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Human Resources Newsletter

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Court of Appeal shaves $100,000 off Trial Judge's $550,000 punitive damages award

Pate Estate v Galway-Cavendish and Harvey (Township), 2013 ONCA 669, is the latest in a series of Judgments related to the dismissal of John Pate by the amalgamated Township of Galway-Cavendish and Harvey. A brief overview of the background facts of this case and the earlier Court decisions will be provided here. For additional commentary on earlier Court Judgments on this matter, see the October 2013 edition of this Newsletter.

In March 1999, the Corporation of the Township of Galway-Cavendish and Harvey (Township) fired John Gordon Pate, after he had worked for the Township for almost 10 years as a building inspector. The Township alleged that it had discovered discrepancies with respect to the amount of permit fees that Mr. Pate received and the amount that he forwarded to the Township. Based upon the evidence of John

Beaven, then Chief Budgetary Officer of the Township, criminal charges were laid against Mr. Pate.

In 2003, after being acquitted of all criminal charges, Mr. Pate sued the Township for damages for wrongful dismissal, malicious prosecution, and reputational injuries. He sought special damages for his criminal trial defence costs, aggravated damages, and punitive damages.

In the first judicial decision in this series (2009 CanLII 70502), the Trial Court found that John Beaven had provided only evidence that inculpated Pate and had withheld exculpatory evidence from the police. The police stated that had they been made aware of all the relevant evidence, no charges would have been laid against Mr. Pate. Mr. Pate was acquitted of all charges, but in the process he suffered harm to his reputation, his marriage dissolved, his family business was forced to close, and he was unable to find further employment. In addition to compensatory and aggravated damages and costs, the Trial Judge awarded Mr. Pate $25,000 in punitive damages and dismissed the malicious prosecution claim.

Mr. Pate appealed and the Ontario Court of Appeal ordered a new trial on malicious prosecution and the quantum of punitive damages (see 2011 ONCA 329). The parties agreed that the two issues should be adjudicated separately before the original Trial Judge and based on the original evidentiary record. In a November, 2011 decision (2011 ONSC 6620) the Trial Judge awarded Mr. Pate punitive damages of $550,000, an increase of $525,000 over the initial punitive damages award. In a December 2012 decision (2012 ONSC 6740), the Trial Judge awarded Mr. Pate $1.00 in damages for malicious prosecution, plus $20,000 for costs.

The Township appealed. The two issues for the Ontario Court of Appeal in its most recent Judgment were 1) Did the Trial Judge misapprehend the evidence and/or fail to apply the proper legal principles in determining that the Township was liable for malicious prosecution? 2) Did the Trial Judge fail to apply the proper legal principles in awarding $550,000 in punitive damages or was it excessive? It is the Court of Appeal's decision (2013 ONCA 669) on these matters that is the focus of this article.

The presiding Justices of the Court of Appeal upheld the Trial Judge's determination of the malicious prosecution issue. However, the Court split on the second issue, regarding punitive damages. A majority of the Justices found that $550,000 was excessive and reduced it to $450,000. Justice Lauwers, in dissent, would have upheld the $550,000 punitive damages award.

All of the Justices agreed that the Trial Judge's reasons on the punitive damages retrial indicated that he appreciated the purpose and objectives of punitive damages, which are retribution, deterrence and denunciation. The Trial Judge explained in his Judgment on the retrial that punitive damages, "*when added to compensatory damages, must produce a total sum which is rationally required to punish the defendant*" and must be an amount that is proportionate to the blameworthiness of the Defendant's conduct. However, though he correctly stated the relevant principles, the majority of the Court of Appeal found that the Trial Judge failed to adequately account for the other amounts already awarded to the plaintiff in this case, including costs.

Besides mentioning that the "total sum" of punitive and compensatory damages must be what is rationally required to punish the Defendant, the Trial Judge nowhere referred to damages and costs already awarded and, in Justice Cronk's view, the Trial Judge did not factor the overall compensation awarded into his quantification of punitive damages. Justice Cronk noted that Mr. Pate had already been awarded $34,100 in compensatory damages for dismissal without notice, an additional $23,413 because of the manner of his dismissal, $7,500 for criminal defence costs, and $75,000 for what

the Trial Judge termed "general and aggravated damages".

Justice Cronk, writing for the majority, reiterated the principles governing punitive damages from the leading case, *Whiten v Pilot Insurance*. Punitive damages are to be "reasonably proportionate" to such factors as harm caused, the severity of the misconduct and the vulnerability of the plaintiff. Where compensatory damages are insufficient to accomplish retribution and deterrence, punitive damages will be awarded "*in an amount that is no greater than necessary*" to achieve these objectives. Justice Cronk also noted that an appellate Court reviewing a punitive damages award must ask whether a reasonable jury, properly instructed, could have concluded than the amount awarded—and no less—was rationally required to punish the misconduct. Again citing the Supreme Court of Canada in *Whiten*, Justice Cronk noted that if punitive damages plus compensatory damages exceed what is required to punish the defendant, then punitive damages will be reduced or set aside on appeal.

Whereas Justice Lauwers did not believe that punitive damages should be reduced to take into account the fact that Mr. Pate had been awarded costs of litigation on a substantive basis and a "costs premium", Justice Cronk explained that these costs awards, which are higher than usual, had a punitive element that must be accounted for. Justice Cronk pointed out that compensatory damages also punish and in many cases are the only punishment required. Before awarding punitive damages, a Judge must consider the punitive components of compensation otherwise awarded. In the view of Justice Cronk and the Judges concurring with her, the Trial Judge had failed to do so.

The Ontario Court of Appeal displays caution about letting punitive damages awards get out of hand or become wildly unpredictable. This has long been a cause for concern with punitive damages, as they go beyond the more established and predictable practice of determining and compensating for losses (compensatory damages) and into the realm of punishing bad behaviour. At the same time, however, it seemed clear in this case that the egregious nature of the employer's conduct called for punishment and deterrence. This may explain why the majority still awarded to Mr. Pate's Estate a substantial amount of punitive damages: $450,000.

Unfortunately, Mr. Pate passed away in January 2011, and did not live to see the result of his challenge. ■

Court upholds dismissal of teacher with mental disability

In 2008, the Halifax Regional School Board fired a teacher who suffers from bipolar disorder because he had inappropriate email communications with a student. The teacher, Mr. Flinn, appealed his dismissal to an Appeal Board, which upheld the School Board's decision. He then applied for judicial review of the Appeal Board's decision, but the Trial Judge upheld his dismissal, finding that the Appeal Board's decision was reasonable. Mr. Flinn appealed, but the Nova Scotia Court of Appeal also decided against him in *Flinn v. Halifax Regional School Board*, 2014 NSCA 64.

During the summer of 2008, Mr. Flinn had been emailing back and forth with one of his female students. In his emails, he criticized the student's parents and talked about rescuing her from her parents. He once invited her for a drive to the ocean. He compared her need to leave her parents to his desire to leave his wife. He once recommended that she kill her parents. The student's parents discovered the emails on her computer and alerted the school principal.

