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Human Resources Digest

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UPCOMING PROFESSIONAL DEVELOPMENT:

May 1-3, 2005

Canadian Association for the Practical Study of Law in Education

"**Annual Conference: The Law as an Agent of Change in Education**"

Regina, Saskatchewan

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Human Resources Digest —
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Grievance / Instructional Time

Instructional period begins with opening exercises

The majority of the Arbitration Panel in **Toronto District School Board v. Elementary Teachers' Federation of Ontario, [2004] O.L.A.A. No. 423**, recently ruled that the 300-minute instructional period for school in the Toronto District School Board ("TDSB") region begins with the start of opening exercises. The ruling came after the Elementary Teachers' Federation of Ontario ("ETFO") grieved the issue of how the 300-minute instructional program should be counted.

In a TDSB memo dated June 14, 2002, the Board's position was that the 300-minute clock began when the instructional program for the pupils began in their classroom, which did not include entry time into the school.

Following the distribution of the memo, the TDSB ordered schools to ring morning and afternoon starting bells 10 to 15 minutes earlier in all schools. As a result, students were to be in class and ready to begin 10 minutes before the broadcast of the morning announcements.

Prior to the memo, each school determined the beginning of the instructional program, and things such as the needs of the community allowed flexibility in entry procedure.

The TDSB, in a subsequent memo, clarified that any teaching that occurred prior to the morning announcements would not be included in the calculation of the 300 instructional minutes. The ETFO responded, filing a grievance claiming that teachers were being required to exceed the teaching time specified in the collective agreement.

In rendering its decision, the Arbitration Panel reviewed the authorities on the topic of "instructional period". The Panel members recognized a trend in the case law that favoured a narrow definition of the instructional-period concept, which did not include the entire amount of time students were in the school building.

The Arbitration Panel pointed out that no prior arbitration award had found that the entry period was part of the instructional program.

By not defining the term "instructional program" in the collective agreement, the Panel concluded that the two sides essentially agreed to incorporate the language from Ontario Regulation 298 of the *Education Act*. The Panel concluded that a narrow interpretation of the term "instructional program" was consistent with the Regulation, and different from the time between the beginning and end of classes.

The Arbitration Panel referred to an earlier case which found that the normal working day of a classroom teacher was longer than the number of minutes set out in the collective agreement for instruction and preparation. Further, the Panel commented that, as professionals in charge of children, teachers must expect things to arise which will cause them to exceed the 300-minute time limit.

It was the position of the ETFO that the term "instructional program" used in the collective agreement was not the same term and did not carry the same meaning as either the expression "instructional minutes" or "instructional day". It argued that the term was broader than either of those constructs.

The Panel held that the terms "instructional time", "classroom instruction", "instructional day", and "instructional program" had essentially the same meaning because they spoke of a teacher providing an activity for his/her students during a period of the school day.

The TDSB made reference to subsection 3(7) of Regulation 298 of the *Education Act*, which makes specific reference to a "school day". The subsection states that buildings and playgrounds shall be open to pupils fifteen minutes before classes begin for the day, and for fifteen minutes after classes end for the day. The Panel felt the Regulation emphasized that there is some period of time when students enter the school building, spend time in the building, but during which instructional program is not delivered. The TDSB argued this non-instructional period was the time prior to the morning announcements.

The Panel found that the objective of ringing the school bell earlier was to give students more time to prepare for the start of the instructional program. The teacher was not expected to begin the lesson plan at any earlier moment.

This decision confirms the professional nature of teaching, as well as the need to allow for non-instructional minutes during the day.

Grievance

Six-week recovery post-childbirth confirmed again

During the months of October 2001 through January 2002, four Manitoba teachers filed individual grievances along with accompanying Association grievances against the St. James Assiniboia School Division. The grievances arose after St. James School Division denied each teacher's sick-leave application following their complicated childbirths. The grievances were heard together in **Manitoba Teachers' Society, No. 2 (St. James-Assiniboia Teachers' Assn.) v. St. James-Assiniboia School Division No. 2, [2004] M.G.A.D. No. 22**.

According to the School Division, medical reports were not sufficiently detailed. The medical reports submitted by the teachers chronicled each teacher's childbirth-related injuries, treatment plan and prognosis.

After the School Division decided the medical reports failed to disclose a sufficient reason for sick-leave, it referred each teacher's claim to an independent consultant pursuant to article 5.06(b) of the parties' collective agreement.

Once the teachers were informed that their applications had been forwarded to an independent consultant, they immediately contacted the Manitoba Teachers' Society. The Society filed grievances. The Society sought a declaration that the School Division violated the provisions of the collective agreement, the *Labour Relations Act*, the *Public Schools Act*, and the *Human Rights Code*.

