence obtained from the warrantless search was all highly reliable and probative and therefore weighed in favour of its inclusion. It is on this basis that the Court held it would **not** exclude the evidence unlawfully obtained by the police.

The SCC allowed the appeal and set aside the decision of the ONCA and Mr. Cole will likely face a new trial.

This decision is of note because the SCC has found that Canadians may reasonably expect privacy in the information contained on their work computers where personal use is permitted or reasonably expected. It is important to note that this reasonable expectation of privacy will be considered diminished where the computer is owned and administrated by the employer.

Arbitrator holds freedom of expression of teachers may be overridden by the need to protect children from political messages in the classroom

In *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [2011] B.C.C.A.A.A. No. 126, the Arbitrator found that although the directive to remove political materials from bulletin boards, classroom doors etc., and prohibit the wearing of buttons with political messages on them was an obstruction of Teachers' freedom of expression rights under s. 2(b) of the *Charter of Rights and Freedoms, 1982* (*Charter*), it was a justifiable infringement under s. 1 of the *Charter* because insulating students from political messages in the classroom was a pressing and substantial objective.

Before reaching this conclusion the Arbitrator extensively reviewed the Court and Arbitration decisions on the rights of teachers, collectively or individually, to express their views on public issues in British Columbia. These decisions are informative and are briefly reviewed below:

In 2004, the British Columbia Teachers Federation (BCTF) conducted a political campaign prior to a provincial election and sought to purchase advertising space on the outside of buses operated by the Greater Vancouver Transportation Authority (GVTA). The GVTA refused to allow political advertisements on the sides of its buses. The Supreme Court of Canada (SCC) held that political advertisements could be

posted on the sides of buses. (*Greater Vancouver Transportation Authority v. Canadian Federation of Students-British Columbia Component*, 2009 SCC 31);

After the BC Provincial Government imposed a collective agreement in 2002, teachers protested in a variety of ways, including posting certain materials on teacher bulletin boards where students and parents might see them. Some school boards ordered teachers to take down such materials and to not discuss issues such as collective bargaining and class sizes at parent-teacher interviews. The Arbitrator upheld the teachers' Grievance, and the BC Court of Appeal affirmed this decision. (*Re British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation,* [2004] B.C.C.A.A.A. No. 82; aff'd by the BC CA, [2005] B.C.J. No. 1719).

In 2010, an Arbitrator upheld the right of a teacher to post a "Staff Representative" sign outside the door to her classroom. The Arbitrator concluded that the order to remove the sign by the employer violated the teacher's section 2(b) *Charter* rights to freedom of expression. (*British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation,* 2010 B.C.C.A.A.A. No. 32).

Lastly, the Arbitrator reviewed two arbitration decisions relating to teachers' protest against the requirement that they administer the Foundation Skills Assessment test (FSA). In the 2008 Pamphlet Grievance, the Arbitrator upheld the Grievance brought by the BCTF based on some school boards prohibiting teachers from sending home pamphlets in envelopes for parents that contained materials that expressed teacher opposition to the use of the FSA. In that award, the Arbitrator concluded that the tests were an educational matter and that teachers had a right to express their view as to the value of those tests. However, the Freedom of Expression Grievance brought by BCTF in 2011, in regards to a school board instructing teachers to remove black armbands worn as an expression of protest against the requirement that they administer the FSA, was denied.

Having reviewed the relevant decisions on this issue, and the position of the parties, the Arbitrator then applied the previous decisions and the principles governing freedom of expression by teachers to the facts of the Grievance.

The Arbitrator cited the SCC's 1989 decision in *Irwin Toy* as the earliest case that set out the method of analyzing alleged violations of s. 2(b) of the *Charter*. The SCC confirmed that the first step is to determine whether the activity is protected by the *Charter* guarantee. The second step is to determine whether the purpose or effect of the government action was to restrict freedom of expression.

The Arbitrator held that the starting point for analysis of the restriction on expression of teachers is the Monroe Award (set out briefly, above). The Arbitrator pointed out that some of the principles set out in the case law referred to above are now settled law, such as that teachers have rights of freedom of expression protected by s. 2(b) of the *Charter*. Further, the Arbitrator held that questions about freedom of expression should be considered under s. 1 of the *Charter*, not by limiting the scope of s. 2(b).

Having reviewed the authorities, the Arbitrator held that:

"Taken together, these authorities stand for a high level of protection for freedom of expression under the Charter. Exercise of this right is regarded as a fundamental element of Canadian democracy, and restrictions are possible, but not easily justified. Furthermore, teachers are not deprived of this right by virtue of their position as employees of school boards or the mere fact that the expression occurs in their workplaces. Their rights extend to the discussion of educational policy issues in the context of a provincial election." (emphasis added)

The Arbitrator went on to find that although the teacher's expression at issue was political, it was not, as advanced by the employer, partisan. The Arbitrator found the materials that led to the Grievance contained modest expressive content.

Further, he found the materials addressed broader educational issues and did not urge readers to vote in a particular way.

Having established that the content of the expression fell within the scope of the s. 2(b) protection, the Arbitrator then turned to the contextual factors that should be assessed when determining the degree of deference to be given to the means chosen to implement a policy. The Arbitrator set them out as: the nature of the harm and the inability to measure it, and the vulnerability of the group affected by the policy.

In this Grievance the Arbitrator found the nature of the harm to be ambiguous: teachers only experienced the harm of the restriction on their expression, and although the political messages were meant for parents of students, children were exposed to it. As such, in identifying the vulnerability of the group that the legislator sought to protect, the Arbitrator found students, who are compelled to attend school, are particularly vulnerable to this type of expression.

The Arbitrator then applied the SCC s. 1 *Oakes* test to determine if this restriction on teacher expression was justified. Under the first step the Arbitrator found that insulating students from political messages in the classroom is a *"pressing and substantial objective"* of sufficient importance to override a constitutionally protected right.

Under the second step of the *Oakes* test, the Arbitrator found that the employer had established a rational connection between the objectives and means chosen in limiting the expression by asking the teachers to remove the posters and buttons that would be visible to students. The effect on parents, the intended audience, was at most modest. Further, the Arbitrator held that the deleterious effects of the restriction on teachers' expression were proportional to the salutary effects of the insulation of students from the political message.

Finally, the Arbitrator held that teachers may not introduce political materials (even non-partisan) in the form of printed matter or buttons into the classroom or the walls or doors immediately adjacent to classrooms.

This decision is of note because it sets limits on teachers' freedom of expression rights in the classroom or school.

School Board violated privacy rights and failed to accommodate teacher's temporary disability

In *Elementary Teachers' Federation of Ontario v. Ottawa-Carleton District School Board*, [2011] O.L.A.A. No. 627, the Arbitrator found that the Ottawa-Carleton District School Board (Board) had failed to properly accommodate a teacher with a temporary disability, and wrongfully obtained medical information without the teacher's consent.

The Grievor, a grade five and six teacher at Lady Evelyn School in Ottawa, suffered a back injury after being thrown from a horse. The resulting pain and fatigue lasted several months and impaired her mobility as well as her ability to remain standing for extended periods of time.

Upon returning to work, the Grievor informed her Principal that she could not supervise students during breaks, a routine task which frequently requires standing and/or being mobile. The Grievor provided two medical notes outlining her restrictions, although the notes were short and the Arbitrator described them as "*cryptic*". Nevertheless, the Grievor was exempted from supervision duties for several weeks.

At the end of this initial exemption period, the Grievor had not yet regained her mobility and communicated as much the Principal. The Principal continued to perform most of the Grievor's supervision duties for several weeks. However, the Principal began to routinely ask the Grievor if she was able to resume supervising the students. Often, the Principal made these

requests by phoning the Grievor in her classroom, which occasionally led her to cry in front of her students.

The Principal eventually assigned the Grievor to supervise the special needs classroom on a daily basis. Although some efforts were made to ensure that the supervision duties could be performed from a stationary position, the Principal did not address the Grievor's concern that she needed to rest in her classroom during breaks and that she experienced significant pain and difficulty walking to the locations where supervision was needed. Fearing that she could not perform what was asked of her, she contacted the vice-president of the Union. At the suggestion of the Union, the Grievor produced a third medical note outlining her restrictions, this time written by herself and signed by her doctor. The Grievor delivered the note the Principal and refused to resume her supervision duties.

Once the Union became involved, the Principal began taking steps to accommodate the Grievor's disability, including enlisting the assistance of the disability management coordinator, who suggested that the Grievor be provided with a wheelchair, which she accepted.

The final confrontation between the Principal and the Grievor occurred after the wheelchair had been offered but before it had arrived. This incident, which led to the filing of the Grievance, took place when the Principal was forced to leave her classroom to attend to a student medical crisis. The Principal asked the Grievor to supervise the classroom in her absence, but the Grievor (who was unaware of the crisis) refused. In response, the Principal threatened to put a note in her file if she did not comply. The Principal also asserted that the Grievor did not need a wheelchair and that she was able to walk without difficulty.

The incident that gave rise to the privacy complaint also occurred shortly after the Grievor had been offered the wheelchair but before the chair had arrived. The disability management coordinator directly contacted the Grievor's doctor without her knowledge or consent and inquired about the sufficiency of the accommodations and asked the doctor to describe any remaining medical reasons why the Grievor could not perform supervisory duties. The doctor responded directly to the coordinator and disclosed some general information regarding the Grievor's condition.

The wheelchair arrived before the Grievance reached arbitration and effectively resolved the issue of accommodation. The Grievor used the chair with success for the remainder of her recovery period.

