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Human Resources Newsletter

— April 2013 —

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OLRB determines ETFO engaged in unlawful strike re withdrawal of voluntary extra-curricular activities

Trillium Lakelands District School Board and Upper Canada District School Board v Elementary Teachers' Federation of Ontario, 3034-12-U (OLRB April 13, 2013) dealt with an Application filed by the Applicant School Boards with the Ontario Labour Relations Board (OLRB) alleging that the Elementary Teachers' Federation of Ontario (ETFO) engaged in unlawful strike activity by advising its members to withdraw from voluntary extra-curricular activities as a way to protest the imposition of contracts under the *Putting Students' First Act 2012 (Bill 115).*

Before turning to the main issue in the Application, the OLRB first had to address a number of preliminary issues. Firstly, the OLRB had to determine whether it should even release this Decision given that ETFO had since suspended its advice to its members regarding extra-curricular activities. ETFO argued that the issues in this Application were therefore moot and that the release of such a Decision would only have a destabilizing impact on ongoing negotiations. However, the OLRB rejected that argument and held that a labour relations purpose would still be served by issuing its Decision. Firstly, ETFO had only suspended its advice to its members and there was no clear reassurance that it would not use such tactics again in the future. Therefore, the issue was not moot as between the parties. Furthermore, the OLRB held that this area of law was unclear and that it would therefore be in the public interest to release its Decision. While ETFO claimed that a Decision would be incomplete, the OLRB disagreed and held that its Reasons would not be based on hypotheticals. The parties had presented nine days of evidence and ETFO only suspended its advice on the eve of the original release date of this Decision.

Having determined to release its Decision, the OLRB then had to determine the impact of the repeal of *Bill 115*. ETFO argued that the repeal of *Bill 115* meant that the collective agreements imposed under *Bill 115* ceased to exist. ETFO further argued that even if the terms and conditions imposed by *Bill 115* survived the repeal, they did not legally amount to a "collective agreement" under either the *Education Act* or the *Labour Relations Act* (*LRA*) since they were not voluntarily negotiated agreements. The first argument was significant because if there were no longer any collective agreements between the parties, then ETFO's advice to its members would constitute legal strike activity. However, the OLRB rejected ETFO's argument and held that "*although the government has repealed the [PSFA], the collective agreements imposed by that legislation continue to exist and operate*". In reaching this conclusion, the OLRB emphasized section 51 of the *Legislation Act, 2006*, which provides that the repeal of an Act does not affect the previous operation of the repealed Act, and does not affect a right, privilege, obligation or liability that came into existence under the repealed Act. While ETFO argued that section 51 only allows for the continuation of contractual rights and not statutorily imposed rights, the OLRB rejected that argument as well and held that statutory rights created under a repealed Act may still be enforceable after the repeal. The OLRB further held that the fact the *Bill 115* collective agreements were statutorily imposed, rather than being voluntarily negotiated between the parties, did not mean that they were not collective agreements for the purposes of the *Education Act* or the *LRA*. As the OLRB noted, there are numerous statutes which mandate a provision in a collective agreement, regardless of the parties' agreement (i.e. the mandatory prohibition against strikes or lockouts during the life of a collective agreement).

Having determined the aforementioned preliminary issues, the OLRB then addressed the main issue in the Application, whether ETFO engaged in illegal strike activity by advising its members not to participate in voluntary extra-curricular activities outside the 300 minute instruction day. Firstly, the OLRB undertook a lengthy historical review of the education-specific statutory definition of "strike", which is different from the general definition of strike contained in the *LRA*. The purpose of this historical review was to see if it would provide any insight as to whether the legislature intended the current definition of strike in the *Education Act* to cover voluntary activities by teachers. ETFO claimed the statutory history demonstrated the legislature did not intend for the current definition of strike to cover extra-curricular activities. The Applicants disagreed and argued the statutory history showed the current definition was intended to cover voluntary activities. However, the OLRB was not as convinced and held that the legislative history

was too unclear and convoluted to provide any meaningful insight. Therefore, the OLRB decided to reach its Decision by focusing on the clear and plain meaning of the existing definition of strike under section 277.2(4) of the *Education Act*, which provides as follows:

(a) the definition of "strike" in section 1 of the Labour Relations Act, 1995 does not apply; and

(b) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed or may reasonably be expected to have the effect of curtailing, restricting, limiting or interfering with,

(i) the normal activities of a board or its employees,

(ii) the operation or functioning of one or more of a board's schools or of one or more of the programs in one or more schools of a board, or

(iii) the performance of the duties of teachers set out in the Act or the regulations under it,

including any withdrawal of services or work to rule by teachers acting in combination or in concert or in accordance with a common understanding.

In interpreting ss. 277.2(4), the OLRB began by noting that teachers had a long history of engaging in voluntary extra-curricular activities and that such activities were an important part of a full rounded education. Based on this finding, the OLRB concluded that ETFO waged an unlawful strike by encouraging its members to withdraw from voluntary extra-curricular activities. The OLRB held that by encouraging its members to withdraw from such activities, ETFO, at a minimum, interfered with the normal activities and operations of the Applicant Boards and their schools. The OLRB further noted that such interference did not have to be enormous in order to constitute a strike, as the *Education Act* only required that the interference affect the normal activities or operation of a school board or a school. Furthermore, the OLRB also concluded that ETFO encouraged an unlawful strike because the definition of strike prohibited a "work to rule" by teachers, which the OLRB interpreted as meaning the collective withdrawal of voluntary services. The OLRB further emphasized that it is not always easy to categorized activities as being voluntary or mandatory. Referring to labour relations jurisprudence, the OLRB noted that while certain activities might originally be considered voluntary, as relationships develop over time, those activities might lose their voluntary status and instead become mandatory.

