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Human Resources Digest

Edu-Law Education H.R. Digest

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UPCOMING PROFESSIONAL DEVELOPMENT:

October 28, 2005

Hosted by: Keel Cottrelle LLP

Complimentary session on

"**Special Education Issues**"

Capitol Banquet Centre

Mississauga, Ontario

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For information, contact Robert Keel at 905-501-4444 or rkeel@keelcottrelle.on.ca

IN THIS ISSUE:

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Edu-Law
Consulting Services Limited

Edu-Law is managed by
KEEL COTTRELLE LLP
Barristers and Solicitors
100 Matheson Blvd. E., Suite 104
Mississauga, Ontario, L4Z 2G7

Human Resources Digest —
Executive Editor—Robert G. Keel
Managing Editor—Nadya Tymochenko

COLLEGE OF TEACHERS

Court finds procedural unfairness

In **Kalin v. Ontario College of Teachers, [2005] O.J. No. 2097 (Sup. Ct. J. – Div. Ct.),** the appellant, Myer William Kalin, succeeded in appealing the decision of the Ontario College of Teachers finding him guilty of professional misconduct and revoking his Certificate of Qualification and Registration following allegations of sexual impropriety with a student.

The Divisional Court quashed the Discipline Committee's decision

on the grounds that there had been breaches of the appellant's right to procedural fairness and disregard for the rules of natural justice.

Kalin had been a math teacher in the Ottawa area. In the school year of 1988–1989, the complainant, RH, had been in his class. It was alleged that during the summer of 1991, when RH was 17 years old, Kalin had shown RH pornographic material on the television, touched his genitals and performed fellatio on him.

RH first complained of this incident in 1998. Criminal charges were laid and a trial was held in December 2000. RH testified and Kalin did not. Kalin was acquitted of the charge of sexual assault. The trial judge found there was reasonable doubt as to whether RH had consented and whether Kalin had an honest but mistaken belief that RH had consented. Kalin was also acquitted of the sexual exploitation charge because the judge was not satisfied beyond a reasonable doubt that Kalin was a person in authority because RH had been in his class two years prior to the incident, and Kalin would be leaving the school that RH was to attend that September.

RH also filed a complaint with the Ontario College of Teachers. Kalin had retired in November 1998 but remained a member in good standing. The College conducted an investigation and referred the case to the Discipline Committee, which issued a Notice of Hearing on May 24, 2002, alleging professional misconduct under the *Ontario College of Teachers Act*.

The hearing was set for January 20, 2003, a time when Kalin was to be in Asia. The College did not wish to wait until his return in June.

Before the January hearing, counsel for Kalin advised that he would be requesting an adjournment, but counsel for the College refused to consent to an adjournment.

In January 2003 the hearing was held before the Committee, which was assisted by its own independent counsel. At the outset, counsel requested an adjournment because Kalin was unable to attend. He informed the Committee that Kalin wanted to testify, and that he wanted to be present to deny RH's allegations. He argued that it would be prejudicial to Kalin to proceed in writing because it would not afford Kalin an opportunity to cross-examine on the evidence. He further informed the Committee that Kalin was in Asia for employment purposes and had contractual obligations. The Tribunal rejected the request. The reasons provided were short, noting that there had been proper service and adequate time for Kalin to make arrangements to be present. The only evidence at the hearing was the transcript of the criminal trial and the reasons of the trial judge.

With regard to both adjournment requests, the Court held that the Tribunal had acted in an arbitrary manner by refusing to allow an adjournment and had not taken relevant considerations into account. This amounted to a breach of its duty to act fairly and in accordance with the principles of natural justice. The Court commented that, while scheduling and the decision of whether or not to grant an adjournment were procedural matters within the discretion of the Tribunal, the Tribunal was required to take all relevant factors into account when applying its discretion, including the reasons for the request, the implications of denying the request and the public interest. The Court found that the Tribunal should have considered the serious nature of the claims, Kalin's previous exemplary record, the grave implications of the hearing for him both personally and professionally, Kalin's co-operation in facilitating service and hiring counsel, Kalin's maintenance of his innocence, and the fact that he indicated that he wanted to testify and was out of the country. Further, the Court found that the Tribunal should have realized that proceeding without Kalin would have the effect of stripping him of any defence. The Court held that the Tribunal's failure to take these factors into account and weigh each party's potential prejudice amounted to a denial of Kalin's right to procedural fairness and was a breach of the principles of natural justice sufficient enough to set aside the Tribunals' decision and require a new hearing with a reconstituted panel.

