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SCHOOL BOARDS

Grievance Arbitration: Scope

Dispute about disability benefits to be heard by Arbitrator, not Court

In **Duke v. Toronto District School Board, [2006] O.J. No. 1983**, the Ontario Superior Court of Justice applied the Supreme Court's "essential character" test to find that the plaintiff's claim for long-term disability benefits was properly the subject matter of an arbitration, not a court proceeding.

The plaintiff, who was employed with the respondent school board as a caretaker, had been receiving disability benefit payments which were stopped on the basis that she had not sustained a "total disability", as defined in the plan. She then brought a claim for continued payment of long-term disability benefits before the court. In addition, she brought a separate claim against Clarica Life Insurance Company. Clarica and the school board had an "Administrative Services Only Agreement", whereby Clarica was to provide administrative services in respect of the Board's benefit plans; however, the board remained responsible for funding all disability claims.

The court cited the Supreme Court of Canada's recent affirmation of the "exclusive jurisdiction model" for issues arising under collective agreements. Under this model "... disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts". The Supreme Court's most recent case on the issue, *Allen v. Alberta*, set out an "essential character test" for determining whether a matter should be before an arbitrator or before a court. In that case, the Supreme Court stated that: "If the essential character of the dispute arises either explicitly or implicitly from the interpretation, application, administration or violation of the collective agreement, the dispute is within the sole jurisdiction of an arbitrator to decide".

The plaintiff argued that, because the issue also impugned the conduct of a third party, who could not be added by the arbitrator as a party to the dispute, the matter should come before the court. Further, the plaintiff argued that the Board's agreement with Clarica served to make the issue of responsibility for the benefits less clear, which supported the issue being heard by a court. Finally, the plaintiff argued that an arbitrator's limitation with respect to awarding punitive damages for bad faith should support the issue being heard by a court.

The plaintiff referred to several cases where it was held that disputes over employer benefits should be heard by courts; however, the court distinguished these cases on the basis that the employer had no power to deny benefits. The court concluded that on the facts of the dispute before it, the Board had the ultimate responsibility to decide whether benefits were payable and Clarica was only acting as an agent of the Board. While recognizing that not every term governing entitlement to long term disability benefits was referred to in the collective agreement, it was nevertheless, clear that the essential nature of the dispute, the denial of continued benefit payments, was within the ambit of the collective agreement. Since the Board's insurance plan arose inferentially from the collective agreement, disputes related to its administration should be brought before a labour arbitrator. In addressing the issue of the related action against Clarica, the court stated that it did not affect its findings in relation to the action against the Board. To support this conclusion, the court referred to a statement in an earlier case to the effect that it "is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue."

As a final point, the court responded to the plaintiff's argument that an arbitrator has limited ability to award punitive damages by referring to the 2004 case of *Ontario Public Services Employee Union v. Seneca College*, in which the court found that an arbitrator could award punitive damages in a dispute arising from a collective agreement.

Collective Bargaining: Bargaining Unit

Principal and Vice-Principal of Special Education should be co-ordinator positions

In **Dufferin-Peel Catholic District School Board v. Ontario English Catholic Teachers' Association, [2006] O.L.A.A. No. 430 (Charney),** the issues before the Arbitrator were: firstly, whether the persons appointed as principal and vice-principal of special education were a principal and vice-principal, as defined in the *Education Act*; secondly, whether the positions were outside the bargaining unit for another reason, i.e. that they were management, and; thirdly, whether the principal and vice-principal of special education were doing the work of teachers, as defined in the Act.

Both the elementary unit and the secondary school unit had grieved the appointment of a principal and a vice-principal of special education on the ground that the position should have been assigned to a part 10.1 teacher, as defined in the Act. The principal had been an acting principal as well as a vice-principal before her appointment, and the vice-principal had been an acting vice-principal before her appointment. Both positions had been posted before being filled.

Prior to 1998, special education had been delivered by co-ordinators. Each co-ordinator of special education reported to the superintendent of special education. The co-ordinator position was subsequently posted and filled as a position for a principal of special education.

The Arbitrator examined the legislation, the job postings and job descriptions, the duties associated with the positions, and the evidence of several witnesses and concluded that the supervision and management of teachers was not a core part of either the principal or vice-principal's duties. He further found that the duties of the principal were not outside the duties of a co-ordinator and were not managerial. Similarly, the Arbitrator concluded that the main functions of the vice-principal were not managerial in nature. He held that there was no reason the work of the principal and vice-principal could not be done by co-ordinators.