The Arbitrator found that the Board failed to accommodate the Grievor's disability in violation of s. 5(1) of the Ontario *Human Rights Code* (*Code*). In doing so, the Arbitrator affirmed that the right to equal treatment under s. 5(1) has both a substantive and a procedural component. The procedural duty to accommodate involves obtaining all relevant information about the employee's disability, at least where it is readily available. A failure to give any thought to the issue of accommodation constitutes a breach of the procedural duty to accommodate.

The procedural violation arose from the Principal's failure to properly assess the extent of the Grievor's disability, to request any additional medical information it required and to consider what assistive devices were necessary. The Arbitrator emphasized that if there were any doubts with respect to the Grievor's restrictions, the proper course would have been to request additional documentation, which the Principal did not do. The Principal's failure to consider solutions to the mobility problem resulted in an unnecessary delay in providing the Grievor with a wheelchair.

The substantive violation occurred when the Principal assigned the Grievor to supervisory duties despite having been told about the Grievor's difficulty with respect to walking. (The Arbitrator noted that the Principal did not violate the *Code* simply by exploring the possibility of the Grievor resuming her normal duties without

pressuring her to do so.) Although the Principal arranged to allow the Grievor to remain stationary while supervising students, she did nothing to assist the Grievor in moving between locations. This omission infringed the Grievor's right to equal treatment under s. 5(1) of the *Code*. The Principal likewise contravened s. 5(1) when she threatened to put a note in the Grievor's file if she did not agree to supervise the classroom.

Notwithstanding the above, the Arbitrator found that the Principal's conduct did not amount to harassment within the meaning of s. 5(2) of the *Code*. While extenuating circumstances do not negate a violation of an employee's right to equal treatment, they do support the conclusion in this case that the Principal's threat, in the exceptional context of a student medical crisis, did not constitute harassment. This conclusion is also supported by the fact that for many weeks, the Principal performed most of the Grievor's supervisory duties herself.

Finally, the Arbitrator found that the Board violated s. 29 of the *Municipal Freedom of Information and Privacy Act* (*MFIPPA*) when it directly solicited medical information from the Grievor's doctor without the Grievor's consent. The Arbitrator clarified that the innocuous nature of the information collected reduces the severity of the violation but did not negate it.

The Arbitrator allowed the Grievance in part and ordered the Board to pay $500 in compensation. In arriving at this number, the Arbitrator determined that although the employer had violated the *Code* and *MFIPPA*, the violations were of *"limited scope and duration"* and did not warrant the $7,500 to $10,000 sought by the Union. The Arbitrator noted that the Grievor was not prejudiced by the information that was obtained by the employer; she remained employed, lost no income and received no discipline; her humiliation was relatively minor compared to other cases; the failure to accommodate lasted only a few weeks; and, the employer's delay in accommodating her disability did not cause any deterioration in her health or quality of personal life.

The Arbitrator also drew a distinction between temporary and long-term or permanent disabilities, writing: *"[a] long-term disability becomes part of a disabled person's sense of identity in a way that a short-term impairment does not. For this reason, greater emotional suffering is caused by failing to accommodate a condition that is chronic than one that is not".*

This case confirms that the employer's duty to accommodate an employee's disability includes both a substantive and procedural component, which includes a duty to obtain information about the disability and to seriously consider how the disability may be accommodated. This case also confirms that improperly obtaining personal medical information constitutes a violation of privacy laws even where the information obtained is inconsequential or already known to the employer. Lastly, this case identifies a number of factors that, in the event that a failure to accommodate occurs, may lessen the severity of the violation (e.g., limiting the scope and duration of the violation and providing the necessary accommodations before the Grievance reaches arbitration).

HRTO holds doctor's suggestions cannot be ignored by an employer in a proper accommodation process

In *Yochim v. Complex Services Inc.*, 2012 HRTO 1396, the Human Rights Tribunal of Ontario (Tribunal) confirmed that the 'duty to accommodate' has both a substantive and procedural component.

In her application to the Tribunal, Yochim (Applicant) alleged she had been harassed and discriminated against in respect of employment on the basis of disability.

The Applicant began working for the Respondent as a temporary contract employee in 2002 and became a permanent employee in 2006. She was

promoted in 2006 and was demoted in July 2008, a month before her departure on an approved medical leave.

The Applicant gave evidence that she was doing well in her job until there was a change in her immediate supervisory team in 2006. She described feeling scrutinized and overly criticized, to the point of it having an effect on her blood pressure.

In April 2009, after having taken her scheduled medical leave, the Applicant's doctor declared her fit to return to work but advised that she should avoid stress and that she had a number of physical restrictions including: no bending; no twisting of the back and knees; no lifting and no standing. Further, the doctor recommended the Applicant be given a job in the Respondent employer's call center.

The Tribunal held the Applicant failed to provide any evidence to establish a *prima facie* case with respect to a connection between the harassment allegations prior to her departure from work on medical leave and the Ontario *Human Rights Code* (*Code*).

In assessing the Applicant's claim of discrimination, the Tribunal cited the Supreme Court of Canada's decision in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (*Meiorin*), as standing for the principle that the duty to accommodate has both a substantive and procedural component.

The Tribunal held that to meet the procedural part of the duty to accommodate, the Respondent must take adequate steps to explore what accommodation is needed, and to assess options; which involves obtaining all relevant information about the Applicant's situation.

Furthermore, the Tribunal held that accommodation is a collaborative process where cooperation and the seeking and sharing of information are essential.

The Tribunal held that the Respondent failed to *"respond in any direct or meaningful way to the Applicant or her physician"* upon receiving the very specific suggestion that the Applicant could work in a call centre. Further, the Tribunal found the Respondent failed to communicate its view that *"the call center job was not a suitable position for the Applicant for reasons relating both to the Applicant's past job performance as well as the medical restrictions outlined in the doctor's notes."*

The Tribunal also held that although the doctor's suggestion of a specific job placement was outside the doctor's purview, it was still inappropriate for the Respondent employer to ignore it. As ongoing dialogue is an aspect of the procedural steps in the accommodation process, the Tribunal found that the Respondent should have *"at the very least…communicated to the Applicant and/or her physician their view that the call center position was a non-starter."* Thus, the Tribunal found that the Respondent employer had breached the procedural aspect of the accommodation process.

The Tribunal did however, accept the Respondent employer's evidence that the physician's suggestion of the call center position was considered but eventually rejected because the position did not fit within the physical or stress related limitations of the Applicant. Additionally, the Tribunal found that the Respondent employer did review all job openings against the Applicant's stated restrictions, and accepted the Respondent employer's position that no suitable positions were available from April 28, 2009 until June 4, 2010, during which the Applicant and her doctor indicated she was able to return to her old position. Consequently, the Tribunal held that the Applicant had failed to establish that the Respondent employer breached the substantive aspect of its obligation to accommodate her.

Finally, the Tribunal found the Respondent employer's subsequent requests for information to ensure the Applicant's safe return to work were not unreasonable and that the Applicant's failure to comply with those requests led to the

communication impasse that then existed and that continued up to the hearing.

In awarding the remedy, the Tribunal found that the Respondent employer's failure to engage *"in meaningful and responsive conversation with the Applicant and her doctor caused the Applicant some considerable frustration at a time when she was financially insecure and vulnerable."* The Tribunal also considered the Applicant's own role in the matter including that she neglected to take steps requested by the Respondent to update her resume and skills, and to provide medical information, and awarded the Applicant $3000 as compensation for the injury to her dignity, feelings and self-respect.

This decision reiterates that both employers and employees have procedural and substantive obligations in the accommodation process. In addition, this decision confirms the role which a professional such as a doctor would have in such circumstances, particularly with respect to the procedural steps required in the accommodation process.

Human Rights Tribunal of Ontario decides jurisdictional issue to review alleged discriminatory WSIA provision

In *Seberras v. Workplace Safety and Insurance Board*, 2012 HRTO 115, the Human Rights Tribunal of Ontario (Tribunal) decided a jurisdictional issue involving Workplace Safety and Insurance Board (WSIB) benefits.

The Applicant claimed that he had been discriminated against with respect to services due to his disability, after being denied benefits by the WSIB. The Applicant argued that the statutory provision that disentitled him from receiving benefits was discriminatory. According to s. 13(5) of the *Workplace Safety and Insurance Act* (*WSIA*), for claims of mental stress, an individual must have a claim related to *"an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of his or her employment"*. The Applicant's mental stress did not fall within this description. The WSIB's team of claims management professionals for handling traumatic mental stress (TMS) claims made determinations for these types of benefits and had reviewed the Applicant's claim.

The Tribunal analyzed a series of decisions regarding the Tribunal's jurisdiction to determine the Application. The Tribunal concluded that it had jurisdiction to hear an Application regarding alleged discriminatory benefit provisions that are made under a statutory scheme. The Tribunal noted that it did not agree that an Application relating to a matter that has been determined by statute where there is an existing system of internal appeals, is not an Application *"in respect of services"*. It did however emphasize that the Tribunal *"is not a mechanism for the appeal of statutory decisions"* related to disability benefits and that it does not have jurisdiction to determine any allegations that a decision-maker of another administrative body made a discriminatory decision. The Tribunal noted that a *"third party neutral decision-maker"* is *"protected by the principles of judicial immunity"* and that this principle remains whether decisions of such decision-makers are considered to be "services". The Tribunal also noted that a question for consideration in future cases would be whether the actual decision made by such a decision-maker would also be protected as well by judicial immunity.

The Tribunal adopted the principle in previous jurisprudence in noting that the Tribunal has concurrent jurisdiction with the WSIB and Workplace Safety and Insurance Appeal Tribunal (WSIAT). The Tribunal reiterated it did not believe that the Legislature intended the Tribunal to be a *"mechanism for appeal of decisions of the WSIB and other statutory decision makers"*, as an appeal of any such decision under statute could not be considered to have a reasonable prospect of success to determine a violation under the *Human Rights Code* (*Code*) and would be dismissed. The Tribunal also noted that s. 45.1 of the *Code* allows for an Application to be dismissed on the basis that another proceeding

has already appropriately dealt with the substance of the Application.