The Court also provided some direction for the panel that would sit for the new hearing. Although rules of evidence are specific to the Tribunal, the Court noted that where there are issues of credibility, as in this case, viva voce testimony is preferable. Moreover, the Tribunal should carefully weigh all factors prior to admitting evidence. The Court commented that the failure of the Tribunal to weigh the evidence before admitting the transcript from the criminal trial amounted to an error affecting the right of the respondent to procedural fairness and natural justice, which could have been mitigated by the Tribunal fairly assessing the weight to be given to the evidence.

The Court also commented that the Tribunal should not have relied on the reasons of the trial judge for its findings of fact.

The Court also found that the Tribunal's reasons, provided at several stages of the proceeding, were insufficient. The Court held that the Tribunal was required by law to provide reasons so that parties could appeal their decision. This Tribunal had provided conclusions only, and on some matters had simply stated that it agreed with the prosecution. This constituted a breach of natural justice and reason for quashing the decision. Moreover, the Court stated that the final decision, though relatively lengthy, gave reasons inadequate enough to also provide grounds for quashing the decision.

Finally, the Court commented that the Tribunal had erred by giving retrospective effect to the legislation. The Court held that such an application of the legislation potentially changed the status of

past conduct. The Court held that it offended the principles of natural justice to change the definitions of an offence after the fact by applying a 1997 definition to 1991 conduct. For all of these reasons a new hearing was ordered.

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Failure to consider medical evidence

In **Stuart v. British Columbia College of Teachers, [2005] B.C.J. No. 989,** the appellant, a former teacher, appealed the disciplinary findings of the College of Teachers to the Court when the College found him guilty of professional misconduct and conduct unbecoming a teacher. He argued that the College, when coming to its decision, failed to properly take into account his medical condition.

The appellant had been diagnosed with bipolar disorder, was on stress leave and undergoing a change in medications when the incidents occurred. While on leave, the appellant engaged in inappropriate and violent behaviour towards students and staff, which resulted in disciplinary action by the College. The appellant argued that the College should have given weight to the impact of his medical condition, which was complicated by a change in medication. The appellant also argued that the College was incorrect in treating his actions as absolute liability offences since he lacked the necessary mental capacity to commit the offences. He suggested that the issue before the College should have been incompetence rather than professional misconduct.

The Court found that the appropriate standard of review regarding an issue of conduct unbecoming a member was reasonableness. However, with respect to the issue of whether a person's mental state is relevant in determining whether their conduct amounts to professional misconduct or conduct unbecoming, the Court held that this was a question of law and that the appropriate standard of review would be correctness.

The Court found that the College erred in concluding that the appellant's mental condition and state of mind were irrelevant in determining whether his conduct amounted to professional misconduct.

Nevertheless, the Court disagreed with the appellant's position that various labour relations authorities, which have held that it is inappropriate to discipline or dismiss an employee where a medical condition causes the conduct and the employee is not culpable, should be applied in his case. The Court distinguished the labour relations decisions from the *Teaching Profession Act* (TPA), because of its purpose, which is the protection of public interests. Recognizing the importance of the public-interest purpose, the Court found that it was appropriate to treat the offences under the TPA as similar to strict liability offences.

This decision is also notable in that, once it had concluded that the College had erred in not considering the member's mental condition, the Court decided to hear the matter, at the request of the parties, rather than remitting it back to the College. However, the Court made it clear that the College was the proper body to balance the competing interests and multiple policy objectives, such as the protection of public education, qualifications, ethics and discipline. As a result, the Court also qualified its decision, stating that this case should carry no precedential value in any future hearings before the College.

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GRIEVANCE ARBITRATION

Grieving duty to accommodate

In **Ontario Liquor Boards Employee's Union v. Ontario (Liquor Control Board) (Di Caro Grievance), [2005] O.G.S.B.A. No. 60,** the grievor brought a grievance, rather than a Human Rights Complaint, against the LCBO alleging that his employer failed to accommodate him contrary to the *Human Rights Code*.

