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Human Resources Newsletter

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BC Government fails to bargain in good faith with BC Teachers' Federation

The Supreme Court of British Columbia (the Court) recently ruled that the Government of British of Columbia (BC) provoked public school teachers to strike when it failed to negotiate in good faith, in *British Columbia Teachers' Federation v. British Columbia*, 2014 BCSC 121, a move that cost the Province $2 million in damages.

On April 13, 2011, a prior proceeding successfully challenged the constitutionality of BC's *Educational Improvement Act* (the legislation). The legislation at issue interfered with teachers' collective bargaining rights,

particularly terms having to do with working conditions, class size and special-needs supports in the class. The BC Government was given one year to rethink its legislative scheme.

At the end of the one-year period, the BC Government did not repeal the legislation, but instead enacted virtually identical legislation (the new legislation). The new legislation still prohibited teachers from bargaining terms such as class size and composition, but the prohibition had an expiry date. The new legislation sparked a three-day walkout by teachers in March of 2012, and forced the Teachers' Federation to return to Court.

The Teachers' Federation challenged the new legislation and the additional measures taken by the BC Government, including its net zero mandate for Collective Agreements, the appointment of a mediator with narrow terms of reference for bargaining, and the enactment of various regulations. The Teachers' Federation sought orders striking down the impugned legislation and regulations, and damages pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms* (the *Charter*).

The issue in this case was whether there was anything new in this legislation that made it constitutional when the previous version was not. The BC Government claimed the new legislation was valid because it included a time limit, and because the Government had *"consulted in good faith"* with the Teachers' Federation.

The Court found that there was no basis for distinguishing the new legislation from the previous findings of unconstitutionality. The discussions between the BC Government and the Teachers' Federation did not correct the unconstitutionality of the legislation or immunize the subsequent duplicative legislation from further constitutional challenge. The discussions were not undertaken in good faith, as the BC Government utilized a strategy designed to provoke a strike in order to gain political support for imposition of the new legislation upon the Teachers' Federation.

The new legislation substantially interfered with teachers' s. 2(d) *Charter* rights, which protected freedom to associate, to make representations to their employer and to have the employer consider those representations in good faith. The impugned provisions were not saved by s. 1 of the *Charter*, as the harmful effects were adversely disproportionate to the legislative objectives. In the result, the impugned provisions of the legislation were struck down with the effect that deleted terms in the teachers' Collective Agreement were restored retroactively and were a permitted subject for future bargaining. In addition, the Province's conduct in effectively extending unconstitutional prohibitions on collective bargaining justified an award of damages pursuant to s. 24(1) of the *Charter*. The Federation was awarded $2 million in damages.

This case demonstrates the importance of collaboration and cooperation in policy making. Governments have a duty to negotiate in good faith, and must not become pre-occupied with political agendas. The damage award of $2 million in this case highlights the Court's support that governments should be focused on students and long-term educational stability. ■

SCC strikes down Alberta's privacy legislation

In *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, the Supreme Court of Canada (the SCC) expressed its views on the constitutionality of Alberta's privacy legislation. This case involved a strike by employees of the Palace Casino in Edmonton, where both the United Food and Commercial Workers (the Union) and the employer videotaped individuals crossing the picket line. The Union posted signs near the picket line which said that recordings of individuals crossing the picket line might be placed on a

website. A number of individuals who were photographed/videotaped crossing the picket line filed complaints to the Alberta Information and Privacy Commissioner, under Alberta's *Personal Information Protection Act* (*PIPA*).

An Adjudicator was appointed by the Privacy Commissioner and concluded that the Union had contravened *PIPA*. The Union then applied to the Alberta Court of Queen's Bench for judicial review. At this level *PIPA* was found to have violated the Union's right to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and certain portions of *PIPA* were struck down. The Alberta Court of Appeal upheld the conclusion that portions of *PIPA* were unconstitutional. Finally, this matter was appealed to the Supreme Court of Canada (the SCC) where all nine Judges agreed that the Union's freedom of expression was restricted by *PIPA*. Unlike the Court of Appeal however, the SCC decide to strike down *PIPA* entirely, as opposed to certain portions. *PIPA* was declared invalid, and the SCC suspended the declaration of invalidity for 12 months to provide Alberta's Legislature with time to make the statute constitutional.