The Tribunal thus concluded that a benefit provided for by statute is a "service" under the *Code* and that the provision of WSIB benefits is a service. The Tribunal concluded that since this Application was not an attempt to appeal a particular WSIB decision and instead challenge the statutory scheme, the Tribunal had jurisdiction over the Application.

The Tribunal noted that further issues had arisen since the time the original Application had been filed by the Applicant and ordered the parties to file new pleadings regarding their positions on the matter. The Tribunal also asked the parties to clarify the status of any cases dealing with whether ss. 13(4) and/or (5) violated the *Code* before an Appeals Resolution officer or the WSIAT.

On May 2012, an Interim Decision was released whereby the Tribunal granted the Attorney General for Ontario leave to intervene. The Attorney General requested that the Application be deferred pending a decision of the WSIAT.

On August 2012, the Tribunal released another Interim Decision having reviewed the submissions of all the parties involved in determining whether or not the Application should be deferred. The Tribunal noted that deferral is a discretionary decision involving the analysis of different factors, *"including the subject of the other proceeding, the nature of the other proceeding, and whether it would be fair to the parties overall to defer".*

The Tribunal recognized that this case was complex, potentially involving extensive preparation and days of hearing which could also be quite costly. The Tribunal noted that another more developed case was already before the WSIAT dealing with the *Canadian Charter of Rights and Freedoms* (*Charter*) and held that it was not persuaded that there were substantial differences in defences between the *Charter* and the *Code*. The Tribunal noted that the pleadings of the interveners were also quite extensive in the WSIAT case and found it appropriate to allow the WSIAT case to proceed first. The Tribunal noted it would consider *"A Request to reactivate an Application"* if the WSIAT proceeding did not move forward towards a hearing in a timely manner.

Arbitrator dismisses Grievance in relation to part-time accommodations and the Ontario Human Rights Code

In *Ontario Secondary School Teachers' Federation v. Peel District School Board,* [2012] O.L.A.A. No. 108, the Arbitrator dismissed a Grievance of the Ontario Secondary School Teachers' Federation (OSSTF), which alleged that the Peel District School Board (Board) had failed to credit the Grievor with experience and full sick leave credits according to the collective agreement.

The Grievor suffered from multiple sclerosis and had worked at the Board since 1997 with several accommodations to reduce her workload. The Grievor initially used her sick-day credits for the days that she did not work and was paid her salary for the days that she did work. The Grievor eventually received Short-Term Disability (STD) followed by Long-Term Disability (LTD) once all of her sick leave credits had been used. In 2007, although the Grievor's doctor said the Grievor could work full-time with accommodations, no suitable position was available for the Grievor and she thus received LTD until January of 2008. The Grievor later required a reduced workload again and was given a letter from the Board stating that she was a part-time teacher and had a 0.50 Full-Time Equivalent (FTE).

The Grievor had received a letter in 2003 which confirmed she was on a Modified Work Program which involved 0.5 teaching of her full-time assignment. The payroll information for the time period of 2005-2010 under the Program showed the Grievor had a 1.0 FTE, working 50% to 60% depending on the year. In 2002, the Grievor filled

out an Application for unpaid leave to remain on a part-time modified work schedule.

In 2005, the Grievor noticed she had been receiving experience credit for half a year for each year worked since 2002 and was two steps lower on the teacher salary grid. The OSSTF submitted on the Grievor's behalf that the Board violated the collective agreement and Ontario *Human Rights Code* (*Code*) by not crediting the Grievor with a full year of experience for each of the years she had worked while receiving LTD benefits having a reduced workload, not crediting her with 20 full sick days per year and not paying her 100% of her benefit premiums. The OSSTF stated that the Grievor was hired as a full-time teacher and remained as such while having *"a medically modified timetable"*.

The OSSTF submitted that the Grievor never requested becoming a part-time teacher and that if there was any lack of clarity with respect to what the part-time schedule meant under the collective agreement, past practices should have been followed whereby the Board would not apply the provision at issue to a teacher who had *"a modified work schedule supplemented by sick leave"*. The OSSTF stated that the Board's interpretation of the collective agreement provision was discriminatory against teachers with disabilities, such that teachers with chronic disabilities would never be able *"to bank sufficient sick leave credits to use to acquire the full experience credit"*. The OSSTF maintained that the Grievor would be required to work five additional years to move up the grid, regardless of the fact that she had been working as much as employees on sick leave who were receiving full experience credits.

The OSSTF also submitted that it was not estopped from bringing this Grievance as it had given notice of its position before the bargaining of the collective agreement had finished. The OSSTF requested that the Grievor be compensated for loss of credit for experience, benefit premiums and sick leave credits back to 2001, as well as a declaration that the Board had discriminated against the Grievor in violation of both the *Code* and the collective agreement.

The Board denied that it violated the collective agreement stating that the provision in question was unambiguous and that a full-time teacher is someone who is assigned six periods, which the Grievor had not been assigned. Furthermore, the Board relied on another provision of the collective agreement which contemplated this situation and allowed a teacher who was teaching less than full-time to still continue under benefit plans paying *"a pro-rata amount of the cost"*. In addition, the Board submitted that the Grievor would have received sick leave credits *"on a pro-rata basis"* in accordance with another provision of the collective agreement and that the Grievor *"must have known"* about both the reduction in benefit plans and sick leave credit accumulation. The Board stated that the provision at issue in the collective agreement *"applied in favour of everyone"* using sick leave credits and that while the issue of part-time teachers was addressed in the previous round of bargaining, the parties did not change the provision at issue. The Board further noted that the OSSTF never advised the Board of any problems with sick leave credits and benefit premiums, it did not file the Grievance until 2009, and it relied on a provision that it had *"since abandoned"*.

The Board further submitted that it did not violate the *Code*, relying on the principle that reasonable accommodation included *"a reasonable opportunity to perform work"* but did *"not require paying for work not performed"*. The Board stated it was not discriminatory to not pay an employee on unpaid disability leave in a similar manner to employees who are working and paid. The Board emphasized that a teacher who is not teaching is not gaining the experience as a teacher. The Board further noted the OSSTF did not raise the issue in a timely manner and was out of time to file a Human Rights issue.

The Arbitrator found that the Board did not violate the collective agreement in not providing the Grievor with full year credits for the years that the she had worked a 50 percent schedule. The

Arbitrator noted that "part-time" was a description of hours worked under the collective agreement and that it did not distinguish between individuals who wanted reduced hours or those who needed reduced hours. The Arbitrator further noted that the collective agreement stated that sick leave credits were not earned in accordance with a teacher's FTE, but instead the amount a teacher worked.

The Arbitrator also found that the Board did not violate the *Code*, relying on the principles set out in *Orillia Soldiers Memorial Hospital*. The Arbitrator noted that in that case, the Court found that *"even if there was constructive discrimination, the requirement that an employee be working to receive the benefit of collective agreement provisions affecting compensation was a bona fide occupational requirement"*.

The Arbitrator also noted that all disabled teachers had to use their sick leave credits and receive full credits before accessing LTD and, as such, were not being discriminated against in comparison to those teachers on sick leave and receiving their full salary. The Arbitrator noted that the Grievor could not complete a full teaching working load due to her disability which was *"deeply unfair"*. However, the Arbitrator stated that it was *"not an unfairness for which the Code requires the Board to bear the cost"* and that *"the Board does not have to compensate teachers for work that is not performed"*. The Arbitrator dismissed the Grievance and stated it was unnecessary to decide upon the estoppel issue argued by the parties.

This decision emphasizes the notion that while school boards have a duty to accommodate, employees must still complete work as defined within the collective agreement in order to receive benefits that are provided for and this in and of itself, is not discriminatory under the *Code*. The issue of accumulating sick days is now irrelevant given the recent changes in the *Putting Students First Act, 2012* (Bill 115).

Arbitrator awards damages for discrimination against experienced teacher on the basis of disability

In *Ottawa-Carleton District School Board v. Elementary Teachers' Federation of Ontario*, {2012] C.L.A.D. No. 88, the Arbitrator allowed a Grievance of a teacher who alleged the Ottawa-Carleton District School Board (Board) disciplined her without just cause, contrary to the collective agreement and the Ontario *Human Rights Code* (*Code*).

The Grievor was a teacher who began her employment with the Board in 1973 and suffered from physical ailments, in particular allergies and *"a sciatic condition"* which required her to often teach classes sitting down. There were a series of events which took place over the 2007-2009 school year, including the Principal and Superintendent of Instruction stating that the Grievor's classroom was not *"in a fit state to receive students"* at the beginning of the 2008-2009 school year due to its allegedly "messy" appearance and what the Principal had considered to be safety issues. The Grievor was given a formal letter explaining that she would be replaced for the following day of teaching and given time to fix the classroom setting. The Grievor was also asked for another medical certificate and advised that there were some complaints from parents who did not wish for the Grievor to be teaching their children for the following year.

Notably, although the Grievor had been accommodated for many years, a new Principal had come into the school and, in light of the issues that had occurred, the Arbitrator noted that a request for a medical certificate was not unreasonable. The Arbitrator further noted that this request was not considered to be a disciplinary measure against the Grievor.

The Principal was later advised that a delegation of parents wished to meet with the Principal in relation to concerns they had about the Grievor

and not wanting their children to remain with the same teacher (the Grievor) for three years. The Grievor agreed to meet with the parents individually to discuss their concerns.

