Volume 2, Issue 1

March 2004

Human Resources Digest

Edu-Law Education H.R. Digest

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Human Resources Digest —
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UPCOMING PROFESSIONAL DEVELOPMENT:

March 29, 2004

Osgoode Hall Law School of York University

"**Current Challenges in Special Education Law**"

Osgoode Professional Development Centre, Toronto, Ontario

. . .

May 20, 2004

Education Safety Association of Ontario

2004 Conference: "**Safety is Your Business**"

International Plaza Hotel, Toronto, Ontario

. . .

June 11, 2004

Keel Cottrelle LLP, Barristers and Solicitors

"**Special Education Session**"

Capitol Banquet Centre, Mississauga, Ontario

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SCHOOL BOARDS: HUMAN RIGHTS

Accommodation

Arbitrator confirms accommodation of injured employee

This arbitration award considered the appropriate level of accommodation necessary for an injured employee who required modified duties.

The Grievor was a full time mail carrier in Saskatchewan with 29 years seniority. He was injured in 1999 and by January 2000 his employer had provided him with full time modified duties to address the restrictions caused by his injuries. He was assigned to the commercial service centre (CSC) to cover for another worker. This assignment was completed after three months, and the Grievor was then moved into a part-time letter carrier position with additional duties as required, including other delivery work. These duties kept the Grievor busy all day. His supervisor testified, however, that he would have to send him home if nothing could be found for him to do, which on occasion occurred more frequently.

The Grievor was often sent home early. The employer began to apply sick leave reducing his banked credits accordingly.

The union argued that by sending the Grievor home after only half a day's work and making him claim sick leave, it could result in any number of accommodated full time carriers being sent home during a low volume time of year. This, the Union argued, amounted to selective lay off of injured workers to avoid the duty to accommodate.

The arbitrator found that on the evidence, the employer had accommodated the Grievor to the best of its ability. He was able to work for at least four hours every day and efforts were made to increase this time to a full day when the work was available.

The employer had to weigh several factors in its obligation to accommodate: the degree of injury or illness being accommodated, the amount of productive work available and the complicating presence of other employees requiring accommodation. In addition, the arbitrator held that there was no obligation on an employer to accommodate the employee by allowing him to stay at work and do nothing productive.

Nothing in the collective agreement prohibited the employer from applying sick leave credits for those hours when no productive work could be found. However, while the employer had to consider a number of other workers who required accommodation, the arbitrator found that it was open to the employer to give the Grievor some of the extra available work from an open delivery position.

Unfortunately, the arbitrator did not provide details regarding how the open position(s) was to be divided among the injured employees. But this decision does support the use of sick leave to top up salary when full-time accommodation cannot be provided.

Canada Post Corp. v. Canadian Union of Postal Workers (Roberts Grievance, CUPW 810-00-00002 , Arb. Jolliffe), [2003] C.L.A.D. No. 336

SCHOOL BOARDS: EMPLOYEES

Discipline

Supreme Court confirms challenge to criminal conviction during Grievance is abuse of process

In this case, an employee working in parks and recreation was charged and convicted of sexually assaulting a minor who participated in one of the programs run by the City. Subsequent to the employee's conviction, the City terminated him, and he grieved his termination.

During the arbitration before a sole arbitrator, the Grievor attempted to re-argue the facts surrounding the criminal conviction. The arbitrator not only permitted this argument but also found in favour of the Grievor, finding his evidence more credible then that of the victim, who was not called by the City, which relied instead on the transcripts from the criminal trial.

The City sought judicial review and was successful. The Divisional Court applied the doctrines of collateral attack, issue estoppel and abuse of process in favour of the City. CUPE then appealed to the Ontario Court of Appeal, which did not allow the appeal, on the grounds of "finality", arguably a new doctrine.

CUPE then appealed to the Supreme Court of Canada. The Supreme Court unanimously dismissed the appeal.

The issue before the Supreme Court was described by the Court as follows: *"Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place?".*

The Supreme Court of Canada reviewed the application of the related doctrines of issue estoppel, collateral attack and abuse of process. The Court found that neither the requirements for issue estoppel or collateral attack applied to circumstances in the present case. The Court then reviewed the doctrine of abuse of process, which was described by the Court as engaging *"the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute".*

The Supreme Court noted that: *"Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel . . . are not met, but where allowing the litigation to*

proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice".

The Supreme Court also found that it was not important who initiated the litigation.

In describing the doctrine the Supreme Court stated: *"the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality".*

The Supreme Court found that the facts in the case were a *"blatant abuse of process"*. The Court commented that: *"as a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise".*

The Supreme Court has with this decision identified when the doctrine of abuse of process can be used to prevent a convicted employee from re-litigating his or her conviction for the purposes of defending their employment. While in the present circumstances the employee was subject to a collective agreement, the doctrine of abuse of process would apply equally in circumstances where an employee sued his or her employer for wrongful termination.

