Keel Cottrelle LLP
www.keelcottrelle.com

Toronto — 36 Toronto St. Suite 920 Toronto ON M5C 2C5
416-367-2900 fax: 416-367-2791

Mississauga — 100 Matheson Blvd. E. Suite 104 Mississauga ON L4Z 2G7
905-890-7700 fax: 905-890-8006

Human Resources Newsletter

— October 2015 —

IN THIS ISSUE —

Court nixes sniffer dogs in employment situations

The unilateral introduction of a policy requiring employees entering a mine to be subject to a random search by sniffer dogs was at issue in *United Steelworkers Local 7552 v. Agrium Vanscoy Potash Operations* (Grievance 16-10, Random Drug Searches/Interviews, [2015] SLAA No. 1). The employer, Agrium Vanscoy Potash Operations operated a potash mine in Vanscoy, Saskatchewan. The Union, United Steelworkers Local 7552, filed a grievance in 2010, and alleged that the employer-instituted process of conducting searches

using sniffer dogs was an unjustifiable violation of the employees' fundamental right of privacy.

Safety at the mine was an important issue as injuries and fatalities, none of which had ever been linked to drug use by employees in the bargaining unit, had occurred. In 2009, Vanscoy introduced a drug and alcohol policy that required employees to be tested for drugs in a number of situations. This occurred after a narcotics syringe had been found on the site. The Union had been consulted about the policy and did not grieve it.

In March of 2010, Vanscoy hired an external contractor and introduced the sniffer dog search policy, without consulting the Union. Employees entering the mine were sniffed by the dogs, and if a dog indicated the presence of drugs, the employee would be subjected to a second sniff test, an interview, and a search of their pockets, bags and/or pail. The dogs would alert when they were in the immediate presence of drugs, and they would also alert when presented with an item of clothing that had previously been exposed to a drug sample. The dogs would also detect drugs after sniffing an employee who had been in the presence of someone else who had been smoking marijuana, even if the employee had not smoked.

Prior to the implementation of the sniffer dog search policy, drug paraphernalia and empty alcohol containers had been found at the mine on two occasions. After the grievance was filed, a few incidents occurred where drugs, traces of drugs or drug equipment was found on the worksite, none of which involved bargaining unit members. Additionally, Vanscoy hired a security firm which found residues of a variety of drugs after testing various surfaces in the mine.

The Union's grievance alleged that the searches and subsequent interviews of employees were unjustifiable intrusions into their private lives, as the dogs' extreme sensitivity would reveal – in addition to drug use – even the mere exposure to drugs, off-site and outside of working hours. The Union argued that Vanscoy could not rely on the objective of drug deterrence in justifying the searches and that the prior detection of traces of drugs in the mine was not sufficient evidence of a drug problem.

Vanscoy argued that the sniffer dog searches were justified, especially since the mine was a safety-sensitive workplace. Additionally, Vanscoy asserted that such searches reduced the risk of workplace accidents and injuries.

The Arbitrator upheld the grievance as he found that Vanscoy failed to establish a demonstrated risk to workplace safety that could justify the searches and the intrusion into employees' privacy.

The deployment of drug detection dogs to screen entry to a dangerous workplace had never been considered in jurisprudence prior to this case. The Arbitrator sought guidance and utilized the test from *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd*. (*Irving*, 2013 SCC 34) to determine whether the sniffer dog searches could be justified. The test requires management rules that entail disciplinary consequences to be reasonable and consistent with the collective agreement. Furthermore, as stated in *Irving*, there must be "evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace".

Although the test in *Irving* applied to an employer seeking to justify drug testing, the Arbitrator stated that the same test could be applied to an employer seeking to justify sniffer dog searches.

The Arbitrator considered the evidence of the drug paraphernalia and alcohol containers that were discovered prior to the implementation of the policy and found that it was insufficient to establish a general drug problem in the workplace or a safety-based rationale for the policy. The Arbitrator noted that even if he were to consider the evidence of drugs and alcohol on the site after the implementation of the policy, he would still find it insufficient. The Arbitrator ultimately

upheld the grievance, declared the sniffer dog policy to be a breach of the collective agreement, and ordered a cessation of the practice.

In the education context, the use of sniffer dog searches has been limited to searches by police on school property, as considered by the Supreme Court of Canada in *R. v. A.M.* (2008, SCC) and only when the reasonable suspicion standard has been met. The Supreme Court did not comment on a school board's authority to conduct such searches in the employment context. ■

Court of Appeal rules B.C. Bill 22 did not violate teachers' constitutional rights

In *British Columbia Teachers' Federation v. British Columbia* (2015 BCCA 184), the British Columbia Court of Appeal (B.C. Court of Appeal) ruled that the provincial government did not violate teachers' constitutional rights when it introduced Bill 22 in 2012. The legislation limited teachers' bargaining on issues related to class size and composition, as well as supports for students with special needs.

In January 2002, the *Education Services Collective Agreement Act* (S.B.C. 2002, c. 1) and the *Public Education Flexibility and Choice Act* (S.B.C. 2002, c. 3), collectively known as Bill 28, were enacted. Bill 28 declared void certain terms of the expired collective agreement between the British Columbia Teachers' Federation (BCTF) and the British Columbia Public School Employers' Association (BCPSEA). The collective agreement made in 2006 expired in June 2011, however it provided that its terms would remain in effect until a new agreement was reached. Bill 28 also prohibited the inclusion of similar provisions in any future collective agreements. The BCTF was not consulted before Bill 28 was enacted.

In May 2002, the BCTF commenced a constitutional challenge and argued that Bill 28 infringed teachers' freedom of association guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The British Columbia Supreme Court (B.C. Supreme Court) held that Bill 28 infringed teachers' freedom of association in two ways. First, Bill 28 declared void certain terms of the collective agreement in force at the time. Second, Bill 28 prohibited collective bargaining on the subject matter of those terms and provisions in the future between the BCTF and the BCPSEA. The B.C. Supreme Court found that the infringement was not demonstrably justified under s. 1 of the *Charter.* Furthermore, the B.C. Supreme Court suspended the declaration of invalidity for one year in order to allow the Province, British Columbia, to consider remedial legislation. The Province did not appeal the decision (2011 BCSC 469).

The Province and the BCTF engaged in collective bargaining in the following year. The discussions and negotiations did not lead to a new agreement within the one-year period that the invalidity of Bill 28 was suspended.

On April 14, 2012, the Province enacted new legislation, the *Education Improvement Act* (S.B.C. 2012, c. 3), also known as Bill 22. The appeal in the current case addressed the issue of the constitutionality of Bill 22.

There are many similarities between the two bills. Bill 22, like Bill 28, declared void every term of the collective agreement between the BCTF and the BCPSEA which restricted a school board's power to establish class size and class composition and which regulated a school board's power to determine staffing levels or ratios, among other things ("Affected Topics"). Bill 22 provided that no term concerning the Affected Topics could be included in a collective agreement until June 30, 2013. Bill 22 prohibited the parties from collective bargaining about the Affected Topics for approximately 14 months.

In *British Columbia Teachers' Federation v. British Columbia* (2014 BCSC 121) (which was

reviewed in the KC H.R. Newsletter of October, 2014), the trial judge held that the discussions between the Province and the BCTF during collective bargaining were irrelevant to the constitutionality of the legislation. In the alternative, the trial judge assumed that the consultations by the Province with the BCTF could be relevant to whether Bill 22 infringed teachers' freedom of association. The trial judge considered the meaning of 'a process of consultation and good faith negotiation' and found that merely meeting with the BCTF before unilaterally passing legislation affecting them was not considered meaningful consultation. The negotiations were held to not be in good faith. The trial judge stated that the Province's strategy was to provoke a strike in order to gain political support for the imposition of Bill 22 on the BCTF. It was held that Bill 22 infringed teachers' s. 2(d) *Charter* rights, and the infringement could not be saved by s. 1 of the *Charter.* The BCTF was awarded $2 million in damages, as well as declaratory relief with Bill 22 being proclaimed as unconstitutional.