Prior to the hearing, the teachers were compensated financially for their requested sick-leave. Nevertheless, the teachers moved forward with their claim for declaratory relief.

The Society argued the School Division is only entitled to a medical certificate, not the underlying diagnosis, prognosis and treatment plan. The Society asserted that the four named teachers had provided sufficient information and, for the School Division to demand anything further constituted discrimination and an invasion of privacy.

A medical expert testified that pregnancy is treated very differently than other types of sick-leave, and doctors and arbitrators alike have determined the normal recovery time following childbirth to be six weeks. The Society submitted that the teachers were validly entitled to six weeks' sick-leave upon presenting their medical notes, and should not have had their application directed to an independent consultant pursuant to article 5.06(b).

The School Division argued that the medical notes simply confirmed the obvious pregnancy, which did not sufficiently substantiate the remainder of the sick-leave claim. The School Division contended its protocol when receiving medical information maintained adequate confidentiality.

In rendering its judgment, the Arbitration Panel allowed the grievance in part. The three-person Panel felt each teacher was entitled to six weeks' paid leave with respect to the post-partum period. It also decided the School Division was entitled to a post-delivery medical certificate from each teacher, but that any request for further medical information was not supported.

The Arbitration Panel decided female employees are entitled to apply for sick-leave pay during the period of pregnancy and maternity leave. The Panel referred to **Brooks v. Canada Safeway Ltd.** for the principle that denying women this right is discrimination on the basis of sex. In light of

Brooks, the Panel found that it is no longer open to an employer to deny that delivery and post-partum recovery constitute valid health-related reasons for absence from the workplace and, further, that the six-week standard should be recognized.

The Panel recognized the School Division's need for a certificate of condition, treatment and prognosis, and held that the Division is entitled to have a supplementary certificate prepared after delivery.

Finally, the Panel was satisfied that the Division had a proper procedure for safeguarding personal health information. During the hearing, there was no indication that the Division's safeguards had previously failed or may fail some time in the future.

This decision is one of a long list finding that six weeks of recovery following childbirth should be recognized, and teachers should be provided with sick-leave. In this case, the teachers were ordered to provide a certificate from their doctor confirming the birth and recovery necessary.

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COLLEGE OF TEACHERS: DISCIPLINE

Investigation

How must citations be issued

In **Fox v. British Columbia College of Teachers, [2004] B.C.J. No. 2322**, three teachers, Fox, Fuglestveit and Piazza, brought applications for judicial review of the decisions of the British Columbia College of Teachers issuing each of these members citations commencing formal inquiries into their conduct and competence.

Fox and Piazza had successfully grieved discipline imposed on them by their respective school boards. Despite their discipline being rescinded, the College proceeded with preliminary investigations and issued citations against them. They argued that the College did not retain jurisdiction to discipline them once their employer's discipline was rescinded.

The College also issued citations against Fox and Fuglestveit after a College subcommittee decided to proceed informally with the complaints against them. The College informed Fox and Fuglestveit that it would proceed informally, and that it would determine whether to take action, including the issuance of a citation, once they had replied to the College. After receiving their reply, the College issued the citations. Fox and Fuglestveit argued that the College lacked the jurisdiction to issue the citations after making the decision to proceed informally. All of the applications were heard together.

The standard of review applied to the issue of the College's jurisdiction to issue citations was correctness, as this was a question of law. With respect to Piazza's appeal, the issue of whether the college came to the appropriate decision on the facts when it issued the citation was a question of fact; thus, the court held that the appropriate standard of review was reasonableness.

With respect to the issue of whether, on a proper construction of the *Teaching Profession Act*, a valid subsisting disciplinary action by a school board was a requirement for the jurisdiction of the College to investigate a member, the court found that it was not the intent of the legislature to require the College's disciplinary investigations to cease if a grievance procedure was successful. The court found that the concerns at stake in a labour arbitration were not identical to those of a body like the College, which must consider the broader provincial public interest. The court commented that the difference in focus between the two processes is a significant one and the legislature could have easily drafted the provision accordingly if it had intended to make the outcome of the grievance binding on the College.

With respect to the issue of whether the decision to proceed informally precludes the subsequent issuance of a citation, the court noted that, under By-law 6.E.01 of the College, the Preliminary Investigation Sub-committee has the power to issue a citation. Therefore, the court found that the By-law, in conjunction with the statutory power granted to the College in the *Teaching Profession Act*, provided the authority to issue a citation despite any prior informal steps taken. The court also noted that the College had informed the Appellants that a citation could be issued after they had submitted their written responses to questions. Moreover, the issuance of a citation was not equivalent to a finding of guilt, but simply the initiation of a formal hearing process, at which all appropriate procedural safeguards are available. Accordingly, the court concluded that the College did not act without jurisdiction or in contravention of the Appellants' procedural rights.