In striking down *PIPA*, the SCC performed a detailed *Charter* analysis under s.1. In essence, the SCC first determined whether *PIPA* served a pressing and substantial objective, and, if so, whether its provisions were rationally connected to that objective. The SCC examined whether *PIPA's* provisions are rationally connected to an objective and whether *PIPA* minimally impairs the right to freedom of expression. The SCC found that *PIPA* had a pressing and substantial objective, which was to provide *"an individual with some measure of control over his or her personal information, [which] is intimately connected to their individual autonomy, dignity and privacy." PIPA* addressed this objective by imposing restrictions on the collection, use and disclosure of information which were too broad and restrictive. *PIPA* deemed virtually all personal information to be protected regardless of its context. Free expression in the labour context can play a significant role in alleviating the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker. The effectiveness of picket lines was dependent on the ability of the Union to try to convince the public not to cross the picket line and do business with the employer. The SCC stated:

"PIPA imposes restrictions on a Union's ability to communicate and persuade the public of its cause, impairing its ability to use one of its most effective bargaining strategies in the course of a lawful strike. In our view, this infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over personal information that they expose by crossing a picket line."

The issues in this case are of interest across Canada, as was demonstrated by the various interveners in this case: the Attorney Generals of Canada and Ontario, the Privacy Commissioners of Canada, Ontario and British Columbia and the Canadian Civil Liberties Association as well as labour and business groups. The case raises the question how privacy legislation might be affected in the rest of Canada, and whether Courts across Canada may re-evaluate whether definitions of "personal information" in existing privacy legislation are too broad. ■

Workplace dress code violates fundamental rights

In *Le Syndicat de l'Enseignement de Lanaudière et La Commission scolaire des Samares*, (Oct. 2012, Grievance Arb.), a Quebec Grievance Arbitration Tribunal found that an employer's rules relating to its employees' physical appearance violated those employees' fundamental rights, including their right to privacy and freedom of expression. The Union challenged the legality of various employer directives at a vocational training centre which

related to the dress code imposed on teaching staff in healthcare programs.

The employer's rules on physical appearance required employees to maintain good personal hygiene. Their hair had to be a natural colour, long hair had to be tied back and beards had to be covered during practical classes. Nails had to be clean and cut short, and no coloured polish or artificial nails were permitted. All jewelry (other than simple jewelry) were prohibited at all times, and rings and arm jewelry were prohibited during practical classes. The dress code standards provided that instructors must wear clean uniforms during practical classes and street clothes covered with white lab coats in theoretical classes as well as in the presence of students. Jeans, miniskirts, shorts and camisoles were not permitted. The employer maintained that the rules were based on industry recommendations related to personal hygiene and professional image provided by the Quebec nurses' professional corporations: the Ordre des infirmières et infirmiers du Québec (OIIQ) and the Ordre des infirmières et infirmiers auxiliaires du Québec (OIIAQ).

The Arbitrator declared the rules to be invalid, noting that labour law principles allow employers to regulate employees' physical appearance as is necessary for the sound administration of its enterprise, but only to the degree that such regulation is consistent with the Collective Agreement and the law, including provincial human rights law, in this case the Quebec *Charter of Human Rights and Freedoms* (the *Charter*). Where a measure infringes on a right protected by the *Charter*, the underlying objectives of such a measure must be serious and valid and the means used to achieve the objective must be in proportion to it.

While some of the requirements were considered legal by the Arbitrator, the rules as a whole were found to be invalid. The Arbitrator found that the requirements relating to the maintenance of good personal hygiene were reasonable and did not contravene fundamental *Charter* rights. However, the rules requiring a natural hair colour infringed employees' rights to privacy as the restriction extended beyond their working hours. In addition, there was no sound rationale for such a measure as it could not be justified by either the OIIQ or OIIAQ requirements. The obligations to cover beards and tie long hair back were considered reasonable given the employer was prepared to provide the gear necessary for this purpose and the limits were confined to a specific period of time (ie during practical classes). The Arbitrator found that the restriction on jewelry and requirement that it be "simple" (in French "*sombre*") constituted an impairment of the right to one's own image, privacy and freedom of expression given that choice of jewellery is a matter of taste and not a pedagogical consideration. It was found that the requirement to wear uniforms during practical classes was reasonable, however the employer was unable to provide sufficient evidence to demonstrate that wearing a lab coat during theoretical classes was essential to providing quality instruction. Finally, even though the prohibition on wearing jeans, miniskirts, shorts and camisoles potentially interfered with employees' privacy and freedom of expression, the Arbitrator found that the ban on miniskirts and camisoles could be justified on the basis of decency standards in an educational environment. As for the jeans, this ban was not justified since jeans are typically considered suitable attire in public academic institutions.