The Province appealed this decision and the issue for the B.C. Court of Appeal was whether the legislation – Bill 22 – interfered with teachers' s. 2(d) *Charter* rights to a meaningful collective bargaining process. The majority of the B.C. Court of Appeal found that the Province's consultations and negotiations with the BCTF were relevant to the constitutionality of the legislation. Therefore, the trial judge's finding that these pre-legislative consultations were irrelevant was erroneous. Furthermore, the majority of the B.C. Court of Appeal found that the trial judge's finding that the Province failed to consult in good faith with the BCTF was based on errors of law and palpable overriding errors of fact. The majority held that teachers were afforded a meaningful process to make collective representations about workplace goals, and that Bill 22 did not infringe s. 2(d) of the *Charter.*

The BCTF stated that it will seek leave to appeal to the Supreme Court of Canada. The SCC's recent expansion in the scope of freedom of association in the labour law jurisprudence will likely influence whether the Supreme Court will grant leave to appeal. ■

HRTO confirms procedural and substantive requirements for accommodation

In *Bottiglia v. Ottawa Catholic School Board* (2015 HRTO 1178), the Human Rights Tribunal of Ontario (HRTO) dismissed an application made by Marcello Bottiglia, the former Superintendent for Schools of the Ottawa Catholic School Board (Board). Bottiglia alleged that the Board discriminated against him by failing to participate in a return-to-work process in good faith after his disability was precipitated by a work-related incident.

The conflict that triggered Bottiglia's condition and his two-year-long sick leave was the appointment of the Board's new Director of Education. Bottiglia strongly disapproved of the decision to rely on an appointment process to fill the position rather than holding an open competition, which would have allowed him to compete for the position. Bottiglia testified that he felt "distraught, betrayed and upset" by the Board's decision, and that this triggered his depression, later diagnosed as Unipolar Depressive Disorder with Anxiety features. In August of 2012, Bottiglia's counsel wrote a letter to the Board's counsel stating that Bottiglia's condition was improving and that his psychiatrist, Dr. Levine, believed he would be able to return to modified work in the next two months.

The issue before the HRTO was whether the actions taken by the Board, in response to Bottiglia's return-to-work accommodation requests, were reasonable. Dr. Levine recommended that Bottiglia work two days a week for four-hour periods, with no evening meetings. As his condition improved, Dr. Levine would recommend increased hours and days per week. This process was expected to take six to twelve months. The

Director of Education was concerned with Dr. Levine's recommendations and Five Point Plan. The proposed return-to-work accommodation was viewed as an excessively slow start for a return-to-work plan. Also, the uncertain and prolonged period for the return-to-work plan was at odds with the Board's experience with graduated plans for other employees, which generally lasted six to eight weeks. The Director questioned whether Bottiglia was ready to perform his duties as a Superintendent, given the drastic restriction on his proposed work hours, since superintendents normally work 50 to 60 hours a week.

The Director was of the view that Dr. Levine was recommending an accommodation without an objective understanding of Bottiglia's essential duties as Superintendent. Dr. Levine did not provide a clear prognosis on his health, and no information was provided about whether Bottiglia might have other restrictions or require other accommodations aside from extremely low working hours. Furthermore, the timing of Bottiglia's return-to-work was suspect given that it coincided exactly with the cessation of his vacation and sick leave credits, which he was using to collect his pay.

The Board requested that Bottiglia undergo an Independent Medical Examination (IME) in order to obtain an independent opinion and a more thorough analysis of his limitations and restrictions as well as accommodation needs. This practice was included in the Board's Management Guide. Bottiglia's counsel asserted that the Board did not have the contractual authority to force him to undertake an IME, as the written terms and conditions of his employment did not include any reference to him being subject to the Board's Policies, including the Management Guide. The HRTO accepted that the Management Guide applied to all employees up to and including the Director of Education, which was evidenced by the fact that IMEs have been conducted in the past with senior supervisory staff of the Board, including a superintendent. Notwithstanding his concerns, Bottiglia was prepared to take the IME with certain conditions.

The Board's counsel wrote to Dr. Suddaby, the psychiatrist chosen to conduct the IME, and the letter noted that Bottiglia had left the workplace following a dispute with the then Director of Education. Furthermore, the letter stated that the modified work hours that Bottiglia proposed would make accommodation of a superintendent's position virtually impossible. Bottiglia argued that the Board compromised the IME examiner's impartiality by the way in which this information was framed. The HRTO did not find that the factual information that the Board provided to Dr. Suddaby was unreasonable or part of a deliberate attempt to provide Dr. Suddaby with misleading or distorted information. Although the Board had clearly expressed its views about Bottiglia's request to return-to-work, the information provided by the Board did not preclude Bottiglia from providing Dr. Suddaby with his own views. Bottiglia did not attend the scheduled IME.

The HRTO found that Bottiglia's "… accommodation needs are not clear and are potentially complex and challenging, and as such the OCSB is justified in seeking additional information as to his diagnosis and treatment in order to appropriately identify and meet his accommodation needs". Furthermore, the HRTO held that the Board had a *bona fide* reason to question the adequacy and reliability of Bottiglia's proposed accommodation since his proposed return-to-work date, after a two-year long absence, coincided with the end of his paid leave. The HRTO concluded that it was reasonable for the Board to request additional information about Bottiglia's medical condition through an IME.

The HRTO rejected the allegation made by Bottiglia that the Board reprised against him by deliberately denying him sick-leave benefits as Bottiglia was not entitled to the additional benefits.

Bottiglia also made allegations of delay and alleged that the Board intended to undermine the return-to-work process and to ultimately pressure him into retiring. The HRTO did not find that the time the Board took to respond to Bottiglia to be inordinate given the substantive issues Bottiglia raised. The HRTO also agreed with the Board that it was reasonable for the IME to take place before any return-to-work meeting was held.

The Board took the position that it did not refuse to accommodate Bottiglia's return-to-work request, and that it made efforts to gather more information about his disability-related needs. The Board stated that the process never got to a point where Bottiglia was told that he would not be returned to work or that his return would cause an undue hardship.

The HRTO found that the Board had an obligation and a duty to accommodate Bottiglia's disability. However, the HRTO stated that the duty to accommodate places obligations on the employee seeking accommodation as well. In considering whether the measures taken by the Board in responding to Bottiglia's request for accommodation were reasonable, the HRTO noted that it was appropriate to consider his actions and participation in the accommodation process. As part of the accommodation process, an employee is expected to provide an employer with information that will allow the employer to assess how or if the employee can be accommodated. The HRTO found that the Board's efforts to meet the procedural aspect of its duty to accommodate were reasonable, and that it fulfilled the procedural duty. The substantive aspect of the duty to accommodate was not triggered because Bottiglia failed to participate in the Board's reasonable requests for medical information through an IME. The HRTO dismissed the Application since Bottiglia failed to meet his onus to prove that he was discriminated or reprised against.

The decision demonstrates that the HRTO will consider an employee's conduct in a return-to-work accommodation process when determining whether the actions taken by an employer were reasonable. ■

Alberta Human Rights Tribunal reaffirms employer's duty to accommodate

A recent decision from Alberta's Human Rights Tribunal has reaffirmed the importance of an employer's duty to accommodate employees with respect to disability.

In *Horvath v. Rocky View School Division No. 41* (2015 AHRC 5), the Complainant was employed as a caretaker with the Respondent employer, Rocky View School Division No 41. She brought an application to the Alberta Human Rights Tribunal (the Tribunal) alleging that the Respondent discriminated against her on the ground of disability.