Toronto v. Canadian Union of Public Employees, Local 79, [2003] S.C.C. 63

At the same time, the Supreme Court issued its Reasons in a similar case involving employees of the Province of Ontario convicted of sexually assaulting people under their care, who grieved termination of their employment, and the Court confirmed the application of the principle of abuse of process.

Ontario v. OPSEU, [2003] S.C.C. 64

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Nova Scotia Court of Appeal confirms application of estoppel to dual proceedings

The Nova Scotia Court of Appeal recently affirmed a decision by a Board of Inquiry under the *Human Rights Act* dismissing a complaint as estopped from proceeding due to a previous ruling on the same issue by the Nova Scotia Supreme Court.

The Complainant had been an employee of Dural from June 1998 to March 1999 when he began to experience medical problems. He had surgery in April of that year and then was terminated in May. He commenced an action for wrongful dismissal in the Nova Scotia Supreme Court and filed a Complaint under the Act.

As part of his Statement of Claim, Mr. Kaiser asked the Court to grant: *"Punitive, aggravated and exemplary damages for the Defendant's malicious, discriminatory and wrongful method and motivation"* for termination.

The trial judge found that although Mr. Kaiser was incompetent, he was not so grossly incompetent as to justify dismissal without notice. The trial judge did not comment on the discrimination.

Following the decision of the Supreme Court, a Board of Inquiry was appointed to review Mr. Kaiser's complaint. At a preliminary hearing, the Board ruled that Mr. Kaiser was estopped from proceeding to a full hearing since the trial judge had jurisdiction to adjudicate on the discrimination issue, and in doing so had determined the issue before the Board of Inquiry.

It was this decision that was then appealed to the Court of Appeal.

The Commission argued that the Board of Inquiry had wrongly applied the principle of issue estoppel. The Court of Appeal disagreed finding that the question before the Board of Inquiry had already been decided "at least implicitly, if not explicitly" by the trial judge.

The Court confirmed that the addition of the Commission as a party following the trial for wrongful dismissal did not prevent the application of issue estoppel. The Complainant was a party to both the wrongful dismissal action and the Complaint.

Finally, the Court of Appeal discussed the policy reasons supporting the dismissal of the appeal, such as *"the importance of finality in litigation … along with the aim of avoiding duplicity, potential inconsistent results, undue costs, inconclusive proceedings, and ensuring just results in the particular case…".* In contrast to the Supreme Court's decision in *Toronto v. CUPE, supra*, in the present case the same parties were before the Court and the Board of Inquiry making estoppel an appropriate principle to apply.

Kaiser v. Dural, a division of Multibond Inc., [2003] N.S.J. No. 418

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Actions of employee did not constitute criminal conduct sufficient to justify termination

This was an application by the Canadian Union of Public Employees for judicial review of the decision of an arbitration panel dismissing a grievance regarding

the termination of an employee.

The Grievor had an otherwise unblemished work record of twelve years but was terminated for cause for attempting to defraud his employer. At issue was an incident wherein the Grievor received proceeds and an invoice in the amount of $942.34 on the sale of the Employer's scrap metal. The Grievor was to take the proceeds and the invoice to either the foreman or his assistant, however, neither were on the business premises at the time. Several days later when the Grievor returned to work, he told the foreman that he had received approximately "$642.00" for the scrap metal and that he did not have the money nor the invoice with him at the moment.

The Court reviewed the fact that while the Grievor did not have a copy of the invoice, he had handed in some of the money, and told his employer that more money may be forthcoming because he could not remember the exact amount he had received as proceeds of the sale. The Court held that the board of arbitration erred when it failed to take into account that the Grievor intended to complete the transaction on the same day he received the proceeds, but could not find the foreman or his assistant.

Additionally, the Court found that the board of arbitration erred when it found that cash sales were an acceptable practice, but then held it against the Grievor. The evidence was clear that the Grievor intended to return to the office to deliver the proceeds and invoice, in the ordinary course. Thus, it was unreasonable for the board of arbitration to conclude that the Grievor intended to commit a criminal act by adding his name to the invoice.

Clear practices, or a procedure regarding the steps to be taken when selling goods, including the requirement to provide the proceeds of the sale by cheque made out to the company, with a corresponding receipt would have both assisted in preventing wrong doing by creating safe guards and would make expectations clear to employees.

