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Human Resources Newsletter

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Supreme Court of Canada Revisits Standard to be Applied on Judicial Review and the Knight Decision

In its recent decision in the case of *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, the Supreme Court of Canada found that the appellant, a former employee with the Department of Justice for the Province of New Brunswick, was not entitled to procedural fairness in connection with the termination of his employment. The employee, who held his office “at pleasure”, had several disciplinary issues throughout his short tenure with the Department and had received letters of reprimand and an unpaid suspension. His employment was eventually terminated and he was provided with four months pay in lieu of notice. Following his termination, the appellant filed a grievance under the Province’s *Public Service Labour Relations Act*, which provides a grievance process for non-unionized, public sector employees. He alleged, amongst other issues, that he was denied procedural fairness with respect to his termination. The adjudicator characterized the appellant’s employment as hybrid in nature and determined that he was entitled to procedural fairness. Accordingly, the adjudicator declared that the termination was void *ab initio*. On judicial review, the Court of Queen’s Bench determined that the standard of review was correctness. On further appeal, the New Brunswick Court of Appeal determined that the standard of review was reasonableness *simpliciter*.

On appeal to the Supreme Court, the majority took the opportunity to “...re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable” and in doing so, reduced the number of standards of review available to reviewing courts from three to

two: correctness and reasonableness. In this case, the majority concluded that the standard of review should be reasonableness and found on the merits that the adjudicator’s decision was not reasonable. The majority concluded that the appellant’s employment was governed by the law of contract and that he was not entitled to procedural fairness in respect of his termination.

While the case is not a complete overhaul of the law of judicial review, the Supreme Court has provided reviewing courts with a clarified and simplified “road map” with which to review administrative decisions, which will be of interest to all public sector decision-makers who exercise statutory authority.

This decision is important both with respect to its impact on judicial review, as well as the approach to be taken by school boards when dismissing senior employees. Arguably, the duty of fairness owed to senior employees as part of a dismissal process may no longer be grounded in common law. But, it should be noted that the *Education Act* continues to contain provisions providing for some measures of procedural fairness.

Duty to Accommodate Probationary Employee

The duty to accommodate was recently highlighted by the Ontario Human Rights Tribunal in *Lane v. ADGA Group Consultants Inc.*, [2008] O.H.R.T.D. No. 34. The complaint arose out of the dismissal of an employee with bipolar disorder, eight days after he commenced working with the company.

The Complainant, Mr. Lane, sought employment with ADGA as a Senior Test Analyst. The position involved providing leadership and supervision to a team, and

working under stressful deadlines. His qualifications and employment experience made him a suitable candidate for the role, and he was hired under a probationary 90-day period, during which time his employment could be terminated without notice or cause.

Interestingly, neither at the interview, nor at any other point before he was hired, did Mr. Lane indicate that he had bipolar disorder. He completed the employment application, and omitted to disclose any health conditions for fear that it would have negative repercussions on his chances of obtaining employment. As well, after being hired, he completed the Employment Equity Survey and failed to identify that he had any form of impairment or disability including “mental disability”.

Two days after he began working, however, he had a conversation with his immediate supervisor advising her that if she witnessed any inappropriate behavior, she should not hesitate to intervene. During the conversation, Mr. Lane failed to specifically identify that he had bipolar disorder. He followed up with another conversation two days later, at which point he revealed his mental disability and offered to provide additional information. He advised her of his workplace history, as well he informed her that stress was a potential trigger of the disorder. He requested that the information remain confidential.

A few days later, the Complainant began demonstrating unusual behavior indicative of a pre-manic state. His supervisor requested that he attend a meeting with her immediate supervisor, Mr. Germain, who she had already advised of Mr. Lane’s condition and recent behaviour. The meeting focused on whether Mr. Lane’s condition and specific needs were compatible with the responsibilities and stress associated with his new position. Mr. Germain advised that he was convinced Mr.

Lane could not do the job; and as he was still in the probationary period, he was dismissed and required to exit the premises. There was no discussion of alternative employment, or any accommodations that could be made by the employer to address Mr. Lane’s needs.

Following a review of the evidence, the Tribunal established that Mr. Germain was acting on the advice of Mr. Lane’s supervisor as to his symptoms and his prognosis. It was clear that Mr. Lane was dismissed because of his disability and the perceptions of that disability on workplace performance. The Tribunal concluded that ADGA violated Mr. Lane’s rights under section 5 of the *Human Rights Code*, R.S.O. 1990, c. H.19, to equal treatment and freedom from discrimination on the basis of disability. The primary violation centred on ADGA’s summary dismissal of Mr. Lane without meeting the procedural obligations that it was bound to meet under s. 17(2) (duty to accommodate provisions) of the *Code*. Pursuant to Section 17(2) of the *Code*, the duty to accommodate is not satisfied unless the Tribunal finds that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the costs, as well as any health and/or safety requirements.