The case highlights the importance of balancing workplace values with employees' fundamental freedoms to privacy and expression. The dress code rules must be both valid as well as designed in a way that the impairment of fundamental rights is rationally connected to the objective sought. The impairment must be minimal and in proportion to the measures' anticipated beneficial effects. Given the current discussions about dress codes for staff in schools, the principles enunciated in this Decision would be relevant. ■

School Principal has reasonable expectation of privacy of personal information on workplace computer

The British Columbia Court of Appeal recently ruled that an elementary school principal had an objectively reasonable expectation of privacy surrounding the use of his workplace laptop to save personal material. *R. v. McNeice*, 2013 BCCA 98, is an appeal by an elementary school principal of the Supreme Court of British Columbia's conviction for accessing and possessing child pornography. The accused, Kelly McNeice, was assigned a laptop computer by the Fort Nelson School District (the Board) for work purposes. The Board's policy did not expressly prohibit using the work-issued computer for personal purposes. An international police investigation provided Canadian police with information that child pornography was accessed and downloaded from an IP address associated with McNeice's home. The police obtained a warrant to search McNeice's home; however instead of obtaining a warrant for the employer-issued laptop, they directly asked the Superintendent of the Board for McNeice's work laptop. The Superintendent sought legal advice and ultimately complied with the police request.

Using software, the police recovered deleted child pornography in the laptop's history and temporary internet files. Section 8 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) provides individuals with protection against unreasonable search and seizure. Property that is found and seized in violation of Section 8 may be excluded as evidence at trial under Section 24(2) of the *Charter*.

At the trial level, the Judge found that based on the computer's lack of a password and the fact that McNeice actually deleted the files, that McNeice abandoned the content and did not have an expectation of privacy. The Trial Judge therefore admitted the evidence. Following this trial decision, a similar case of *R. v. Cole* (discussed in the October 2012 KC HR Newsletter) was decided by the Supreme Court of Canada.

R. v. Cole held that the deletion of files by the accused was more consistent with an intent to destroy the data (or at least conceal it), than an intention to abandon the privacy interest in those files. McNeice therefore appealed the trial decision arguing that the deletion of files effectively prohibited access by others to the content.

The British Columbia Court of Appeal (the Court) found that the deleted files containing the pornographic images were subject to a reasonable expectation of privacy and the police search of those files, without a warrant, was a breach of McNeice's section 8 *Charter* right to be secure against unreasonable search and seizure.

In considering whether the unlawfully seized information should be admissible as evidence under section 24(2) of the *Charter* the Court considered whether admitting the laptop evidence would bring the administration of justice into disrepute. The Court explained that the police acted reasonably in their search since they believed the appellant was a potential danger to children under his care at school. In addition, as an elementary school principal, McNeice held a position of trust and society ought to have reasonable assurance that a school principal is not viewing child pornography. The Court therefore held that the admission of the unlawfully seized evidence was in society's best interests and would not bring the administration into disrepute.

While putting something in your garbage or recycling bin in real life may indicate an intent to abandon a privacy interest in the trash you throw away, this case shows us that doing the same thing does not hold true for files put in a computer's desktop recycling bin. Instead, deleting files on your computer is consistent with an intent to conceal and maintain a privacy

interest. This case should alert employers (particularly School Boards) about the need to have appropriate policies in place regarding the use of employer technology. Finally, even though an employer may own the electronic device and have an adequate policy in place, these facts on their own will not serve to eliminate an employee's reasonable expectation of privacy. ■

OLRB examines whether EAs can administer medication to students

Niagara Catholic District School Board v. Canadian Union of Public Employees, Local 1317, (Educational Assistants Grievance), [2013] O.L.A.A. No. 510, deals with the assignment of certain duties and responsibilities to Educational Assistants (the EAs) employed by the Niagara Catholic District School Board (the Board). The Canadian Union of Public Employees, Local 1317 (the Union) claimed the assignment was contrary to the Collective Agreement and other employment-related statutes, including the *Occupational Health and Safety Act*, the *Education Act* and the *Regulated Health Professions Act*. The Union asserted that in the circumstances of this case the latter Act must also be considered an "*employment related statute*" under section 48 (12)(j) of the *Labour Relations Act*.