During her employment, the Complainant suffered an injury in the workplace and required surgery. The Complainant received benefits and treatment through the Workers' Compensation Board (WCB), but then was terminated from her employment by the Respondent. The Respondent argued that the Complainant's injury was related to a pre-existing condition, and that her restrictions made it impossible to accommodate her without the employer suffering undue hardship. The Complainant argued that the Respondent discriminated against her by failing to consider any reasonable form of accommodation.

The Complainant fully dislocated her right shoulder while working for the Respondent employer. The WCB subsequently scheduled the Complainant to undergo surgery. The Complainant was recovering well during the months following the surgery. A case conference hosted by the WCB and attended by the Complainant and a representative of the Respondent determined that the Complainant was fit to work and could

perform modified duties with temporary restrictions. Notes from the case conference indicated that the Respondent stated that modified hours and duties could be available to the Complainant and that the Respondent would be able to accommodate modified work. However, the Complainant's surgeon later determined that her medical restrictions would be permanent. In response, the employer terminated the Complainant's employment, claiming that it did not have a permanent positon for her given her permanent medical restrictions. The Complainant applied to other positions with the Respondent, but received no response to her applications.

Pursuant to the *Alberta Human Rights Act*, no employer may refuse to continue to employ, or discriminate against, any person with regard to employment on the basis of physical disability. The Respondent's letter of termination to the Complainant explicitly stated that the Respondent refused to continue the Complainant's employment because of her restrictions. As such, the Tribunal found that the Complainant was discriminated against by the Respondent. The Tribunal was then left to determine whether the Respondent could justify its conduct and demonstrate that it accommodated the Complainant's disability to the point of undue hardship. The Tribunal noted that undue hardship may provide a justification for otherwise discriminatory actions.

Since the Respondent had terminated the Complainant's employment, it bore the onus of demonstrating undue hardship, which it failed to do. The Tribunal determined that the Respondent failed to consider alternatives for the Complainant. The Respondent focused too heavily on returning the Complainant to her position as a caretaker, and failed to explore her other capabilities and other accommodations that may have been possible.

The Tribunal found that the Complainant was discriminated against in employment on the prohibited ground of physical disability. The Respondent's attempt to find suitable work to accommodate the Complainant was insufficient and superficial as the Tribunal found that accommodation was likely possible. The Tribunal awarded the Complainant $44,658.48 in lost wages, and $15,000.00 for the mental distress, injury to her dignity and the negative impact on her personal life.

This decision reinforces the obligations of an employer with respect to accommodation. ■

Federal Court of Appeal confirms after acquired disability information does not impact termination

In *Khaper v. Air Canada* (2015 FCA 99), the Federal Court of Appeal considered whether the refusal to reinstate an employee after termination could be a discriminatory act based on the grounds of disability, in relation to a disability only discovered after the termination.

This action arose from a complaint to the Canadian Human Rights Commission (CHRC) where the Applicant alleged that his former employer, Air Canada, had discriminated against him based on mental disability, race, and national or ethnic origin in terminating his employment. The complaint was filed under the *Canadian Human Rights Act* (*CHRA*) and was subsequently dismissed by the CHRC. The Federal Court dismissed his application for judicial review, and the Federal Court of Appeal upheld this decision.

The Applicant began working for Air Canada in 1997. During the course of his employment, the Applicant received numerous letters of expectation and letters of discipline as a result of his conduct at work. These letters were related to either his "stealing time" from his employer or his insubordination. In 2008, the Applicant was issued a "step 5" disciplinary letter which informed him that if he continued to "steal time", his employment would be terminated. At the grievance

arbitration for the accompanying suspension related to this "step 5" disciplinary letter, the Arbitrator warned him that if he "stole time" again, he would be fired. On January 22, 2009, almost one year later, the Applicant was caught "stealing time" again and Air Canada terminated his employment effective that date.

The Applicant's grievance in relation to his termination was dismissed. The Applicant then retained counsel and four months later obtained a psychiatric report diagnosing him with Bipolar Affective Disorder. The Federal Court of Appeal found there to be no indication that either the Applicant or Air Canada were aware of his condition prior to this diagnosis. In light of this information, the Applicant's union wrote to Air Canada asking that his employment be reinstated. This request was denied on November, 23, 2009. On January 22, 2010, the Applicant filed the complaint with the CHRC, which was subsequently dismissed on the basis that there did not appear to be any link between the alleged discriminatory acts and any prohibited ground of discrimination.

On the request of the Applicant's counsel, the CHRC reopened the complaint and an investigation report was prepared recommending that the claim be dismissed. The parties were invited to respond to the report and make submissions. Ultimately, the CHRC dismissed the complaint on the basis that it was not brought within the time period for filing a complaint under the relevant provisions of the *CHRA* and that the complaint was vexatious. The CHRC refused to exercise its discretion to extend the time period to file the complaint.

In the application for judicial review before the Federal Court, the Applicant raised the issue of procedural fairness and argued that the CHRC's decision to dismiss his complaint should not be upheld. After a review of the decision on a standard of reasonableness, the Federal Court held that the findings and the decision of the CHRC to dismiss the complaint were reasonable.

On appeal, the Applicant only pursued a claim for discrimination on the ground of disability. In its analysis, the Federal Court of Appeal (the Court) first confirmed that the appropriate standard of review was that of reasonableness, and then went on to consider whether it was applied correctly by the lower court. The Court concluded that the determination of the CHRC that no discriminatory act occurred when Air Canada refused to reinstate the Applicant as an employee in November 2009 was reasonable.

The Applicant's position was that his employer had a duty to accommodate him which survived the termination of his employment, and that the employer failed to perform this duty by refusing to reinstate him. The Applicant relied on the Nova Scotia Supreme Court's decision in *Cape Breton (Regional Municipality) v. Canadian Union of Public Employees, Local 933* (*Cape Breton,* 2014 NSSC 97) which dealt with an employee who was terminated for absenteeism. In *Cape Breton*, the termination was found to be justified, but the arbitrator permitted the grievor to submit evidence of her medical condition that was available prior to the termination of employment, but which had not been disclosed to the employer. As a result of this evidence, the arbitrator ordered the employer to conditionally reinstate the terminated employee. This decision determined that a duty to accommodate a disabled employee could arise before the termination of his or her employment, even if the employer was not aware of the employee's disability until after the employment was terminated.

The Court declined to express any opinion on *Cape Breton* as the issue in the case at hand did not concern whether Air Canada had a duty to accommodate the Applicant on or before January, 22, 2009. Rather, the issue was whether the refusal of Air Canada to reinstate the Applicant on November 23, 2009, after his disability was discovered and reported to Air Canada, could be considered a discriminatory act under the *CHRA*. The Federal Court of Appeal in *Lever v. Canada (Human Rights Commission)* (*Lever*, [1988]

F.C.J. No. 1062) considered whether continuing to maintain a decision to terminate the employment of a person could constitute a separate discriminatory act. Although *Lever* did not deal with an unknown disability that was only disclosed to the employer after the employee was terminated, the Federal Court of Appeal found that, "the principle that complaints arising out of employment must relate to acts committed before the employment relationship is terminated, is applicable in this case." The Court concluded that in the present case the Applicant was terminated on January, 22, 2009, and this was the last act that was related to his employment. Regardless of whether or not Air Canada had a duty to accommodate him on or before this date, it would not change the date of the last act of the employer.

The Court further noted that, if the last act for the purposes of the *CHRA* was the refusal of Air Canada to reinstate the Applicant's employment, this would mean the Applicant could control the commencement of the one year limitation period by choosing when to submit a request for reinstatement. Additionally, if the employer had a continuing obligation to accommodate the needs of the Applicant, then any later refusals to reinstate him would also be deemed a discriminatory act and the Applicant would have the ability to renew the limitation period by submitting an additional request for reinstatement.