The Tribunal rejected the argument that ADGA had the right to dismiss Mr. Lane once it discovered that he had lied about his bipolar disorder during the hiring process. Rather, the Tribunal noted that Mr. Lane fulfilled his obligation by identifying the nature of his illness, provided adequate information about his personal work history, and sought suggestions for accommodation. From that point onward, the Tribunal held, the onus rested with ADGA. *“Those responsible at ADGA did not conduct an appropriate assessment of the situation to enable them to reach an informed conclusion that they could not accommodate*

Mr. Lane’s disability without undue hardship.”

The Tribunal ordered the employer to pay the Complainant damages totaling \$79,278.75 including damages for lost wages and mental distress. Additionally, due to the particularly egregious nature of the employer’s response, a number of public interest remedies were also awarded. The employer was ordered to provide training to all employees, supervisors, and managers on the obligation of employers under the *Human Rights Code*, and specifically, the accommodation of persons with disabilities with a special focus on mental health issues. Also, an anti-discrimination policy was to be established to ensure that the values of the *Code* were well understood and applied by all employees in hopes of preventing future incidents of workplace discrimination.

The decision in Lane highlights the responsibilities that school boards have to try to accommodate the disability related needs of employees, even probationary employees, by conducting a searching and thorough review of what accommodation measures might be appropriate in the circumstances.

Divisional Court Upholds Arbitration Decision that Special Education Principals are Performing Consultant’s Work

The decision of Arbitrator Gerald Charney, judicially reviewed in *Dufferin-Peel Catholic District School Board v. Ontario English Catholic Teachers’ Association*, [2008] O.J. No. 87 (Divisional Court), was reviewed in the November, 2006, issue of the Human Resources Digest (Vol. 4, Issue 3).

The Ontario English Catholic Teachers’ Association (the “Association”) had filed two grievances respecting the appointment of two individuals who were not members of the bargaining unit to the positions of Principal of Special Education and Vice Principal of Special Education. Arbitrator Charney held that the positions were not managerial positions and would more properly be categorized as “co-ordinator” positions, which fell within the teachers’ bargaining unit. Therefore, the Board was required to post the positions so that they were available for members of the teachers’ bargaining unit to apply to, and to remit appropriate dues with respect to the two (2) positions.

The Divisional Court applied the most deferential standard, patent unreasonableness, to its review and found that the decision was reasonable.

This decision has had and may continue to have an impact on a number of school boards who utilize a model that employs Principals and Vice Principals in central or regional special education leadership roles.

Sick Leave Credits Not Accumulated on Long-Term Disability Leave

In *Grand Erie District School Board v. Ontario Secondary School Teachers’ Federation, District 23*, [2008] O.L.A.A. No. 44 (Knopf, Riddell, Morose), the issue before the Panel was whether a teacher was entitled to accumulate Sick Leave credits while receiving Long Term Disability. The Union had filed both an individual grievance on behalf of an individual teacher, as well as a policy grievance. The Union sought retroactive cumulative Sick Leave credits for the grievor and for every other teacher on Long Term Disability.

The Board argued that Sick Leave credits were an earned benefit and that it had been its practice to not allocate such credits to teachers on Long Term Disability. The issue had been raised in collective bargaining in 2002/2003 by the Board, however, the Union objected and, as a result, specific language was not included in the Collective Agreement and the status quo remained. The evidence presented to the Arbitration Panel, however, demonstrated that the Board and the Union had different understandings of what the status quo entailed.

The Panel's decision to dismiss the grievances was based on the interpretation of the Collective Agreement rather than on any extrinsic evidence presented during the hearing. The Panel reviewed the Collective Agreement as a whole, taking many provisions into account in a contextual analysis to determine the meaning of the provision in question. The Panel found that the general approach in the Collective Agreement was that Sick Leave credits were an earned benefit that accumulated in relation to a teacher's performance of services.