The Arbitrator agreed with the Union, and stated at paragraph 38, that:

"...the evidence simply does not establish that the management and direction of the special education staff was a core or substantial duty of the positions in issue. A fair review of the evidence established that [the principal] was primarily involved in the special education plan and the ISA process. [The vice-principal] was primarily involved in the ISA process and the IEP engine, and other ancillary duties. A review of various exhibits...indicates that [the principal's] duties were not focused on the management of teachers or other staff".

The Arbitrator noted that the positions did not require supervisory officer qualifications and that the functions were not similar to those of supervisory officers. The core duties were not managerial but were administrative. The supervisory functions the principal and vice-principal performed were found to be within the range of duties anticipated in section 17 of Regulation 298, Program Supervision and Co-ordination, and were consistent with the broad interpretation of teaching duties in the case law.

The Arbitrator found that the principal and vice-principal did not supervise teachers and did not have managerial authority in respect of school principals.

The Arbitrator concluded at paragraph 47: "I am not necessarily persuaded that a principal must be a principal of a physical school, but with a statute drafted to extract principals and vice-principals from the bargaining unit, if there were exceptions to be made to the definition of principal and vice-principal of a school they would be made. I think I am entitled to make the assumption that unless excluded they are included, unless the work is managerial in nature. Therefore, they should be included in the bargaining unit".

The Arbitrator concluded that the work was not managerial and there was no compelling reason that the work was not that of a co-ordinator. The principal and vice-principal did not exercise core managerial functions over teachers and had no supervisory duties over school principals.

The Board was ordered to post the positions so as to make them available to members of the bargaining unit and to remit

the appropriate dues associated with the positions to the Union.

There was an interim of approximately two years between the completion of the arbitration and the issuing of the decision. The decision did not take into consideration changes at the Board. The decision is currently subject to an application for judicial review to the Divisional Court.

Termination: Grounds

Fraud sufficient ground for termination

In **Hamilton-Wentworth District School Board and O.S.S.T.F., (Re Milanovich), 85 C.L.A.S. 154**, the Union filed a grievance seeking reinstatement of a teacher charged with fraud. The fraud charges related to over 200 false invoices for physiotherapy services submitted to the School Board's insurance carrier for services that were not provided. The Union argued that terminating his employment was an unfairly severe penalty for conduct that was out of character and unreflective of the grievor's exemplary teaching skills and abilities. Rejecting the Union's position, the Arbitration Board concluded that the School Board's decision to terminate the teacher was reasonable in the circumstances.

The grievor, Nick Milanovich, was a teacher with the Hamilton-Wentworth District School Board since September 2001. Over a two-year span, the grievor received in excess of $50,000.00 as reimbursement for fraudulent invoices submitted to the School Board's insurance carrier, Great West Life Insurance Company ("GWL").

On August 29, 2003, following an audit and investigation by the insurance company, the grievor was charged with fraud over $5,000.00. When interviewed, the grievor admitted that on a regular basis, (three or four times a month), he submitted claim forms to the insurer for services not provided to him. Moreover, the grievor confirmed that he had incurred out-of-pocket expenses for services, which were also reimbursed by the insurer.

On January 28, 2004, the School Board terminated the grievor's employment viewing the grievor's actions as incompatible with his obligations as a teacher. The School Board alleged that it had just cause to terminate the employment relationship because the dishonesty and breach of trust constituted serious misconduct and was inconsistent with the School Board's values and policies.

On October 27, 2004 the grievor pleaded guilty to the charge and was placed on probation for one year. With the assistance of his family, the grievor was able to make full restitution to the insurer that same day. The grievor was remorseful for his conduct characterizing his actions as "idiotic" and "stupid".

The Union argued that the grievor was a good teacher whose past performance appraisals and evaluations evidenced a person whose abilities, personality and classroom management skills made him an effective teacher. Further, the Union asserted that preventing him from continuing his chosen career would deprive students from the benefits of his skills and abilities, as well as being unnecessarily punitive for uncharacteristic conduct.

Emphasizing a contextual approach, the Union argued that the grievor's life was subject to financial, familial and work-related pressures. In a "desperate" attempt to provide for his family, the fraudulent invoices provided "relief" from the financial stress. Additionally, the grievor's wife faced a loss of employment during the course of her maternity leave, which added to the grievor's financial stress. The grievor kept these circumstances to himself and did not seek any type of outside help, although assistance was available through an Employee Assistance Program.