Mr. Flinn called in sick on September 16, 2008, and did not return to teaching thereafter. Mr. Flinn had no prior disciplinary record and was regarded as an excellent teacher. Mr. Flinn was subsequently diagnosed with bipolar disorder and received treatment. Dr. Theriault,

a psychiatrist who assessed Mr. Flinn, believed Mr. Flinn was suffering from a hypomanic episode during the summer of 2008. Dr. Theriault also said Mr. Flinn had a chronic mental illness that would require ongoing treatment for the indefinite future. Dr. Theriault thought it would be reasonable for Mr. Flinn to return to a classroom setting, but that his mood should be monitored for depressive and hypomanic relapses.

Michael Christy, the School Board's Director of Human Resources, recommended that the Board dismiss Mr. Flinn. Although Mr. Flinn suffered from a mental disorder, Mr. Christy found that Mr. Flinn was capable of making informed judgments and that he understood the wrongness of his actions. Even if Mr. Flinn was not culpable, Mr. Christy was of the view that the Board could not accommodate him as there was no sure way of detecting an onset of hypomania and the risks to students were too significant.

After several meetings and hearings occurred, the School Board terminated Mr. Flinn in April 2010. The Board found that his conduct damaged the student's relationship with friends and parents and damaged her impression of herself. Mr. Flinn abused a position of trust and failed to comply with the *Education Act* by not referring the student to counsellors or health professionals. Mr. Flinn appealed to the Appeal Board, which consisted of one Arbitrator.

The Appeal Board found that Mr. Flinn was not culpable for his actions because he was suffering from a mental illness at the time of the incidents. The Appeal Board found that there was a *prima facie* case of discrimination. Since Mr. Flinn had a disability, the duty to accommodate was triggered. This duty requires accommodation to the point of "undue hardship". Expert evidence suggested that Mr. Flinn would continue to suffer from the same disability in the future, but that it could be controlled. However, the Appeal Board was not satisfied that the School could monitor the Appellant to the degree necessary to ensure student safety, should a relapse occur. The Appeal Board found that the presence of an ongoing risk to students and the impracticality of imposing on the principal and other teachers the duty of monitoring Mr. Flinn constituted undue hardship. Also, it was significant that Mr. Flinn had used his position as a teacher to carry out the conduct engaged in during the summer of 2008, when no teachers or staff could have been monitoring him.

Mr. Flinn applied for judicial review of the Appeal Board's decision. The Court found that the Appeal Board's decision was reasonable. On appeal, Mr. Flinn argued that the reviewing Judge erred with respect to determining whether Mr. Flinn could be reasonably accommodated. Mr. Flinn contended that the School Board did not canvass all reasonable possibilities to accommodate him, but limited its exploration of the possibilities to Dr. Theriault's suggestion that he be monitored. With the exploration of the possibilities for accommodation having been so limited, Mr. Flinn argued further that this error could not be corrected by the Appeal Board.

The Nova Scotia Court of Appeal, however, found that the *de novo* ("from the beginning") nature of the Appeal Board hearing rectified any deficiency in the School Board's decision. At the Appeal Board hearing, the Union had the opportunity to present and test evidence through cross-examination. Dr. Theriault testified before the Appeal Board and suggested ways to accommodate Mr. Flinn. It is a principle of administrative law that a breach of the duty of fairness may be "cured" by an appeal that takes the form of a *de novo* hearing before a different decision-making body which itself satisfies the duty of fairness in its proceedings.

The Court referred to an Ontario Court of Appeal decision, *Khan v University of Ottawa*, for the legal principles governing whether or not an error may be cured in a subsequent hearing. In short, it depends on the seriousness of the initial error, the appellate body's procedures and powers, and the weight the appellate body

attributes to the initial decision. The closer an appeal is to a complete reconsideration, with fair procedures, by a body that does not attribute significance to the initial decision, the more likely any defects in the initial decision will be cured.

In this case, the Nova Scotia Court of Appeal noted that, even assuming the Director of H.R. failed to consider all accommodation options, the Appeal Board made its own assessment based on evidence it heard over the course of five days. The Appeal Board hearing was the first formal adjudication of the matter. The burden at this hearing was on the School Board to show that it could not accommodate Mr. Flinn without undue hardship. Ultimately, the Appeal Board found that the risk of reoccurrence was too great. The Appeal Board took into account the vulnerability of the students to whom the School Board owed a duty, which the Appeal Board found to be reasonable.

The Appeal Board's review took into account the employer's duty to accommodate and the duty of the School Board to protect students from risk. The Appeal Board did not insist on an absolute standard of safety or no risk. Its decision does not suggest that persons with a mental disorder cannot be teachers. Rather, the Appeal Board assessed Mr. Flinn as an individual and considered facts specific to him, including the risks he posed, but also including his prior good record. Ultimately, however, the Appeal Board's decision that accommodating Mr. Flinn would require undue hardship was a reasonable finding of fact. The Court of Appeal therefore upheld the decision.

This case illustrates the legal principle that the duty to accommodate has limits. It also demonstrates the importance of fair procedures and of a full exploration of the possibilities for accommodation. It is only because the Court of Appeal was satisfied that the Appeal Board followed fair procedures and reached a reasonable decision that it upheld Mr. Flinn's dismissal. ■

Senior executive awarded 12 months' pay in lieu of notice after less than two years of work

Felice v Cardinal Health Canada Inc. was an unjust dismissal lawsuit brought by Joe Felice, who had been employed as a senior executive of Cardinal Health Canada Inc. and its predecessor corporation, Futuremed Health Care Products Corp., for 19 months.

Mr. Felice was 52 years old at the time Cardinal Health terminated his employment. Mr. Felice alleges he was induced to leave secure employment of almost five years to join Futuremed. Cardinal Health bought the shares of Futuremed in February 2012. Mr. Felice continued his position with Cardinal without interruption after the share purchase.

The written contract of employment with Futuremed provided for severance of twelve months of income if Mr. Felice's employment was terminated without cause. However, Mr. Felice later signed another document that Cardinal argued was a new, comprehensive employment contract. The Court agreed with Cardinal. Therefore, the severance provision offering 12 months' pay from the old contract no longer applied. Rather, Mr. Felice was entitled to receive a reasonable period of notice under the common law.

Mr. Felice had the burden of proving that he was induced to leave his former employment, and the Court held that he failed to meet the burden of proof. The Court then applied the factors for determining an appropriate common law notice period from *Bardal v Globe and Mail*, which are: (1) the character of employment; (2) the length of service; (3) the age of the employee; and (4) the availability of similar employment having regard to the experience, training and qualifications of the employee.

Without much explanation, the Court concluded that a 12-month period of notice was appropriate in light of the *Bardal* factors and

existing jurisprudence in which senior executives serving for a short term received lengthy notice periods.

This Decision confirms the principles applicable to dismissal without cause which must be considered by an employer. ■

Indemnification clause covered employee's costs of defending herself against an internal workplace investigation

The Simcoe Muskoka Catholic School Board (Board) hired Diane Legg as its communications officer in July 2000. When Ms. Legg was promoted to Communications and Public Affairs Director in 2008, she and the Board signed a new employment contract. The contract was drafted solely by the Board.

The contract included an indemnification provision stating that "*the Board shall … both during the term of this contract and thereafter indemnify and save harmless the Communications and Public Affairs Director … from and against: (a) all costs, charges and expenses whatsoever which the [Director] sustains or incurs in relation to any action, suit, or proceeding which is brought [against the Director]*". The Board's duty to indemnify the Applicant was subject to disqualification where the Applicant faces costs or charges because she acted in bad faith.