The Grievor attended a meeting with the Federation's Vice-President, the Principal and Vice-Principal to discuss the situation regarding the classroom incident and other matters of concern. The Federation was of the view the Grievor had been unfairly targeted and that conclusions were drawn about the Grievor from the first day of school. The medical certificate issue was also raised. The Principal noted that the Grievor may possibly be required to move to another school to be appropriately accommodated. The Grievor stated she would consider it and some time after the meeting, was moved to a Grade 2 class.

The Grievor fell ill in January of 2009 and while still absent from her illness in February, injured a ligament in her leg, developing a sciatic nerve problem. The Grievor stated that she called the Vice-Principal to provide an update and was asked to speak with the Board's "Wellness Officer". Despite being advised by the Federation not to do so, the Grievor spoke with the Wellness Officer who the Grievor felt had an aggressive and unprofessional tone. The Grievor, upon request, faxed a copy of the medical certificate from her chiropractor and was advised by the Principal that this documentation was unacceptable. The Principal further stated that the Grievor would have to complete a functional abilities form to justify her accommodations and was not allowed to return to school on March 13. The Grievor was asked instead to come in a week later, following March Break. The Federation's Vice-President spoke with the Wellness Officer to ensure that the certificate was sufficient documentation to allow the Grievor to return. The Wellness Officer appeared to have agreed with the Federation's Vice-President, but remarked on how *"there were so many issues with the Grievor"* including the Grievor's need to wear tinted glasses and also commented *"why doesn't she just retire?"* The Federation's Vice-President spoke with the Board's Director of Education seeking his intervention and the Grievor returned to her classroom on March 31st.

Notably, the Arbitrator found that the medical certificate was an acceptable document which should have allowed the Grievor to return to work on March 13th.

Two further incidents involving two parents occurred after the meeting was held. The Grievor was advised by the Principal that the mother of one her students alleged the Grievor had yelled at her child and torn up his work, and as such, complained to the Children's Aid Society (CAS). The Arbitrator noted that the Principal *"seemed to have accepted"* the mother's complaint *"and made no enquiry to verify it".*

The second incident occurred when the father of one of the students in the Grievor's class, who had visited the school several times before, behaving at times in an aggressive manner, also complained about the Grievor. He claimed that the Grievor had asked his son to pick up what he alleged was *"poop".* The Grievor stated that this was *"outlandish"* and that the boys enjoyed *"bathroom humour".* The Grievor stated she had instructed them to clean up any mess left from snacks they had eaten and that *"it was obviously a piece of chocolate cake or a brownie".* The Principal and Vice-Principal informed the Grievor that the father had reported the Grievor to the CAS. The Arbitrator held that *"in fact, no such complaint was made".* The Arbitrator also made note that again *"no formal complaint, no attempt at verification"* was made by the Principal or Vice-Principal and that the CAS never contacted the Grievor. The Grievor was asked to leave immediately pending an investigation and a letter was sent to the Grievor later that afternoon.

The Arbitrator held that the letter was disciplinary in nature for several reasons including the fact that an experienced teacher such as the Grievor was removed from the school quickly which was *"undoubtedly the infliction of a penalty";* no just cause had been shown for the imposition of any penalty; a *"gag order"* was imposed on the Grievor which was *"beyond the authority of the*

Board"; and, no reference was made to any complaint to the CAS which was *"supposedly the legal basis for the Grievor's exclusion from the school".* The Arbitrator further noted that the investigation seemed unreliable as it appeared only two of the boys involved in the matters were interviewed as well as another pupil, and there was no indication of the context of the interviews with the children, including when they were held, or evidence that there was any type of *"cross-examination"* with respect to their evidence. Furthermore, the Principal did not try to contact the CAS because she had been told that each parent had contacted the CAS. The Arbitrator noted that a letter to the Grievor, after the Grievor (in the company of the Federation) had responded to the Investigation Report, was also disciplinary in nature and served as a warning being *"issued without just cause".*

The Arbitrator concluded that the Board was in violation of the *Code* as there was evidence to conclude that the Board engaged in a course of "harassment" as defined in s. 10(1) of the *Code*. The Arbitrator further concluded that the Board was in violation of the collective agreement which contained a similar non-discrimination clause. The Arbitrator ordered that any disciplinary notations in the Grievor's file relating to any of the events at issue be expunged and that she be compensated for any loss of benefits and/or earnings following her attempt to return from her illness on March 13, 2009. The Arbitrator awarded the Grievor $20,000 in general damages for pain and suffering but did not award punitive damages, stating that such damages were generally awarded in cases of particularly egregious misconduct, and that caution should be exercised in awarding such damages when parties are in a continuing relationship.

This decision emphasizes the need for administrative staff to investigate matters thoroughly, take detailed notes throughout the process and ensure that proper communication is had with all parties involved. Employers must also be cognizant of human rights issues when dealing with discipline and disability.

Class size and composition governed by the School Act, and not subject to "the Rule of 33"

In *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, [2012] B.C.J. No. 1618, the British Columbia Court of Appeal (BCCA or the Court) heard an appeal of an Arbitrator's interpretation of some of the class size and composition provisions of the *School Act* (*Act*). The British Columbia Teachers' Federation (Union) took issue with how the Arbitrator assigned the burden of proof in Grievances that alleged the statutorily set class size and composition had been breached. The Union also appealed the Arbitrator's related decision to create a formula: "the Rule of 33", that accorded presumptive deference to the opinion of the Principal and superintendent that the class was appropriate for student learning.

The class size provisions provide for a maximum number of 30 students per class, unless:

"(a) in the opinions of the superintendent of schools for the school district and the Principal of the school, the organization of the class is appropriate for student learning; and

(b) the Principal of the school has obtained the consent of the teacher of that class".

The unanimous Court held that the Arbitrator's so-called Rule of 33, although expedient, was not consistent with the *Act* which sets out class composition and held that the legal burden for disproving the exception in the *Act* had been improperly placed on the Union.

The BCCA reviewed the decades long-conflict in British Columbia over classroom organization. Amendments to the *Act* in 2002, meant class size and class composition limits could no longer be the subject of collective bargaining. The Court commented that the current version of the *Act* attempts to balance the sometimes-conflicting

goals of teachers wanting to teach classes of manageable size and composition with the needs of school administrators to have flexibility in meeting demands on school resources. The Court observed that the language of the *Act* sets class organization limits and only grants school administrators' permission to exceed those limits if doing so does not compromise student learning.

The parties had previously agreed to a process whereby certain of the over 1,600 class-size Grievances would be resolved as Representative Grievances. It was during the First Representative Grievance that the Arbitrator developed the Rule of 33 formula, which he applied to assist in determining if the impugned class organization contravened the *Act*.

The Arbitrator set out of the Rule of 33 formula as: *"add the number of students in the class to the number of students in the class with an individual education plan — if it is equal to or less than 33 then presumptive deference should be given to the Principal and the superintendent's organization of the class".*

It is the Second Representative Decision that formed the basis of this appeal. In it, the Arbitrator reaffirmed the usefulness and applicability of the Rule of 33 as set out in the First Representative Grievance.

The Arbitrator explained the difficulty in determining under the *Act* whether the employer or the Grievor carries the burden in showing the class size and composition was not appropriate for student learning. In respect of classes that did not exceed the Rule of 33 and were thus presumptively organized based on reasonable opinions that the classes were appropriate for student learning, the Arbitrator ruled the Union must lead evidence to rebut the presumption. Where the class exceeded the Rule of 33 and was thus not presumptively appropriate for student learning, the Arbitrator ruled the burden should be placed on the employer and that the teacher could choose whether to testify. As such the Arbitrator ruled against the Union and found that *"a contextual approach was required to resolve the matters at hand; the context required consideration of multiple objectives; and the presumptive deference approach was appropriate."*

The issues on appeal before the BCCA were whether the Arbitrator erred in creating the Rule of 33 and two sub-issues that related to whether the *Act* creates an exception and who should bear the legal and/or evidentiary burden.

On the first issue the BCCA held that the Arbitrator, being appointed pursuant to the *Labour Relations Code* had no authority to amend the rules created by the *Act*, and only had the authority to interpret it. The Court found that the *Act* created clear limits subject to identified exceptions: that the school board must ensure that class size and composition does not exceed the stated statutory limits unless the exceptions apply. The Court found the Arbitrator's creation of the Rule of 33 to be expedient but inconsistent with the *Act*.

The Court interpreted the second issue, the burden of proof, to be made up two sub-issues: (i) whether the statute creates an exception and (ii) who should bear the legal and/or evidential burden.

On the first sub-issue: (i) the Court agreed with the submission that the *Act's* statement that when a class' size and/or composition exceeds the standard stipulated in the *Act*, the school board must rely on an exception.

In answering the second sub-issue: (ii) the Court first set out the differences between the concepts of a "legal burden" versus an "evidentiary burden". Holding that the Arbitrator erred in placing the legal burden on the Union to disprove the exception, the Court reasoned that the burden must fall on the employer to show that its opinion that the class was appropriate for student learning was reasonable. If it failed to do so, the class organization violates the *Act*.

The Court noted:

- that the wording of the class size and composition limits is strict (evidenced by the *Act's* use of the words "must" and "unless");

- that although a teacher will know about a class generally, it is the Principal and Superintendent who have expertise and knowledge on the broader concerns that are relevant to whether a class is appropriate for student learning; and,

- that placing the legal burden on the employer, the decision-maker, will not defeat the statutory intent to create flexibility as the exception remains relatively easily met through evidence that the opinions were reasonable.

Thus, the Court held the overall burden of proving a breach to be on the Union, but the burden of proving the exception is on the employer.

The remedy awarded by the Court was confined to the 2010/2011 school year in recognition of the enormous administration burden associated with these Grievances, and was agreed to by the parties.