The Court summarized:

"This could not be an intended result for the purposes of paragraph 41(1)(e) of the *CHRA*. It would therefore be reasonable, in the circumstances of this case, for the CHRC to determine that, for the purposes of the *CHRA*, the refusal by Air Canada to reinstate him as an employee should not be considered as a possible discriminatory act because it occurred after his employment had been terminated."

The Court also found that the CHRC's decision that the last discriminatory act was in January 2009 when the Applicant was terminated, rather than in November 2009 when Air Canada refused to reinstate the Applicant, was reasonable. The Court noted that the CHRC quoted the investigation report addressing the issue of extending the time to file a complaint, which would only have been relevant if the last possible discriminatory act was the termination of the Applicant's employment in January 2009. Therefore, the Court concluded that the CHRC must have agreed with the conclusion that the failure of Air Canada to reinstate the Applicant on November 23, 2009 was not an act which could give rise to a new limitation period under the *CHRA*. The Court also noted that Supreme Court of Canada jurisprudence has confirmed that "reviewing courts should first attempt to supplement the reasons of a tribunal before they search for ways to subvert them." The Court held that the lower court's analysis of the jurisprudence was done to supplement the CHRC's decision that the complaint was not filed within the time period set out in the *CHRA*.

The Court then considered the reasonableness of the CHRC's refusal to extend the time to file a complaint. It was noted that the Applicant was represented by counsel long before the one year limitation period expired. In addition, the Applicant, in his submissions to the Federal Court of Appeal, did not make any substantial arguments on why it was unreasonable for the CHRC to deny him the extension of time to file his complaint. The Court therefore concluded that there was no basis to find the decision of the CHRC unreasonable. Although the Court dismissed the appeal on the timeliness issue, it did not address the issue of whether the complaint should have been dismissed on the basis that it was vexatious.

This decision clarifies that an employer has no duty to accommodate if the employer was legitimately unaware of an employee's disability at the time of dismissal. Employers, however, cannot be wilfully blind to the actions or behaviours of an employee that suggest accommodation may be necessary. ■

Court confirms protected ground of family status includes eldercare obligations

In *Canada (Attorney General) v. Hicks* (2015 FC 599), the Attorney General of Canada, acting on behalf of Human Resources and Skills Development Canada (HRSDC), applied to the Federal Court for judicial review of a decision by the Canadian Human Rights Tribunal (the Tribunal) in respect of Leslie Hicks' (Hicks) claim for Temporary Dual Residence Assistance under the Treasury Board's Relocation Directive.

Hicks, an employee of the HRSDC, relocated from Sydney, Nova Scotia to Ottawa, Ontario for a new position, since his previous position became redundant. The letter of offer for relocation stated: "Relocation Expenses will be reimbursed at public expense according to the Treasury Board Relocation Directive". Hicks' wife did not move with him due in part to her mother's ailing health, and Hicks and his wife maintained dual residences. His mother-in-law was moved to an assisted living apartment, and later to a full care nursing home before her death.

Hicks made an expense claim for Temporary Dual Residence Assistance under the Relocation Directive in the amount of $21,247, covering the first year of the relocation period. The claim was denied and Hicks filed a grievance challenging this denial. The reason for the denial was stated as: "[N]ot eligible for the Temporary Dual Residence Assistance since he was a renter and not the owner of a house in Sydney". Hicks' grievance was also denied at the second level. The reason for the second denial was that his mother-in-law was not living with him in the principal residence, and as such could not be considered a dependant pursuant to the 1993 Relocation Directive, which defined "dependant" to mean a family member who is "permanently" residing with the employee. In 2009, the definition of "dependant" in the Directive was expanded to include "a person who resides outside of the employee's residence and for whom the employee has formally declared a responsibility for assistance and/or support". Hicks' grievance was also denied at the third level before the National Joint Council for the same reasons provided at the second level. His grievance was then referred to adjudication before the Public Service Labour Relations Board (PSLRB). The PSLRB denied Hicks' grievance for the same reasons provided at the second and third levels.

Hicks filed a complaint with the Canadian Human Rights Commission (the Commission).The Commission advised Hicks that it could not deal with the complaint pursuant to paragraph 41(1)(c) of the *Canadian Human Rights Act*. Hicks sought judicial review of the Commission's refusal and his application was allowed. The Commission referred the matter to the Canadian Human Rights Tribunal (the Tribunal), which was asked to determine whether the decision to deny payment was discriminatory under the prohibited grounds of family status and disability.

The HRSDC argued that the purpose of the Relocation Directive is to help relocate employees at the most reasonable cost to the public yet having a minimum detrimental effect on the transferred employee and family. Under the eligibility criteria, it states that assistance is not provided "for the voluntary separation of the family for personal reasons." Under the Relocation Directive, Hicks would only be able to claim benefits if his mother-in-law, a dependent, were to reside with him for reasons of temporary illness. The HRSDC argued that the definition of dependant was erroneously extended to include Hicks' claim. The Relocation Directive's stated aim is to offset the cost of maintaining a second residence when one of the residences is occupied by a dependent for reasons of temporary illness – not to subsidize the cost of maintaining a second home for someone who is chronically ill. Hicks argued that the temporary illness limitation was under-inclusive on the grounds of family status. He stated that the term "family status" should be

interpreted broadly and should apply to eldercare obligations.

The Tribunal determined that the Relocation Directive was under-inclusive and the denial of the benefit was based on a characteristic of Hicks' family – he and his wife cared for his mother-in-law, who, because of a permanent disability, could not live in the family home. The Tribunal found that the denial of his expense claim under the Relocation Directive constituted a *prima facie* discriminatory practice.

The Federal Court held that the Tribunal did not commit a reviewable error in concluding that family status includes eldercare obligations. The Federal Court agreed with Hicks that the prohibited ground of family status should remain flexible in order to address unique circumstances. In light of the 2009 amendment, the Federal Court found that the Relocation Directive intended to provide assistance to relocated employees irrespective of whether the dependant resides with an employee, the dependant is suffering from a temporary or chronic illness, or the dependant is well enough to relocate with the employee. The benefit was under-inclusive by limiting its application to dependants who were temporarily sick and who were living with the relocated employee.

This decision prompts employers to consider whether the benefits they offer to employees could be found to be under-inclusive as a result of specific requirements or limitations relating to a protected ground. ■

HRTO confirms not necessary to establish employee status under the Ontario Human Rights Code to claim rights

In *Swain v. MBM Intellectual Property Law LLP* (2015 HRTO 1011), the Human Rights Tribunal of Ontario (HRTO) considered whether an equity partner of a law firm could seek protection against discrimination under the Ontario *Human Rights Code* (*Code).* The Applicant was a founding partner of MBM Intellectual Property LLP (MBM), a law firm that provides legal services in the area of patents and intellectual property. The Applicant was an equity partner until the breakdown of her relationship with another partner of the firm. The Applicant claimed that her removal from the partnership was tainted by considerations related to various prohibited grounds under the *Code.* It was rumoured throughout MBM that she had certain psychological illnesses that impacted her performance and her relationships at the office, and that she derived certain considerations due to her status as a former spouse of a partner. The Applicant alleged discrimination with respect to employment and contract because of gender, family status and perceived disability contrary to the *Code.*

The Respondent, MBM, requested that the Application be dismissed on various grounds, most importantly, that the HRTO is without jurisdiction as there was no employment relationship between the parties and the social area of contract was not engaged in the application. The Supreme Court of Canada ruled in *McCormick v. Fasken Martineau DuMoulin LLP* (*McCormick*, 2014 SCC 39) that the applicant in the case was precluded from being protected as an employee given her role as an equity partner of the law firm. This decision related to the British Columbia *Human Rights Code* (B.C. *Code*). Similarly, MBM asserted that the right to contract was not engaged in this application, since the *Code* protection relates to entering into a contract only.