An employee lodged a complaint against Ms. Legg in November 2013, citing "*abusive behaviour*" and "*a generally negative work environment in the communications department due to her behaviour*". By early February 2013, concerns of others began to surface about Ms. Legg's alleged "*abusive, manipulative, and dishonest behaviour*", including allegations that Ms. Legg was not always where her work required her to be or where her expense reports indicated.

On February 4, 2014, the Board suspended the Applicant without pay. The Board also hired an investigative firm. Investigators interviewed a number of Board employees and conducted surveillance of Ms. Legg. They forensically examined her iPhone, computers, network logs and camera memory card. In light of the findings of the investigators, the Board decided on April 24 to dismiss the Applicant. According to the Applicant's employment contract, the Board was required to give written notice to the Applicant identifying the allegations against her and inviting her to appear at a proceeding before the Board.

Ms. Legg applied to the Ontario Superior Court of Justice for a determination of her right to ongoing indemnification by the Board for her legal and other costs and expenses incurred in defending herself. The fundamental issue was whether what the Board described as a "workplace investigation" was in fact a "proceeding" affecting Ms. Legg's legal rights.

Clearly, there was no legal "action" or "suit" against the Applicant, but the contract also included: "proceeding". In *Legg v. Simcoe Muskoka Catholic District School Board*, 2014 ONSC 3172, the Court found that "*one could not find a much broader word to describe activities that could trigger the advancement and indemnification principle*." The Board drafted the contract and it chose not to use a phrase such as "legal proceeding" or "regulatory proceeding", which may have narrowed the meaning.

The Court determined that the initial meetings between the parties and their attempts toward informal resolution were not part of a proceeding, or at least the proceeding with which this Application was concerned. Rather, the proceeding began when Ms. Legg was told that she was to be investigated. The proceeding intensified with the suspension and flowed through the retention of a professional investigator, the recording of interviews, the forensic examination and surveillance, the presentation of the investigation, the dismissal and the Board proceeding.

The Court also found that the inclusion of the words "save harmless" provided added assurance to Ms. Legg and clarified that indemnification was to be immediate and ongoing. The duty to save harmless is broader than that of indemnification. Neither duty can be avoided simply because the employer is the initiator of the proceedings.

The Court ordered the Board to reimburse Ms. Legg for costs, charges and expenses that she had incurred and would incur in defending herself.

Boards which have indemnification clauses for Senior Administration should consider amending any qualification where the employee faces costs or charges because he/she acted in bad faith, to be determined in the sole discretion of the Board. ■

Court upholds school board's refusal to pay retirement gratuity to teacher convicted of sexual assault

The day after he was convicted of sexual assault on a minor, Gavin Williamson, a teacher with the Upper Canada District School Board from 1981 to 2011, advised the Board that he was retiring, and claimed the retirement gratuity provided for under the collective agreement.

The sexual assault charges laid against Mr. Williamson on January 6, 2009 involved incidents with a student whom he had purported to mentor between 1979 and 1982. Upon learning of the charges, the Board had assigned Mr. Williamson to work at home with full pay. On December 22, 2011—the day after he was convicted—the Board wrote to Mr. Williamson in order to place him on unpaid home assignment. Mr. Williamson wrote to the Board the same day informing the Board that he was retiring immediately and claimed the retirement gratuity.

Article 16.10.01 of the collective agreement provided for a retirement gratuity upon retirement as follows: "*A teacher retiring from the teaching profession for the reason of health or age (the age at which a teacher is in receipt of a pension from the Teacher's Pension Plan Board), or any reason approved by the Board after (10) or more years of continuous service with the Board or predecessor Boards, shall be entitled to a retirement gratuity to a maximum of two hundred (200) days* [...]"

The Board refused to pay. The Federation initiated a grievance.

The labour Arbitrator determined that the reason for Mr. Williamson's retirement was the only issue in this case. The Arbitrator did not accept the Federation's argument that the mere fact that the Grievor is of an age to receive a pension meant automatically that he had to retire "for the reason of age" as required by Article 16.10.01. Such an interpretation would fail to give contractual effect to the added words "for the reason of" in the agreement. The fact that Article 16.10.01 stipulated "the" reason meant an inquiry into the main or primary reason for leaving the teaching profession was required. The Arbitrator further noted that *"[…]while clear language is needed to disentitle employees to an earned benefit under a Collective Agreement, the limiting clause of 'for the reason of' under Article 16.10.01 is precisely such clear language*".

The Arbitrator found the Grievor's retirement was not for the reason of age, but was prompted by his criminal conviction. He was therefore not entitled to the gratuity. The Federation applied for judicial review of the Arbitrator's decision. The Court applied the standard of reasonableness, meaning the onus was on the Applicant Federation to show that the Arbitrator's decision was unreasonable.

The Ontario Superior Court of Justice in *Ontario Secondary School Teachers Federation of Ontario v Upper Canada District School Board,* [2014] O.J. 2110, found that the Arbitrator's decision

was reasonable. The Court agreed with the Arbitrator that the true reason for Mr. Williamson's retirement was "*blindingly obvious*". The Court found that Arbitrator had correctly articulated the issues in the case and agreed that the wording of Article 16.10.01 permitted the importing of a subjective element into the "reason" for retirement. Mr. Williamson's subjective reason for retiring was not one that entitled him to a gratuity under the collective agreement.

Counsel for the Federation argued that introducing a subjective element was problematic because it could mean that retiring to spend more time with grandchildren or to care for aging parents, for example, would disentitle a person from receiving the gratuity. However, the Court countered that such reasons for retiring would naturally fit with the third category in Article 16.10.01, namely "*any reason approved by the Board*". The Court concluded that the parties had bargained for a collective agreement in which certain reasons for retiring would not be a basis for receiving a gratuity and that sexual assault would obviously falls in that category.

The Arbitrator was required to give meaning to the words used in the collective agreement and the Court found that the meaning the Arbitrator attributed to the words in Article 16.10.01 was reasonable. It was sufficiently clear that the addition of "*for the reason of…*" and the portions following that phrase were intended to restrict the availability of the gratuity. Though the Arbitrator commented that it was "obvious" that retiring because of a sexual assault fell outside of Article 16.10.01, clearer drafting of this Article may have prevented this from becoming a litigated issue. ■

Requiring an employee to take disability leave may amount to constructive dismissal

In the case of *Irvine v. Gauthier (Jim) Chevrolet*, 2013 MBCA 93, the Manitoba Court of Appeal ruled that Jim Gauthier Chevrolet Oldsmobile Cadillac Ltd. (Jim Gauthier Chevrolet) constructively dismissed its employee, Kelly Irvine, by forcing him to take an indefinite leave of absence due to vision-related symptoms of his diabetes. Irvine was awarded $346,111.00, plus costs.

The Court of Appeal overturned the decision of the Trial Judge, which had found that the Plaintiff employee, Mr. Irvine, was not terminated but quit his job. The Court of Appeal concluded that the Trial Judge erred in law by not addressing the Plaintiff's claim that he was *constructively* dismissed. Constructive dismissal arises when an employer unilaterally makes a fundamental change to the employment relationship.

