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Human Resources Digest

Edu-Law Education H.R. Digest

Through arrangements with various Associations, it is hoped that this publication will be widely disseminated throughout the Education Sector. There is no charge for the Human Resources Digest and recipients are welcome to provide copies to colleagues. However, Edu-Law retains the copyright and does not consent to any changes or amendments to the content. Edu-Law welcomes submissions from any educator or Manager on relevant Human Resources cases. If you wish to publish a synopsis of a case, kindly contact either **Bob Keel (905-501-4444 / rkeel@keelcottrelle.on.ca)** or **Nadya Tymochenko (905-501-4455 / ntymochenk@keelcottrelle.on.ca)**. The Editors and Contributors hope that you will find the Digest helpful. Edu-Law also welcomes any comments or suggestions with respect to the format or content of the Digest. —

UPCOMING PROFESSIONAL DEVELOPMENT:

October 28, 2005

Hosted by: Keel Cottrelle LLP

Complimentary session on

"**Special Education and Student Discipline Issues**"

Capitol Banquet Centre

Mississauga, Ontario

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Human Resources Digest —
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WRONGFUL TERMINATION

Discrimination

Significant damages in wrongful termination

The Ontario Superior Court in **Keays v. Honda Canada Inc. [2005] O.J. No. 1145, (Ont.Ct.J.)** recently awarded the most significant punitive-damages award ever awarded in a wrongful termination case in Canada.

The plaintiff, Keyes, a 15-year employee of Honda, suffered from Chronic Fatigue Syndrome. He had

been on Long Term Disability and had attempted to return to work; however, he continued to have extensive absences, which the Court found were exacerbated by Honda's approach to his accommodation.

The Court found that Honda failed to appropriately accommodate Keays' disability, and rather than working with his physicians to determine a suitable accommodation plan, Honda took the position that "*Mr. Keays' physicians were the problem because they would 'certify' his absences like Sidney Crosby signs autographs after a hockey game. They were the villains because they perpetuated the myth that the plaintiff was required, by his illness, to be absent from work. He just hadn't been 'hardened' enough and Honda was the one to do it with the able assistance of their advocate of employers' anti-absenteeism rights, Dr. Brennan. The subterfuge practiced by everyone associated with Honda in attempting to intimidate him into seeing their occupational medicine specialist should make the blood boil of any right-thinking individual. This scheme was nothing less than a conspiracy to insinuate Dr. Brennan into the plaintiff's long-established medical relationship with his own doctors and, hopefully, to exclude them from any participation in advocating for his patient's rights*".

When Keays refused to meet with Dr. Brennan, a doctor working for Honda, without first receiving information about the purpose of the meeting, he was terminated. The Court found that his termination was callous and insensitive.

Following his termination, Keays was diagnosed with an adjustment disorder with depressive symptoms. The Court commented that "*This wrongful termination did turn him [Keays] from an individual who could function at work with the accommodation predicted by Dr. Morris to a totally unemployable and dependent recluse*".

The Court also commented on the requirement of employers to accommodate disabled employees. The Court stated that it is a "*fundamental principle of human rights law that accommodation is a right, not an indulgence granted by one's employer or, worse yet, an act of charity*".

The Court held that Keays was wrongfully terminated because of his disability, and awarded him 24-months pay in lieu of notice of termination and $500,000.00 in punitive damages.

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SCHOOL BOARDS: TEACHERS

Accommodation

Arbitrator requires employee to inform employer of accommodation needs

In **Kamloops/Thompson School District No. 73 v. British Columbia Teacher's Federation (Reimer Grievance), [2005] B.C.C.A.A.A. No. 39**, the Union filed a grievance arguing that the Employer had failed in its duty to accommodate the Grievor's return to full-time employment from sick leave. In response, the Employer claimed that a duty to accommodate the Grievor did not arise in the circumstances of the case, or in the alternative, that the Grievor had been accommodated to the point of undue hardship.