The Ontario Human Rights Commission (OHRC) intervened in the application and argued that it is improper to read limitations into the *Code*. The OHRC opposed the argument that neither protections in the social area of contract or employment applied in this case. The OHRC also expressed the view that partnership arrangements do not create "a human rights free zone".

The HRTO accepted the OHRC's position and held that the Applicant, as an equity partner in a firm, is entitled to invoke the protection of the *Code.* Ontario is one of the jurisdictions in Canada that specifically names "contracts" as a social area. The HRTO held that the *Code* provision pertaining to "a right to contract on equal terms" applies not only to contract formation, but also includes the life of the contract and the termination of it. Therefore, the allegations relating to discrimination arising during the term of the Applicant's partnership relationship with MBM can be properly considered in the social area of contracts under the *Code.*

Furthermore, the protection afforded under the *Code* is not contingent on establishing employee status in contrast to the B.C. *Code*, where protection from discrimination is afforded to employees only. This is a significant distinction between the *Code* and the B.C. *Code*, under which *McCormick* was decided. In Ontario, *Code* protections address social areas, not relationships.

This interim decision makes clear that those in partnerships in Ontario are protected by the *Code* in the areas of contract and employment. ■

SCC clarifies test for constructive dismissal in suspension cases

In a recent decision of the Supreme Court of Canada (SCC) in *Potter v. New Brunswick Legal Aid Services Commission* (2015 SCC 10), the SCC found that placing a non-unionized employee on an indefinite administrative suspension with pay constituted constructive dismissal.

The Plaintiff was appointed as the Executive Director of the New Brunswick Legal Aid Services Commission (the Commission) for a seven-year term. After almost four years of the term, the parties discussed the buy-out of the remainder of the Plaintiff's contract. Before the negotiations had concluded, the Plaintiff took a medical leave. On January 5, 2010, the Board of Directors (the Board) of the Commission decided, without notifying the Plaintiff, that if the buy-out negotiations were not resolved before January 11, 2010, it would request that the Lieutenant-Governor in Council revoke the Plaintiff's appointment for cause, pursuant to s. 39(4) of the *Legal Aid Act* (R.S.N.B. 1973, c. L-2, amended by 2005, c. 8).

On January 11, 2010, unbeknownst to the Plaintiff, the Chairperson of the Board sent a letter to the Minister of Justice recommending that the Plaintiff be dismissed for cause, outlining the grounds for dismissal. The Commission also sent a letter to counsel for the Plaintiff advising that the Plaintiff was not to return to work "until further direction". The letter also stated: "He will continue to be paid until instructed otherwise." Counsel for the Plaintiff replied on January 12, 2010, requesting clarification, and counsel for the Commission wrote back the following day without clarifying whether the Plaintiff had been suspended.

The Plaintiff commenced an action for constructive dismissal. In response, the Board stopped payment of the Plaintiff's salary and benefits, claiming that by starting a legal action, he effectively resigned his position. Counsel for the Plaintiff responded by stating that he had not resigned. Counsel also asked that the Office take immediate steps to reinstate his salary and benefits until the matter was resolved.

The issue before the courts was whether the Plaintiff was constructively dismissed or whether he resigned. The New Brunswick Court of Queen's Bench (Court of Queen's Bench) and the New Brunswick Court of Appeal (Court of Appeal) found that the Plaintiff had resigned and that the suspension did not amount to constructive dismissal.

The Court of Queen's Bench found that by commencing an action for constructive dismissal, the Plaintiff "destroyed any chance of a productive working relationship between

the parties and had therefore repudiated the employment contract by what amounted to a resignation." The Court of Appeal stated that whether an indefinite suspension with pay constitutes constructive dismissal depends on the circumstances of the case.

The Court of Appeal held that despite the indefinite duration of the suspension, factors, such as the Plaintiff continuing to be paid his full salary and benefits during the suspension and the designation by the Plaintiff of his responsibilities to someone else upon going on sick leave rather than the Board appointing someone to replace him, weighed in favour of a finding that the Plaintiff had not been constructively dismissed.

On appeal, the SCC found that there are two branches of the test for constructive dismissal. If one of the following branches is satisfied, then constructive dismissal is established.

The first branch of the test, requiring a review of the specific terms of the contract, has two steps: (1) the employer makes a unilateral change that breaches an express or implied term of the employment contract, and (2) this breach must be found to substantially alter an essential term of the contract. To determine the second step, the court must ask whether a reasonable person in the same situation as the employee would have believed that an essential term of employment was substantially changed. In the case of administrative suspensions, the burden will shift to the employer to show that the suspension was justified. If the employer cannot do so, a breach will have been established and the burden will shift back to the employee at the second step of the analysis.

The second branch of the test for constructive dismissal considers a course of conduct by the employer, rather than a single unilateral change, that shows that the employer intended to no longer be bound by the contract.

The SCC considered the first branch of the test. After reviewing the Plaintiff's employment contract, the SCC concluded that the Commission lacked the authority, whether express or implied, to suspend him. The SCC stated that the suspension was not justified given the indefinite nature of the suspension and the Commission's failure to act in good faith – the Plaintiff was given no reasons for the suspension. Furthermore, although the Plaintiff was agreeable to a buy-out, it cannot be said that the Plaintiff acquiesced in the change. His interest in a buy-out can in no way be taken as consent to his suspension. The SCC held that the Commission's conduct was enough for the Plaintiff to reasonably assume that an essential term of his employment had been substantially changed. Since both steps of the first branch test for constructive dismissal were satisfied, the SCC reversed the lower court decisions, finding that the Plaintiff had been constructively dismissed. The SCC awarded the Plaintiff damages for wrongful dismissal.

The majority of the SCC did not find that constructive dismissal could be established on the basis of the second branch of the test. However, since the SCC found that the first branch of the test was satisfied, their finding with respect to the second branch did not affect their decision that the Plaintiff had been constructively dismissed.

The SCC clarified the common law test for constructive dismissal and cautions employers that paying an employee a salary or wages while on suspension will not assist them in avoiding a constructive dismissal claim and the employer should have an express or implied right to administratively suspend the employee. ■

Arbitrator denies school board's right to terminate principal without cause

Bluewater District School Board v. Association of Bluewater Administrators (*K.J.M.*

Grievance, [2015] O.L.A.A. No. 267) dealt with the issue of whether a school board has the ability to terminate a principal's employment on a without cause basis by providing her with pay in lieu of notice. The Bluewater District School Board (School Board) placed the school principal on an administrative leave without pay for over a year, pending the negotiated termination of her employment. The School Board put the principal on notice that the money being paid counted towards the notice of termination in lieu of reasonable notice. The Association of Bluewater Administrators (the Association) grieved this action by the School Board and disputed the employer's ability to suspend or terminate the principal without just cause. The employer claimed that there were concerns with the principal's performance and behaviour; however, the employer did not assert just cause for its decision to terminate. The School Board asserted that the common law allows for termination of employment without just cause provided reasonable notice or payment in lieu is given.

Until 1997, principals and vice-principals were members of bargaining units that represented teachers in Ontario's public schools. With the introduction of Bill 160, and its amendments to the *Education Act* (R.S.O. 1990, c. E-2) and the *Labour Relations Act,* 1995 (S.O. 1995, c. 1, Sched. A), principals and vice-principals were excluded from teachers' bargaining units and were outside of the scope of the *Labour Relations Act.* The Ontario Principals' Council and associations of administrators were created in order to represent the employment rights of principals and vice-principals. School boards have recognized and engaged in discussions with these associations.

In the current case, the School Board and the Association had entered into an Agreement which included several terms and conditions. Article 25.2 of the Agreement stated: "Administrators shall not be disciplined, demoted, or have their employment terminated without just and sufficient cause. This shall be communicated in writing."

The Association took the position that the principal's employment was governed by terms and conditions in the Agreement negotiated between the Association and the School Board, and the principal had the right to continued employment unless the principal was terminated for just cause. The Association acknowledged that it did not have the status of a trade union under the *Labour Relations Act,* however, it had been exercising principals' constitutional right to bargain collectively.