This decision is informative as it sets out that an Arbitrator appointed under the *Labour Relations Code* although tasked with interpreting legislation, cannot do so to the point of amending it.

Arbitrator holds that teachers need not act reasonably in refusing to teach a combined course class

In *Grand Erie District School Board v. Ontario Secondary School Teachers' Federation, District 23 (Combined Course Classes Grievance)*, [2012] O.L.A.A. No. 313, the Arbitrator held that the Grievances brought by two teachers in regards to their refusal to each teach a combined course class should be allowed because Article 12.06 of the collective agreement contained no explicit nor implicit duty to be reasonable.

These Grievances arose out of Port Dover High School, a small rural school, which is being reviewed by an Accommodation Review Committee for potential closure. Although small, the school is expected to do its best to provide its students with all the courses the students require to meet their "educational pathways". There are three educational pathways: Local, Applied, and Academic. Finding ways for all of the school's students to meet their educational pathways has typically included the School Board assigning teachers to teach, "combined course classes".

The Arbitrator explained that a "combined course class" means the same teacher teaches two classes at the same time, in one classroom. Combined course classes count as two courses for the purpose of Article 12.06 of the collective agreement.

Article 12.06 of the collective agreement states: *"No teacher shall be assigned more than 3.0 courses per semester unless there is an agreement by the teacher, the Bargaining Unit and the Board."*

The individual Grievors testified that, for separate reasons, they were unable to teach the combined course classes assigned to them, and relied on Article 12.06 of their collective agreement to support their refusal.

Ms. Milner was the Head of the Science Department, and has been teaching at the school since 1989. She was asked to teach a combined course class for the 2011 Fall semester, as well as 2 regular courses. Under the collective agreement this meant Ms. Milner was assigned to teach a total of four courses. Although Ms. Milner had taught both levels of the courses which made up the combined course class, she had never taught a combined course class before. Ms. Milner felt that the curriculum for the two courses was substantially different, that it would be unduly onerous for her to prepare for and teach them as a combined class, and that such a combined class would be detrimental to students' learning experiences.

Mr. Fu emigrated from China in 1980 and had been teaching at the school since 1992. Although he is qualified to teach grades 9 through 12 sciences courses, he had most frequently taught math and grades 11 and 12 University level physics. He was asked to teach a combined course for the Fall 2011 semester that was composed of grade 9 Local and Applied level students. Mr. Fu was concerned with teaching the combined course for two reasons: he had never taught Local or Applied grade 9 science before and was unfamiliar with the terms used in the chemistry and biology units; and was concerned he would not be able to pronounce many of the terms. He was also concerned about teaching a combined course of students who commonly have learning disabilities or behavioural problems.

The Ontario Secondary School Teachers' Federation (OSSTF) made numerous submissions that supported its assertion that Article 12.06 is clear and unambiguous in that it grants teachers the right not to consent to teaching more than three courses per semester, which meant Ms. Milner and Mr. Fu had the right not to consent to teaching the combined courses they were assigned.

The OSSTF submitted that the language of Article 12.06 did not contain any explicit requirement of reasonableness regarding the teacher's consent, and that it also did not contain an implied duty to not act unreasonably.

The OSSTF relied on case law that supported its position, including an earlier unreported decision where Article 12.06 was interpreted as "inviting" parties to act reasonably, but not as requiring parties to act reasonably. Further, the OSSTF asserted that by looking at the entire collective agreement and different types of language used in Article 12 in particular it was clear that Article 12.06 should not be interpreted as containing an implied duty to not act unreasonably. This is because other Articles contained either clear mandatory language or used clear qualifications or exceptions to set out the standard. Of particular note was Article 12.08, which explicitly places a requirement on teachers to act reasonably if they wish to refuse to supervise during a lunch period.

The School Board submitted that Article 12.06 must be interpreted to include an implied duty to act reasonably; meaning the teacher and the bargaining unit can only withhold their consent if they have reasonable grounds. The School Board submitted that the teachers had not acted reasonably in refusing to teach the combined courses.

The Arbitrator rejected these submissions and found the case law actually supported the OSSTF position.

The Arbitrator preferred the OSSTF's submissions and held that Article 12.06 did not include an implied duty that teachers must act reasonably, nor that they must not act unreasonably in not granting their consent to teach more than 3.0 classes. In light of principles of collective agreement interpretation and in the context of the entire collective agreement, the Arbitrator found that the language in Article 12.06 was intentional and clear, and that there is no implied duty for teachers to act reasonably or to not act unreasonably in not consenting to teaching more than 3.0 classes.

The Arbitrator held that interpreting the Article otherwise would significantly diminish, if not render meaningless, the teacher's ability to not grant their consent. Further, the Arbitrator found that even if there was an implied duty for a teacher to not act unreasonably in not granting their consent, that on the facts both Grievors would have met that threshold.

This decision demonstrates that collective agreement interpretation requires that the language of the collective agreement be given its plain and ordinary meaning, and that the particular language must be read in the context of the entire agreement, so that appropriate meaning is given to the agreement.

Court holds that the Labour Board does not have discretion to ignore or override express provisions of a collective agreement

In *Greater Essex County District School Board v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552*, [2012] O.J. No. 3129, the Ontario Court of Appeal (ONCA or Court) considered the issue of whether a Grievance filed by the United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (Union) in July 2004, that was not referred to arbitration until four months beyond the 14-day time limit for referral of a matter under the Collective Agreement, was nonetheless arbitrable before the Ontario Labour Relations Board (OLRB) by virtue of the powers vested under s. 133 of its enabling statute the *Ontario Labour Relations Act, 1995* (*Act*).

This Grievance arose out of a disagreement between the Greater Essex County District School Board (Board) and the Union about whether or not the Board was obliged to hire only Unionized plumbers and pipefitters for construction projects. In 1998 the Board was created by a merger of the former Essex County Board of Education and the former Board of Education for the City of Windsor. Prior to the merger the City of Windsor had been bound by the provincial collective agreements with the Union (and other construction Unions), but the Essex County Board of Education had not been and had been able to hire both Unionized and non-Unionized workers.

In 2006, the OLRB determined that the Board was a single employer and therefore subject to the Collective Agreement, and made its obligation to hire only Unionized workers retroactive to the date the Board was formed by the merger. Prior to the OLRB's decision, the Union grieved the Board's hiring of workers not bound by the collective agreement to work at two schools. The Union did not refer the Grievance to arbitration until December 2004, more than 4 months after the 14-day time limit to refer a matter to arbitration under the Collective Agreement.

The Vice-Chair of the OLRB conceded that the Grievance had not been referred within the 14-day time limit, and that the time limit had not been extended by mutual agreement of the parties, but nevertheless decided that he had the authority to hear it. He concluded that under the Collective Agreement the arbitration process is entirely separate from the Grievance procedure, and as a consequence, the 14-day time limit in the Collective Agreement was directory, not mandatory. The Vice-Chair concluded in the alternative that s. 48(16) of the *Act* applied to allow the extension of the time for referral. In the further alternative, he held that even if the Grievance had been referred to the OLRB outside the time limits set out in the Collective Agreement, and even if the time limits were mandatory, he had the authority under s. 133 of the *Act*, which provides that a Grievance under a collective agreement may be referred to the OLRB *"despite the Grievance arbitration provisions in a collective agreement"*, to hear the Grievance.

In May 2010, the Vice-Chair heard the Grievance and rejected the Board's only defence that the Union could not rely on the strict terms of the Collective Agreement. The Board brought an application for judicial review to the Ontario Divisional Court.

The Divisional Court concluded that the timelines within the Collective Agreement were mandatory and took note of the particular language used in Article 17.3, which provides that:

"any Grievance … that has not been carried through Article 17 – Grievance Procedure Clauses and in accordance with the time limit specified, or mutually agreed to, will be deemed to have been settled satisfactorily by the parties to the Grievance."

The Divisional Court held that the only reasonable, rational conclusion to be drawn from

Article 17.3 is that once the clause is engaged it *"brings the Grievance and the referral to arbitration to an end through a deemed settlement…there is nothing left that could be referred to arbitration."* The Divisional Court also concluded that the Vice-Chair's interpretation of s. 133 of the *Act* was unreasonable and reversed the Vice-Chair's ruling. The Union appealed to the ONCA.

The ONCA rejected the Union's assertion that the Vice-Chair's reliance on s. 133 was reasonable. The unanimous Court agreed with the Divisional Court's conclusion that the Vice-Chair's assertion of jurisdiction was unreasonable and could not stand.

The ONCA emphasized that s. 133 (1) of the *Act* exists to provide a useful forum for the prompt resolution of construction industry Grievances, provided that there is, in fact, a Grievance to arbitrate. The Court cited past decisions of the OLRB, which held that where a collective agreement clearly provides that a Grievance that is not processed in a timely fashion is deemed to be abandoned, the Grievance effectively ceases to exist and is not therefore capable of referral to arbitration. The ONCA found that the Vice-Chair declined to follow this line of authority (including previous decisions of his own), and instead *"invested the Labour Board with the wide open discretion to ignore or override the collective agreement".*

The Court found this departure from earlier OLRB cases to be unreasonable, and concluded that there was no live Grievance that could be referred to the OLRB under s. 133, pursuant to the terms of the Collective Agreement.

Furthermore, the ONCA held that the Grievance not being filed within the 14-day time limit meant it was deemed settled pursuant to the terms of the collective agreement. The ONCA also found the OLRB's interpretation of the *Act* to be unreasonable. Lastly, the Court held the OLRB did not have the right to ignore the express terms of the Collective Agreement dealing with Grievance and arbitration.