The School Board argued that the grievor engaged in serious misconduct considering his position as a teacher and a role model. Notwithstanding the fact that his performance reviews suggested he was a good teacher, the School Board asserted that there were no compelling circumstances sufficient to warrant his reinstatement.

The Arbitration Board weighed the competing factors and found the actions of the grievor to be calculated conduct that compromised the high standards of teachers, as well as his employment relationship with the

School Board. The actions began soon after employment, and the conduct stopped only when he was caught. The sheer volume of the fraudulent invoices and the length of time over which the grievor committed the fraud indicated a significant pattern of deceit. Moreover, the grievor acknowledged that at the time he engaged in his fraudulent conduct he knew what he was doing was wrong.

Referring to the high standard of teacher's conduct, the Arbitration Board considered ss. 264(1)(c) of the *Education Act*, and addressed the impact of conduct outside the classroom. "The cases show that the public holds teachers to high standards both within and outside the classroom because teachers are integral to the education system. As a result, the loss of trust or confidence in the integrity of a teacher because of 'off-duty' conduct is inextricably linked to the confidence and integrity with which the public views the education system within which that teacher is employed". [36]

In all of the circumstances, the Arbitrators found the School Board had reasonable grounds to dismiss the grievor. There were no compelling mitigating factors to render an otherwise reasonable response to the grievor's misconduct unjust, or to warrant the grievor's reinstatement.

Discipline: Accommodation: Alcoholism

Therapeutic model to be used when alcoholic no longer rational

The issue of how employers should handle alcoholism in the workplace was put before a Manitoba Labour Arbitrator in **Winnipeg (City) v. Amalgamated Transit Union, Local 1505, [2006] M.G.A.D. No. 4**. The grievor had received a 15-day suspension for arriving to work on December 24, 2004 in an inebriated state. The grievor was an alcoholic, and had a history of both alcohol-related and non-alcohol-related disciplinary issues with the employer for arriving late and not showing up for work. In grieving the suspension, the union took the position that the grievor's alcoholism was a disability, and that he should have been accommodated by being allowed to take a "sick day" instead of being subjected to disciplinary action.

The grievor had worked for the City since 1980, commencing his current position as a "Storekeeper III" in 1989. A series of disciplinary actions had been taken against him for alcohol-related absences and tardiness, and in conjunction with this discipline he had participated in various treatment programs. Between 1994 and 2003 he had no alcohol-related incidents at work, although he did receive a series of disciplinary consequences not related to alcohol use. Throughout his tenure with the employer, the grievor had been involved with the employer's Counsel and Guidance Program, which dealt progressively with employee attendance, safety and performance issues. In addition, the employer had accommodated the grievor during periods when he was seeking treatment. In 2004, following personal difficulties, the grievor began to drink following an eleven year period of "trying to control his drinking". His relapse continued and gave rise to an incident attracting the 15 day suspension. In conjunction with the suspension, the employer required the grievor to seek further treatment for his alcoholism and allowed him to use sick days to pursue this treatment.

In presenting its arguments before the arbitrator, the employer cited three "categories" of arbitral cases addressing alcoholism in the workplace: the first treats impairment in the workplace as "culpable misconduct warranting discipline" and is referred to as the "disciplinary model"; the second, the "hybrid model", combines "a disciplinary response to the problematic behaviour of the alcoholic grievor, with a therapeutic approach to the grievor's disability."; the final category, the "therapeutic model" treats alcoholism as a disability or disease and related employee conduct is non-culpable.

The employer argued that it was unnecessary to determine which model was appropriate for this case, because it had been applying a hybrid model to alcohol-related problems in the workplace for several years, including to the grievor's situation. The action taken in respect of the incident was indicative of this approach—the 15 day suspension without pay was a disciplinary consequence and the requirement and facilitation of a treatment plan was therapeutic in nature.

The union argued that, while it did not advocate the application of a therapeutic model in all cases of alcohol-related employee issues, certain circumstances called for such a model and the circumstances surrounding the

grievor's actions represented such a situation. The union pointed out that it was the grievor's first alcohol-related incident in 11 years and the grievor could easily have been accommodated by receiving a sick day.

The Arbitrator found that at issue, when deciding whether to apply a therapeutic model to a particular situation involving an alcoholic employee, is "whether that employee has reached the point of being incapable of making rational decisions". If this is the case, the therapeutic model, which treats the alcoholism purely as a disability, should be applied; and "... conversely, if the employee in question remains capable of making rational decisions ... the hybrid approach may be the most appropriate ....".