Kelly Irvine was a senior employee of Jim Gauthier Chevrolet for 19 years. He was the general manager of new car sales and a vice-president of the dealership when the events that led to this case occurred. Irvine began experiencing vision problems in 2005 and was subsequently diagnosed with diabetes. By 2007 he had lost sight in one eye.

On May 5, 2009, Irvine and his wife, who also worked for the dealership, were called into a meeting with dealership owner Jim Gauthier, Jim's son, and the dealership's comptroller. After the meeting, Irvine left the dealership and never returned, except to pick up personal belongings. The dealership paid the Plaintiff for two weeks after the May 5th meeting and filed employer forms in support of an application by the Plaintiff for long-term disability, which the Plaintiff never filed. On June 1, 2009, another employee of the dealership was promoted to Irvine's position of general manager.

In August 2009 the Plaintiff filed his statement of claim alleging that he was wrongfully dismissed when he was told to go on long term disability or be terminated. He argued, in the alternative, that he had been constructively dismissed. The dealership denied that the Plaintiff was threatened with termination if he

didn't go on long-term disability and asserted that the Plaintiff's employment ended with him quitting. The Trial Judge found the Plaintiff's evidence less probable than the dealership's position that Irvine was advised to take time off, convalesce, apply for disability insurance and return when he was better.

The Court of Appeal decided it was unnecessary to revisit the Trial Judge's findings of fact. Even on the facts as laid out by the Trial Judge, the Court of Appeal found a basis for Irvine's claim. As Ellen E. Mole, a legal scholar cited in the Court of Appeal's decision, explained, *"[A]n employee who is forced to resign rather than accept a fundamental change in employment is not precluded from suing by the fact that he or she resigned, because he or she has already been constructively dismissed*."

The employer did not ask Mr. Irvine to resign or lay him off. Rather, Irvine was asked to take a "leave of absence." However, the Court noted, again citing Ellen E. Mole, "*Where a cessation of employment is permanent and there is no intention to recall the employee or there is no assurance of the job resuming, a dismissal has occurred, regardless of whether it is called a termination, a layoff or a leave of absence.*" For legal precedent on this point, the Court cited the leading Supreme Court of Canada decision *Farber v Royal Trust Co.*, [1997] 1 SCR 846.

On the issue of whether or not a leave of absence is forced, the Court observed that *"[w]hether there was a plan, or a real and meaningful dialogue, between the employer and the ill employee prior to the forced leave of absence is often an important consideration*." In this case, there was no discussion at the May 5th meeting. Jim Gauthier simply told the Plaintiff he could return when he was "better", but replaced him shortly after. The Plaintiff was not asked to obtain a medical report or to discuss difficulties he was experiencing at work in order to plan for his return. Rather, he was unilaterally removed from his position. This amounted to a forced leave of absence—a fundamental change in the employment relationship amounting to constructive dismissal.

Once the Plaintiff employee has made out a case for dismissal, the onus shifts to the Defendant employer, who may then try to prove on a balance of probabilities that the employee was dismissed for just cause or that the contract of employment was *frustrated*. Only the latter was in issue in this case:

"*Whether a contract has been frustrated due to illness depends on a number of factors including the terms of the contract, how long the employee is likely to remain sick, the nature of the employment, the nature of the illness, the availability of sick leave and pay, the period of past employment and how long the employer should reasonably be expected to await the employee's return*".

Evidence of frustration is typically well documented and in the case of illness would include doctor's reports attesting to an employee's disability and prognosis. The Trial Judge accepted evidence that the Plaintiff had eyesight difficulties and needed some assistance. "*However*," the Court of Appeal determined, "*the dealership had no documentation by way of medical reports, or otherwise, attesting to the Plaintiff's prognosis and whether he was permanently disabled from doing his job*." Had the dealership engaged in meaningful discussion with Irvine, it might have obtained such information. Since it did not, it could not demonstrate that the employment contract was frustrated. The dealership was therefore liable for the constructive dismissal of Mr. Irvine.

Where an employee may be having difficulties meeting the demands of their job due to illness or disability, encouraging such an employee to take a leave of absence may seem like an appropriate option. However, if imposed unilaterally and for an indeterminate length of time, a leave of absence is forced and amounts to constructive dismissal, which in turn could

result in a substantial damages award in the employee's favour, as in this case. ■

Arbitrator excludes audio recordings of collective bargaining sessions from evidence

In *Jazz Aviation LP v Canadian Airline Dispatchers' Association* (Grievance Award, May 27, 2014), an Ontario Arbitrator decided to exclude from evidence the audio recordings of collective bargaining sessions that were secretly made by Union representatives.

Jazz Aviation (Jazz) is a subsidiary of Air Canada. The Canadian Airline Dispatcher's Association (Union) is the Union representing dispatchers who work for Jazz. On April 22, 2012, at the beginning of a meeting to negotiate a renewal collective agreement, the spokesperson for the Union asked Jazz whether it could record the bargaining sessions. Jazz's spokesperson replied that the company was not comfortable with having the sessions recorded. The Union surreptitiously recorded the bargaining sessions anyway.

An agreement was reached between the parties later that year pertaining to a wage grid that would be applied to assistant dispatchers. Differences later arose between the Union and Jazz about the application of the wage schedule under their new collective agreement. The Union filed a grievance. At the Grievance Arbitration Hearing, the Union sought to introduce into evidence its secretly made audio recordings of the collective bargaining sessions.

The Ontario Arbitrator reasoned that whatever light the audio recordings might shed on issues that were in dispute at the Arbitration Hearing could not justify admitting the recordings into evidence. The effect of admitting the recordings "*would be to seriously undermine the relationship between these parties, especially where permission [to record the bargaining sessions] had been requested and was refused*," the Arbitrator explained. Moreover, it would set a bad precedent, *"[suggesting] to the labour relations community at large that this is acceptable in an ongoing collective bargaining relationship, when clearly it is not*."

The *Canada Labour Code*, the legislation governing the relationship between the parties in this case, requires that collective bargaining be done in good faith. The Arbitrator found the surreptitious recording of the bargaining sessions was antithetical to good faith bargaining.

While the Arbitrator excluded the recordings for the reasons above, it declined to punish the Union as the employer requested by also excluding all other evidence related to the bargaining discussions. The Arbitrator was willing to admit the bargaining notes taken by Union representatives during the sessions and to hear testimony from any Union witness who had not heard the excluded recordings or read a transcript of those recordings.

The main emphasis of the Arbitrator's Decision in this case was that the *Canada Labour Code* aims at establishing and maintaining a harmonious and constructive collective bargaining relationship. Conduct that flies in the face of good faith bargaining should not be rewarded.

The reasoning can also be applied to other circumstances where recordings are made improperly; for example, discipline meetings. ■

Board should have re-assigned, not suspended, school custodian charged with sexual assault on a minor

In *TDSB v CUPE Local 4400* (Award June 7, 2013), a labour Arbitrator ruled that the Toronto District School Board (Board) was not justified in suspending without pay a school caretaker

(Grievor) who was charged with sexually assaulting his 14-year-old stepdaughter. The Board suspended him with pay at first, but shortly after changed his status to suspended without pay, which led to this Grievance being filed. His suspension without pay lasted for over two years.