The grievor had a back condition that caused him to be absent from work on two previous occasions. Each time, the grievor returned to work with modified duties and/or modified hours. In April of 2003, the grievor aggravated his condition while putting files away in the cabinet at work. He left work and did not return. In his absence, the grievor provided the LCBO with a series of medical reports that indicated he was unable to sit or stand for extended periods and was unable to lift, reach or climb stairs. The grievor's doctor recommended that he be provided a modified position on a permanent basis. The employer offered modified duties but refused to relieve the grievor of his cashiering position for another type of position. Ultimately, the employer determined that it could not accommodate the grievor's limitations with "necessary, productive and meaningful work" and terminated him.

The employer argued that the grievor was hired as a customer service representative (CSR) and that cashiering and stocking were essential duties of a CSR, and once taken away, a completely different job would be left. The employer argued that it was not obligated to accommodate the employee by providing a different position, or creating a position. Secondly, the employer argued that any modified work performed by the grievor must be productive and of value. Thirdly, the LCBO argued that the grievor's disability did not entitle him to be in a better position than if he was not disabled. Finally, the LCBO argued that its structure made another position impossible. The LCBO submitted that a

CSR was the only position available in LCBO stores. The head office and warehouses, which may provide other employment opportunities, were located in different geographic areas. The employer argued that, at most, its search for accommodation would extend only to the store system within the grievor's own geographic area, and to do otherwise would impact other employees' seniority rights under the collective agreement.

The Union argued that the employer had failed to accommodate the grievor because it followed a rule that the grievor could not be accommodated unless he was able to work for at least four hours a day. Second, the Union argued that the LCBO took the position that the grievor was not entitled to be considered for accommodation as long as he could not do any cashiering or stocking duties. Thirdly, the grievor argued that the LCBO would not bundle a job consisting of CSR duties that were within the grievor's restrictions, nor consider accommodating the grievor in a position outside the bargaining unit.

The Board found that the duty to accommodate had evolved and expanded to such an extent that the law now requires an employer to look far beyond the disabled employee's own position as a means of accommodation. The Board held that the duty to accommodate is limited only to the point that results in undue hardship to the employer. The Board held that an employer must incrementally broaden the scope of its search until the point of undue hardship is reached. In failing to even consider other positions for the grievor, the Board held that the LCBO had failed to accommodate the grievor, breached the collective agreement and the *Human Rights Code*. The Board held that the scope of the duty to accommodate included positions outside the bargaining unit as a last resort. The Board found that LCBO's argument that accommodating the grievor in other bargaining units would disrupt seniority rights was premature since the employer had made no attempts to accommodate in any manner.

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Scope of arbitrator's jurisdiction

In **British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn., [2005] B.C.J. No. 289, 2005 BCCA 92**, the B.C.T.F. appealed a labour arbitrator's decision that he lacked jurisdiction to address the grievance at issue. The matter related to a legislative change implemented by the provincial government in 2002. Through amendments to the *School Act*, the government removed class size from the scope of collective bargaining and regulated it by the aforementioned statute and its corresponding regulations. In addition, all references to class size in existing collective agreements were purged by way of the *Education Services Collective Agreement Amendment Act 2004*.

The B.C.T.F. grieved a violation of these statutory class size provisions to a labour arbitrator, who concluded that he lacked the jurisdiction to arbitrate a violation of the statute. The arbitrator's reasoning was that his powers were limited to interpreting collective agreements, and in this case the legislature had expressly excluded, with legislative amendments, class size from teachers' collective agreements. The B.C.T.F. appealed this decision to the B.C. Court of Appeal under s. 100 of the *Labour Relations Code*, which allows an appeal "on a matter or issue of general law".