This decision clearly sets out that although the OLRB has broad discretion to accept or refuse a Grievance for referral, it cannot do so when under the Collective Agreement the Grievance has been deemed settled.

Arbitration Panel assesses reasonableness of medical forms

In *Fort McMurray Roman Catholic Separate School District No. 32 v. Alberta Teachers' Assn.* (Medical Forms Grievance), [2012] A.G.A.A. No. 40, the Alberta Teachers' Association (Association) filed a policy Grievance against the Fort McMurray Roman Catholic Separate School District No. 32 (School District) concerning the legitimacy of medical forms designed to be completed by physicians. The School District unilaterally implemented the policy. The policy included a requirement for medical information to be provided in relation to illness benefits during pregnancy.

The Panel wrote that the introduction of the policy into the employment relationship raised the issue of how an employer's legitimate business interests in managing the workplace should be balanced against the employees' recognized rights to privacy as well as the protection of their personal medical information.

The Grievance also raised an issue related to a clause contained in the standard employment contract used by the School District which required teachers, on its request, to provide written medical opinions concerning their mental and physical health, in a form and content satisfactory to the employer. The Panel also found that the Association extended an invitation to the School District to negotiate a form that both parties would be satisfied with.

The Superintendent of the School District responded to the policy Grievance by letter. The Superintendent wrote that the medical forms at

issue were not developed by the School District but by the long-term benefits provider and that management intended on developing a general form to administer all sick leave requests. A new form was created; however, the Association continued to take issue with it.

The Panel heard the evidence of several witnesses who outlined their experiences in seeking medical leave and the use of the medical request forms.

The Association submitted that at the very least, the contractual language should be assessed on a "reasonableness" basis, which does not lend itself to permitting any extensive questioning on a certificate/form of first instance. The Association asserted that the form itself does not indicate any minimum time away from work for it to be applicable and that presumably, the form must find its legitimacy within the negotiated language of the collective agreement, which indicates only that an absent teacher *"may be required to present a signed statement or medical certification upon request".*

The Association relied on a line of arbitral case law dealing with the reasonableness of an employer's approach when asserting its management requirements as against an employee's privacy rights. Arbitrators have held that employers must act reasonably as there is *"no inherent management right to compel an employee to provide confidential and personal medical information. If that right is to be found, it must be found in the language of the collective agreement or in the particular circumstances to which the employer responds."*

The Panel ultimately defined the Association's characterization of the issue as being a matter of asking whether the School District's current illness form, or any of its previous drafts, can be taken as reasonable in the context of the collective agreement and under the statutory overlap with privacy legislation.

The School District submitted the 2009 form should be considered reasonable and valid to address illnesses approaching the extended leave category (20 school days), and that the form is not intended to seek any more information than it considers to be reasonable in order to adequately administer its collective agreement obligations.

The Panel was satisfied that the School District has a legitimate management concern over better understanding certain extended medical leave situations, i.e. those exceeding the 20 teaching day range, or those approaching that absence figure, which have not been reasonably explained to the School District through other means, such as an initial comprehensive medical note or the obvious nature of the illness or disability, which may not require further explanation.

The Panel found that in most situations of an absence approaching the 20 teaching day range, the teacher would have already submitted a prescription pad note. The School District then has to determine whether anything more is needed through the use of the standard form.

The Panel held that Arbitrators are reluctant to enforce standard form documentation on an absent employee as an early first step approach: other Arbitrators have referred to information disclosure as moving along a continuum. That is, as the length of absence progresses, the employer is entitled to request more detailed medical information from the employee.

The Panel concluded that having reviewed the contractual language placed alongside the standard form 2009 document, said to represent the School District's current position, along with the changes the Panel directed, that the form is appropriate under the reasonableness test and is able to be circulated and relied upon. The Panel held that the form (with the changes as directed), reflects the extent of medical information which the School District is entitled to request in reviewing extended illness leaves, and possibly also dealing with shorter leaves in some unusual particular circumstances as might be revealed on a case-by-case basis.

This award reflects the difficulty employers continue to have in balancing the interest in

managing an employee's absence while respecting the privacy interests of the employee. Whether the request for medical information is reasonable is the most determinative factor in assessing whether that balance has been achieved.

Arbitrator orders reinstatement of teacher who assaulted 13-year-old student

In *Ontario Secondary School Teachers' Federation, District 17 v. Simcoe County District School Board*, [2011] CanLII 81305 (ON LA), the Arbitrator ordered the reinstatement of a teacher who had slapped a 13-year-old student, finding that a two-year suspension was the more appropriate remedy than termination of employment.

The Grievor, a teacher at Bear Creek Secondary School in Simcoe County, Ontario, slapped a 13-year-old student across the cheek after repeatedly warning him to stop whistling in class. The student had a red mark on his face for approximately 30 minutes after the incident.

The Arbitrator accepted the Grievor's testimony that she did not intend to harm the student and merely wished to knock his fingers out of his mouth. Nevertheless, the Arbitrator found that the Grievor intentionally struck the student, that she recklessly disregarded the possibility that harm might result, and that she did, in fact, cause harm to the student.

Immediately following the incident, the Grievor realized that she had done something wrong, but she did not apologize to the student, nor did she notify her superiors. She testified that she planned to speak to the student the next day to apologize and explain why it was unacceptable to engage in disruptive behaviour in class. Before she could approach the student, however, she was confronted by the administration and suspended with pay pending an investigation by the Board.

During the investigation, the Grievor declined to give any explanation for her actions on the advice of her criminal defence counsel. The Board ultimately terminated her employment on the basis that she had violated her professional code of conduct and breached her statutory duties under section 264 of the *Education Act*.

Several months after her dismissal, the Grievor pled guilty to a charge of criminal assault in relation to the incident. Rather than convicting her, the Court granted her a conditional discharge.

In order to determine whether there was just cause for a dismissal, adjudicators must engage in a three-step inquiry. Specifically, the adjudicator must determine: (1) whether the employee is responsible for the alleged misconduct; (2) whether the misconduct gives rise to just cause for discipline; and (3), whether the disciplinary measures taken are appropriate in light of the misconduct and the other relevant circumstances. The only point at issue in this case is whether termination of employment was an appropriate disciplinary measure.

The Arbitrator rejected the Board's proposition that the mere presence of reasonable grounds for dismissal is sufficient to constitute just cause. Rather, the Arbitrator confirmed that when determining the existence of just cause, both the facts and the employer's choice of disciplinary measures are subject to broad arbitral review. In other words, the Arbitrator retains broad discretion to evaluate the appropriateness of the dismissal on the balance of probabilities.

The Arbitrator held that a failure to fulfill the professional duties under the *Education Act* does not, on its own, constitute just cause for dismissal. In reviewing the jurisprudence, the Arbitrator noted a number of arbitral decisions in which a teacher's criminal assault on a student was not found to merit termination. Furthermore, the Supreme Court of Canada established in *Bhadauria* (1997, Grievance) that the duties imposed on teachers by virtue of s. 264 of the *Education Act* represent an unattainable ideal, not

a minimum standard. It follows that an employer will only be justified in disciplining a teacher where there has been a significant breach. Arbitrators must assess the seriousness of the misconduct in the context of the circumstances, including: (1) the gravity of the conduct; (2) the teacher's intent to harm; (3) the teacher's seniority; (4) the degree of the employer's responsibility for the incident; (5) the teacher's past performance; (6) the teacher's remorse; and (7) the risk of re-occurrence.

The Arbitrator determined that the Grievor's misconduct was serious. She clearly violated her professional Code of Conduct and her conduct amounted to criminal assault, meaning that the application of force was both intentional and unjustified.

The Arbitrator reviewed a number of decisions by the Ontario College of Teachers Discipline Committee and concluded that the Committee does not consider the type of assault that occurred in this case to be sufficient grounds to prevent a teacher from teaching. While decisions of the Committee are not binding with respect to arbitration, the Arbitrator nevertheless stated that these decisions were relevant and useful to his assessment of the severity of misconduct.

The Arbitrator noted that certain forms of assault may be more or less serious than others, and distinguished between slapping a student in a moment of anger and, for instance, repeatedly punching a student. The severity of an assault is also influenced by the teacher's intent to harm and the relative vulnerability of the student. In this case, although the Grievor did not intend to inflict harm, she showed reckless disregard for that possibility.

The Grievor had never hit a student prior to the incident in question. However, she had yelled and used an aggressive tone of voice in the classroom, and once said to two disruptive students: *"I would hit you if I could."* Moreover, the Arbitrator found that the fact that she did not acknowledge either the aggressive character of the remarks or their potential for being misunderstood by her students suggested that she has issues with classroom management.

The Arbitrator further held that some of the Grievor's evidence suggested a minimization of the incident, specifically with respect to her level of anger, the amount of force that she used, and the recklessness that she demonstrated. Likewise, although the Grievor eventually took responsibility for her actions, her initial response was to blame the student. The Arbitrator found that although the Grievor was not intentionally trying to negate her responsibility, she was nevertheless still struggling to come to terms with the seriousness of her actions.

Notwithstanding the above, the Arbitrator found that the Grievor genuinely felt remorse and took responsibility for her actions. Her failure to immediately report the incident was attributed to shock rather than an effort to cover up her actions. Her refusal to explain her actions during the course of the Board's investigation was found to constitute nothing more than a reasonable reliance on the advice of her criminal defence counsel. The Arbitrator further found that her apology to the student was sincere, as was her testimony that she immediately recognized that she had done something wrong after striking the student.

In addition to showing remorse, the Grievor had attended counselling as a condition of her criminal discharge and indicated an understanding that she needed to adopt a different approach to classroom management in the future. The Arbitrator concluded that there was a minimal risk that the misconduct would reoccur and that discharge was therefore not the appropriate penalty. The Grievor was ordered reinstated but was denied compensation for lost wages and benefits.