The Grievor, hired as a teacher on call (TOC) in September 2000 with School District No. 73, had qualifications in English, Drama and ESL. Previously, the Grievor had worked 3-4 years as a drama teacher in Vancouver at the secondary level. In June, the Grievor applied for two posted Drama positions. She was awarded a position in Valleyview, to commence in September of 2003. On the first day of school in September 2003, the Grievor contacted the Principal and expressed concerns over her assignment; in particular, the number of different courses with different grade levels she was required to teach. The Principal advised the Grievor that she was working on changes to the timetable but that she would not know what changes could be made until September 11, when the student numbers would be finalized. Ultimately, the school removed eight students from the Grievor's class. On September 11, the Grievor commenced a medical leave and returned for one day on September 22, 2003, but left before the end of the day. On October 3, 2003, the Union grieved the Drama/Acting/Stagecraft assignment at Valleyview Secondary School.

The Employer denied the October 3, 2003 grievance, noting that no evidence of discrimination had been provided. The Employer also described comparable assignments in other schools and demonstrated the steps it had taken to modify the assignment. Following negotiations, the Employer agreed, on a without prejudice basis, to the Grievor's request that she not return to Valleyview. In addition, the Employer agreed to a number of other requests, such as making the Grievor the first priority callout TOC for assignments for which she was qualified and provided no other teacher had been specifically requested, and maintaining her full benefits as though she were continuing in a full-time continuing position.

It should be noted that at no time was the Employer informed by the Grievor or the Union that the Grievor had a disability or that special circumstances existed.

The Arbitrator held that, in requiring an employer to accommodate to the point of undue hardship, the employer must not be deprived of the tools necessary to meet that challenge. The Grievor is entitled to keep her disability private; however, where the Grievor requests accommodation, there must be a balance between those rights and the Employer's legitimate need for information in order to fulfill its duty under Human Rights legislation. The Arbitrator noted that this was not a case where the Employer turned a blind eye to the circumstances, which should lead it to investigate.

Here, once the Grievor returned to work, the Employer did not require her to go back to the situation from which she departed on medical leave. Additionally, the Arbitrator found that, despite the lack of knowledge on the Employer's part, the Grievor was accommodated in this case, as the Employer had reprogrammed the call-out system, maintained the Grievor's full-time benefits, paid her at her pay scale for any day's work, gave priority for any posted assignment for which she was qualified, had her assignment reduced when she secured a position and increased her seniority the following year so that she could secure an additional position. The Arbitrator concluded that, while the Employer did not accede to every request of the Grievor, it made a significant effort in accommodating her requests, such that it fulfilled its duty.

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Supplementary Employment Insurance Benefits

Top up paid in summer based on salary paid during the school year

In **Rainy River District School Board v. Elementary Teachers' Federation [2005] O.L.A.A. No. 129**, the ETFO brought a grievance regarding the provision of supplementary employment insurance benefits for teachers on pregnancy leave, which were not being paid to teachers who began their pregnancy leave during the summer.

Until the 2000-2002 Collective Agreement, teachers were paid the benefit regardless of when they took their leave. However, in 2002-2004, the language in the Agreement was changed and stated: "*The Board shall provide for Teacher on maternity leave a supplementary employment insurance benefits plan providing for payment of 75% of normal weekly earnings for the two week waiting period for EI benefits*".

The Board's practice was to pay 75% of the teacher's normal weekly earnings calculated at the rate they would receive during the school year, as a benefit to cover the two week waiting period but only if the pregnancy leave commenced during a time when the teacher would have otherwise been scheduled to teach. Thus, the benefit was not provided to teachers who began their pregnancy leave during the summer months.

Although the Board and the Union disagreed on the exact method of calculating normal weekly earnings, both agreed that it was a proportion of the teacher's salary divided by the number of teaching days, 194.

The arbitrator held that the Board's argument, that paying a teacher the two-week benefit during the summer months would mean that she earns more than other teachers during the year, had previously been addressed in an unreported decision between the Avon-Maitland District School Board and ETFO in November 2004. In the Avon-Maitland decision, the arbitrator held that the benefit during the two-week period did not mean that the teacher would be earning more than other teachers, since the Employment Insurance benefit paid during the pregnancy leave was only a portion of the teacher's normal salary for the equivalent period. Thus, the teacher's income would only be slightly improved by the benefit.

