Volume 4, Issue 2

June 2006

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 20, 2006

Keel Cottrelle LLP
Special Education Session

Mississauga, Ontario

. . .

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

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

IN THIS ISSUE:

—

CONSTITUTIONAL & HUMAN RIGHTS

Freedom of Expression & Equality

School employees must take leave to run as Trustee in Alberta

The Alberta Court of Appeal in **Baier v. Alberta, [2006] A.J. No. 447** concluded that the Alberta government's decision to limit the circumstances when school board employees can run as school trustees did not violate the *Charter*.

In an amendment to the *Local Authorities Election Act*, R.S.A. 2000, c. L-21, the Alberta government precluded school board employees from seeking nomination as school trustees anywhere in the province, unless they took an unpaid leave to absence and resigned if elected. A group of teachers challenged the amendment on the ground that it offended the Canadian *Charter of Rights and Freedoms* and, specifically, their rights to freedom of expression and equality. The teachers argued that, because the salary of a trustee was significantly lower than that of a teacher, the economic consequence of the amendment was to effectively bar a teacher from running as a school trustee in the province. The teachers argued that this exclusion violated their right to express themselves by running in local elections and treated them differently from other groups eligible to run as school trustees.

At trial, the judge agreed that the amendments violated the *Charter* and, therefore, were of no force and effect.

The government appealed to the Alberta Court of Appeal. The government argued that the *Charter* protection and freedom of expression did not create a positive right; therefore, the government was not obligated to facilitate a particular form of expression. Further, the government argued that seeking election to a school board was a statutory platform of expression and not a fundamental freedom. The Court of Appeal agreed that the *Charter* did not create a right to any particular means of expression and that seeking election to a school board was not a constitutionally-protected fundamental freedom.

Moreover, the Court of Appeal found that, since the province was not required to provide the particular form of expressive activity, then, absent other *Charter* infringements, there was nothing to preclude the province from withdrawing the form of expression. The Court of Appeal held that the expressive activity that was the subject of the challenge was not protected under the *Charter*.

Next, the Court of Appeal examined whether or not the government's requirement that teachers resign from their positions, when no such restrictions were placed on other local authorities, violated the equality guarantees of the *Charter*. The teachers argued that occupational status was an analogous ground, but the Court of Appeal quickly rejected this argument. The Court of Appeal concluded that the teachers, as "highly trained, skilled professionals who enjoy societal recognition and respect" did not suffer disadvantage and, therefore, their occupational status was not an analogous ground. For this reason, the challenge pursuant to this ground of the *Charter* also failed.

As of the date of publication, there was no application for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

In Ontario, ss. 219(4)(a) provides that: "an employee of a district school board or school authority ... is not qualified to be elected or to act as a member of a district school board or school authority ...". Pursuant to ss. 219(5), an employee is not ineligible if the employee takes an unpaid leave of absence "beginning no later than the day the person is nominated and ending on voting day". The provision does not deal with the situation where an employee is elected. However, if the employee is elected and does not resign, he/she would be ineligible to continue to sit as a trustee. Consequently, the practical effect is that an employee must resign if elected and must know that this will be the outcome when he/she is a candidate. It should be noted that the Act also prohibited spouses of employees from sitting as trustees. A constitutional challenge to both provisions resulted in a decision of the Ontario Court of Appeal in 1999 that the prohibition against employees would be upheld, but the prohibition against spouses could not. Consequently, the disqualification with respect to spouses was removed from the Act.

—

Freedom of Expression

Appeal to Supreme Court of Canada denied in B.C. teacher expression case

In **British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, [2005] S.C.C.A. No. 455,** the Supreme Court of Canada dismissed without reasons the application for leave to appeal the B.C. Court of Appeal's decision allowing teachers to post materials about class sizes on school bulletin boards and permitting teachers to distribute related materials to parents during parent-teacher interviews. The Court of Appeal decision was reviewed in "Teacher's right to free speech affirmed" (Edu-Law Newsletter, October 2005, Vol. 3, Issue 3).