The issue before the Arbitrator was whether or not the Board had cause to suspend the Grievor without pay while the charges remained outstanding. The Grievor's Union argued that the Board should have assigned the Grievor to one of a number of available work assignments which would have prevented contact with minors. Locations were available at which the Grievor could have worked as a caretaker without any risk of being in the presence of anyone under the age of 16.

The Board's policies provide that when an employee is charged with a criminal offence the employee will be assigned immediately to suitable alternate duties not involving contact with students until the charges have been disposed of. The Board's policies further provide that an employee will be dismissed if *convicted* of a sexual offence against a student, or if an internal investigation determines, on a balance of probabilities, that the employee sexually abused, sexually exploited or sexually assaulted a student.

The Board did not begin to investigate until after the charges had been withdrawn. Its investigation ended shortly after it began, as the mother of the alleged victim told the Board that she did not want her daughter involved further and would not cooperate. Nonetheless, the Board argued that the nature of the charges, the age of the alleged victim and the alleged involvement of drugs created a risk to the Board's legitimate concerns sufficient to justify suspension without pay. One of the Board's legitimate concerns was the public perception of the safety of its schools.

The Arbitrator laid out the principles that govern whether the existence of criminal charges is a legitimate cause for suspension. The existence of a criminal charge must reasonably give rise to a legitimate fear for the safety of other employees or property, or of substantial adverse effects on business. The onus is on the employer to show the existence of such a risk. This need not be proven through direct evidence of negative public attention. Rather, the potential for negative impact is the key consideration. The Arbitrator is required to assess whether a fair-minded, well-informed member of the public who was made aware of the nature of the pending charges and the nature of the proposed alternative work would lose confidence in the ability of the Board to keep children and perhaps other employees safe.

Further, the employer must show that it investigated the charge in a genuine attempt to assess the risk of continued employment and took reasonable steps to ascertain how it might lessen that risk. Finally, if suspension occurs, there is a continuing obligation to consider the possibility of reinstatement. With schools in particular, public perception is an important consideration as parents need to feel that their children are safe when in the care of the school.

The Arbitrator found that the Board never made it past the step of establishing a risk to its reputation or other legitimate interest. The reason for this was simply that there was work available that was completely separated from students and the Board did not suggest that the Grievor might be a risk to adults or property at other available work locations.

The Board also pointed to the Grievor's history of misconduct and the disciplinary action taken against him as evidence supporting its decision to suspend. The Arbitrator found that this was not relevant. When suspension occurs due to the mere existence of criminal charges, such suspension is non-disciplinary. "It follows that the employee's prior disciplinary record cannot play a role in assessing whether there is cause for such a suspension," the Arbitrator ruled, unless perhaps the past misconduct is logically relevant to assessing the risk of continuing to

employ him in the work that the Union suggested. In this case, the Grievor's past workplace misconduct had been dealt with and the Grievor kept on as an employee.

As a remedy, the Arbitrator ordered the Board to compensate the Grievor for any loss of wages or benefits that resulted from his suspension.

Board Policies should not mandate alternate work and should be flexible enough to enable the Board to impose appropriate interim measures. ■

No duty to accommodate where employer could not have known about employee's disability

In *Stewart v Ontario (Government Services)*, 2013 HRTO 163J, Applicant Heather Stewart alleged discrimination with respect to employment because of her disability, family status, marital status, age, and association with a person identified by a protected ground. Ms. Stewart also alleged that the Respondent breached the *Code* by failing to accommodate her learning process disorder and ADHD. The Respondent had dismissed Ms. Stewart for poor performance.

Ms. Stewart alleged that a few weeks after she started working for the Respondent, management personnel began harassing her. She claimed her direct manager was rude, ignored her, interrupted her in meetings, excluded her from social events, and responded negatively to requests to attend medical appointments, among other things. She also alleged that, following her termination, her manager failed to provide timely responses to requests from prospective employers for an oral reference.

The Human Rights Tribunal held a summary hearing to determine whether or not Ms. Stewart's claims of discrimination had a reasonable prospect of success. Claims with no prospect of success are dismissed at the summary hearing stage and do not proceed to a full hearing. In a summary hearing, the Tribunal does not assess the truth of an Applicant's claims. Rather, the Applicant's factual claims, absent clear evidence to the contrary, are assumed to be true. The Tribunal simply determines whether those claims are capable of supporting a finding of discrimination.

In this case, the Tribunal had to decide whether there was sufficient evidence available to connect the allegedly unfair treatment with the Applicant's disability, family status, marital status, age, or association with a person identified by a protected ground. Without a connection between differential treatment and a personal characteristic listed in the *Code*, a claim of discrimination cannot succeed.

With respect to age, the Applicant, who was 50, alleged that her manager perceived her to be of lesser value because of her age. This allegation was dismissed by the Tribunal as based on the Applicant's beliefs rather than on any specific comments or behaviour of her manager that might support an inference that she was treated in the manner she alleged because of her age.

The Tribunal also dismissed Ms. Stewart's allegations of harassment with regard to her learning process disorder and ADHD. Ms. Stewart admitted in her Application that she did not disclose these to her employer. Nevertheless, she argued that the Respondent knew or ought to have known of these disabilities because of her behaviour, her stated preference for visual learning aids, her difficulties in remembering proper pronunciations and acronyms, and statements she made concerning her children having learning disabilities.

The only evidence that Ms. Stewart pointed to as a connection between the alleged harassing treatment she experienced and these disabilities was her manager's assessment of her performance. That is, according to Ms. Stewart, her manager identified performance problems closely aligned with symptoms of processing

learning disorder and ADHD; therefore, Ms. Stewart argued, her manager must have known she had these disabilities. The Tribunal found her belief that her manager must have known to be speculative. If at the summary hearing the Applicant cannot point to evidence beyond his or her own assumptions, the Application will be dismissed as having no reasonable prospect of success.

Ms. Stewart's allegations with respect to the duty to accommodate were also dismissed. The duty to accommodate is not a free standing right under the *Code*. Rather, it arises when an Applicant claims she has experienced direct or adverse effect discrimination. The Ontario Human Rights Commission's *Policy and guidelines on disability and the duty to accommodate* sets out the employee's obligations, which include making one's needs known as a first step and cooperating in accommodation efforts thereafter.

When an employer is aware or ought reasonably to be aware that an employee has disability-related needs, the procedural branch of the duty to accommodate is engaged and the employer has a positive obligation to inquire into the employee's needs. Ms. Stewart contended that her references to her learning better with templates and visual aids, her difficulties with acronyms and pronunciations, and her children's learning disabilities were sufficient to trigger a duty to inquire into her accommodation needs on the part of the Respondent. The Tribunal disagreed.

The Tribunal found that it was not unreasonable for the Respondent to conclude that the Applicant's statements, behaviours, and performance problems were simply indicative of someone struggling to do the job. It was entirely reasonable for the Respondent, without clearer information, to conclude that Ms. Stewart's performance problems were entirely skill related.

As for the Applicant's other claims of discrimination, the Tribunal found that because there was some evidence that might on closer examination support a finding of discrimination, those claims could proceed to a full hearing.