The arbitrator also contrasted the language in the benefit provision to language in the Collective Agreement that provided for a six-week top-up of employment benefits following the delivery of the teacher's child. This benefit explicitly restricted access to the benefit to teachers normally scheduled to work.

The arbitrator stated that "*all teachers should be entitled to receive the same pregnancy and parental leave benefit, regardless of when their time off occurs, unless the language of the collective agreement expressly requires otherwise*". The grievance was upheld.

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Instructional Time

Lost instructional time must be made up

The Arbitrator in **Mission School District No. 75 v. British Columbia Teacher's Federation [2005] B.C.C.A.A.A No. 94** was asked to determine whether the School District was required to replace preparation time lost as a result of a non-instructional day or statutory holiday during the week.

The British Columbia Teachers' Federation argued that, pursuant to the collective bargaining agreement, teachers were required to receive 90 minutes of preparation time weekly, and that time lost because of statutory holidays or non-instructional days should be accounted for by the school board. In weeks that included less than five teaching days, the Board had not undertaken to reschedule preparation time that had been affected by the occurrence of a non-teaching day during the week.

The school board argued that the 90 minutes of preparation in a given week should be considered on a yearly, not weekly basis. There was no evidence that a consistent direction was given by the school board regarding how preparation time would be scheduled or how it should be dealt with. The school board maintained that the lost time could be made up in other ways, without having it specifically rescheduled. The school board argued that preparation time was scheduled by the principals and that teachers who lost preparation time could use assembly time to make it up or do so on an individual basis with an arrangement with the librarian or music teachers.

The Arbitrator identified the issue as being solely whether 90 minutes of preparation time for elementary school teachers was required by the collective agreement. The collective agreement was found to create an obligation to provide a specific amount of preparation time. Thus, the arbitrator held that any missed time must be provided. As such, the Employer was ordered to provide elementary teachers their 90 minutes of preparation time per week, regardless of statutory holidays or non-instructional days.

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Work to Rule

Definition of extracurricular activities must consider program

During the Fall of 2001 and early 2002 the members of the BC Teachers' Federation mounted job action against the school boards in the province, including withdrawal of extracurricular activities and the issue of a teacher continuing to provide extra-curricular activities came before the B.C. Labour Board in **Tessler (Re) [2005] B.C.L.R.B.D. No. 13**.

In the September 2001 and January 2002 school terms, Tessler taught for School District No. 57 in Prince George. His teaching responsibilities included Drama, Acting and Stagecraft. Each year Tessler prepared the same course outlines, which provided for compulsory rehearsals and performances that occurred outside of the regular teaching day. The assignments had an academic weight of between 4% and 30% of the total marks for the respective courses.

On January 7th, Tessler received an email from the President of the Federation advising him that continuing to have performances and rehearsals outside of the regular school day would be contrary to the BCTF's job action. Tessler argued that the rehearsals and performances were not extracurricular, but rather a compulsory component of the program. He argued that dress and technical rehearsals could not fit into a regular school day.

The issue before the Labour Relation's Board was whether Tessler's actions constituted a breach of the Federation's Code of Ethics.

The Federation informed Tessler that if he continued to schedule activities outside the school day an internal complaint would be filed within BCTF.

In February 2002, the Federation filed an internal complaint with the BCTF Judicial Counsel. In June 2002, a Panel found the allegations against Tessler to have merit. The allegations were then referred to a Hearing Panel of the Judicial Council for a determination of whether a breach had occurred. Throughout these proceedings Tessler was self represented.

After hearing the case the Hearing Panel found Tessler guilty of breaching the Federation's Code of Ethics. The Panel imposed several penalties, including a letter of reprimand, a fine of $1,000.00, and publication of the findings and penalties in the monthly teachers' magazine.

This ruling was upheld by the Federation's Appeal Panel with a reduced penalty, and was subsequently appealed to the British Columbia Labour Relations Board.