The Federation had argued that directives by school boards not to post or distribute materials violated the teachers' freedom of expression rights as protected by s. 2(b) of the Canadian *Charter of Rights and Freedoms*. The arbitrator allowed the grievance and that decision was eventually appealed to the B.C. Court of Appeal by the Employers' Association. The appeal was dismissed by the majority of the Court. The B.C. Court of Appeal held that the *Charter* applied to school boards and found that school bulletin boards and parent-teacher interviews invoked the right of freedom of expression and that the directives by the school board violated this freedom.

The Court of Appeal found that the expression at issue had significant political value and the school boards failed to justify the restriction of this expression.

The Supreme Court's denial of leave to appeal leaves the Court of Appeal's decision as final.

—

Discrimination: Sexual Orientation

Report to police leads to significant human rights award

A Nova Scotia Board of Inquiry in **Willow v. John Orlando, Dr. Gordon Young and Halifax Regional School Board (Nova Scotia Human Rights Board of Inquiry, May 9, 2006)** awarded an existing employee $25,000.00 for damages incurred as a result of the Halifax Regional School Board's and other respondents' discrimination against her on the basis of sexual orientation. The Board of Inquiry made significant findings with respect to the School Board's conduct, and damages awarded were far greater than those usually awarded by human rights tribunals.

The complaint arose following a report by Mr. Orlando, a teacher at the high school where the complainant worked as a physical education instructor, to Dr. Young, the Principal. The complainant asked a student to assist her to move some athletic equipment that was temporarily being stored in a part of the boys' change room. After moving the equipment, the complainant and student used a small washroom attached to the change room to wash their hands. While they were in the washroom, Mr. Orlando and another male teacher came into the change room and saw the complainant and the student together through the partially open door. The complainant and student left the room and passed the two male teachers. According to the two male teachers, the complainant and the student had guilty and shocked looks on their faces when they passed. As a result, Mr. Orlando reported to the school principal an allegation that the complainant and the student were engaging in sexual impropriety.

On hearing the report from Mr. Orlando and the other teacher, the principal called the police into the school to investigate. The police came to the school, conducted interviews with all the parties, including the complainant and the student, and filed a report indicating that there was no evidence supporting the allegation.

Following these events, neither the complainant, nor the student was offered an apology. Further, the complainant was forced to continue her job under a "cloud of suspicion" and was denied opportunities in her employment, which she asserts resulted because of the allegations made against her.

The Board of Inquiry found Mr. Orlando's testimony to be contradictory and disbelieved his assertion that the complainant and student left the washroom looking in any way upset or guilty. Further, the Board of Inquiry concluded that it was absurd to assume that there was something sexual between the parties in the

circumstances and that the assumption was the result of Mr. Orlando's attitude towards the complainant's perceived sexual orientation. The Board of Inquiry also found that his decision to report the complainant to the administration was also caused by his discriminatory attitudes towards the complainant's sexual orientation.

The Board of Inquiry found that the principal, Dr. Young, had made two mistakes in his response to the situation. First, he called the police without conducting his own investigation into the matter, including neglecting to speak to the complainant or the student. The Board of Inquiry concluded that Dr. Young's decision to call police based on information that the complainant and a female student were together in a small room was caused by his discriminatory attitude towards the complainant's perceived sexual orientation.

Second, the Board of Inquiry found that the complainant's perceived sexual orientation was a factor in Dr. Young's mistaken refusal to apologize and his failure to ensure that, in light of the false accusations, the complainant was comfortable in the school environment.

The Board of Inquiry found the School Board responsible for failing to create an inclusive school environment free from discrimination.

In deciding on the quantum of the award, the Board of Inquiry considered the damages awarded in a comparable case, but concluded that the complainant's suffering as a result of the discrimination was worse and therefore, the Board of Inquiry awarded a higher amount. The sum was reached by assessing $5,000.00 for the false report to the police and $5,000.00 for each school year from the date of the incident that the complainant had to endure without an apology. If the employee had resigned because of the matter the damages would have been much more significant. In addition, damages were awarded to the complainant's parents for expenses incurred in supporting her, and also to the student for damages incurred by being implicated in the matter.