The above case suggests that the British Columbia College of Teachers' process is not unlike Ontario's in its complexity and power to review. Moreover, the focus is the protection of all children in the Province, not only those under that teacher's care and that school board's responsibility.

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COLLEGE OF TEACHERS: DISCIPLINE

Judicial Review

Evidentiary standard reviewed by B.C. court

The British Columbia College of Teachers found Appellant X guilty of professional misconduct with respect to allegations that X had engaged in inappropriate activity of a sexual nature with a student. In **X v. British Columbia College of Teachers, [2004] B.C.J. No. 2528**, X appealed the College's decision to the British Columbia Supreme Court on the basis that the Discipline Committee of the College made several errors with respect to the evidence before it. X argued that, because the Panel found that the student had lied under oath, it should have required corroborating evidence for each allegation made by the victim. X also alleged that the Panel based its findings on tainted evidence and that the reasons were inadequate.

The Court found that the proper standard of review was reasonableness. The Court noted that it was not its job to substitute its views of the evidence for those of the Panel, but rather to review the decision of the Panel against a standard of reasonableness.

The Court found that the Panel acknowledged and dealt with all of the disparities in the student's evidence. In particular, the Panel had noted that, while there were inconsistencies with specific dates, the timing of the events was consistent, and the student never overstated her case. Moreover, some aspects of the student's evidence was corroborated by other evidence. Although the Panel did not require corroborating evidence for all of the student's allegations, the Panel did not accept all of the student's evidence without question. In addition, at law, corroboration of evidence is not required when considering the totality of

the evidence where the trier of facts is satisfied with the witness. In this case, the Court found that there was sufficient evidence supporting the Panel's conclusion that the student was truthful with respect to the conduct alleged. The Court held that the Panel was entitled to reach the conclusion that the student's testimony was convincing based on all of the evidence. Further, the Court found that the reasons of the panel stood up to a somewhat probing examination, which is required to meet the reasonableness standard.

With respect to the allegation that the Panel relied on tainted evidence, the Court found that reading the final report as a whole demonstrated that the Panel assessed credibility on the basis of a number of factors. The Panel did not only determine credibility solely by reference to the witnesses' demeanour, but also reviewed the testimony in light of other evidence. The Court found that the Panel did not accept X's versions of the several key events, noting that his evidence was not only inconsistent with other evidence, but also convenient and suspect. The Court was satisfied that the Panel had summarized and analyzed all of the evidence and concluded that X had engaged in an inappropriate relationship with the student and that the Panel's decision was reasonable.

The Court clarified that an inconsistency with respect to one piece of evidence did not require that all of the evidence be corroborated which, for sexual assault and other such claims, would almost surely mean that members would go unpunished.

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COLLEGES & UNIVERSITIES

Discharge

Arbitration board has power to award aggravated and punitive damages

The grievor, a lawyer and professor at Seneca College, who was discharged for allegedly sending a fellow employee anti-Semitic and disturbing written material, sought judicial review of the Arbitration Board's finding. In **Ontario Public Service Employees Union v. Seneca College of Applied Arts & Technology, [2004] O.J. No. 4440**, the relationship between the Union and Seneca had been strained for some time and worsened when the employee, funded by Seneca, launched a defamation suit against the grievor and others. The only evidence connecting the grievor to the written material was the fact that the documents had been sent in inter-departmental envelopes addressed to the employee in the grievor's handwriting.

The Union sought aggravated damages to compensate the grievor for the "special harm, including mental distress" that he suffered in the "egregious circumstances of his unwarranted termination". The Union also sought punitivie damages to deter Seneca from similar conduct, claiming that Seneca was motivated by bad faith, malice and anti-union animus. The Board rejected the Union's claims and held that the authority of an Arbitration Board to grant damages must arise from the collective agreement.

The Court found that the standard of review with respect to the Board's decision that it lacked the jurisdiction to award aggravated and/or punitive damages was correctness, as the determination is a question of law and jurisdiction. The Court characterized the dispute before the Board of Arbitration as an unjust dismissal and question of remedy for the unjust dismissal.

The issue of whether aggravated and/or punitive damages could be ordered was within the Board's jurisdiction as a question of remedy for unjust dismissal. The Court noted that it was well established in law that labour arbitrators have broad remedial power, including the power to award damages. Having decided that the Board had the authority and exclusive jurisdiction to determine the claim of damages sought by the Union and the Grievor, the Court remitted the matter back to the Board and noted that it was for the Board to determine whether or not the requested damages should or should not be granted in consideration of the relevant case law.

Where the issue of damages arises in connection with an unjust dismissal, an Arbitration Board has the authority to award aggravated and punitive damages in the appropriate circumstances.

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