In this case, the employer's duty to accommodate an employee's disability was not triggered because the employee had not fulfilled her obligation to make known her needs to her employer. Also, importantly, the employer's duty to inquire was not triggered because the employee's performance problems were plausibly skill-related. Had the facts been such that the employer ought reasonably to have known that an employee was struggling due to a disability, the matter would not have been dismissed at the summary hearing stage. ■

Court awards damages for injury to dignity under Ontario Human Rights Code

The *Ontario Human Rights Code* was amended in 2008 to allow for human rights remedies to be awarded by a Court in a wrongful dismissal case. In *Wilson v. Solix Mexican Foods Inc.,* 2013 ONSC 5799, the first decision by a Court awarding damages under the *Code*, the Ontario Superior Court awarded Patricia Wilson $20,000 for injury to her dignity, feelings, and self-respect.

The Plaintiff, Patricia Wilson, was dismissed without cause on May 19, 2011. Wilson began working for the defendant, Solis Mexican Foods Inc. (Solis), on January 5, 2010. She was Assistant Controller for about five months, and then was transferred laterally to Business Analyst. In its November, 2010 performance review, apart from noting a time management issue, Solis gave Wilson a grade of satisfactory or better.

Shortly after, however, it appeared that some concerns about Wilson emerged, and on December 16, 2010, the Solis Human Resources Manager met with the Plaintiff. At this meeting, Wilson mentioned problems with her back and that she felt physically unwell.

During March and April, 2011, there were frequent internal communications about the Plaintiff's back problems. In early March, the Plaintiff stopped coming to work and on March 7, Solis received a brief note from Wilson's physician, Dr. Belyea, which stated only that Wilson would be "*off work until further notice due to medical reasons*."

Solis requested that more detailed medical documentation be provided by March 22. Wilson provided e-mail updates, but nothing further with Dr. Belyea's name. On March 24, Roberts requested a doctor's note by March 29. Wilson sent a doctor's note on March 28, which advised that Wilson was ready to start a "graduated return to work", with four hours per day the week of April 4, six hours per day the week after, and eight hours per day the week after that.

Solis found this plan unacceptable and required that Wilson be capable of returning to full-time hours and full duties before transitioning back into work. It asked the Plaintiff to have a Functional Abilities Form (FAF) completed by April 18. Dr. Belyea completed and signed the Form on April 12. The Form suggested that Wilson could return to work full-time provided she was accommodated by allowing her to combine sitting, standing, and walking.

Solis did not accept such an arrangement, but reiterated its requirement that Wilson be capable of returning to her regular hours and duties before coming back to work. Solis also required Wilson to complete another FAF by May 10. Another FAF was never provided. On April 28, Solis received a further note from Dr. Belyea, which said simply that Wilson would need to be off work until mid-June for medical reasons. On May 19, the Plaintiff's employment was terminated.

The Court found that Wilson was entitled to three months' pay in lieu of notice under the *Employment Standards Act*, based on her application of the factors listed in *Bardal v Globe and Mail* decision. Solis had only given her two weeks' pay in lieu of notice.

This case is noteworthy, however, for the Court's award of damages under the *Ontario Human Rights Code*. Section 5(1) of the *Code* gives every person the right to equal treatment with respect to employment without discrimination because of disability. Wilson argued that her back pain qualified as a disability, which Solis did not dispute. Solis maintained that its decision to dismiss Wilson was based on the fact that it was selling its New Orleans Pizza division and was unrelated to Wilson's back problems.

The Court stated the issue this way: "*If an employer regards disability as a factor justifying termination (or other negative treatment), the employee in question is not receiving 'equal treatment…without discrimination' as s. 5 (1) of the Code requires*."

The Court found the Plaintiff's back issue was a significant factor in the decision to terminate her employment and pointed to several facts in support of this conclusion. Wilson received an acceptable performance review in November, but in December, just five days after mentioning her back problems to the HR Manager, the HR manager met with the COO and Controller and they concluded it was "*time to consider that [the Plaintiff] may not be suited to Solis.*" In March, the Plaintiff provided the medical documentation requested. Solis then rejected the proposal that Wilson return to work on a graduated schedule and not long after rejected the idea of having the Plaintiff return to work and alternate between standing, sitting, and walking.

If the sale of Solis' New Orleans Pizza division was the real reason for Wilson's termination, the Court questioned why there had been no communication with the Plaintiff about the sale until post-closing. The Court found that the sale was merely "*the excuse [Solis] needed to rid itself of the Plaintiff once and for all*." The actual decision to fire the Plaintiff started with her

complaints on December 16, 2010, the Court found, and only its implementation was delayed.

Section 46.1 of the *Code* gives Courts the authority to award damages for human rights infringements in a civil proceeding, "*including compensation for injury to dignity, feelings and self-respect*." The Court stated that the only evidence presented to her on the injury to the Plaintiff's feelings, dignity was Plaintiff's statement that she was "*shocked, dismayed and angered*" by the defendant's April 14 letter rejecting the second proposal for her return to work.

However, the Court found that the *Code*'s remedies provisions were broad enough to permit compensation for the loss of the right to be free from discrimination and victimization. In this case, the Plaintiff had lost "the right to be free from discrimination" and had experienced victimization. In addition, the Court found that Solis' breach of the *Code* was serious. Solis had "*orchestrated the dismissal and was disingenuous at various times both before and during termination*." In light of this, the Court found that $20,000 in damages under the *Code* was appropriate.

The Court's broad approach to section 46.1 of the *Code* is noteworthy as it allowed the Plaintiff to obtain a significant damages award even without evidence confirming injury to her dignity, feelings, and self-respect. ■

Employee awarded damages for employer's failure to investigate allegations of racial discrimination

The Ontario Human Rights Tribunal's (Tribunal) decision in *Morgan v. Herman Miller Canada Inc.,* [2013] OHRTD No. 650, demonstrates that an employer can be held liable simply for failing to investigate allegations of discrimination by an employee under the *Code*. The employer has a duty to take reasonable steps to address allegations of discrimination.

Morgan was employed by Herman Miller Canada Inc. (Herman Miller), the corporate Respondent, as an Installation Scheduler. Morgan alleged that he was assigned tasks that fell outside of his job description, performing menial tasks such as breaking down boxes, taking out garbage, and lifting heavy furniture. He believed that he was assigned these tasks due to his race and colour and that the Vice-President Finance/Operations (V.P.) of the company at the time, thought it was the Applicant's duty to act like a janitor or moving man.

In the winter of 2008, Morgan had raised a human rights issue with respect to an internal company email about an installation team, which contained a remark that the team looked like they were "*picked up at the corner of Sherbourne and Queen*". Morgan alleged this email was discriminatory since the entire installation team was black and the Sherbourne and Queen area is predominantly populated by homeless black men. Morgan raised this issue to the V.P., but the V.P. disagreed with Morgan that the email had racist overtones. The V.P. also noted to Morgan that the email was not addressed to him. The V.P. did not act further on the matter.

After speaking with a human resources manager at the company in February 2010 indicating his discrimination concerns, Morgan claimed that the manager told him that she would follow up on the complaint and never did so. Morgan also spoke to his supervisor about his concerns. Finally, Morgan informed the company's new director of sales about the same issues. The director emailed the V.P. indicating that Morgan was clearly unhappy working for the company. She also provided several highlights of the conversation. No one at Herman Miller got back to Morgan and his employment was terminated on March 30, 2010.