Canadian Union of Public Employees, Local 784 v. Edmonton School District No. 7, [2003] A.J. No. 1007

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Unfair Labour Practices

Terminations during strike constituted unfair labour practice

The Canadian Union of Public Employees, Local 3078 filed two unfair labour practice applications against Wadena School Division No. 46. At issue was the termination of a number of teaching assistants and the planned termination of more.

The group of teaching assistants who were terminated were approximately 10% of the bargaining unit and, at the time, were involved in rotating strikes. The Board claimed that the terminations were part of a plan implemented three years earlier, which called for the replacement of all teaching assistants with special education teachers, and there was no connection between the permanent lay-off of the teaching assistants and the strikes.

The teaching assistants had no prior knowledge that their jobs would be terminated nor were parents of students with special needs informed about the school board's plan. Moreover, the school board did not advise the Union of its decision to permanently lay-off the teaching assistants. Instead, the Union was made aware of the school board's plan when staff received newsletters providing information. A copy of the newsletter was not sent directly to either the Union or the Union representative.

The Labour Board found that the school board had a duty to inform the Union about decisions having a significant impact on the bargaining unit, and that the termination of 10% of the unit would have a significant impact. The Labour Board found that by withholding this information, the school board committed an unfair labour practice contrary to s. 11 of the *Trade Union Act*, R. S.S. 1978, c. T-17.

The Labour Board also found that the Employer did not provide a good and sufficient reason why the teaching assistants were terminated at that time and while they were engaged in lawful strike activity. The terminations interfered with, coerced, intimidated, threatened or restrained the teaching assistants in the exercise of a right conferred by the Act and was an unfair labour practice.

Wadena School Division No. 46 (Re), [2003] S.L.R.B.D. No. 40

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Occupational Health and Safety

Court reviews duty relating to alleged biological substances in the classroom

This was an appeal by the Complainant Lewis from an adjudicator's decision that the Regina School Division No. 4 had not contravened the *Saskatchewan Occupational Health and Safety Act* (The "Act").

The Complainant Lewis had been employed with the school board for 20 years as a teacher. In 1996 she began to experience persistent health problems after she started teaching in a modular classroom. These included fatigue, headaches, nosebleeds, sore throats, severe coughs and chest pains. She attributed these health concerns to her new classroom environment.

While the school board took the position that the Complainant's illness was not work related, it nevertheless, undertook to find her a position in another school. During this time, the Complainant was on sick leave until her sick leave days were used up. She then went on an income continuance plan until June 1999, when she accepted a position at another school.

Two years later she complained to the Occupational Health and Safety Division of the Department of Labour that the school board's refusal to offer her a suitable alternate classroom at the school forced her to remain home on sick leave, to her financial detriment, and that the school board's actions discriminated against her.

An occupational health officer undertook an investigation into the allegations and found that the school board had discriminated against the Complainant because it did not take practical and reasonable steps to determine the presence of biological substances in the classrooms. The officer went on to find that the school board had not provided sufficient reasons for its failure to provide alternate work for the Complainant. The officer issued a Notice of Contravention and ordered the Board to cease the discriminatory action, to reinstate the Complainant, pay any wages she would have earned, and remove any reprimand from her employment record.

This decision was appealed to the Director of the Occupational Health and Safety Division. The Director found that the Notice of Contravention was flawed, as the school board had done everything reasonably practicable to provide the Complainant with alternate work. This decision was further appealed to an adjudicator who agreed with the decision of the Director. The adjudicator found that there was no certainty that the substance responsible for the Complainant's illness was in the classroom, and that the financial loss she suffered was due to her illness, not because she had been discriminated against. The Complainant appealed to the Saskatchewan Court of Queen's Bench.

The Court dismissed the appeal, because there was no evidence that any chemical or biological substance was present in the modular classroom. Therefore, there was no obligation on the part of the Board to assign the Complainant to an alternative classroom. Though the Board may not have done everything practical to monitor the presence of chemical or biological substances, any oversight did not amount to discrimination.

Further, the Complainant was asked to go on sick leave solely as a concern over her health and not because she had refused to work or was attempting to enforce the Act. Accordingly, the Court found that there was no error in the adjudicator's decision.

Although the Court did not find that the school board's actions constituted discrimination, clearly, it would have been prudent for the school board to conduct tests of the work site in order to eliminate the possibility of work site contamination. As a result of the "mould in portables" issue in Ontario during the late 1990's most school boards have imposed protocols or practices for the surveillance of contaminants, and it remains prudent to institute such protocols when employees or students raise the issue of potential environmental causes of illness.

Lewis v. Regina School Division No. 4, [2003] S.J. No. 526

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Labour Board finds the use of two-way radios a good first-aid practice

The health and safety office issued a direction to a Saskatchewan Wheat Pool (SWP) work place, regarding the provision of first aid services. First aid attendants did not always work in close proximity to the first aid room. The decision was appealed by the employer, who argued that the use of 2-way radios ensured prompt and adequate response to first aid matters and that there was no record of a first aid attendant failing to provide a prompt response over the past twenty years.