This Decision confirms the principles applicable in such cases. An interesting twist is the reference to the OCT Discipline Committee decisions to assist with the analysis.

Arbitrator grants order for production of documents involving autistic students in relation to class-size policy Grievances

In *Ottawa Carleton District School Board v. Elementary Teachers Federation of Ontario (Ottawa Carleton Elementary Teachers Federation)*, [2012] O.L.A.A. No. 69, the Arbitrator determined a preliminary issue in granting a production order sought in relation to two policy Grievances filed regarding class sizes for autistic kindergarten students.

The Arbitration focused on two policy Grievances brought by the Ontario Secondary School Teachers' Federation (Federation) for the school years of 2010-2011 and 2011-2012. The Federation alleged that the Ottawa-Carleton District School Board (Board) violated s. 31 of Regulation 298 of the *Education Act* of Ontario (*Act*), stating that the Board *"exceeded the enrolment of six students in a class for autistic pupils"* in one of the Board's public schools. The Federation sought production of documents in relation to the Grievance submitting that such were relevant to issues of the Grievance. The Board had complied with the Federation's request with the exception of the following material: current and prior statement decisions of the Identification, Placement and Review Committee (IPRC) for students who were in the class of the Grievor (a teacher of the kindergarten class in question) for the school years between 2009-2012; the current and prior Individual Education Plan (IEP) for each student in the Grievor's class for the school years between 2009-2012; any documentation of IPRC hearings and appeals for students in the Grievor's class for the school years between 2009-2012; any documentation related to the behaviours, descriptions, exceptionalities and reports for each of the students in the Grievor's class for the school years between 2009-2012; and, any documentation related to the selection or identification process of students enrolled in the Grievor's class for the school years between 2009-2012, including documentation from the Autism Selection Committee.

The Board stated it was concerned about violating Section 266(2) of the *Act* which includes privilege for student documentation and inadmissibility of the documents for the purposes of any type of proceeding. The Federation argued that it required such documentation to properly prepare for the cross-examination of witnesses to be called by the Board. The Federation further submitted that the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) trumped the *Act*, and that the Arbitrator had the authority to order the production of such documents under ss. 52 and 53 of *MFIPPA* regardless of the privilege provisions within the *Act*.

The Arbitrator relied on the decision in *Re Hastings and Prince Edward District School Board, supra* (*Re Hastings*), which stated that the effect of *MFIPPA* was *"to remove the absolute immunity"* that the *Act "may have originally intended to confer upon student or pupil records".* Furthermore the case stated that s. 266(2) of the *Act* could only *"be read and understood as being a confidentiality provision"*. The Arbitrator utilized the criteria set out in *Re Hastings* when an Ontario Student Record should be ordered and produced. The Arbitrator was satisfied that the following criteria were applicable to the production of the documentation for the policy Grievances: *"it is essential for the course of natural justice at a hearing"*; the documents are *"relevant"* and have *"significant probative value to the issues in the case"*; *"the probative value outweighs the social interests of protecting the documents and the information"*; and, *"the nature of the case is of sufficient weight and significance to override the need to protect the information and documents…"*. The Arbitrator also noted that the request for disclosure of such documents needed to be accompanied by the appropriate safeguards to protect the privacy of the students involved.

The Arbitrator also dismissed the Board's request to create a *"mock file"* to protect each student's

privacy *"with a moniker",* as the Board had also submitted that the *Act* limited the individuals who were entitled to access such documentation. The Arbitrator found that this would be *"unnecessary and time consuming"* and instead outlined procedural steps and rules which both parties had to follow during both the production phase as well as the evidentiary phase of the proceedings, which in turn would act as sufficient safeguards. The Arbitrator further stated that the Arbitration would be closed to the members of public unless they could demonstrate to the Arbitrator that they had *"a legitimate interest in the proceedings".*

Notably, the Arbitrator stated the order was *"fact specific to the instant case"* and *"made on a without precedent basis".* This leaves room for interpretation by decision-making bodies with respect to the production of privacy-sensitive materials involving staff and/or students during a proceeding.

Arbitrator determines documentation related to teacher investigation was not litigation-privileged

In *Peel District School Board v. Ontario Secondary School Teacher's Federation, District 19-Peel Region*, [2012] O.L.A.A. No. 99, the Arbitrator made an interim order to grant a request by the Ontario Secondary School Teachers' Federation (Federation) for production of documents which the employer, Peel District School Board (Board) had refused to produce.

The Grievor, Mr. Tremis, was employed by the Board from September 1989 until October 2010, teaching Transportation Technology (also known as "auto shop"). The Principal, new to the Secondary School where the Grievor had been teaching auto shop, had issued a memo to the Grievor at the start of the 2008-2009 school year *"directing him to remove all material not belonging to the school board, to stop any personal use of the auto shop"* as well as to follow safety and other procedures and *"to obtain written approval before purchasing any vehicles"* brought to the compound. The Principal believed that the Grievor was not following her directives and she began looking into other issues including revenue and accounting matters related to the auto shop. The Principal had concerns that there were continual health and safety violations, that a volunteer had not been cleared through the office but had been working in the auto shop and that the Grievor had not been truthful about the ownership of twelve vehicles in the compound.

Officials of the Board discussed matters with the Principal and sent the Grievor home in order to investigate matters further. In October 2010, the Trustees of the Board accepted a recommendation to terminate the Grievor's employment, based on the 2009 investigation whereby the Board concluded he was guilty of misconduct and: (i) "*inappropriately profited from his position as a teacher*"; (ii) "*was insubordinate and conducted himself without regard for board policies and procedures*"; and, (iii) "*breached his duties as a teacher*".

At the hearing of the Grievor's termination Grievance, the parties addressed the production of documents request made by the Federation. The Board agreed to provide some of the requested material but refused to produce documents which post-dated November 19, 2008 when the Grievor was assigned to home, with the exception of documents that it had intended to rely on during the hearing. The Board stated that such documentation was litigation privileged and/or solicitor-client privileged. This documentation included: emails, many of which were from the Principal dealing mainly with shop security issues and equipment; handwritten and signed statements of Erindale Secondary School students; interview notes; and, general notes mostly written by the Principal discussing various issues regarding the investigation. The Board argued that litigation privilege of the documents *"was triggered"* when the Grievor was sent home on November 19, 2008.

The Arbitrator reiterated that *"the burden lies on the party who resists disclosure to justify the refusal to disclose".* The Arbitrator noted that all of the documentation was arguably relevant to the issues within the Grievance and that none of the documentation requested was based on communication between the Board officials of what actions to take following the investigation and/or communication between Board officials and the Board's legal counsel (which is subject to solicitor-client privilege).

The Arbitrator noted that the documents met *"the test of arguable relevance"* and that the Board failed to meet the test for non-disclosure. The test for non-disclosure required the Board to demonstrate that the documents had been created at a time when litigation was *"reasonably anticipated"* and that *"they must have been created for the dominant purpose of that litigation"*. While the Arbitrator agreed that litigation could have been reasonably anticipated at the time the Grievor was sent home, the Arbitrator did not agree that the dominant purpose of the documents was for litigation but instead, was for the investigation of the Grievor which took place. The Arbitrator stated that *"placing a blanket protection over interview notes and statements during the ensuing investigation would insulate from production documents that are normally disclosed in termination cases where the employer has conducted its investigation before the employee is sent home"* and that *"it would undermine the firmly established trend toward greater pre-hearing production in labour arbitration".* The Arbitrator thus ordered the production of the documents and noted that there was no guarantee that any document would *"meet the test of relevance at the hearing".*

The Arbitrator also granted the Board's request that *"any order for production be reciprocal"* but noted that correspondence between the Grievor and the Federation representatives was covered by labour relations privilege, preventing disclosure.

This decision emphasizes the importance that all administrative staff involved in an investigation take careful notes and be mindful that such documentation may be ordered for production with respect to a Grievance.

British Columbia Court of Appeal dismisses appeal regarding failure of School Boards to comply with Ministerial Order

In *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, [2012] B.C.J. No. 2473, the British Columbia Court of Appeal (BCCA) dismissed an Appeal brought by the British Columbia Teachers' Federation (Federation) from a preliminary arbitral ruling which found that the British Columbia Public School Employers' Association (Association) did not violate a collective agreement with respect to following a Ministerial Order.

In October of 2000, the British Columbia Ministry of Education established a MLA Task Force designed to improve school safety. Legislation entitled the *School Act* (*Act*) was later amended in 2007 to state that a given Board, *"must … establish a code of conduct for students enrolled in educational programs provided by the board"*. The Minister ordered that: *"under this legislation it is mandatory for school boards to establish codes of conduct for their districts to help prevent bullying and harassment at their schools"* in the Amendment to the *School Act's* Second Reading. The Ministerial Order (MO) in essence, required school boards to establish codes of conduct for their respective schools *"envisioning consultation with individuals or groups the school considers are representative of employees of the board, parents and students".*

The Federation took a survey of the school districts regarding this issue and, of the responses it received, determined that many school districts had not complied with the MO. The Federation filed a Grievance stating that the Boards of

Education throughout the province had violated the collective agreement in their failure to comply with the Ministerial Order.

The Arbitrator in reviewing the Grievance, determined that the matter was neither grievable nor within the jurisdiction of the Arbitrator to decide. The Arbitrator agreed with the Association that the MO was not subject to Arbitration as it deals with consequences for students. While the Federation only sought a declaration that school boards had not complied with the MO, the Arbitrator stated that the Federation's position *"would require certain disputes as to whether a particular code of conduct complied with the Ministerial Order to be resolved by arbitration and others to be settled in a different forum"*. Moreover, the Arbitrator stated that he would have to determine *"what constitutes sufficient compliance"* with the MO's requirements, and that teachers formed only one of the employee groups who have to be consulted. The Arbitrator noted that student behaviours certainly impacted the employment of teachers, but he was not satisfied that such a dispute fell *"within the exclusive jurisdiction of a Grievance arbitrator"*.