Having found that ETFO encouraged an unlawful strike, the OLRB issued an Interim Order requiring the posting of an attached Notice to Employees as a way to inform the Applicants' employees about the findings reached in this Decision. The OLRB did not issue a Final Order since ETFO's constitutional challenge to the definition of strike in the *Education Act* remained to be litigated.

This case is significant because it demonstrates that teachers are governed by specialized labour relations legislation and that the concerted withdrawal from voluntary activities can constitute an illegal strike under the *Education Act*.

OLRB determines ETFO's "Day of Protest" constitutes illegal strike

In *Minister of Education v Elementary Teachers' Federation of Ontario and Sam Hammond*, [2013] OLRD 19, the Ontario Labour Relations Board (OLRB) determined that the Elementary Teachers' Federation of Ontario (ETFO) and its President, Sam Hammond (Respondents), engaged in unlawful strike activity. This case

arose in the following context. On January 2, 2013, by Order in Council made under what was then the *Putting Students First Act*, collective agreements were imposed for bargaining units represented by ETFO. Despite those statutorily-imposed collective agreements and the legal prohibition against engaging in strike activity during the term of a collective agreement, on January 9, 2013, ETFO announced its intention to have its members engage in a "day of protest" or "political protest" on January 11, 2013, a regular school day. Mr. Hammond indicated that this would be a full day of protest which would involve the full day withdrawal of services by ETFO's members on a province-wide basis. The Minister of Education argued that such action constituted illegal strike activity but the Respondents claimed the day of action was a valid political protest.

Prior to turning to the merits of the Application, the OLRB first addressed preliminary issues. Firstly, while the Respondents requested the OLRB to defer the Application to the Courts, the OLRB refused to make such an Order. Given the delay that would be involved in obtaining a court judgment, the OLRB held that it would be appropriate for it to determine whether the Respondents' proposed political protest constituted illegal strike activity. Furthermore, while the Respondents argued that the Minister of Education had no standing to bring the Application, the OLRB held that the *Putting Students First Act* granted the Minister such standing in the context of this case.

In regards to the main issue in the case, the Minister of Education referred to prior Decisions by the OLRB wherein it had held that a political strike during the term of a Collective Agreement is still an unlawful strike under the *Labour Relations Act*. ETFO sought to distinguish those cases on the basis that they involved strikes during freely-negotiated Collective Agreements or that they were cases in which the OLRB was unable to precisely or effectively determine the parameters of a "political strike". However, the OLRB rejected ETFO's arguments, noting that this case was not sufficiently distinguishable from the prior jurisprudence. As stated by the OLRB:

"*I am not persuaded that ETFO's suggested test for a political strike that would be exempted from the unlawful strike provisions is workable and that it would not undermine the fundamental provisions of the Act that preclude strikes during the course of a collective agreement. Nor am I persuaded that the Charter protection afforded to speech (whether "labour speech" or speech generally) outweighs the disruption that will be wrought on the statutory labour relations scheme by acceding to ETFO's position - in other words that the section 1 defence to the Charter violation is not as applicable in this case as it was in all the previous cases.*"

The OLRB concluded that the day of protest authorized and supported by the Respondents would be an unlawful strike contrary to the *Labour Relations Act*. As such, the OLRB made numerous remedial Orders, including an Order that the Respondents and anyone acting on their behalf cease and desist from authorizing, supporting, encouraging or threatening to call or authorize such an illegal strike.

This Decision clarifies the balance between political protect or freedom of speech and labour relations.

OLRB dismisses Application by OSSTF against Crown due to Crown Immunity

In *OSSTF et al v. Crown*, [2012] OLRD No. 4547, the Ontario Secondary School Teachers' Federation (OSSTF) brought an Application before the Ontario Labour Relations Board (Board) under section 96 of the *Labour Relations Act* (*LRA*), alleging violations under sections 17, 70, 72, 73 and 76 of the *LRA* by various

government bodies. The Responding Parties included the Crown in Right of Ontario, the Hon. Dalton McGuinty, the then Premier of Ontario, the Hon. Laurel Broten, the then Minister of Education, the Hon. Dwight Duncan, the then Minister of Finance, as well as against all three individuals in their personal capacity. A number of teaching federations also intervened in support of OSSTF.

The Responding Parties filed a Response denying violations of the *LRA* and making a preliminary objection of the Board's jurisdiction to hear the Application on the grounds that (a) the *LRA* does not apply to the Responding Parties because of Crown immunity, (b) the Responding Parties' alleged actions are not justiciable, and (c) OSSTF had not made out a *prima facie* case of violations of the *LRA*.

The Court reviewed the legislated model in the *Education Act* of Collective Agreements between school boards and the designated statutory bargaining agents, as well as the introduction of the government-initiated process also known as the Provincial Discussions Table (PDT), which by comparison is a completely voluntary process in which "framework" agreements or Memorandums of Understanding would be negotiated and form the basis for the actual Collective Agreements between the school boards and the teaching federations.

PDT discussions successfully produced framework agreements in 2008, however the discussions in 2012 were not so successful. The provincial government was concerned about limiting the expenditures in the education sector and produced a document, titled "Government of Ontario Parameters for the 2012 PDT" that set out their expectations including an agreement that included a wage and grid freeze and changes to the ability to bank and "cash out" sick leave credits upon retirement. OSSTF complained that the actions of the Government with respect to its PDT positions constituted a failure to bargain in good faith contrary to section 17 of the *LRA*, threatening or intimidating its members contrary to sections 72 and 76 of the *LRA*, or conduct that interfered with bargaining rights contrary to sections 73 of the *LRA*.