The assignment at issue was the administration of a prefilled syringe of medication to a student if necessary. For purposes of this award it is necessary only to note that there is no dispute that the student had a medical issue which may cause the student to have a seizure. The Board's medical emergency protocol for the student indicated that, if the student had a seizure, a pre-filled syringe of medication must be administered into the student's rectum. The Board had assigned this duty to EAs who had been trained in the administration of the medication. The student did not ride in a school bus to attend school, but had been transported by a third-party transportation provider hired by the Board. In 2012, when the student entered high school, the Board assigned EAs to accompany the driver of the vehicle when the student was transported to and from school.

The Union sought an interim order directing the Board to refrain from assigning EAs to travel with the student, and claimed that the Board had violated the Collective Agreement and other employment-related statutes by assigning to the EAs the responsibility of administering the medication when necessary. It asserted that assigning EAs to accompany the driver for the sole purpose of administering the medication if necessary contravened the Collective Agreement. The grievance claimed that *"… the EAs at [named school] are not responsible for emergency medical procedures."* The Grievor explained that the Board should not expect them to administer a medical emergency procedure which is beyond the scope of their job practice and is unsafe.

The Board argued that the Arbitrator did not have the jurisdiction to grant the interim relief requested as the Union's request was for substantive relief with respect to the very matter at the heart of the grievance.

The test in determining whether or not any interim relief should be granted focuses on balancing the relative harm which may result from the decision to grant or not to grant interim relief. The issue is not only what harm the EAs/Union will suffer if the interim order is not granted. It is also what harm the Board will suffer if the interim order is granted.

The Arbitrator explained that granting an interim order in favour of the Union would have essentially decided the matter in favour of the Union. To grant the interim relief requested, the Arbitrator would be making findings on the issues of whether EAs administering these medical procedures are *"beyond the scope of the EA's practice"* or *"unsafe",* which have not yet been determined. In this case, the harm to the EAs/Union did not outweigh the harm to

the Board and therefore the Arbitrator did not grant the Order as requested, and instead set the matter down for hearing.

The final Decision will assist with this very difficult issue which occurs in numerous schools. ■

DSB to halt investigation into harassment complaint surrounding Union

The issues in *Elementary Teachers' Federation of Ontario v. Upper Grand District School Board*, [2013] OLRD No. 4365, arose following Union elections in the Spring of 2012. A new Local President was named to the Elementary Teachers' Federation of Ontario (the ETFO) at the Upper Grand District School Board (the Board). The former Local President no longer held a position on the executive, and the Vice President prior to the elections, who had also run for President, had been re-elected as Vice President. The positions of Vice President and President are paid full-time release positions. The other elected positions of Chief Negotiators and Local Staff Officers are 0.5 release positions (part time). During the release, while on Union leave, the employee continued to be entitled to health benefits, sick leave and accrue seniority and teaching experience. At the conclusion of the leave, the individual was expected to resume teaching duties for the Board.

In May of 2013 a harassment complaint was initiated through the Board's harassment policy by the Local Vice President, Staff Officer and former President, against the current Local President. The *Occupational Health and Safety Act* requires employers to establish policies and conduct investigations where workplace harassment is alleged. The allegations of misconduct included controlling, demanding and bullying behaviours. Following receipt of the complaint, the Board initiated an investigation in accordance with their Policy.

The ETFO objected to the Board's investigation, on grounds that the employer was interfering in the administration of a trade Union contrary to Section 70 of the *Labour Relations Act* (the *Act*). The ETFO alleged that the incidents occurred while the individuals were on leave from their teaching duties and were engaged solely in internal Union business. The Board maintained the position that despite the release, the individuals remained Board employees and the Board intended to proceed with its investigation. The ETFO therefore commenced an Application before the Ontario Labour relations Board (the OLRB), alleging the Board's investigation into the complaint filed against the Local President was without Jurisdiction and constituted interference in the administration of a trade Union contrary to the *Act*.

The OLRB held that once the ETFO indicated to the Board, that in it's view, the complaint was confined solely to alleged misconduct in the course of Union business, and advised the Board that an alternative process was available, the Board's investigation ought to have been halted at that stage. The OLRB noted that while the Board had a valid interest in maintaining a safe, harmonious and efficient workplace, there was nothing to suggest that the antagonism between the parties would spill over from the ETFO into the workplace. The ETFO had a legitimate interest in protecting its internal processes and affairs from disclosure to the Board, which outweighed the Board's interest, particularly where an alternative was available to the complainants to pursue a complaint of harassment against the Local President. The purpose of the *Labour Relations Act* is to protect a Union's privacy no matter how strongly the employer feels they have an interest that justifies an intrusion into a Union's internal affairs.