This decision might well have been different had proper steps been taken following the police investigation to ensure that the complainant's reputation and status were intact. It is interesting to note that the Board of Inquiry had expectations that the Principal would conduct some form of inquiry prior to calling authorities. In Ontario, in sexual misconduct cases, the expectation is that no investigation be conducted prior to contacting the Children's Aid Society or police.

—

FREEDOM OF INFORMATION & PROTECTION OF PERSONAL PRIVACY

Disciplinary Proceedings

Investigation of teacher's personal information

The British Columbia Supreme Court in **B.C. Teachers' Federation v. B.C. (Information and Privacy Commissioner, [2006] B.C.J. No. 155 (BCSC)** overturned the decision of the British Columbia Information and Privacy Commissioner regarding the release of records containing the personal information of a teacher.

Following a closed board meeting during the 2001/2002 school year, where the school board reviewed with the federation the conduct of a teacher who had received multiple parental complaints, the school board received three requests for information regarding copies of investigation reports and/ or findings, with respect to the complaints filed against the teacher.

Upon receiving the requests, the school board granted only partial release on the grounds that the balance contained the teacher's personal information. The parents were unsatisfied by the partial disclosure and appealed the school board's decision to the Information and Privacy Commissioner.

The Information and Privacy Commissioner made two Orders requiring the school board to release further information, which contained the teacher's personal information.

The Federation sought judicial review of the Orders on the basis that release constituted an invasion of the teacher's privacy.

The B.C. Supreme Court commented that the legislation was conceived as a mechanism to advance the right of the public to access information in the hands of the government, but required a balance to protect an individual's privacy with respect to the information being sought.

The Court determined that the Privacy Commissioner had made several unreasonable

decisions. Specifically, the Court found that the decision to disclose information about the teacher already known to the complainant parents was an invasion of privacy. Further, the Court held that it was unreasonable for the Commissioner to label certain information as "no-one's personal information" and disclose it without giving any justification. The Commissioner failed to explain why he considered the information "no-one's personal information" and not the teacher's personal information. Moreover, the Commissioner failed to explain why it would not be an invasion of privacy to disclose the teacher's personal information to the parents. The Commissioner also failed to provide satisfactory reasons for the further disclosure and therefore, the Court found the decisions to be unreasonable.

The Court required various aspects of the Commissioner's Order mandating further disclosure to be sent back for reconsideration.

This case highlights the sensitivity with which personal information must be treated.

—

SCHOOL BOARDS: AMALGAMATION

Amalgamation created one employer

The Ontario Labour Relations Board in **Board of Education for the City of Windsor, [2006] O.L.R.D. No. 8,** approved an application brought by various building trades unions in Windsor and Essex County who sought a declaration naming one school board as their employer for all purposes of the *Labour Relations Act*. The OLRB in approving the application declared that the Windsor Board of Education and the Greater Essex County District School Board were one employer for all purposes of the *Labour Relations Act* and also in respect of the provincial collective agreements of each of the trade union applicants. The declaration was made retroactive to January 1, 1998, to reflect the date the Windsor Board of Education and the Essex County Board of Education amalgamated to form the Greater Essex County District School Board.

Pursuant to the *Fewer School Boards Act, 1997* (FSBA), on January 1, 1998, the Greater Essex County District School Board was formed superseding the Essex County Board of Education and the Windsor Board of Education and assuming responsibility for running, operating and controlling the schools that had previously been operated by both school boards. The Greater Essex County District School Board also assumed all of the assets and financial responsibilities of the school boards and all employees were transferred in accordance with the FSBA.

A new collective agreement was negotiated with the applicants. It was a single collective agreement between the Greater Essex County District School Board and a panel of representatives from the five trade unions in Windsor and Essex County.

All construction projects were contracted out consistent with prior practice; however, the construction projects tendered in the City of Windsor required that the union bidder be bound by a provision of the collective agreement, that required the contractors to hire employees who were members of the various trade unions. The construction contracts in the County of Essex did not have the same compliance requirement.