The Responding Parties submitted that the Crown was not bound by legislation, including the *LRA*, unless than legislation expressly stated so. In fact, the *LRA* specifically states in section 4 that the "*Act does not bind the Crown*". Relying upon Crown immunity and recent Ontario Labour Board decisions confirming same, the Responding Parties requested that the Application be dismissed against the Crown and its Ministers.

OSSTF argued that the Government "*stepped into the shoes of the district school boards as employers and attempted to dictate the process and contents of the collective bargaining process, in effect depriving unions of the opportunity to negotiate collective agreements even within the Government's financial parameters*." Further, OSSTF argued that Crown immunity was lost because the Premier and Ministers acted in their personal capacity as politicians interested in re-election as a Government.

The Board disagreed with OSSTF stating "*Without being trite, immunity is immunity, if the Crown is immune, then the legislation simply does not apply to it for whatever purpose or motive the Crown is acting..*" The Board dismissed the Application pursuant to section 4(2) of the *LRA* and Crown immunity.

The Board also noted that it would also dismiss the Application on the grounds that the essence of the Application was not justiciable. "*Even if I leave aside the legislative aspect of the Government conduct – and the Putting Students First Act is the legislative response that the Government stated from the outset to a failure to reach MOUs or framework agreements in the PDT process – there is no dispute that the Government's conduct was also part of its fiscal policy and educational policy.*" The Board stated

that "*I do not consider a political decision to no longer fund in a publicly-funded education system, for example, the cashing out of sick leave credits, and a process (albeit, arguably a blunt and heavy-handed one) to get unions to agree to it, a justiciable issue.*" Moreover, the Board found that it would also dismiss the Application because it did not make out a prima facie case.

This Decision confirms the legislative authority to restrict challenges to Government action.

Court affirms jurisdiction of Collective Agreement and OLRB

In *Moro v. Thames Valley District School Board et al.*, [2013] OJ No. 268, the Ontario Superior Court of Justice considered three motions to dismiss the Plaintiff's action on the ground that the claims made by the Plaintiff were barred by reason of the *Labour Relations Act (LRA).*

The Plaintiff, a former teacher with the Defendant School Board (Board), alleged harassment and/or bullying in the workplace and constructive dismissal. At all material times, the Plaintiff was a member of the Ontario Secondary School Teachers Federation (OSSTF), the bargaining unit representing public secondary school teachers in the province.

The Plaintiff went on leave on or around the end of April 2007, and in May 2007 submitted a complaint to the Board alleging various types of harassment over the prior six years. The Board conducted an investigation into the Plaintiff's complaint between June through November 2007, and concluded in December 2007 with a report that did not make any findings of harassment by any individuals. The report was released to the Plaintiff in January 2008, and the Board attempted to have the Plaintiff return to work shortly thereafter, but the Plaintiff refused the various offers. The Plaintiff sought Long Term Disability (LTD) benefits but was denied. The Plaintiff filed a complaint with the Human Rights Tribunal which was subsequently dismissed. The Plaintiff ultimately resigned her employment from the Board on or about the August 31 2009 and commenced the civil action in September 2011.

The issue of jurisdiction was the focus of all three motions brought before the Court. The Court considered whether it had the jurisdiction to deal with the Plaintiff's claim given that the Plaintiff was the member of the bargaining unit whose terms and conditions of employment were governed by a Collective Agreement.

The Plaintiff requested that the Court take inherent jurisdiction and hear the matter on the grounds that her case was "unique" and not a dispute about the Collective Agreement and that it was in the public's interest to do so.

Following a review of the leading cases on this jurisdictional issue, and considering the submissions of the parties, the Court highlighted that "*the question is whether the dispute arises from the interpretation, application, administration or violation of the collective agreement*". The Court noted that the claims in the Plaintiff's Statement of Claim involved disputes arising between the Plaintiff and the Board within the context of the employment relationship as a teacher and a member of OSSTF.

The Court further acknowledged that the Collective Agreement governing the Plaintiff and OSSTF set out a detailed grievance and arbitration procedure to address complaints such as the harassment and/or constructive dismissal claims raised by the Plaintiff. The Court noted that no grievance was ever lodged on behalf of the Plaintiff and this omission was central to the issues relating to her claim of unfair representation by OSSTF. The Court stated that any alleged breach of a union's duty of fair representation was a question appropriately for the Ontario Labour Relations Board and not for the Court.

Finding the subject matter of the Plaintiff's claim to fall within the Collective Agreement, the Court concluded that it had no jurisdiction over the subject matter and dismissed the action for lack of jurisdiction.

This Decision confirms the jurisdiction of the *LRA* instead of Court actions.

Court sets aside Arbitration Award which failed to deal with key factual issue

In *Ottawa Carleton District School Board v Ottawa Carleton Elementary Teachers' Federation*, [2012] OJ No 5224 (Ont Div Ct), the Ottawa Carleton District School Board sought Judicial Review of an Arbitration Decision. The dispute between the Applicant Board and the Ottawa Carleton Elementary Teachers' Federation focused on the interpretation of Article 28.01 of the parties' Collective Agreement, which provided as follows:

"*The Instructional Day shall be defined as a maximum of 300 instructional minutes, commencing with the published start time for the school (i.e. the time for the entry of the students into the school for the commencement of the morning program), excluding recess and lunch/nutritional breaks*".