The Appeals Officer found that the arrangements made by the employer, including the use of 2-way radios, met the performance standard of ensuring prompt and adequate rendering of first aid. Furthermore, supervisors at the work place were authorized to alter any work assignment where a first aid attendant complained that the activity to which they were assigned could interfere with their prompt and adequate rendering of first aid.

The use of two-way radios by teachers or teaching assistants to ensure the adequate response to first aid issues involving students, particularly students with special needs, has also become a common practice, setting a standard for first aid responses.

Lawrynsyn and Wilkins, [2003] C.L.C.A.O.D. No. 15

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SCHOOL BOARDS: UNIONS

Duty of Fair Representation

Labour Board determines that Union did not breach duty of fair representation

The Ontario Labour Relations Board recently ruled on an application under section 96 of the *Labour Relations Act* in which the applicant, a former teacher, claimed that the Ontario English Catholic Teachers' Association (OECTA) had contravened Section 74 of the Act.

The applicant had been employed as a teacher with the Bruce-Grey Catholic District School Board for nearly five years starting in 1991. Over this time, he had made it known that he had certain "doctrinal disputes" with other members of the staff and with school officials about how his school was being run.

In December of 1995, the applicant approached another teacher and made certain comments and expressions about the school principal. This teacher, who also happened to be the school chaplain, subsequently informed Board Officials about these comments and the applicant was soon charged with "uttering threats". These charges were later dropped in return for the applicant's entering into a peace bond in the fall of 1996.

Meanwhile, the applicant had voluntarily committed himself into a psychiatric facility just days after making the comments, and remained there for over a month. The applicant was suspended by the Board from January of 1996 until the end of March 1998 when it had finished its investigation. He was then terminated.

The applicant grieved his termination, and in April of 2000 a three member arbitration panel upheld the discharge. The panel found that he had engaged in misconduct and though such misconduct may have been occasioned by his mental problems, the Board had accommodated him to the point of undue hardship.

The Ontario College of Teachers initiated discipline proceedings after receiving a copy of the arbitration award. However, OECTA ceased funding the applicant's defence when the applicant refused to accept a "reasonable settlement offer".

The applicant claimed that OECTA breached its duty under Section 74 of the Act when it ceased funding his legal proceedings in front of the OCT, and as a result of decisions made by counsel, such as the decision not to judicially review the arbitration award.

The Labour Board found that OECTA was not required to fund the discipline proceedings before the OCT, as *"the duty of fair representation contained in Section 74 of the Act does not apply with respect to a union's representation of bargaining unit employees in legal proceedings other than those in which the union enjoys exclusive representation rights vis-à-vis the employer."* The proceedings had been a matter between the applicant and the OCT. Regardless of whether OECTA chose to represent the applicant or represented him at any preliminary stage of the proceedings, this would not create an obligation to continue that representation for the balance of the proceedings.

Further, the Labour Board found that the applicant had not produced a prima facie case that the decisions made by OECTA counsel resulted in a breach of section 74 of the Act. Specifically on the issue of judicial review, the Board stated that it was *"clear that for a union to breach section 74 in such circumstances, the arbitration award in question must be so 'perverse and pervasive in its consequences' that the union's decision not to seek judicial review must be considered arbitrary."*

While this decision clarifies that the federations are not required to represent their members throughout proceedings before the College, in many instances they do continue their representation. The issue for school boards continues to be the College's refusal to involve them when their employees are before the College.

Bruce-Grey Catholic District School Board, [2003] O.L.R.D. No. 3081

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SCHOOL BOARDS: TEACHERS

Employment Insurance

Supreme Court refuses leave to appeal decision that Teachers not entitled to E.I.

The Supreme Court of Canada in **Oliver v. Canada (Attorney General)** recently refused leave to appeal the Federal Court of Appeal's decision that teachers employed in a contract position were not entitled to employment insurance.

All of the teachers who sought employment insurance had been employed for the entire school year as contract employees. The teachers were paid during their 10-month contract for 12 months. The summer months were considered vacation by the school board. Their employment, however, was terminated at the end of the school year. All of them had been offered employment for the following school year, some prior to the termination of their contract, and others shortly thereafter.

The Federal Court of Appeal upheld that, in such circumstances, in accordance with section 33 of the Employment Insurance Regulations, the teachers were not entitled to employment insurance during the summer months. The Supreme Court of Canada refused leave to appeal, thereby confirming the decision.

Oliver v. Canada (Attorney General), [2003] S.C.C.A. No. 190 (SCC)

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