Morgan then filed an Application under section 34 of the *Human Rights Code* ("the *Code*")

alleging discrimination and harassment with respect to employment because of colour. Morgan also claimed reprisal, meaning he alleged that his employer sought to punish him for asserting his rights under the *Code*. Reprisal itself is prohibited by the *Code*.

Herman Miller denied it had treated Morgan any differently than its other employees. It also claimed that the tasks Morgan was asked to perform were part of his job description. The V.P. testified that Morgan was dismissed due to his negative influence in the workplace. Morgan was profoundly unhappy and his "*communication style was unprofessional, loud and inappropriate*". It was alleged that Morgan communicated false information to another Herman Miller employee stating that the Toronto Herman Miller dealership was going to be sold due to economic conditions. This undermined Herman Miller's efforts to maintain employee morale in difficult times. Morgan was ultimately terminated solely due to his spreading of inaccurate information and his overall hostility and negativity, the employer insisted. However, if discrimination was found, the employer argued that the Tribunal should take into account Morgan's past misconduct and the likelihood that he would have been dismissed in the future.

The Tribunal found that the decision to terminate Morgan's employment was made as a reprisal because the Applicant had raised issues of harassment and discrimination in the workplace. The Tribunal concluded that Morgan's unhappiness and negative attitude was a direct result of his perception that he was being treated in a discriminatory manner. The Tribunal did not accept the Respondents argument that damages should be reduced because Morgan would have been dismissed in the future: "*Who knows what would have happened if the respondents had dealt with the applicant's human rights issues— it may or may not have resulted in an improvement in the applicant's attitude at work".*

The Respondents did not adequately address or take steps to respond to the Applicant's allegations of discrimination. The Tribunal found that the Applicant genuinely believed that he was subjected to differential treatment because of his colour. However, based on the evidence, the Tribunal held that Morgan had not suffered discrimination in employment on the basis of race. Despite the absence of racial discrimination, the Tribunal held that the employer breached the *Code* by failing to investigate Morgan's claims.

The Tribunal applied the following criteria, which were established in an earlier Tribunal decision, for assessing whether an employer had adequately responded to an employee's human rights complaint:

(1) An employer should have an awareness of the issues of discrimination and/or harassment. The Tribunal will consider whether there is a complaint process in place and whether adequate training has been provided to both employees and management;

(2) An employer should take a complaint made by an employee seriously and should investigate the matter promptly; and

(3) An employer should resolve the complaint and provide a reasonable solution.

The Tribunal decided that the employer had not satisfied *any* of the three criteria. The Tribunal awarded Morgan damages of 14 months' pay, as well as $15,000 for injury to his dignity, feelings and self-respect. The employer was also ordered to hire a human rights expert to review the company's policies and train its staff. The V.P. was not held personally liable for damages; he was, however, ordered to complete a human rights training course.

This case confirms that the failure to follow procedural requirements may result in a finding of breach of the *Code*. ■

Employee, laid off for discriminatory reasons, entitled to defined benefit pension

The Canadian Human Rights Tribunal (Tribunal) found that the Complainant in *Grant v. Manitoba Telecom Services Inc.,* 2014 CHRT 14, had been subjected to discrimination based on disability when her employer decided to lay her off. Heather Lynn Grant had worked for Manitoba Telecom Services Inc. (MTS) for 26 years before she was laid off in February 2007. Grant's performance evaluations had generally been positive, but worsened following her diagnosis of Type II Diabetes in 2005. MTS knew about Grant's diabetes.

MTS announced a major downsizing initiative in 2006. In Grant's region, it was decided that either she or another employee would be laid off. After consulting their performance reviews and interviewing their supervisors, the layoff committee laid off Grant and kept the other employee. Grant then filed a Complaint with the Canada Human Rights Commission.

In its 2012 Decision, the Tribunal ruled that Grant's performance had been "*evaluated without seriously considering the effects of her disability on her performance*". The Tribunal awarded $10,000 for Grant's pain and suffering and an additional $10,000 because the employer "*engaged in the discriminatory practice wilfully or recklessly*".

Grant requested other remedies as well, including compensation for missed pension contributions and reinstatement. Reinstatement was not ordered. In its 2012 decision, the Tribunal decided to give the parties an opportunity to provide additional submissions on the pensions issue. The Tribunal explained that it was concerned with remedying "*the opportunity the Complainant lost to have her performance assessed in a non-discriminatory manner and consequently, the possibility she shared with one other candidate of retaining her job*". The Tribunal found that, regardless of discriminatory practice, there was "*at least a 50% possibility*" that Grant would have been laid off anyway.

Therefore, the Tribunal ordered MTS to "*contribute to [Grant's] pension plan half of the pension contributions it would have made*", but the Tribunal also used the phrase "*restore the lost pension benefits*" in its Order. MTS and Grant disagreed on what remedy the Tribunal had ordered. Specifically, they disagreed over whether MTS owed Grant (a) 50% of the pension contributions MTS would have made or (b) 50% of the pension benefits Grant would have received, less the contributions Grant would have made. The Tribunal's December 19, 2013 Decision dealt with this dispute and decided that (a), above, was correct. However, in its April 10, 2014 decision, the Tribunal found that both (a) and (b) resulted in the same award, as explained below.

The Tribunal clarified in its 2013 Decision, that the Award was for "***half*** *of the* ***employer's pension contributions*** *for the* ***period following the layoff***" (emphasis in original). The Tribunal intended to deal with the time after Grant's layoff separately from the time before. For the period up until her layoff, she was entitled to full pension benefits. After her layoff, only half the employer's contributions were awarded, because of the possibility that the complainant would have lost her employment anyway. She received the employer's contribution only because the complainant did not lose her own contributions, but simply did not pay into the plan following her layoff.

There was no dispute that the employer's normal contributions for the relevant time period would have been $17,789.72. However, the complainant argued that the $17,789.72 figure did not take into account special contributions and interest. Grant had not raised this argument in her initial submissions, and the Tribunal noted that it was unfair to Respondent to raise it in her reply. Nevertheless, the Tribunal, "*in the interests of justice*", allowed her

argument to proceed and directed MTS to provide a response.

On April 10, 2014, the Tribunal released its final decision on the pensions issue. MTS argued that if special contributions for the period following layoff were awarded to the complainant, it would result in double recovery for the pre-layoff period because the complainant would be receiving both the benefit and the contributions which fund that benefit for the same pre-layoff period. The Tribunal found that MTS presented a "*narrow and strict interpretation of the distinction between benefits and contributions*" and concluded: "*Given the pension is a defined benefit, the exclusion of special contributions, or only including the 'actual special contributions' required 'during' the period following layoff, would stray far from the intent of the Tribunal's order of awarding the Complainant comparable retirement benefits to those she would have received from the Respondent had the Complainant remained in its employ*."

There would be no double benefit because, the Tribunal explained, the pension is a defined benefit that remains the same whether the special contributions were paid pre or post layoff. The Tribunal also awarded interest on the normal and special contributions as being "a function of and included within the applicable pension plan." The starting point for calculating the remedy, the Tribunal stated, is "*what the Complainant's pension benefit would have been*", from which it subtracted what the Complainant's contributions would have been, leaving us with the figure the employer must contribute to provide for the defined benefit.