There was no dispute between the parties that the "published start time" varied from school to school. The published start time for any individual school could be found on its website. Instead, the Grievance was filed because 12 of the Board's 115 elementary schools rang their bell at a different time from their published start time. The Federation took the position that the 12 identified schools were ringing an "early bell" which *required* students to enter their school anywhere from three minutes to ten minutes before the published start time. The Board seemed only to have conceded that at certain schools early bells *permitted* students to enter the school before the published start time, but that did not require them to do so.

At Arbitration, the Arbitrator allowed the Federation's Grievance and held that the Board was in breach of Article 28.01. She awarded compensation as a remedy. However, on Judicial Review, the Divisional Court quashed the Arbitrator's Decision and remitted the Grievance to a different Arbitrator for reconsideration. As the Court emphasized, the Arbitrator misapprehended the nature of the Grievance and failed to specifically address or resolve the fundamental factual dispute at issue. For example, while the Arbitrator seemed to recognize that a bell being rung before a published start time did not constitute a violation of the Collective Agreement if it was merely permissive or invitational, there was no reference anywhere in the Arbitrator's Reasons as to whether the ringing of a bell before the published start time actually required students to enter school. As noted by the Court,

"*The Federation can only establish that instructional minutes exceed 300 in a day, contrary to Article 28.01 of the collective agreement, by actually proving that students were required to enter the school before the published start time. It is far from clear on the record before us that it did so. The [Arbitrator's] reasons of August 18, 2011 do not make that explicit finding*".

While the Court held that the Arbitrator misapprehended the nature of the dispute, it also held that the compensation award was unreasonable in the circumstances. As noted by the Court:

"*[I]t is difficult to understand how any compensation could flow from a mere calculation (even assuming the Federation is correct in its calculation) when it is plain that (i) the affected teachers at these twelve schools did not have to work a minute longer than their colleagues at other schools; (ii) the label or*

categorization of the minutes has absolutely no practical consequence; (iii) the affected teachers had no different duties, or additional duties, than their colleagues at other schools. Given the evidence that after an 'early bell' some affected teachers simply continued drinking coffee in the staff room or locked themselves in their classroom while students lined up in the hall, it is unreasonable, if not irrational, to conclude that those teachers are entitled to compensatory time or money based on differential treatment".

This Decision confirms the importance of proving key elements of facts.

Court confirms teachers need not act reasonably in deciding whether to teach more than three courses as per Collective Agreement

In *Grand Erie District School Board v Ontario Secondary School Teacher's Federation, District 23*, [2013] OJ No 465 (Div Ct), the Grand Erie District School Board (Board) sought Judicial Review of an Arbitrator's interpretation of Article 12.06 of a Collective Agreement, which provided as follows: "*No teacher shall be assigned more than 3.0 courses per semester unless there is an agreement by the teacher, the Bargaining Unit and the Board*" (The Arbitration Award was reviewed in "Arbitrator holds that teachers need not act reasonably in refusing to teach a combined course class", Keel Cottrelle LLP Human Resources Newsletter, April 2012).

In seeking Judicial Review, the Board argued that unless a Collective Agreement precludes a duty of reasonableness, such a duty should be presumed or implied any time a party exercises discretion. Therefore, in this case, the Board argued that a teacher has an obligation to exercise his or her discretion reasonably when refusing to agree to teach more than three courses. The Board argued that the Arbitrator's Decision was unreasonable, both with respect to the outcome and the process in which he reached his Decision. The Arbitrator concluded that the plain and ordinary meaning of Article 12.06 granted teachers the right to withhold consent and was not subject to an implied duty to act reasonably, and that to conclude otherwise would contradict other provisions of the Collective Agreement.

Upon reviewing the facts, the Divisional Court dismissed the Board's Application and held that the Arbitrator's Decision was reasonable. The Divisional Court held that the Arbitrator's reasons provided a clear explanation of his interpretation of the relevant provisions of the Collective Agreement, and that his interpretation was well within the range of possible and acceptable outcomes. As stated by the Court:

"*The arbitrator carefully considered the provisions of the Collective Agreement, beginning with the fundamental principle of Collective Agreement interpretation, that is, that the language of Collective Agreement must be given its plain and ordinary meaning and must be read in the context of the entire Collective Agreement*".

The Court noted that the Arbitrator had interpreted Article 12.06 in the context of the other provisions negotiated by the parties in Article 12, concluding that they had negotiated a range of requirements and constraints on the Board's assignment of work to teachers. The Court was also unwilling to interfere with the Arbitrator's conclusion that if there was an implied duty to act reasonably, the teachers would have met that duty in the circumstances. The Arbitrator concluded that there was insufficient evidence that the Principal considered other options. Furthermore, he accepted that the teachers had legitimate pedagogical concerns and reasons for refusing to agree to teach more than 3.0 courses.

This case demonstrates that Arbitrators and Courts will often first look to the plain and ordinary meaning of the terms of Collective Agreements, and that the particular language must be read in the context of the entire agreement, so that appropriate meaning is given to the Agreement.

Federal Court confirms expansion of the concept of family status to child care responsibilities

In *Johnstone v Canada (Border Services)*, 2013 FC 113, the Federal Court heard an Application by the Attorney General for Judicial Review of a Canadian Human Rights Tribunal (CHRT) Decision that allowed the Respondent's Complaint that her employer discriminated against her on the basis of family status when it failed to accommodate her parental childcare obligations. The Respondent worked for the Canadian Border Services Agency (CBSA) as a full-time Border Services Officer at Pearson International Airport (Pearson). Her husband also worked at Pearson as a Customs Superintendent. Full-time employees like the Respondent were required to work 37.5 hours per week in rotating shifts and therefore did not have fixed work schedules.