The Panel also relied on the decision in *Lambton Kent District School Board v. Elementary Teachers Federation of Ontario* (August 16, 2007, unreported, Etherington), which concerned language identical to that in the article of the Collective Agreement before the Panel. In that case, the Arbitrator held that it was generally understood that Sick Leave credits were earned rather than an automatic entitlement that flowed from employment status. The Panel agreed. In addition, the Panel held that the Collective Agreement would have to contain clear language to demonstrate an intention to depart from this general understanding. The Panel found that the Collective Agreement in question did not contain such language. As a result, the grievances were dismissed.

The language relied on in this decision has now been tested by both ETFO and OSSTF. For other school boards with similar language, likely those unions who continue to wish to have sick leave granted during an LTD period will seek to address this issue through bargaining this year.

Disclosure of Personal Information is an Issue that can be Grieved

The authority of an arbitrator to hear a grievance relating to the alleged improper disclosure of medical information was recently reviewed in *Kawartha Pine Ridge District School Board v. Elementary Teachers' Federation of Ontario (S.D. Grievance)*, [2008] O.L.A.A. No. 106 (Luborsky). An elementary school teacher alleged that the School Board violated the collective agreement when the principal sent a letter to the approximately 20-22 parents of the teacher's Grade 1 or 2 level students informing them of the her six month medical leave due to treatment for breast cancer.

The Union alleged that the Board "*improperly released confidential, sensitive and private personal information to the parents of the Grievor's students in flagrant violation of the collective agreement, provincial privacy, health care and human rights legislation, as well as a breach of the Employer's fiduciary duty of trust, confidence and good faith towards the teacher*".

In this interim award, the Board responded alleging that the grievance was not arbitrable; and therefore, no violation of the collective agreement occurred. In the alternative, the Board claimed that, if there was any breach of a statutory or common law right respecting privacy, the Grievor must pursue a remedy through the civil courts. The Board argued (referring to

sections of the collective agreement regarding access to information) that, if the parties had not expressly included a requirement to keep medical information about a teacher confidential, the Board's rights to disclose such information remained unfettered in that regard. Additionally, the Board argued that the Arbitrator did not have authority to interpret and apply the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA"), R.S.O. 1990, c. M.56, as amended, due to the fact that the provisions of *MFIPPA* do not apply to records collected, maintained or used by an institution, including a school board, in relation to employment or labour-related matters.

The Union submitted that it intended to present evidence that confirmed that the Grievor did not want her personal medical circumstances revealed to members of the school community generally, and preferred to deal with the matter privately. The Grievor alleged that the principal was aware of the Grievor's feelings and knew or ought to have known that any release of her personal medical information without her consent was likely to cause her distress. The Union claimed that, as a result of the disclosure, the grievor suffered and continues to suffer emotionally. Additionally, referring directly to the *MFIPPA*, the Union submitted that the principal's disclosure of the Grievor's medical condition in the letter to the parents of her students was a clear violation of the statute.

The Arbitrator reviewed jurisprudence relating to its jurisdiction, and determined that the Arbitrator's duty was: (i) to decide whether the "essential character" of the dispute presented by the Union's grievance arose from the interpretation, application, administration or alleged violation of the collective agreement; and (ii) to determine the proper jurisdiction to adjudicate the

dispute from an assessment of the express and/or implied terms of the parties' agreement.

The Arbitrator concluded that based on his interpretation of the provisions in the collective agreement, the appropriateness of the principal's letter to the parents of the Grievor's young students in its "essential character" arose from provisions of the collective agreement, its application and/or its administration. The collective agreement required a teacher to provide medical certification of an absence due to illness. Therefore, the transmission of the information provided by the teacher to the principal relating to her upcoming treatment for breast cancer, and its subsequent disclosure to the student's parents was in its "essential character" related to the collective agreement. Finding jurisdiction on those grounds, the Arbitrator concluded that he could adjudicate the Federation's grievance and assess its claims for various declarations and damages flowing from an alleged breach of contract including aggravated or punitive damages, along with damages for mental distress arising out of a contractual breach.

Moreover, the Arbitrator concluded that *MFIPPA* is an employment-related statute that the parties recognized in the collective agreement as a prevailing statute. The Arbitrator rejected the Board's submission that the *Act* did not apply to records collected, maintained or used by a school board in relation to employment or labour-related matters; because in these circumstances, the Board failed to demonstrate how the fact that the Grievor had breast cancer was an employment-related matter warranting disclosure.

School boards should be mindful of the need to keep employee health information confidential for many reasons. This decision supports that need by recognizing that it may also be a duty that school board employers have to their employees. **KC LLP**

Professional Development Corner

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Keel Cottrelle LLP Human Resources Newsletter

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