The Greater Essex County District School Board created the different practice on the basis that it had assumed and had to apply the provisions existing in the former Windsor Board's agreements. The applicants however, argued the Greater Essex County District School Board should be the sole employer applying the terms of only the newly negotiated agreement.

The OLRB determined that after January 1, 1998 the Greater Essex County District School Board fully assumed the jurisdiction and former activities of both the Windsor Board and the Essex County Board.

The OLRB applied its discretionary powers under the *Labour Relations Act* where there are two or more entities that carry on associated or related businesses to find that they are under common control or direction. In the OLRB's opinion, the Windsor Board and the Greater Essex County District School Board were under common control and direction and the Greater Essex Board was held to have gained control over the Windsor Board following the January 1, 1998 amalgamation, including becoming the sole employer. Thus the OLRB held that the Windsor Board and the Greater Essex County District School Board were one employer for the purposes of the *Labour Relations Act*, 1995. Consequently, the provision with respect to contracting out applied to the whole Board and not just the City of Windsor.

—

SCHOOL BOARDS: COLLECTIVE AGREEMENTS

Maternity Leave

Term contracts attracted maternity leave

Flin Flon School Division No. 46 v. Flin Flon Teachers' Association of the Manitoba Teachers' Society, [2006] M.J. No. 71 (Q.B.), was an application for judicial review, brought by the School Division, of an arbitration award which found a teacher eligible for maternity leave. The issue was whether the teacher had been an employee for "at least seven consecutive months" before taking maternity leave, as required by the *Employment Standards Code* and the collective agreement.

The teacher was employed as a "term teacher" pursuant to a contract that specified her start and termination dates. She had signed a series of contracts, both full and half time, dating from April 2001 though to June 2004. Each contract provided a start date at the beginning of September and a termination date at the end of June. She had signed the most recent contract in June of the year proceeding the commencement of the contract, and requested maternity leave benefits on August 5, 2003 to be effective September 15, 2003 through January 5, 2004. She had not worked in July and August of that year.

The School Division denied the request and instead granted the teacher unpaid leave. The teacher filed a grievance, which was allowed on the ground that the School Division had breached the collective agreement. The majority of the arbitration board held that the teacher had been employed for seven consecutive months and that to interpret the collective agreement otherwise would be unreasonable and would render eligibility for benefits dependent on the date the teacher expected to deliver her baby.

In upholding the arbitration board's decision, the Court focused on whether the provision of the *Employment Standards Code* could sustain the interpretation the arbitration board relied on, i.e. that consecutive employment could be expanded to include continuous employment. It was clear that the employee had not worked in July and August and that her contracts of employment were for the period of September to June. The Court considered several cases that supported the arbitration decision finding that the teacher had been continuously employed for seven months and noted that it was assumed that a public employer would not treat employees of the same class differently with respect to benefits on such an arbitrary basis (i.e. a contract teacher who was due to give birth in April following seven months of consecutive employment would be granted maternity leave while the teacher in this case would not). The Court held that the award was based on a liberal and purposive interpretation of the status of consecutive employment, was consistent with the approach taken by the Courts with respect to minimum standards legislation and had focused on the substantive nature of the employment relationship. The Court held that the interpretation of the agreement was "consistent with the usual goal of providing equal benefits to the same class of employees".

The arbitrator's decision is consistent with the position currently reflected in case law that consecutive specific term contracts can form continuous employment for termination and benefits.

—

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

EDU-LAW CONSULTING SERVICES LIMITED provides a full range of professional development for educators, and offers Negotiation and Mediation Training Programs. In addition to this Human Resources Digest, Edu-Law publishes the Edu-Law Newsletter. Edu-Law is managed by members of KEEL COTTRELLE LLP. For any information with respect to EDU-LAW or the services provided by KEEL COTTRELLE LLP, please contact **Bob Keel** at **905-501-4444**, or by email at **rkeel@keelcottrelle.on.ca**, or visit our website **www.keelcottrelle.com**.

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