The Arbitrator further stated that codes of conduct had not been negotiated at the provincial or local level and that the MO was neither *"employment related legislation"* nor *"a significant part of the employment relationship between teachers and their school boards"*. The Arbitrator found that the Grievance did not "arise expressly or inferentially from the ambit of the collective agreement".

The Arbitrator made note that while a particular provision of the *Act* made the Ministerial Order a condition or term of a given teacher's employment contract, it was not a term of the teachers' collective agreement. The Arbitrator stated that not all provisions under the *Act* could be arbitrated despite the inclusion of given provisions of the *Act* into the teacher's employment contract.

The BCCA first determined that the appropriate standard of review for the Appeal was correctness, as the Arbitrator was required to interpret the MO and *Act* which the Court considered to be *"laws of general application"* not within the *"specialized jurisdiction of the arbitrator"*.

The BCCA noted that there was nothing within the *School Act* to suggest that its regulations "are automatically imported into a teacher's collective agreement". The Court then analyzed whether the codes of conduct had formed *"a significant part of the employment relationship"* which had formed a part of the collective bargaining process in the past.

The BCCA noted that the Arbitrator had found that issues of student conduct and sexual harassment had not been included in the provincial collective agreement despite the Federation bringing such issues to light during negotiations. Furthermore the Court found that the *School Act* did *"not import the Ministerial Order into the collective agreement"*, noting that the collective agreement was *"the root of the arbitrator's authority"*. The BCCA also agreed with the Arbitrator that the MO was *"not employment-related legislation"* and that the primary focus was to address bullying and improve student safety.

The BCCA also mentioned the fact that it did not feel Arbitrators should assume roles *"in developing solutions to resolve complex disputes"*, as argued by the Federation. The BCCA noted that this situation would appear to require an Arbitrator to handle Ministry tasks and to approve of Codes of Conduct relevant to students, parents and board employees who were not parties to the arbitration. As such, the BCCA dismissed the Appeal.

This decision highlights the significance of an Arbitrator's role in analyzing employment-related matters, particularly the relationship of existing legislation and collective agreements governing board responsibilities towards staff and students.

Ontario College of Teachers revokes Certificate of Qualification of retired member for sexual misconduct.

In *Ontario College of Teachers v. Thompson*, 2012 LNON CTO 13, the Ontario College of Teachers Discipline Committee (Committee) made a penalty decision regarding the allegations against Wayne Clark Thompson (Member).

The Member was not present at the hearing despite being served with Notice of Hearing and disclosure documents. The Committee proceeded with analyzing allegations against the Member stemming from the academic years of 1973 to 1976 when the Member was a teacher of the District School Board of Niagara (formerly known as the Lincoln County Board of Education). Two males who were students of the Member at the material times alleged that the Member engaged in sexual conversations and sexual acts with each of them and also encouraged sexual acts between the two students. The Member, who retired with the Board in 1994, was arrested on May 4, 2009 and charged with *"four (4) counts of indecent assault"*, two against each student, contrary to the *Criminal Code of Canada (Code)*.

The Committee noted that a non-publication and non-broadcast order had been issued under the *Code* during proceedings which occurred in the Ontario Court of Justice and as such, the Committee stated that no publication of information would occur which could identify the victims involved.

The Committee proceeded on the basis that the Member had denied the allegations as set out in the Notice of Hearing, in the Member's absence. The Committee considered the evidence including a Transcript of Sentencing Proceedings, Certified copies of the Convictions and Court documents which confirmed the Member was found guilty in the Ontario Court of Justice of indecent assault against both male students. The Court documents further confirmed the Member had been sentenced to two years in jail and three subsequent years of probation, with conditions that the Member be prohibited from the following: entering public parks, swimming areas and school grounds where persons under the age of 16 are present; obtaining employment or volunteer work that involves the Member being in a position of trust to persons under the age of 16; contacting or communicating alone with a person under the age of 16; and, using a computer system for the purpose of communicating with a person under the age of 16.

The Committee determined that the facts supported a finding that the Member had engaged in professional misconduct, breached provisions of Ontario Regulation 437/97 and engaged in sexual abuse of students as defined in the *Education Act* of Ontario. **The Committee, noting its entitlement to rely on a finding of guilt and conviction of a Member in a Canadian Court, made reference to Justice Nadel's Reasons for Sentencing in coming to its decision; namely that *"a major aggravating factor of these crimes was the abuse of the trust reposed in Mr. Thompson as a teacher and Principal"* and that the Member *"has no sense of the gravity of the seriousness of his crimes".*** The Committee noted that the Member admitted to abusing these students weekly over a span of three years in the Member's office, at the school and during overnight school trips. The Member had submitted that *"he did not know the legal age of consent throughout the duration of his teaching relations with students"*. The Member had further submitted that he *"did not believe that he used his position as a teacher to sexually take advantage of students"*. The Committee noted that this type of misconduct *"brings the profession into disrepute and tarnishes public trust in the profession".*

The Committee revoked the Member's Certificate of Qualification and Registration and directed publication of the Order with the Member's name in the College's official publication "Professionally Speaking / Pour parler profession". The Committee noted that publishing the Member's name *"acts as a general deterrent"*, establishing that such conduct will not be tolerated. The Committee also noted that this action *"serves the public interest"* by informing the community as to the Committee's decisions on such matters.

Allocation methodology for wind-up and distribution of a Trust must be reasonable

In *Goodwin v. Elementary Teachers' Federation of Ontario*, [2012] O.J. No. 3337, the Ontario Superior Court of Justice heard a motion by the School Board (Board) for an order approving its proposed distribution methodology for approximately $1.7 million received by it as a result of the wind-up of an Insurance Trust in which the Board and the other Defendants participated.

The motion was objected to by Mary Hay on her own behalf and on the behalf of other former Board employees who ceased to be enrolled in the Trust's group insurance plan before June 30, 2006 (former employees) who opposed the proposed distribution plan.

The central issue in the motion was whether the distribution plan was an unreasonable exercise of the Board's discretion by excluding the former employees who paid premiums for and were beneficiaries of the Trust's group insurance policies.

Between 1969 and 2007, teachers and other employees of the Board received group insurance benefits organized under an Insurance Trust. In 2006 the Board and the Unions decided to wind up the Trust and distribute its assets. They entered into an amending agreement (Amendment) as of June 30 2006, which provided for administrative trustees appointed by the Board and the Unions to wind up the Trust.

Under the Amendment, the assets of the trust remaining after the Trust windup (surplus funds) were to be distributed to the Board and the Unions for distribution to the beneficiaries or for the purpose of providing continuing benefits to the beneficiary groups.

In 2009, the administrative trustees commenced this action, seeking the advice and direction of the Court on the issue of winding-up the Trust and distributing its assets. The Court directed the administrative trustees to wind-up the Trust in part, distribute the majority of the surplus assets of the Trust remaining after the wind-up; and distribute the remainder of the surplus funds once the Trust's remaining liabilities had been discharged.

The surplus funds were only to be used for the enhancement of existing benefits, the payment of premiums or premium deficits, or distribution to employees who were enrolled in policies administered by the Trust or the payment of legal fees.

As a result of that order, the Board received almost $1.7 million. It sought to allocate the funds to reimbursement of its legal fees, with the remainder allocated in the proportion of 25% to a premium reserve against the Board's future benefit premium obligations, and 75% to be distributed to persons who were enrolled in the Trust policies as of June 30, 2006.

The objectors to the motion asserted that this choice of date, which would exclude them from receiving any of the surplus which they felt they should receive as former beneficiaries of the

Insurance trust, was an unreasonable decision by the Board.

The Board submitted that the proposed distribution methodology was the product of careful consideration of relevant factors by individuals with no personal interest in the outcome.

The Court accepted the proposition that the Board was not obliged, in its exercise of its permitted discretion under the Permitted Uses, to propose any distribution to members at all, but also held that because the Board chose to allocate some portion of the surplus to members, the allocation methodology had to be reasonable and not based on irrelevant considerations.

The Court held that the primary basis for the Board's decision to restrict the distribution to employees enrolled in the policy as of June 30, 2006 was because that threshold constituted the very basis upon which the Board received its almost $1.7 million share on the wind-up of the Trust. The Court did not agree with the objector's claim that the date chosen for the cut off was irrelevant and held that the date was not arbitrary or unfair. The Court found that the date decided on was reasonable and that notice of it had been widely circulated to those involved, including the former employees.

The Court found that it was not true that the proposed scheme of distribution defeated any reasonable expectations of the former employees, holding that *"the fact that the objector group contributed to the plans, while not an irrelevant consideration, cannot give rise to a claim so superior that it renders the Board's proposed distribution methodology unreasonable".* Further, the Court held, *"[in] this case, the plans themselves always contemplated the possibility of surplus. The Board and the Unions were the beneficial owners of any surplus. The plans always provide for the distribution of surplus to the Board and the Unions, not to individual members."*

The Court also found that calculation of entitlements based on actual contributory experience would present vast calculation and informational problems.

For all of those reasons, the Court held the Board was entitled to the exercise of its discretion to decline to adopt employee contribution as the basis for its proposed distribution plan, and that this approach was not unfair.

This decision demonstrates that where a distribution plan for an insurance trust is reasonable, especially where it is the product of careful consideration by individuals with no personal interest in the outcome, it is unlikely that a Court will overturn it.

— KC LLP —

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