The Association argued that the Agreement contained many of the hallmarks of a collective agreement such as a recognition clause, terms on probation and continuing employment, salary and benefits, a grievance procedure, and an interest dispute resolution mechanism. Most importantly, the Association asserted that the School Board negotiated a collective agreement with a just cause provision and that it must be bound by it. In the alternative, the Association argued that even if the School Board had the ability to terminate the employment of a principal without cause, it was bound by the Agreement that empowered an arbitrator, appointed under the grievance procedure, to modify the penalty. The Association claimed that if the employer cannot establish just cause for termination, the result would be reinstatement.

The School Board argued that it was justified in terminating the principal's employment on a without cause basis by providing pay in lieu of notice, and that this is an implied term in all individual contracts of employment. The School Board claimed that the Agreement with the Association was not a collective agreement. It further stated that if the Agreement was interpreted as a collective agreement, that it would override the legislative intent of taking principals and vice-principals out of teachers' bargaining units.

The School Board claimed that it would be against public policy if it could not terminate the principal's employment on a without cause basis, and if it was compelled to maintain the services of an employee where

mutual trust and confidence no longer existed. Furthermore, the School Board noted that there are circumstances where labour arbitrators have refused to award reinstatement, for example, when there is a breakdown in the employment relationship.

"The School Board stressed that regardless of whether or not it can terminate without just cause, it will take the position that reinstatement is not an appropriate remedy in this case because there has been a loss of trust and confidence in the employment relationship, and damages would be adequate compensation for the loss of KJM's employment with the Board."

The Arbitrator stated that whether the parties are operating under a collective bargaining regime or the common law applicable to employment contracts, the result is the same. Furthermore, the Arbitrator asserted that the words in the Agreement "cannot be more clear." The School Board had agreed not to terminate without just cause and that an arbitrator could substitute another penalty, allowing for reinstatement where it is just and equitable to do so. The Arbitrator found that the School Board was bound by that Agreement.

The Arbitrator referred to the Supreme Court of Canada's (SCC) upholding of the constitutional right of association for collective bargaining in *Mounted Police Association of Ontario v. Canada* (*Attorney General*) (*Mounted Police*, 2015 SCC 1). The Arbitrator noted that in *Mounted Police*, there were private associations with no trade union status that were formed to represent the employment interests of police officers who were not permitted to unionize or engage in collective bargaining. The SCC held that officers have the right to association that represents their collective employment interests. The Arbitrator noted: "The Ontario Principals' Council and the Association of Bluewater Administrators are also private entities with no status as trade unions, but they are formed to represent the professional and employment interests of principals and vice principals."

The Arbitrator also relied on *British Columbia v. British Columbia Crown Counsel Assn.* (*B.C. Crown Counsel,* [2012] B.C.C.A.A.A. No. 80), a case involving an Association that represented Crown Counsel who were excluded from bargaining units under the B.C. *Public Service Act* (R.S.B.C. 1996, c. 385). In *B.C. Crown Counsel*, the Arbitrator stated that the parties had to explicitly provide for common law principles to apply to terminations in order to oust the normative collective bargaining interpretive principles. In the current case, there is no provision in the Agreement to that effect. *B.C. Crown Counsel* illustrated the fact that such a clause can be negotiated into a collective agreement.

The Arbitrator concluded by stating that the School Board did not retain the right to terminate without just cause by paying compensation in lieu of notice. Rather, the School Board promised not to terminate without cause.

This decision illustrates that common law principles cannot be imported into a collective agreement in order to justify termination without cause if the agreement stipulates that there must be grounds for termination. The employer's right to terminate without notice and payment of salary in lieu of notice should be included in the Terms and Conditions. ■

Court finds that unauthorized deductions from an employee's wages constitutes constructive dismissal

Rothberger v. Concord Excavating & Contracting Ltd. (2015 BCSC 729) addresses the issue of unauthorized deductions from employee pay by the employer. The Plaintiff was an excavator operator, employed by the Defendant, Concord Excavating & Contracting Ltd. (Concord). The Plaintiff was a seasonal worker who made an hourly wage. He frequently worked in excess of eight hours per day and 40 hours per week, and he was not paid overtime for these additional hours.

Throughout the spring and summer of 2012, there were two incidents that occurred resulting in damage to the Defendant employer's equipment. During the first incident, the Plaintiff was operating the equipment and the wedge became detached, causing the machine's bucket to fall off and time lost on the job. On the second occasion, the wedge was lost in the ditch, resulting in an even longer shutdown time at the work site and costs to replace the lost part. The employer claimed that each incident was due to the Plaintiff's conduct in the operation and maintenance of the equipment. The Supreme Court of British Columbia (BCSC) held that since the employer did not refer to the incidents for the purpose of alleging grounds for dismissal, it was unnecessary to decide whether the incidents were the Plaintiff's fault. The Plaintiff did not acknowledge that the breakdown and equipment loss was a result of any misconduct or failure on his part in maintaining the equipment.

In August 2012, the employer informed the Plaintiff, with a handwritten note on his pay slip, that any subsequent loss or damage to the employer's equipment would be deducted from his income. After receiving this notification, the Plaintiff sought the first reasonable opportunity to speak with the employer's principal, who dismissed his concerns. After this conversation, the Plaintiff investigated and learned that the employer's proposed future deduction of costs off of his pay was prohibited by British Columbia's *Employment Standards Act* (*ESA*). The Plaintiff left a copy of the relevant passages of the *ESA* in his employer's mailbox. This action resulted in a threatening email from the company's bookkeeper, which made reference to a prior employee who had left the employer under "unhappy circumstances". The email also indicated that if the Plaintiff wished to pursue the matter further, that the employer's legal counsel would get involved.

Rothberger alleged that the note made on his pay slip amounted to a change in the terms of his employment. He argued that the note, coupled with the threatening email, amounted to constructive dismissal. On October 2, 2012, the Plaintiff walked off the job and he subsequently filed a lawsuit.

The BCSC found that the employer's decision to deduct future costs from its employee's pay cheque was a violation of the *ESA*. The BCSC agreed with the Plaintiff that the email was "threatening and provocative". Furthermore, "[i]t was wholly unresponsive to his legitimate effort to have the defendant resile from its stated intention to charge him with future incidents involving the loss of a wedge."

Whether constructive dismissal has occurred is a question of fact. Where an employer unilaterally makes substantial changes to the essential terms of an employee's contract of employment and the employee does not agree to those changes, the employee has not resigned but has been dismissed. Since the employer has not formally dismissed the employee, it is constructive dismissal. The employer is ceasing to meet its obligations and is therefore terminating the contract.

The BCSC had to determine whether the unilateral decision to charge the Plaintiff for losses incurred by the employer significantly altered the essential terms of his employment contract. The BCSC found that a notation indicating a deduction of his paycheck in an unspecified sum was a material change to the employment contract. Moreover, the BCSC held that "a fundamental term of any employment relationship [is] that the employer will treat the employee with civility, decency, respect and dignity." Concord's manner of communicating with the Plaintiff, via the threatening email, was a breach of this implied term of the employment relationship.

The Plaintiff pursued a claim for unpaid overtime through the *ESA* and was awarded back pay from Concord for the six month period prior to his cessation of work beginning on April 1, 2012. An employee is entitled to a maximum of a six month period for which he or she could be awarded unpaid overtime under the *ESA*. The BCSC had to determine whether the Plaintiff was entitled to payment of overtime hours performed before April 1, 2012 — a period greater than the six-month

maximum. The Plaintiff asserted that he was entitled to overtime for all hours worked for the whole 11-year term of employment based on unjust enrichment. The Plaintiff argued that he should be paid for the overtime since this amounted to a conferral of a benefit to the employer, a corresponding deprivation to the Plaintiff, and there was no juristic reason for Concord to be enriched by his unpaid overtime hours.