In January 2003, the Respondent went on maternity leave and returned to work a year later. Since both the Respondent and her husband had rotating shift schedules, it was essentially impossible for them to find a childcare provider with matching availability. Their work schedules overlapped 60% of the time but were not coordinated. As a result, the Respondent requested accommodation in the form of three fixed 13-hour shifts per week so that alternate childcare could be obtained while she was at work. She renewed this request in December 2005 after the birth of her second child. The Respondent wanted to maintain her full-time employment status in order to access opportunities for training and advancement, pensions, and other benefits available to full-time employees. For employees whose childcare responsibilities conflicted with the rotating shift schedule, the CBSA had an unwritten policy which provided that fixed shifts were only available to employees working up to 34 hours per week. In essence, the CBSA would not allow the Respondent to have fixed shifts while working as a full-time Border Services Officer. In order to have a fixed work schedule, the Respondent would have to work part-time up to a maximum of 34 hours per week. The Respondent accepted part-time work but was not satisfied with the CBSA's policy. Therefore, the Respondent filed a Human Rights Complaint pursuant the *Canadian Human Rights Act* (*Act*) arguing that the CBSA policy discriminated against her on the basis of family status.

Assessing the Complaint, the CHRT first determined that the enumerated ground of family status in the *Act* included parental childcare responsibilities. In interpreting the term "family status", the CHRT held that the jurisprudence demonstrated that the term "*should not be limited to identifying one as a parent or a familial relation of another person, but rather [the term should] include the needs and obligations naturally flowing from that relationship*". Based on this broad definition, the CHRT then applied the Supreme Court of Canada's two-part test for assessing allegations of discrimination. Under the first part of the test, the CHRT found that the Respondent made out a *prima facie* case of discrimination on the basis of family status. More specifically, the CHRT found that the CBSA established and pursued an unwritten policy communicated to and followed by management that affected the Respondent's employment opportunities including, but not limited to promotion, training, transfer, and benefits on the prohibited ground of family status. When the onus shifted to the employer under the second part of the test, the CHRT found that the CBSA failed to demonstrate that its policy was a *bona fide* occupational

requirement or that it accommodated the Respondent to the point of undue hardship. As a result, the CHRT made several remedial Orders, including awarding the Respondent $15,000 in general damages and $20,000 in special compensation. The CHRT also ordered the employer to develop an accommodation policy which was to be agreeable to the Respondent and the CHRT.

The Attorney General sought Judicial Review of the CHRT's Decision, arguing that it erred in its analysis of family status and in making its remedial orders. In particular, the Attorney General argued that the term "family status" does not encompass obligations that arise between parents and children, including childcare. Rather, the Attorney General claimed the intention of the term was to prevent discriminatory treatment merely because one is a parent or a parent of a particular child.

The Federal Court largely upheld the CHRT's Decision but modified some of the remedial Orders that were issued. With respect to the main issue in the case, the Court held that the CHRT's Decision was reasonable in finding that parental childcare obligations fell within the scope and meaning of "family status". The Court noted that, as a quasi-constitutional statute, the term "family status" in section 3 of the *Act* was to be interpreted in a large and liberal manner consistent with the attainment of the *Act*'s objectives and purposes. However, the Court also noted that not every situation can give rise to a finding of *prima facie* discrimination on the basis of family status. As stated by the Court, "*the childcare obligations arising in discrimination claims based on family status must be one of substance and the complainant must have tried to reconcile family obligations with work obligations*". However, the Court went on to explicitly emphasis that this requirement does not create a higher threshold test of requiring serious interference with parental obligations. In conclusion, the Court summarized its position as follows:

"*Simply stated, any significant interference with a substantial parental obligation is serious. Parental obligations to the child may be met in a number of different ways. …In my view, the serious interference test as proposed by the Applicant is not an appropriate test for discrimination on the ground of family status. It creates a higher threshold to establish a prima facie case on the ground of family status as compared to other grounds. Rather, the question to be asked is whether the employment rule interferes with an employee's ability to fulfill her substantial parental obligations in any realistic way*".

Turning to the specific facts of the case before it, the Court held that the CHRT's finding that the CBSA discriminated against the Respondent on the basis of family status was reasonable. There was evidence demonstrating that the Respondent was a parent who had substantial childcare obligations and despite her best efforts could not find daycare for her children. There was also evidence that the CBSA made no attempt to accommodate the Respondent or inquire into her individual circumstances, choosing instead to rely on its unwritten blanket policy. Furthermore, there was evidence to support the conclusion that the CBSA would not have suffered undue hardship had it accommodated the Respondent's needs. For example, the CBSA was willing to accommodate other employees seeking accommodation for medical or religious reasons, given that the CBSA allowed those groups to work full-time fixed shifts. Finally, the Respondent's request to work long shifts did not raise any real health or work concerns as the CBSA already allowed part-time employees to work shifts longer than 10 hours.

In regards to the remedial Orders imposed by the CHRT, the Federal Court held that the Orders to pay the Respondent $20,000 in special damages and to pay the Respondent the difference between her part-time and full-time wages and benefits from 2004 until August 2007 were reasonable, as the CHRT was entitled to deference on matters concerning its expertise

and its identification of the basis for the award. However, the Court held that the CHRT exceeded its remedial jurisdiction by requiring the CBSA to develop an accommodation policy that was satisfactory to the Respondent. As noted by the Court, "*the [Act] does not provide that a victim may have a role or participate in the development of remedial policies to redress discriminatory practices*". Furthermore, the CHRT's award of full-time wages and benefits for the period when the Respondent opted for unpaid leave provisions to accompany her spouse to Ottawa was referred back to the CHRT for reconsideration, as Federal Court found that the CHRT failed to justify that aspect of its award.