For these reasons, the OLRB found that the Board violated s. 70 of the *Act* and directed them to cease and desist their investigation into the complaint.

Despite the requirements of the *Occupational Health and Safety Act*, the Decision in this case suggests that, in certain circumstances, employers will not be required to conduct investigations into alleged harassment. However, although this Decision seems to limit an employer's duty to investigate, it must be noted that in this case the OLRB found that there was not a substantial risk of the harassment carrying over to the workplace. Each situation is fact specific, and the same considerations may not apply in cases where more serious forms of harassment are alleged. ■

Arbitrator upholds firing of veteran teacher who failed to report sexual assault on student, interfered with investigation

In *British Columbia Public School Employer's Assn., School District 36 Surrey v British Columbia Teachers' Federation, Surrey Teachers' Assn/ (JC Grievance)*, [2013] BCCAAA No. 121, a Teacher (the Grievor) grieved the Board of Education's (the Board) decision to terminate her for failing to report that a Student disclosed inappropriate touching by a family member. The Arbitrator upheld the Board's decision, also finding that the Grievor interfered with the subsequent investigation into the Grievor's actions.

The Grievor was a fifth grade teacher with 31 years of experience in the Surrey School District. In January, 2012, a 10 year old Student (the Student) approached the Grievor asking to speak to the Vice-Principal (the VP). The Grievor and Student then had a brief discussion about why the Student wanted to see the VP. Shortly thereafter, the VP came to the classroom to see the Student, but was told by the Grievor that it was not a good time. The VP later returned, and the Student and the VP went to the VP's office. The Student disclosed to the VP that she had watched pornography and had been touched inappropriately by her cousin. The Student then returned to the classroom and told the Grievor what she had disclosed to the VP. Later that day the VP reported the Student's disclosure to the Ministry of Children and Family Development (the Ministry).

The following day the Student told the VP that she disclosed the incident with her cousin to the Grievor prior to discussing it with the VP. The VP was concerned that the Grievor's failure to report the disclosure was a violation of the Board's policies and protocols. The VP contacted the Board's HR Principal for advice. The Board's HR Principal then met with the Grievor and her Union representative, and served both a letter of investigation and a letter directing her not to discuss the fact that she was under investigation with anyone, especially the Student.

The Board HR Principal investigated the incident, and after interviewing the Student, expanded the investigation to include "*comments she told him the Grievor had made about the Vice-Principal not understanding Indo-Canadian culture*" and how that culture deals with disclosures. The Grievor later questioned the Student about both the sequence of her disclosures and the substance of the Student's conversations with the administration. About an hour after class ended, the Student's mother and the VP showed up in the classroom looking for the Student, prompting the Grievor to give a direction to the Student to hand in her work, which was "*a direction not to let on to her Mother and the Vice-Principal that they had been talking about the investigation*".

The VP was suspicious about the after school meeting and met with the Student the next day. The Student told the VP that she did not think the Grievor heard her the first time she disclosed the touching, and that she and the Grievor had not been discussing the investigation after school. A couple of days later the Student revisited the VP to tell him she lied; she knew the Grievor heard her the first time, and that they discussed the investigation. The

Grievor was then suspended with pay and the investigation was expanded to include the additional allegation of interfering with the investigation.

Following the investigation, a disciplinary hearing was held before the Board. The Board terminated the Grievor for the failure to report and interfering with the investigation. The Grievor appealed that decision to the Arbitrator.

Before the Arbitrator, the Board argued that dismissal was the only appropriate discipline. The Union countered that the Grievor did not have to report the disclosure since the VP would report it. Furthermore, the fact that the Student's cousin was under the age of 12, and her parents were willing and able to protect her, meant she did not have to report the disclosure to the Ministry under the *Schools Act*. Finally, the Union argued that if she were guilty of any misconduct, it resulted from a panic that occurred from "*the employer's zeal to prosecute her for an offence she had not committed*".