In its final Order, the Tribunal ordered MTS to pay Grant half of what her pension benefits would have been minus what the contributions would have been, or half of $98,83.81.

Employers should be aware of the potential consequences of laying off or dismissing an employee based on sub-standard performance without deliberately considering whether a disability negatively impacted that employee's performance. The Tribunal in this case was committed to the principle that the full benefit of the employee's pension should be provided, resulting in a significant damages award despite the fact that Grant might have been laid off regardless of any discriminatory practice. ■

Court Order requiring BC Government to restore terms to Teachers' Collective Agreements stayed pending appeal

In 2002, British Columbia enacted legislation voiding terms of its collective agreement with the province's teachers relating to class size and class composition. The legislation also prohibited collective bargaining on issues of class size and composition. In a 2011 Decision, the B.C. Supreme Court declared the legislation unconstitutional because it interfered with teachers' right of freedom of association guaranteed by s. 2(d) of the *Charter of Rights and Freedoms (Charter)*. (This Decision (2011 BCSC 469) is reviewed in the April 2011 edition of this Newsletter.)

In 2012, the Province enacted the *Education Improvement Act*. This legislation continued the cancellation of the collective agreement terms and temporarily prohibited collective bargaining on class size and composition. The British Columbia Teachers' Federation (BCTF) challenged the constitutionality of this legislation and, again, the BC Supreme Court found that it unjustifiably infringed teachers' s. 2(d) right. The Court ordered that the cancelled clauses be returned to the collective agreement. (This Decision (2014 BCSC 121) was reviewed in the April 2014 edition of this Newsletter.)

The Province appealed. Along with its application for leave to appeal, the Province applied for a stay of the order to return the cancelled clauses to the collective agreement and for a variation of the orders permitting the BCTF to distribute un-redacted written submissions to its members. The confidentiality

orders in question governed the use that could be made of Cabinet documents, which are arguably protected by public interest immunity. The BC Court of Appeal granted both stays in *British Columbia Teachers Federation v British Columbia*, 2014 BCCA 75.

The Court of Appeal applied the standard test for whether a stay should be granted. Under this test, the onus is on the party requesting the stay to demonstrate: (1) there is a serious question to be tried on appeal; (2) it would suffer irreparable harm if the stay is not granted; and (3) the balance of convenience favours a stay. For the first part of the test, the threshold is low; the applicant need only show that the claim is not "frivolous or vexatious", which was satisfied here.

As for the second part, 'irreparable' refers to the nature rather than the magnitude of the harm. The harm from a refusal of a stay may be great but still reparable. If it is unclear that the potential loss could be recovered, this part of the test will be satisfied. For the third part, a court must take into account the damage each party alleges it will suffer, as well as the interest of the public. Where the declared purpose of legislation is to promote the public interest, it is not the job of a motions court to determine whether or not legislation actually promotes the public interest. Rather, the legislation must be assumed to do so.

The Court found that the disruption and costs of implementing the lower Court Decision amounted to irreparable harm, and the balance of convenience justified a stay pending appeal. Similarly, if the un-redacted submissions were distributed before the appeal was heard, the Province would suffer irreparable harm even if it won the appeal, and Cabinet confidentiality over the documents would have been lost irretrievably. The balance of convenience favours the stay to prevent irreparable harm, and because the effect was simply to postpone access to the un-redacted argument until the appeal was decided.

This has been a long, arduous journey in the Courts for B.C. teachers, and it is not over yet. ■

IPC upholds University's refusal to disclose internal audit

In March of this year, the Information and Privacy Commissioner of Ontario (Commissioner) issued three Orders dismissing three appeals of McMaster University's refusals to disclose certain records. The requester, referred to as "the appellant" in the Orders, requested access under Ontario's *Freedom of Information and Privacy Act* (Act) to an internal audit report, expense claims of a certain faculty member, and a letter from the Dean and Vice President to the same faculty member . The IPC dismissed the appeals for disclosure of each of these records in Orders PO-3320 (March 14, 2014), PO-3323 (March 19, 2014), and PO-3324 (March 19, 2014), respectively.

The University submitted that the Act did not apply to the records in question and that disclosure was therefore not required based on the exclusions set out in sections 65(8.1)(a) and 65(6)3 of the Act. Section 65(8.1)(a) excludes from the application of the Act records "*respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution*;" section 65(6)3 excludes records "*collected, prepared, maintained or used by or on behalf of an institution in relation to […] 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.*" These exclusions are referred to below as the "research exclusion" and "employment-related matters exclusion", below.

The Commissioner found that the requested records were excluded from the application of the Act. The Commissioner based the decision on the employment-related matters exclusion in section 65(6)3 of the Act in all three Orders, whereas the Commissioner did not find that the

research exclusion excluded any of the records in question.

Research exclusion — For the collection, preparation, maintenance or use of records to be "in relation to" research under section 65(8.1)(a), it must be reasonable to conclude that there is "some connection" between them. In order for the exclusion to apply, the research must be related to specific, identifiable research projects conceived by a specific faculty member, employee or associate of an educational institution. McMaster argued that the research exclusion applied to these records because the records related to expenditures in a particular faculty member's research expense accounts. However, the Commissioner disagreed with McMaster's characterization of the contents of the audit report and expense claims. The Commissioner found that the accounts being audited did not relate solely to research projects and the records did not refer to any specific identifiable research projects. Consequently, the records did not satisfy the requirement that research be "conducted or proposed" under ss. 65(8.1)(a) and could therefore not be excluded under this provision.

McMaster argued in the alternative that even if the Act applied to the records in question, certain exemptions (to be distinguished from exclusions) in the Act would apply to shield the records from disclosure. However, since the Commissioner decided that the Act did not apply to the records in question, these exemption provisions were not reviewed in the Orders.

Employment-related matters exclusion — The term "employment-related matters" in section 65(6)3 refers to human resources or staff relations issues arising from the relationship between employer and employees that do not arise out of a collective bargaining relationship. The type of records excluded from the Act by section 65(6) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.

In order for the exclusion in section 65(6)3 to apply, the institution must establish that: 1. the records were collected, prepared, maintained or used by an institution or on its behalf; 2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and 3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest. These three components are "the test" for this exclusion.

The first two parts of the test were straightforward in this case. Under the first part, it was clear that the audit report, expense claim forms, and letter from the Dean to the faculty member were all prepared and used by the University as part of its audit of the faculty member's expenses. Furthermore, McMaster used these records in relation to meetings, consultations, discussions and communications with its internal audit department, legal counsel, and the affected faculty member, thus satisfying part 2 of the test.

In the third part of the test, the phrase "*in which the institution has an interest*" means more than a "*mere curiosity or concern*" and refers to matters involving the institution's own workforce. As the Commissioner found in a similar matter (see Order PO-2074-R), the tracking and auditing of employee expense claims can lead to disciplinary action being taken against an employee. The records in this case—the audit report and the expense claims and letter which are related to the audit report—deal with human resource issues and other matters about the employment of a particular person in McMaster's workforce.

As a result, the documents requested were not subject to disclosure.

These Orders, as well as the prior Order PO-2074-R, provide a useful framework for dealing with access requests to internal audit records.

— KC —

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