The Labour Relations Board found the Federation's decision unreasonable. The Board found that, while the Federation could design the nature of the job action, during a work to rule, the School Board had the power to designate the services, facilities and productions that must be continued.

The Labour Board also found that the term "extra-curricular activity" had various definitions and to use it to identify the actions of Tessler during the strike was a complete misinterpretation. The Labour Board held that the Federation's simplistic approach in defining "extra-curricula activity" needed to be curtailed. Teachers were the ones who developed the curriculum, and teachers could design the curriculum to provide for activities that fall outside the instructional day. The Labour Board found that Tessler's instructional plan did not fall outside the approved standard and was not extra-curricular in nature.

The Labour Relations Board remedied the situation by putting the parties back in the position they were in prior to the Federation's contravention, thus overturning the decisions of the Hearing Panel and the Appeal Panel.

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COLLEGE OF TEACHERS

Discipline

Court reduces discipline imposed by College in sexual misconduct case

In **Mitchell v. British Columbia College of Teachers, [2005] B.C.J. No. 269**, the British Columbia College of Teachers appealed a judge's decision to overturn the decision of the Council of the College to cancel a teacher's certificate of qualification and terminate her membership in the College.

Following a hearing in which the teacher admitted to sexual conduct with a 14-year old former student, the Council cancelled the teacher's certificate and terminated her membership. The relationship occurred sixteen years prior, and in both a civil and criminal trial, the conduct was found to be consensual. The teacher acknowledged that her conduct was unbecoming of a teacher and deserved sanction, but submitted that it did not constitute

professional misconduct, because she was not teaching the student when the conduct occurred. Further, the teacher presented medical evidence that indicated that she posed no risk to any of her students. Prior to this incident, the teacher had an exemplary record as an ESL teacher until the Vancouver School Board suspended, then terminated her in 1996 following the student's complaint in late 1995.

The College concluded that the respondent was guilty of Professional Misconduct and Conduct Unbecoming a Member. Their reasons were based on the grounds that a teacher holds a position of trust, confidence and responsibility, and that the conduct of a teacher bears directly on the community's perception to fulfill such a position of trust and confidence and upon the community's confidence in the public school system as a whole.

The Court allowed the appeal, finding that the Council ignored portions of evidence, considered only selected facts, and treated the case as "*if it had occurred yesterday rather than sixteen years prior*". Judge Humphries substituted the College decision for a two-year suspension commencing June 22, 2001, and prohibited the College from publishing the respondent's name in the case summary. The decision was appealed by the College to the British Columbia Court of Appeal.

The Court of Appeal dismissed the Appeal, finding it untenable that the College would impose the maximum penalty without an analysis as to why a lesser penalty would not suffice, especially in light of the fact that the respondent was a highly regarded teacher who would be a benefit to students. The Court held that it was reasonable for the judge to conclude that the reasons of the Discipline Committee and Council were inadequate. In coming to its decision, the Court of Appeal noted that the "*imposition of a maximum penalty cannot be an invariable rule*" and that "*disciplinary measures taken by a statutory authority in relation to sexual misconduct by a teacher ought to be directed at preventing specific harms rather than enforcing a state-imposed moral code*".

In addition, the Court noted that the practical difference between a two-year suspension and cancellation of a teaching certificate is that the teacher is not required to establish, on re-application after two years, that she is of good moral character and a fit person to teach, a finding supported by the evidence. The Court ruled that a two-year suspension was appropriate when considering the harm the respondent caused her former student against the high regard in which she was held during her ten subsequent years of teaching, the lack of risk to future students and the five non-teaching years that followed her suspension in 1996. The Court also reasoned that the jury's verdict in the civil trial suggested that cancellation of the teacher's certificate was unnecessary to maintain the public's confidence in the educational system. In allowing the respondent's request for a publication ban, the lower Court held that there was "*no reason, other than punishment, to publish the appellant's name at this late date and in these circumstances. There is no risk of harm, no risk of repetition of the conduct and no risk of the school system being brought into disrepute in the eyes of the community*". The Court of Appeal upheld the lower Court's decision finding that the College's discipline was unreasonable and that it was unreasonable for the Council to reject the publication ban. —

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