The Arbitrator noted that the Board had a policy that "*recognizes that it is the legal responsibility of every person who has reason to believe that a child has been or is likely to be physically harmed, sexually abused or sexually exploited…to report the matter to a Child Protection Social Worker*". The teaching staff was told the duty to report was a "*serious, legal obligation*". There was evidence that this Policy was reviewed annually at staff meetings. Even if a teacher thinks another may have reported the disclosure, they are to "*err on the side of caution*" and report anyway because they could not be certain that the same information has been communicated to the Ministry. The Grievor admitted she was familiar with the Board Policy and protocols, and had reported suspected abuse in the past.

The Arbitrator concluded that "*the Grievor's conduct was deserving of discipline*", citing the following reasons:

"she failed to report the Student's disclosure of inappropriate touching; she undermined the Vice-Principal to the Student; she persuaded the Student to tell the Vice-Principal that her recollection of the order of her disclosures was incorrect; she suggested the Student lie to her mother and the Vice-Principal about their discussion…and she was not forthright with the District HR Principal during his investigation".

As for the appropriate sanction, the Arbitrator had to consider the fact that the Grievor was a 31-year employee with no previous record of discipline. Additionally, the Arbitrator had to consider whether the Grievor showed any signs of remorse, apology or acknowledgement of responsibility.

Despite the fact that the failure to report to the Ministry may not have technically breached the *Schools Act*, the fact that the Grievor maintained that she was not required to report meant "*the Grievor was not willing to take responsibility for failing, at a bare minimum, to report what the Student had told her to the Vice-Principal or the Principal*". Furthermore, the discussions about the investigation with the Student were *"serious offences for a teacher*" since "*teachers are in a particular position of trust and are held to a high standard*".

The Grievor had acted "*contrary to her professional duty to act as would a caring and judicious parent*" since "*the Grievor worked to turn her problem into the Student's problem*". The Arbitrator further noted the following:

"*I am unable to find that the Grievor accepted responsibility for her wrongdoing either immediately or at hearing. She involved the Student in her conflict with the Vice-Principal and told the Student that she was in trouble for not reporting her disclosure. As a result, the Student felt guilty about her role in the Grievor's troubles. The Student felt that she had to lie to the Vice-Principal to help get the Grievor out of trouble. The Grievor's conduct led the Student to bear the guilt of telling that lie and to suffer through confessing to the Vice-Principal that she*

had told her a lie. The Grievor did not appear to truly appreciate the seriousness of her actions. By her own admission, she did not tell the truth during the investigation and I was not convinced that she was always telling the truth during the hearing"

The Arbitrator thus concluded that "*dismissal was appropriate in all the circumstances of the case*". The evidence did not point to any rehabilitative potential.

The duty to report child abuse was consistently reinforced by the Board and staff knew they had a legal duty to report even if they thought someone else had already done so. This Decision emphasizes the importance of that responsibility. ■

PEI Court of Appeal dismisses lawsuit against School Board

In *Lanigan v. Eastern School District*, 2014 PECA 3, the P.E.I. Court of Appeal considered an appeal from a trial decision of the P.E.I. Supreme Court which dealt with an action by Jo-Anne Lanigan (Lanigan) against her employer, the Easter School District (the Board) claiming damages for wrongful dismissal and refusal to hire her for Vice-Principal and guidance counsellor positions. Lanigan was the Vice-Principal of and a teacher at Donagh Regional School until an issue arose between her and the parents of a special needs student. The parents of the child wrote a letter to the school's Principal as well as the Leader of School Development complaining about Lanigan.

Lanigan considered the comments in the letter defamatory and wrote back to the parents in a letter marked "without prejudice" to the parents. The letter was sealed, addressed to the parents and sent home with the child. It asked for a written retraction of the comments made in the earlier note to the Principal. She enclosed a draft apology for them to sign and ended her letter by writing "*I would rather this issue be resolved quietly and effectively in this matter instead of me having to take formal or legal action ... ..*". When she heard nothing in response, she sent another sealed "without prejudice" letter home with the child on the final day of school. This letter advised that, as she had no response, she had retained counsel and was prepared to continue to rectify the issue "*by more formal means.*"

When the Board found out about the letters, they contacted Lanigan and her Union and arranged for a meeting. There was a meeting held and the result was that the Board took disciplinary action including: removing Lanigan from her administrative duties (her position as vice-principal); placing her in a grade two teaching assignment at the School; telling her that a formal evaluation of her teaching would be conducted for the 2010-2011 year; advising her that there would be a record of discipline placed on her personnel file; and, that any further misconduct would be subject to disciplinary action up to and including termination of her employment.