This case is significant in that it demonstrates the broadening of the concept of family status, and the need to accommodate the parental obligations of employees, since the failure to do so might lead to a finding of discrimination on the basis of family status.

HRTO awards reinstatement plus over $450,000 in back-pay and benefits to former Board employee

In *Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440, the Ontario Human Rights Tribunal (Tribunal) determined that reinstatement of employment and over $450,000.00 in back pay and benefits was the appropriate remedy arising from its prior decision that the Respondent School Board (Board) discriminated against the Applicant on the basis of disability contrary to sections 5 and 9 of the *Human Rights Code* (*Code*).

The Tribunal made a number of noteworthy factual findings in the prior decision, as follows.

The Applicant was employed by the Board from October 1988 to July 8, 2004, including full-time employment from September 1994 in the role of Supervisor, Regulated Substances, Asbestos. In the Fall 2001, the Applicant developed a generalized anxiety disorder as a result of the highly stressful nature of her job, and a fear of personal liability under the *Occupational Health and Safety Act* (*OHSA*) that could result from a mistake about asbestos removal. The Applicant received long-term disability benefits through the Ontario Teachers Insurance Plan until April 3, 2004, when she was assessed as capable of gainful employment. The Applicant's employment was subsequently terminated in July, 2004.

The Tribunal determined that the Board failed to take steps to investigate possible forms of accommodation from April 2003 and failed to offer the Applicant available, alternative work from June 2003. In particular, in June 2003, two alternative positions as an area supervisor or a Staff Development Supervisor occurred which the Applicant appeared qualified to fulfil and would, if properly accommodated, allow her to return to full-time employment with the Board.

The Applicant sought reinstatement as a remedy arguing that she held no negative feelings towards the Board as a whole and believed she could return to work there. The Applicant submitted that the few individuals who were responsible for the decisions leading to the termination of her employment were no longer working at the Board.

The Respondent opposed reinstatement on a number of grounds. The Board submitted that the evidence did not establish that the Applicant could have been accommodated in the available positions identified, on the basis that the medical evidence indicated that the Applicant could not work in *any* position involving liability for health and safety issues, which existed in both alternative positions. Further, the Board noted that the Applicant had not demonstrated that she was medically fit to return to the available positions identified. Additionally, the Board argued that it would be unfair to order

reinstatement given the length of time, approximately eight and a half years, since the Applicant's employment ended.

The Tribunal disagreed concluding that the Applicant should be reinstated, with appropriate adjustment to her length of seniority, banked sick days and other employment entitlements, to a suitable position that did not involve exposure to personal liability for health and safety issues similar to those caused by working with asbestos, as soon as reasonably possible. The Tribunal held that the Applicant did provide evidence that she would have been medically cleared to return to either of the alternative positions, had the Board sought the appropriate medical confirmation. Further, the Tribunal noted that the Applicant was timely in filing her Human Rights Application in November 2004, four months after her employment was terminated, listing reinstatement as a remedy, and thus any delay could not be attributed to the Applicant. The Tribunal did note a potential erosion of the Applicant's skills over the years, and required the Board to provide a reasonable period of up to six months of training, as required, to prepare the Applicant for her return to work.

With respect to financial compensation, the Tribunal stated that "*there are numerous human rights cases awarding full compensation for the entire period of unemployment or underemployment resulting from a discriminatory termination"*. As such the Tribunal ordered the Board to: compensate the Applicant for the loss of wages from June 2003 until the date of reinstatement; reinstate the Applicant's years of service with OMERS and pay any related employer pension contributions and CPP pension contributions; pay any out-of-pocket medical and dental expenses which would have been covered by applicable health benefit plans as well as address any related tax consequences of such payments; and pay $30,000.00 to the Applicant as compensation for the injury to dignity, feelings and self-respect.

This Decision confirms the principles for accommodation and also demonstrates the financial exposure when employers fail to accommodate and terminate employment.

Court declines to strike references to a Human Rights Claim in an action

In *Al-Dandachi v. SNC-Lavalin Inc.* [2012] O.J. No. 5432, the Plaintiff sued his former employer for wrongful dismissal and amended the claim to allege a breach of the Ontario *Human Rights Code*. The Plaintiff claimed that his employment was terminated on the basis of his opinions and statements he had made regarding the armed conflict in Syria.

The Plaintiff had expressed views on a radio show allegedly based on religious beliefs as being strongly opposed to religious extremism. Given the political position of the Plaintiff, he had been interpreted by some as being pro-Assad. The Defendant argued that its decision to dismiss was made based on the Plaintiff's political views, not his religious views and that the Plaintiff's political opinion is not protected by the Ontario *Human Rights Code*.

The Court explained that the Ontario Divisional Court in *Jazairi v. Ontario (Human Rights Commission)* had left the question open as to whether some systems of political opinion could amount to a creed. The Court, therefore, dismissed the Defendant's request to strike the Human Rights Claim, finding that it was not plain and obvious that the views of the Plaintiff could not amount to a creed, and that this could not be determined on a preliminary motion.

The Court granted the Defendant's motion in part by striking allegations relating to other events regarding the Defendant's public relations as irrelevant and superfluous, finding that "*they would prejudice or delay a fair trial of the action and the probative value of any evidence concerning these allegations would be*

far outweighed by the time and effort involve[d] in exploring them."

HRTO confirms principles applicable to joint proceedings by Grievance or Application

In *Nash v Ottawa-Carleton District School Board*, 2012 HRTO 2299, the Human Rights Tribunal of Ontario (HRTO) issued an Interim Decision allowing the Applicant to continue her previously deferred Application after she withdrew a labour Grievance which pertained to the same human rights issues.