The BCSC stated that the statutory mechanisms under the *ESA* provide exclusive jurisdiction for an employee to claim overtime payment. The BCSC rejected the Plaintiff's claim since he cannot recover pay beyond that maximum six month period. Furthermore, the BCSC held that the employer received no additional benefit by virtue of his overtime hours since Concord did not charge clients any additional fees for the extra hours worked.

In considering the appropriate amount of damages, the BCSC had to determine the reasonable notice period. The Plaintiff was a seasonal employee where he would be rehired each spring, however, that did not mean that he was not a full-time, long-term employee. The BCSC treated the Plaintiff as an employee with an 11-year employment history with Concord. The BCSC determined that the reasonable notice period for the Plaintiff should be six months. The Plaintiff had mitigated his loss when he obtained other employment on March 5, 2013, which was five months into the notice period. During the course of that five month period, his compensation would have varied depending on the amount of work available. His damages were assessed by the BCSC as 12 weeks of lost employment at 40 hours per week, totalling $15,264 with his holiday pay.

The Court confirmed that unauthorized deductions from an employee's wages not only violate employment standards legislation across Canada, but may also constitute constructive dismissal.

This decision serves as a caution to employers who want to make deductions from employee wages to recover business losses. ■

Court affirms that 40 years of service to one employer is a consideration in the determination of a reasonable notice period

In *Markoulakis v. SNC-Lavalin Inc.* (2015 ONSC 1081), the Ontario Superior Court of Justice (ONSC or the Court) recognized that the Plaintiff, a 66-year-old employee with over 40 years' of service with his employer, SNC-Lavalin Inc. (SNC), was "uniquely situated". The exceptional length of his employment and the fact that he had been employed only by SNC for his entire working life, were important considerations in deciding the length of notice upon termination.

The Plaintiff's employment with the Defendant employer as a Senior Civil Engineer was terminated as a result of a shortage of work. In lieu of reasonable notice, the employer paid the Plaintiff an amount approximately equivalent to 34 weeks compensation. The Plaintiff claimed that he should have been paid 30 months' compensation. The employer argued that the amount paid was within the "reasonable range" of payment in lieu of notice. The employer claimed that an award of more than 34 weeks would have the effect of removing the Plaintiff's obligation to mitigate his damages. In addition, SNC argued that it was inappropriate to render judgment before the expiry of the notice period and that the summary judgment motion should be adjourned until the end of the notice period to avoid an unfair resolution. The ONSC had to determine whether it was appropriate to render judgment before the expiry of the notice period.

The employer claimed that the only fair manner of proceeding was to wait until the damages crystalized at the end of the notice period. SNC asserted: "This allows for an accurate assessment of the Plaintiff's damages and allows the Defendant to test the reasonableness of the Plaintiff's mitigation efforts if necessary." The employer argued

that it is neither unusual nor unfair to require a party to wait until his or her damages have crystalized before obtaining an award. The employer noted that the Plaintiff had not yet suffered any loss, since he had received all of his *Employment Standards Act* (*ESA*) termination and severance pay entitlements of 34 weeks. SNC further stated: "What *is* unfair, is requiring the Defendant to pay an amount, representing the maximum damages it may be responsible for, when the Defendant's liability may in fact be substantially less in the case where the Plaintiff has been paid his *ESA* entitlements, fully compensating him to the date of the hearing." The ONSC found that it was appropriate to resolve this issue on a motion for summary judgment, and turned its attention to determining the amount of reasonable notice to which the Plaintiff was entitled to.

The ONSC considered the three approaches used when determining how to award damages before the expiry of the period of reasonable notice. First, with the Trust Approach, the Plaintiff must account for any mitigation earnings. Also, there is a procedure for a return to court in the event of disputes. The Partial Summary Judgment Approach allows the parties to return at the end of the notice period to determine the adequacy of the Plaintiff's mitigation efforts. Finally, with the Contingency Approach, the Plaintiff's damages are reduced by a contingency for re-employment.

The Plaintiff argued that the Trust Approach was the appropriate procedure to use in determining how to award damages before the expiry of the notice period. The Plaintiff was prepared to submit income statements and to put any money earned from possible re-employment during the notice period in trust for SNC. If there was a dispute, the Defendant employer could return to the Court to challenge his mitigation efforts.

SNC argued that the Trust Approach was not appropriate and that it was inconsistent with the principles of judicial economy and fairness. The employer argued that if the Court awards the maximum amount of damages to the Plaintiff, it may be forced to recover any overpayment through subsequent negotiations or further litigation. The employer also stated that this approach will create a "motivational problem" – it will negatively affect the Plaintiff's determination to mitigate his damages. The employer claimed that "…this 'motivational problem' is of particular concern in the instant case, as the Plaintiff has the belief that he will not succeed" in obtaining other, comparable employment. The ONSC held that while the evidence indicated that the Plaintiff's chances of re-employment were low, the Court was not willing to make a finding that re-employment during the notice period was impossible.

The Court has the discretion to award notice beyond 24 months in exceptional cases. The ONSC set out the factors to consider when determining the appropriate notice period, such as the character of employment, the length of service, the age of the employee, and the availability of similar employment having regard to the experience, training, and qualifications of the employee. The Plaintiff argued that due to his 40.66 years of service to his employer and his age of 66 years, he was entitled to an extraordinary notice period of 30 months.

The ONSC did not find that the minimum 34 weeks of pay was sufficient. The Court agreed with the Plaintiff that there were exceptional circumstances, such as the number of years of service, his age and the fact that SNC was his only employer, justifying an award of notice beyond 24 months. However, the ONSC did not agree that the Plaintiff was entitled to a notice period of 30 months. The Court determined that the appropriate reasonable notice was 27 months. Furthermore, the ONSC reiterated that this obligation of the employer to pay was subject to the Plaintiff's obligation to mitigate his damages and to a deduction for any earnings from employment or a business. If the employer challenges these efforts or earnings during the balance of the notice period, the employer could bring the dispute back to the Court.

This decision serves as a reminder to employers that awards for long notice periods can be made to older employees, who have an exceptionally lengthy service with the employer. However, employees also need to be aware that obtaining an award prior to the expiry of the notice period does not remove the employee's duty to mitigate, and these efforts can be subject to further review by the courts. ■

Court limits teachers' claims to grid-line increments for pregnancy or parental leave

In *British Columbia Teachers' Federation (Greater Victoria Teachers' Association) v. British Columbia Public School Employers' Association* (2015 BCSC 1081), the British Columbia Public School Employers' Association (Employer) failed to provide credit for pregnancy or parental leave taken by teachers, as required by section 56(3) of the *Employment Standards Act* (*ESA*, RSBC 1996, c. 113). Since the Employer did not credit teachers for time taken for pregnancy or parental leave, a teacher who took a leave did not advance on the salary grid as he or she would have done if no leave was taken.

Section 56(3) of the *ESA* states: "The employee is entitled to all increases in wages and benefits the employee would have been entitled to had the leave not been taken or the attendance as a juror not been required." The *ESA* came into force in November 1995.

On October 2, 2009, the British Columbia Teachers' Federation (Union) filed a grievance claiming the increments teachers ought to have been credited with from the time the *ESA* was enacted. The grievance was filed under the 2006-2011 collective agreement. The collective agreement provided a time limit for the filing of grievances and it stated that the grievance must be raised within 30 working days of the alleged violation or within 30 working days of the party becoming reasonably aware of the alleged violation.

Prior to arbitration, the Employer enacted changes to its practice, on a without prejudice basis, effective September 1, 2010. The Employer recalculated increments for any teachers who were on a pregnancy or parental leave on or after April 1, 2009, and it paid salaries in accordance with the new increments from September 1, 2010. No adjustments were made for leaves taken from 1995 to 2009.