Lanigan went to her Union to file a grievance but the time for filing a grievance had expired and/or her Union declined to advance her grievance. Lanigan was out on sick leave for most of the 2010-2011 school year. She had since been teaching Grade 5 at a new school. Since 2011, she applied for one Vice-Principal position and several Guidance Counselor positions, but was not the successful applicant. Lanigan therefore brought an action against the Board in December 2011.

The Trial Judge found Lanigan had a right to pursue her actions in Court, but declined to hear the matter because the Collective Agreement in force between the Union and the Board contained a grievance procedure. Lanigan appealed this decision, and the P.E.I. Court of Appeal dismissed the appeal on the basis that the lower court had no jurisdiction to hear the matter.

The nature of the dispute between Lanigan and her employer, involving claims for wrongful dismissal, constructive dismissal, and failure to hire her for the positions of Vice-Principal and guidance counsellor, arose out of the Collective Agreement made pursuant to the *School Act*. While the *School Act* and Regulations did not contain a statutory final and binding dispute-resolution mechanism, it does set out a comprehensive code that covers, amongst other things, all employment related issues within the school system. The question then became whether or not the essential character of the dispute arose out of the Collective Agreement and whether or not the Collective Agreement had an effective dispute resolution mechanism. The answer to these questions was that the dispute arose out of disciplinary action taken by the employer and an alleged failure to hire, both of which are classic examples of disputes arising out of a Collective Agreement. The Collective Agreement had a final and binding dispute resolution mechanism and conferred upon the grievance review board the power to grant an appropriate remedy.

The effect of allowing actions to proceed in the courts would be to undermine the legislative scheme set up in the *School Act.* The legislative scheme sets up a process whereby there is a recognized bargaining agent for the Union and a recognized negotiating agency for the employer. Furthermore, the Collective Agreement had a final and binding dispute resolution mechanism capable of providing effective redress. The Supreme Court of Canada has stated in previous cases that the relationship in this case is properly regulated through arbitration and it would subvert both the relationship and the statutory scheme to rule that matters addressed and governed by the Collective Agreement may nevertheless be the subject of actions in the courts at common law. ■

SCC rules disclosure of employee's rights to Unions does not violate Federal Privacy Act or Charter

In *Bernard v. Canada (Attorney General*), 2014 SCC 13, the Supreme Court of Canada (the SCC) set a new precedent in the area of an employee's expectation of privacy and a Union's right to collect basic personal information about employees.

Elizabeth Bernard (Bernard) was a member of a bargaining unit in the federal public service, but did not belong to the Union that had exclusive bargaining rights for her bargaining unit. In labour relations terms, this meant that Bernard was a "Rand Formula employee". Although she was not a Union member, she was entitled to the benefits of the Collective Agreement and representation by the Union, and was required to pay Union dues. The Union was the exclusive bargaining agent for all members of the bargaining unit and had representational duties - such as in collective bargaining, the grievance process, workforce adjustments, prosecuting complaints, and conducting strike votes. Those duties were owed to all bargaining unit members, whether or not they were members of the Union.

The Union was of the view that it required home contact information for bargaining unit members. It sought that information from the employer in order to carry out these obligations. The employer refused. Complaints were made to Public Service Labour Relations Board (the Labour Board) by the Union, alleging that the refusal to provide basic information constituted an unfair labour practice. The Labour Board directed the parties to reach an agreement and they did. The parties agreed that the employer would be required to disclose to the Union, on a quarterly basis, the home mailing addresses and home telephone numbers of members of the bargaining unit, subject to a number of conditions, all of which

related to the security and privacy of the information. The Union undertook not to disclose the information to anyone other than the appropriate Union officials, and to advise employees as to what information would be disclosed prior to its disclosure. An email was sent to all bargaining unit members, including Bernard. She responded by seeking Judicial Review two times, and alleged that her employer's disclosure of her personal contact information without her consent breached her rights under the *Privacy Act*, and violated s.2(d) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), her right to refuse association with the Union and s. 8 of the *Charter*, which deals with unlawful seizure. The Federal Court of Appeal concluded that the Labour Board's decision that the Union required employee's home contact information in order to fulfill its representational duties was reasonable and the Union's use of the home contact information was a "consistent use" under the *Privacy Act*.