The Applicant, a teacher for the Ottawa-Carleton District School Board, had a neck condition which resulted in chronic pain and physical restriction. This condition started in 2002 and occasionally flared up with episodes of acute increased pain and physical restriction. The Applicant alleged that she was not appropriately accommodated by the Board following a flare-up in 2008. When her Application was filed in 2009, the parties indicated that the Applicant had also filed a Grievance that was still in progress. As a result, the HRTO deferred further consideration of the Application until the completion of the Grievance proceeding. During the Grievance process, the parties engaged in settlement discussions for two days, but the Applicant then decided to withdraw her Grievance in order to continue her Application before the HRTO. The Board vigorously objected to the withdrawal and requested that it only be dismissed on a "with prejudice" basis. The Board also argued that a withdrawal of the Grievance in order to pursue the Application should be considered an abuse of process. At the time, the Arbitrator spoke to the Applicant about the consequences of withdrawing her Grievance in order to pursue her Application, and was satisfied that the Applicant understood the implications of withdrawing. The Applicant's Union further submitted to the Arbitrator that the Grievance should be dismissed on a "without prejudice" basis and that there be no finding of abuse of process. In dismissing the Grievance, the Arbitrator found there was no abuse of process. She noted that the parties engaged in the Grievance process in good faith and that there was simply no evidence of any intention to waste time, frustrate any process or engage in fruitless litigation. The Arbitrator noted that while she had received documents into evidence, she had not heard any testimony from any witness, no one had been cross-examined and there had been no consideration of the case on its merits. Nevertheless, the Arbitrator found that it was necessary to dismiss the Grievance on a "with prejudice" basis as it would be an abuse of process if the Applicant tried to reconvene the Arbitration.

Following the withdrawal of the Grievance, the Applicant sought to pursue her Application, but the Board requested the HRTO dismiss the Application on the basis that the Grievance proceeding had appropriately dealt with the substance of the Application and that to proceed would result in an abuse of process. The Applicant requested that the HRTO not dismiss her Application since she voluntarily withdrew her Grievance. She argued that it could not be said that the Arbitrator appropriately dealt with the substance of the Application because the Arbitrator was clear that she had made no consideration of the merits of the case before her.

At the beginning of its Reasons, the HRTO noted that the Ontario *Human Rights Code* (*Code*) provides unionized employees with a choice of procedure in protecting their *Code* rights. An employee can either file a Grievance or file an Application with the HRTO. Nothing prevents a unionized employee from filing both a Grievance and an Application. However, in that situation, the HRTO's general practice is to defer further consideration of the Application until the completion of Grievance process. With respect to when it will be appropriate to reactivate a

deferred Application, the HRTO stated the following:

"[I]f the grievance is withdrawn at some time prior to the start of arbitration, the Tribunal will generally reactivate the Application if a timely request to reactivate is received. If the grievance has proceeded to arbitration, and if the arbitrator has dealt with the substance of the Application, the Application will generally be dismissed pursuant to section 45.1 [of the Code]. The Tribunal may also reactivate an Application if it is satisfied that the arbitration process is unduly delayed."

The HRTO noted that this case fell between the above noted situations. Here, the Grievance was withdrawn after the Arbitration hearing had commenced and before it was completed. Furthermore, the request to reactivate was not made on the basis that the process was unduly delayed. The basis for the request was that the Applicant wanted to abandon the Arbitration process in order to continue her Application.

After reviewing the jurisprudence with respect to section 45.1 of the *Code*, the HRTO went on to further state that "*section 45.1 applies to an arbitration proceeding where the underlying issues in the arbitration and the Application are the same, even if the Code issues were not directly raised or ruled on by the arbitrator*".

In this Interim Decision, the Board submitted that the Application should be dismissed because the Applicant had a full opportunity to argue all of the issues in the Application before an Arbitrator who had full jurisdiction to deal with those issues. However, the HRTO concluded that this was not a case where the Applicant was attempting to re-litigate an issue that had been decided in another forum. The HRTO found that the Grievance was not withdrawn as part of a settlement of any issues before the Arbitrator, and that the Arbitrator did not appropriately deal with the substance of the issues in the Application. In essence, all the Arbitrator did was assist the parties with settlement discussions which ultimately failed.

The HRTO further held that allowing the Application to continue would not amount to an abuse of process. The HRTO noted that while the Arbitrator dismissed the Grievance on a "with prejudice" basis, the Arbitrator explained that this was necessary because a later attempt by the Applicant to re-instigate the Grievance would be an abuse of the Arbitration process. While the Arbitrator was concerned about a potential future abuse of process, she was satisfied that the withdrawal of the Grievance did not constitute an abuse of the Arbitration process. The HRTO considered the potential unfairness to each party by letting the Application proceed and determined that allowing the Application to proceed would not result in manifest unfairness to the Board. On the other hand, the Applicant would be clearly prejudiced if the Application were not allowed to proceed. The HRTO noted that it was clear that, at the time she made the decision to withdraw from the Arbitration process, the Applicant believed that she had the option to reactivate her Application at the HRTO. This also seemed to be the understanding of the Board and the Arbitrator. The HRTO determined that although there could be circumstances where the abandonment of a Grievance before an Arbitrator might result in an abuse of process at the HRTO, this was not such a case as there was no finality in the Arbitration process and no concern about inconsistency or misuse of HRTO resources. As a result, the Application was permitted to continue and the Applicant's request to amend her Application to include further alleged incidents of discrimination was granted.