The Union sought two remedies. First, it requested all affected teachers be placed on the correct grid-line after being credited with leaves taken from 1995. Secondly, the Union sought retroactive payment for unpaid amounts as a result of teachers not being on the correct grid-line, either from 1995, or in the alternative, from the start of the collective agreement in 2006 or from 30 working days prior to the date of the grievance.

The Employer argued that s. 56(3) of the *ESA* did not apply to the crediting of experience for increment purposes. In the alternative, the Employer claimed that there could be no remedy for leaves taken more than 30 days prior to the grievance being filed. Since the Employer had already calculated increments for any teacher who had taken leave from April 2009 onwards, which was six months preceding the date of the grievance, there was no basis for any further award.

The Arbitrator denied the grievance and found that the term "increase in wages" in s. 56(3) of the *ESA* did not include salary grid increases earned through work experience. The Union appealed to the British Columbia Court of Appeal and the appeal was allowed.

The Court of Appeal disagreed with the Arbitrator's narrow interpretation of s. 56(3) and relied upon the ordinary and plain meaning of the words. The Court of Appeal stated: "The wording of s. 56(3) is that the employee is entitled to all increases in wages he or she would have received had the leave not been taken."

The Court of Appeal remitted the matter back to the Arbitrator, who issued a Supplementary

Award. The Arbitrator did not award retroactive wages beyond 30 days prior to the filing of the grievance. He stated: "It is important to consider that the rights for all teachers to 'increments' arise from the *Collective Agreement* and past collective agreements. They do not arise from the provisions of the *Employment Standards Act.*" However, the Arbitrator applied a different analysis when considering the obligation of the Employer to credit the teachers with the appropriate increments. The Arbitrator agreed with the Union that the teachers who had taken pregnancy or parental leave under the terms of the current collective agreement should be credited the applicable increments earned since July 1, 2006, and their scale placement adjusted accordingly.

The Employer appealed that award to the Court of Appeal. The Court of Appeal held that it did not have jurisdiction. The matter proceeded to a review by the Labour Relations Board (Board), which dismissed the Employer's application for review.

The Employer then applied for a reconsideration of that decision by the Board's review panel. The review panel found that sections 3(6) and (7) of the *ESA*, which are enforcement provisions, expressly provide that rights in section 56(3) are subject to the grievance procedure enforcement mechanism under the collective agreement. As a result, the crediting of increments is subject to the same time limits the Arbitrator noted and applied to the back-wages or monetary award. The review panel held that the original decision had to be varied in that respect.

The review panel's reconsideration decision was then the subject of judicial review by the British Columbia Supreme Court (BCSC). The BCSC held that the collective agreement governed the enforcement of a breach of s. 56(3). The time limits of the grievance clause should apply to both of the remedies that the Union sought. The discretion of the Arbitrator not to provide relief for the back-wage component was properly exercised and the same analysis ought to have been applied to the adjustment of the salary scale for leaves taken more than 30 days prior to the grievance. The BCSC held that it was not patently unreasonable for the review panel to have adopted this analysis.

This series of decisions illustrate that, in the context of teachers' unpaid increments with respect to maternity or parental leave, the grievance procedures and timelines set out in a collective agreement will trump the remedial provisions in Employment Standards legislation. ■

Court upholds denial of experience pay increments to teacher based on collective agreement

British Columbia Teachers' Federation v. British Columbia Public School Employers' Association (2015 BCSC 1411) was a case involving an error made by the Surrey School District (School District) in respect of money it had paid to one of its teachers, Ms. Charlotte Austin (Austin).

In 2005, Austin transferred from "teacher-on-call" status to "contract teacher" status. However, the School District mistakenly failed to import her accumulated service as a teacher-on-call to the payroll system. Austin did not discover the mistake until December 2011. As a result, she lost "experience pay" increments. Austin raised the issue with the School District and they admitted the error. In her email to the School District, Austin stated that her years of service on her pay stub were listed as 5 years, when she had been teaching for 6.6 years. The School District claimed that she could only be retroactively reimbursed for any pay increments in the immediately preceding 30 days since that was the "Grievance Time Period" set out in the collective agreement.

The British Columbia Teachers' Federation (Union) grieved the decision on behalf of Austin. The grievance was heard by an Arbitrator, who found that the mistake by the

School District constituted a breach of the collective agreement. However, the Arbitrator did not exercise the discretion given to him under section 89(e) of the *B.C. Labour Relations Code* (*Code*) to allow Austin to receive retroactive pay from the first pay increment in 2006 to which she would have been entitled to. The Arbitrator relied on the 30-day time limit set out in the collective agreement and found that Austin was primarily to blame for the six year delay in discovering the error. A pay stub expressly set out the number of years of service, therefore, Austin was in the best position to realize the mistake. The Arbitrator stated that once the original error was made, the employer was unlikely to discover it.

The Union applied to the Labour Relations Board (LRB) for a review of the award, arguing that it was inconsistent with the principles expressed in the *Code* and that the Arbitrator was incorrect in not applying the equitable principles of unjust enrichment. The Union also argued that the Arbitrator's finding that Austin was primarily responsible for the continuation of the error was a palpable and overriding error.

The Vice-Chair issued the LRB's Original Decision. She dismissed the application and found that the Arbitrator had turned his mind to equitable principles, including unjust enrichment. The Vice-Chair also found that the Union failed to show that the Arbitrator's conclusion was inconsistent with the principles expressed or implied in the *Code.*

The Union then applied for leave and reconsideration of the LRB's Original Decision. The LRB denied the Union's application for leave for reconsideration, finding that it did not disclose a "good, arguable case of reviewable error."

The Union sought judicial review of the Reconsideration Decision and an order remitting the matter back to the LRB with directions. The British Columbia Supreme Court (Court) determined that the standard of review was patent unreasonableness. The Court had to ask whether there was any rational or tenable line of analysis supporting the decision of the LRB, such that the decision was not clearly irrational or otherwise flawed.

The Union argued that it was patently unfair for Austin to be denied the pay she was entitled to because of the School District's error. Furthermore, the Union claimed that it would be unjust and unreasonable to permit the School District to retain the benefit of its own mistake. The Union disagreed with the Arbitrator's reasons for declining to grant the remedy it requested, being retroactive payments to the first pay increment Austin was entitled to.

The Court held that the Union was seeking to reargue its case as if the judicial review was an appeal. The Court stated that it could not determine whether it believed the LRB's decision was correct. Its task was to determine whether the LRB's decision was "rational and reached in accordance with the rules of natural justice." The Court held that it was not clearly irrational for the LRB to find in both the Original and the Reconsideration Decisions that it was Austin who was in the best position to discover the mistake.

This Decision cautions employees that claims for retroactive reimbursements of unpaid amounts can be denied due to their failure to realize and report errors with respect to their pay in a timely manner consistent with the governing collective agreement. ■

— KC —

Professional Development Corner

Keel Cottrelle LLP provides
Negotiation and Conflict Resolution Training
for Administrators as well as Mediation Training.

Modules include a one-day Session
or a four-day Mediation Training Program.

For information on the above, contact Bob Keel:
416-219-7716 rkeel@keelcottrelle.on.ca

KEEL COTTRELLE LLP

100 Matheson Blvd. E., Suite 104
Mississauga, Ontario L4Z 2G7
Phone: 905-890-7700
Fax: 905-890-8006

36 Toronto St. Suite 920
Toronto, Ontario M5C 2C5
Phone: 416-367-2900
Fax: 416-367-2791

Keel Cottrelle LLP
Education Law Newsletter

Robert Keel - Executive Editor
Jennifer Trépanier - Managing Editor
Nicola Simmons – Contributing Editor
Kimberley Ishmael – Contributing Editor

Contributors —
The articles in this Newsletter were prepared by Tamar Ohanian, who is associated with KEEL COTTRELLE LLP.