The SCC upheld the Federal Court of Appeal's Judgment that the Labour Board's decision was reasonable and dismissed Bernard's appeal. The SCC noted that Bernard's ss. 2(d) *Charter* right to be free from association was not engaged, because she could not demonstrate she was forced to associate. Bernard's claim that the employer's disclosure of her personal information without consent constituted an unlawful seizure under section 8 of the *Charter* failed as well, given that she voluntarily disclosed her contact information to her bargaining agent. Section 8 was designed to protect against actions by the state and its agents, of which the Union is neither. ■

Ontario Labour Arbitration Board examines whether teachers can be assigned duties during their "unassigned" time

In *Hamilton-Wentworth District School Board v. Ontario Secondary School Teacher's Federation* (Working Conditions Grievance), [2013] O.L.A.A. No. 436, the Ontario Labour Arbitration Board (OLRB) considered the interpretation and application of the Working Conditions provisions in teachers' Collective Agreements, and whether secondary school teachers could be required to attend Professional Development sessions that were held during the course of a school day during teachers' "unassigned time".

The Ontario Secondary School Teachers' Federation (the Federation) acknowledged at the outset that the Hamilton-Wentworth District School Board (the Board) had the authority to assign Professional Development sessions or workshops to teachers. However, the grievance asserted that those "assignments" cannot be imposed during the unassigned portions of a school day. The Board claimed that the Federation's position would lead to an absurd and unworkable application of the Collective Agreement. Accordingly, the Board took the position that the language of the Collective Agreement did not support the Federation's case or, in the alternative, that there was a latent ambiguity that should be resolved with extrinsic evidence of the parties' history of negotiations.

The parties agreed to have four grievances heard together and to seek a ruling as to whether the Federation had established a prima facie case with respect to the four individual grievors. The parties further agreed that if a prima facie case was established, the Board would exercise the right it has reserved to respond with evidence regarding the history of negotiations.

There are 300 minutes with four instructional periods timetabled in each school day. The Collective Agreement provided that full-time teachers had 225 minutes of assigned time daily in each semester. The 3 'assigned' periods per day were allocated to instruction. The remaining time was what the teachers referred to as their 'unassigned' time or 'prep' time, asserting that it was protected from other assignments by their Collective Agreement.

The Collective Agreement outlined that during the unassigned time teachers could be assigned limited period on-call duties, supervision duties and mentoring duties. The Collective Agreement stated that *"no teacher shall be assigned duties other than those outlined"*. The Federation therefore argued that the 'unassigned' portion of the school day could not include other duties and the Board had violated their Collective Agreement by requiring professional development to take place during this time. The Federation further argued that professional development, collegial meetings, preparation and evaluation are carried out at the times of the teacher's choosing and cannot be assigned.

The Board argued that the Collective Agreement, particularly the provision stating that no teacher shall be assigned duties other than on-call, supervision and mentoring during their unassigned time, should be understood as listing all of the duties expected of a teacher. The Board stated it would be "absurd" to interpret the Collective Agreement to mean that no other duties or education responsibilities could be assigned during the school day.

The Arbitrator reviewed the context of the Collective Agreement and assessed the wording in light of the *Education Act*. The Arbitrator considered the relevant case law and observed that it supported the fact that teachers could be assigned duties other than those outlined in the Collective Agreement. However, the language of the Collective Agreement at issue in this case was ambiguous and the Board should be provided with the opportunity to call evidence and present arguments on the issue. It is important to note that this is an Interim Decision, meaning that the issues are still outstanding and the parties may choose to proceed further. Of the four cases, only one was determined to be substantive enough to proceed to the next stage.

At the conclusion of the Arbitrator's decision, she stated:

"Finally, I feel obliged to muse upon the implications of this case, albeit reluctantly. If the Federation is correct, it would mean that the School Board might decide to assign Professional Development workshops outside of the school day. It bears pointing out that in cases dealing with expectations upon teachers, it has been ruled that despite there being no contractual or express statutory basis, teachers can be obliged to perform reasonable ancillary activities over and above and/or outside of the instructional day. For example:

- *Parent-teacher interviews*
- *'voluntary' or extra-curricular activities*
- *health and safety training*
- *divisional or staff meetings*

Therefore, if the Federation ultimately succeeds, the result may be less palatable than the status quo.

Would teachers prefer to be assigned to the Professional Development workshops before or after school and be required to attending during times they would otherwise spend with their friends and families?"

The final Decision will hopefully assist in resolving the conundrum inherent in the Federation position. ■

— KC —

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