The Court of Appeal quashed the arbitrator's decision and held that arbitrators do have the jurisdiction to enforce the class size provisions of the provincial statute and regulations. The Court relied on the Supreme Court case of *Parry Sound v. Ontario Public Service Employee Union*, [2003] 2 S.C.R. 157, in reaching its conclusion. In *Parry Sound*, the Supreme Court held that labour arbitrators have the jurisdiction to apply provincial human rights codes and employment standards legislation in deciding grievances. The Court of Appeal interpreted and applied the *Parry Sound* case broadly, emphasizing the labour arbitrators' power to apply employment related law.

The Court of Appeal commented that, when making a determination with respect to whether or not an arbitrator has the power to apply a statute, the issue is whether there is a real contextual connection between the statute and the collective agreement, such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement. According to the Court, class size was still a significant part of the employment relationship, and despite removing its determination from the scope of collective bargaining, it continued to effect teachers' employment because of its impact on staffing issues and health concerns resulting from stress.

The Court of Appeal, applying the standard of correctness, held that the arbitrator made an error in law when he concluded that he did not have jurisdiction to enforce the statutory class size provisions when deciding a labour grievance.

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CONSTITUTIONAL

Ontario Court of Appeal deals with constitutionality of section 58(5)(c) of ESA

The issue in **Ontario Nurses' Assn. v. Mount Sinai Hospital, [2005] O.J. No. 1739 (C.A.),** was the termination of a neonatal nurse at Mount Sinai

Hospital in Toronto, Christine Tilley, after 13 years of employment. Innocent absenteeism was cited as the reason for the termination. Tilley suffered from serious bouts of depression and bulimia, that ultimately led to her filing for long-term disability benefits. Her doctor believed that one day she would return to her job. The exact date of return remained uncertain and Mount Sinai determined this timeframe was unacceptable and that her employment should be terminated.

Tilley's grievance was denied, and she appealed eventually to the Court of Appeal. She had argued that on termination she was entitled to severance pay. The Hospital had not paid severance based on the exception in section 58(5)(c) of the *Employment Standards Act* ("ESA") (see below).

The issue on appeal to the Court of Appeal concerned the constitutionality of s. 58(5)(c) of the ESA and, specifically, whether s. 58(5)(c) created an exception to an employer's obligation to pay severance to employees whose contracts of employment had been frustrated due to illness or injury.

The Court found that compensation for past contribution is merely one purpose of severance pay. Employees, such as Tilley, who are not likely to return to the workforce, are also entitled to compensation for their past contributions to the employer's business. There is to be no distinction between employees who are forced to seek out long-term disability and employees who are merely dismissed, both are entitled to severance.

The Court found that the purpose of severance pay is to provide assistance for employees trying to rejoin the workforce. In reading s. 58(5) of the ESA, the Ontario Court of Appeal concluded the section denies this benefit to all persons whose contracts of employment have been frustrated due to disability, without regard to whether or not they will attempt to rejoin the workforce. The Court held that the provision was contrary to s. 15 (equality rights) of the Charter and discriminated on the basis of disability.

The Court reviewed the government's entitlement to balance the interests of employers and employees by limiting the availability of severance pay. However, the Court was not convinced that the government's objective was compelling enough to override the right of disabled persons to be treated equally. Furthermore, the Court found that there was no rational connection between the objective of granting severance pay to those employees who will rejoin the workforce and denying severance pay to employees whose contracts have been frustrated due to illness or injury. Finally, the Court of Appeal commented that an employer has a duty under the *Human Rights Code* to consider a disabled employee's personal characteristics in accommodating them to the point of undue hardship, and in the case of innocent absenteeism, this includes the employer's ability to cope with the employee's prolonged absence. The Court of Appeal held that s. 58(5)(c) was of no force or effect.

Termination for disability was confirmed to be a last resort and, in most circumstances, termination should only follow an extensively documented attempt to accommodate an employee. —

Edu-Law

EDU-LAW CONSULTING SERVICES LIMITED

c/o Keel Cottrelle llp
100 Matheson Blvd. E., Suite 104
Mississauga, Ontario
L4Z 2G7

Phone: 905-890-7700
Fax: 905-890-8006
Email: rkeel@keelcottrelle.on.ca

www.keelcottrelle.com

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Contributors — The articles in this Digest were prepared by Catrina Duong, Kim Ferreira, Rosslyn Young and Nicola Simmons, who are associated with KEEL COTTRELLE LLP.