Given the lack of expert evidence as to the extent of the grievor's alcoholism, the employer's history of addressing the grievor's alcoholism and the fact that there was no reference to a Manitoba arbitration case where a purely therapeutic model was applied, the Arbitrator concluded that the hybrid model was most appropriate. In respect of whether or not the employer had accommodated the grievor's disability, the Arbitrator concluded, that while the grievor had acted reasonably in pursuing treatment over the years, the employer had done its part and "consistently made efforts to accommodate the grievor's alcoholism". This accommodation continued with respect to the incident. On this basis, the arbitrator dismissed the grievance.

Grievance: Occasional Teachers

Occasional teacher to fill permanent teacher's absence

In **Elementary Teachers' Federation of Ontario v. Lambton Kent District School Board (Split Vacancy Grievance), [2006] O.L.A.A. No. 207 (Etherington),** the issue before the Arbitrator was whether the Board had violated the collective agreement and the *Education Act* when it posted two long-term occasional vacancies to replace a full-time regular teacher on maternity leave rather than one full-time long-term occasional vacancy. The Board argued that that there was nothing in either the collective agreement or the Act that restricted its management right to organize and assign the work of the Board as it deemed necessary in order to fulfill its mandate.

The only evidence put before the Arbitrator was the testimony of the principal who had posted the two positions. He presented evidence as to why he had posted two positions instead of one. In the Junior Kindergarten and Senior Kindergarten program at the school the classes were scheduled on a "full day half-time schedule" so that one class would attend full days on Mondays and Wednesdays and half days on Fridays, and the other class would attend full days on Tuesdays and Thursdays and half days on Fridays. At the time, there were two teachers, one (full-time equivalent) FTE teacher who taught both an A and a B schedule, and one 0.5 FTE teacher who taught a second A schedule class. The timetables for each of the classes were scheduled separately, with the preparation time for the class assignment within each schedule.

The decision to post two positions was based on the principal's past experience unsuccessfully substituting a long-term occasional teacher for a permanent teacher for an extended period of time, which led to unhappiness in the parent community and among teachers and the school council.

By posting the position as two positions, the other permanent Kindergarten teacher would be able to apply to teach one of the classes without resigning from her permanent contract. This was in fact what happened, and a full-time long-term occasional teacher was appointed to fill the other position. The principal testified that it was a very successful year.

The Arbitrator found that the posting of a split vacancy, two 0.5 FTE long-term occasional teaching positions, to replace a single permanent full-time teacher was inconsistent with the Board's obligations under the collective agreement, which provided restrictions on the employer's general management right to organize the work to be done. The Arbitrator was careful to note that, the decision was based on the specific provisions of the collective agreement and not on provisions in the *Education Act*. The Arbitrator held, however, that past interpretations of the Act supported the Federation's argument that the definition of occasional teacher meant that a particular

occasional teacher was to take over the work performed by the absent permanent teacher. However, the Arbitrator did not rely on this interpretation, but rather relied on the language in the collective agreement. The Arbitrator did not make a finding that the split vacancy posting was contrary to the Act.

The Arbitrator considered the particular wording of the relevant provisions of the collective agreement and found that the parties contemplated and intended that an occasional teacher would be hired to replace or to substitute a particular absent permanent teacher and so would be assigned that teacher's timetable and preparation time, rather than the occasional teacher being hired to teach a specific class or part of an absent teacher's teaching assignment.

The Arbitrator acknowledged the employer's concerns about unduly fettering its discretion to fine tune the organization of work and of job postings, however held that there were devices in the agreement by which the employer could protect itself from negative experiences, such as determining who would be qualified to be hired as a long-term occasional teacher and removing qualified occasional teachers for cause, if necessary.

The Arbitrator concluded at paragraph 25, "Based on the evidence before me in this case, I am unable to conclude that a finding that the relevant provisions of the collective agreement require that an occasional teacher is to be hired as a substitute for a particular teacher in the sense of substantially taking over the work done by that teacher would unduly fetter the Board's ability to meet the pedagogical needs of its programs and students".

The Arbitrator did not issue a declaration of wide application, as requested by the Union, and held that such a declaration would be "tantamount to a finding that in no circumstances could the Board ever be allowed to hire more than one occasional teacher to replace an absent regular teacher and could unduly fetter the ability of the Board to deal with exigent circumstances in fulfilling its statutory obligations" (para. 26). Rather, the arbitrator declared that the Board had violated the collective agreement by positing two separate vacancies to replace a full-time permanent teacher. The Board was required to post a single long-term occasional vacancy to comply with the collective agreement.

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