This Decision confirms the principles applicable to pursuing a Grievance or HRTO Application.

HRTO confirms allegations of unfairness are not *Code* issues

In *Shaw v Cox*, 2012 HRTO 1949, the Human Rights Tribunal of Ontario (HRTO) held that the Respondent did not violate the Ontario *Human Rights Code (Code)* when she decided not to rehire the Applicant as an English and ESL instructor. The Applicant, a self-identified black male, was hired as an English and ESL instructor for the 2010 fall semester at the School of Advancement at Centennial College. The Respondent, the Chair of the English and ESL School, hired the Applicant for the fall semester but decided not to renew the Applicant's employment contract for the winter semester. The Applicant alleged that the Respondent did not renew his employment contract for the winter session because she had discriminated against him on the basis of his age, race and gender.

The Respondent denied that she breached any *Code* grounds when she decided not to offer the Applicant another fixed-term contract for the winter semester. The Respondent stated that she hired the Applicant without interviewing any other candidates. Therefore, she claimed that if she was really concerned about the Applicant's age, race or gender she would not have hired him and would have continued interviewing other persons who had applied for the position. The Respondent claimed that her decision to not offer the Applicant another contract was based on several factors. These included that he was disorganized, maintaining few records of his work; he continuously relied on a Coordinator who was assigned to initially familiarize the Applicant with the curriculum and proper assessment techniques; he was essentially unable to use a computerized voice program which was intended to develop the students' verbal skills; he was apparently unaware that the Respondent would be visiting his classroom to observe his teaching methods on a specified date, although he was previously notified; he had very poor class management, which she observed; he failed to prepare and submit a lesson plan, as required; he failed to attend his scheduled feedback session; and he failed to reschedule the session although advised to do so.

The Applicant alleged the Respondent did not spend enough time in his class to conduct a fair assessment and that Respondent would have been more sympathetic had the Applicant been of "Caucasian ethnicity". Furthermore, the Applicant claimed the fact that the majority of the English teachers were not "visible minority males" was evidence of a possible bias against visible minority males.

In this case, the HRTO decided on its own initiative to schedule a summary hearing to determine whether to dismiss the Application on the basis that it had no reasonable prospect of success. Given the explanation provided by the Respondent, the Applicant was required to point to evidence proving a link between the Respondent's actions and the grounds of discrimination that were cited. When the Applicant was asked what evidence he intended to rely on that would show that he had experienced discrimination, he indicated that he had filed a Request for an Order During Proceedings, requesting a "*Statistical Comparative Analysis of new hires / non-renewed English Professors (2006-2011) at Centennial College School of Advancement*". He was of the belief that this analysis would show that the Respondent had a bias against visible minority males in hiring and rehiring. The Applicant was asked whether he could think of any other evidence that might show discrimination contrary to the *Code*, but he could not provide any. He stated that the unfair treatment he received from the Respondent along with the data he wanted produced, could allow a person to "draw inferences" that the Respondent discriminated against him because of his age, race and gender.

Based on the Applicant's inability to produce any evidence of discrimination, the HRTO decided to dismiss his Application. As noted by the HRTO:

"*The Tribunal does not have the power to deal with allegations of unfairness. The Tribunal only deals with applications alleging a violation of the Code, which prohibits discrimination or harassment on specific grounds. To succeed the applicant must be able to prove, on a balance of probabilities, a link between the respondent's alleged actions and a Code ground*".

In this case, the HRTO held that the Respondent offered a reasonable and non-discriminatory explanation for her decision to not renew the Applicant's employment contract. While the Applicant may have genuinely believed that he was treated unfairly, the HRTO stated that "*his allegations are based on assumptions, which have no evidentiary basis to prove that he was discriminated against on the basis of a Code-related ground.*"

Furthermore, while the Applicant was seeking the creation and disclosure of a statistical analysis of newly hired and not rehired English Professors over a five year period, the HRTO refused to order such an analysis. As stated by the HRTO, "*The theory that this may provide support for the applicant's case is entirely speculative, or in other words it is a 'fishing expedition*".

This case demonstrates the willingness of the HRTO to take the initiative to schedule summary hearings. It also demonstrates the stringent evidentiary requirements that are needed in order to succeed with a Human Rights Application.

HRTO dismisses Application against employer on First Nations Reserve as outside of its jurisdiction

In *Tobin v. Aroland First Nations*, 2012 HRTO 2360, the Applicant filed a Human Rights Application against Aroland First Nations, alleging discrimination in her employment on the basis of disability. The Tribunal issued a Notice of Intention to Dismiss the Application (NOID) on the basis that the Application appeared to fall under federal jurisdiction. In brief submissions by the Applicant, she noted that she was dismissed when off sick and was not sure to whom to apply for her "*application for wrongful dismissal*".

Although the Application gave only a "very brief account of events", the Tribunal found that the Applicant was employed (apparently through contract) in providing educational services on the Aroland First Nations. The Tribunal noted that it was not entirely clear from the Application whether she was employed by the named Respondent or another unnamed First Nations Educational Authority.

The Tribunal explained that section 91(24) of the *Constitution Act, 1867* gives the Federal Government jurisdiction over "*Indians and lands reserved for Indians*"; however, section 93 of the *Constitution Act, 1867* provides the provinces with exclusive rights to the provisions regarding to education. The Tribunal concluded; however, that the case law "*establishes that allegations of discrimination relating to employment in the provision of educational services on First Nations Reserves have been dealt with under the Canadian Human Rights Act.*" The Tribunal, therefore, dismissed the Application on the basis that it was plain and obvious that the matter falls under federal and not provincial legislation.

— KC —

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Education Law Newsletter

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