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Human Resources Law Newsletter

— November 2018 —

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Tribunal deals with communication policy

In *Colbert v. District of North Vancouver*, 2018 BCHRT 40, the Tribunal confirmed that the mere presence of a protected characteristic is not enough to prove that an organization's targeted policy is discriminatory. Additionally, a party cannot rely on a protected characteristic to shield themselves from consequences resulting from negative behaviour.

Hazen Colbert (Complainant) was a citizen of the District of North Vancouver, and identified as a gay man and an advocate for the LGBTQ community. Since 2010, he wrote over 600 communications to the District and members of its council.

The emails included personal attacks on the members and their families. The Complainant also threatened to report certain information he had about Council members if they voted in a particular way. Finally, he made inappropriate comments about Council members' intellect, marriages and appearances. The Council asked the RCMP to investigate and found the Complainant to

be a low-grade threat. No charges were ever filed and he was never questioned or arrested.

The District developed a policy that only applied to the Complainant to restrict the processing of his communications. This policy was intended to protect the staff from the inappropriate and harassing conduct of the Complainant. The policy directed all harassing communication through a Municipal Clerk who would review the correspondence and either forward it to the appropriate person, if it was appropriate, or store it in an accessible location if it was inappropriate. The policy was applied to the Complainant for a period of one year and renewed for a subsequent year.

Between when the policy was applied in November 2015 and the date the Human Rights Complaint was filed in January 2017 the Complainant sent an additional 200 pieces of correspondence. Twenty of those referred to issues affecting the LGBTQ community.

The Complainant's Human Rights Complaint alleged the Council's policy was censorship and discriminatory on the basis of sexual orientation. The Complainant advised that he would continue communicating directly with Council members "through their personal email accounts, office mail and/or home addresses".

The Tribunal set out the test for discrimination. In order to succeed, the Complainant has to prove that "(1) he has a characteristic protected under s. 8 of the *Code* [...] (2) he was adversely treated in connection with a service that the District customarily provides to the public; and (3) his sexual orientation was a factor in that adverse treatment".

The Tribunal found there was no reasonable prospect of success because The Complainant could not establish that his sexual orientation played a role in the decision to apply the policy to him.

The Complainant argued that the Council was trying to silence him and insulate themselves from oversight. The Council argued that the only reason the policy was applied was because the Complainant's conduct was inappropriate and harassing and they wanted to protect members of Council. The District's affiants indicated they were not aware of the Complainant's sexual orientation when the policy was applied, and at that point relatively little of his correspondence related to the LGBTQ community.

The Tribunal found that there was nothing that could establish a connection between the Complainant's sexual orientation and the policy. In fact, the Tribunal found that the evidence supported the District's characterization that the communication was inappropriate and threatening. The Tribunal accepted that the District had an obligation to protect its employees from harassment in the workplace. The Tribunal recognized that the policy was a response to the communications, and was separate from the Complainants sexual orientation.

The policy was created only after a meeting with the Complainant was unsuccessful at changing his behaviour. The Tribunal found that the Complainants attempt to use the Code to shield himself from sanction "trivialize[d] the genuine

discrimination that members of the LGBTQ community continue to face on a daily basis".

The Tribunal concluded that the Complainants "sexual orientation does not insulate him from the expectation that he treat people with basic courtesy and respect".

With regard to costs, the Tribunal recognized that the purpose of a costs award is punitive in order to deter conduct that would have a detrimental impact on the Tribunal's process.

The Complainant argued he should be entitled to costs because the District's affiants lied in their affidavits. The Tribunal found the Complainant's argument fell short of proving this serious allegation and denied the Complainant's application for costs.

The District submitted it was entitled to costs because of the Complainant's conduct since filing the complaint. The Complainant wrote to the District's legal counsel numerous times and insulted his professional integrity. The Complainant also continued to send inappropriate messages to District council and staff. He also threatened to escalate his human rights complaint, including requesting more damages, and submitting a claim in court for discrimination and breach of his *Charter* rights.

The Tribunal concluded that the Complainant "engaged in improper conduct which threaten[ed] the integrity of the Tribunal's process". The Tribunal indicated that the Complainant's improper conduct consisted of attacking legal counsel and threats of retaliation to force the District to engage in settlement discussions. The Tribunal recognized that there was clear precedent to sanction a participant's behaviour through costs.

The Tribunal indicated the quantum should signal condemnation of the conduct and deter others from engaging in similar conduct. The factors the Tribunal considered were "nature and severity of the behaviour, impact of that behaviour on the Tribunal's process, the ability of the party against whom costs are awarded to pay any award and any other consequences to the party which have arisen as a result of the sanctioned behaviour".

The Tribunal awarded $750.00 for costs.

This case confirms that presence of a protected ground and adverse treatment are not sufficient to ground a human rights complaint. There must be a clear link between the adverse treatment and the protected ground for the complainant to be successful. As well, a complainant cannot use a protected ground to avoid consequences of their bad behaviour. ■

HRTO determines that terminating employee benefits at age 65 is contrary to the *Charter*

Talos v. Grand Erie District School Board, (2018 OHRTD No 525) was the first case in which the constitutionality of section 25(2.1) of the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (*Code*), that permits the termination of employee benefits at age 65, was raised before the Human Rights Tribunal of Ontario (Tribunal). In this interim decision, the Tribunal found that the impact of the

section infringed the applicant's equality rights under the *Charter.*

The applicant was a secondary school teacher whose extended health, dental and life insurance benefits were terminated when he reached age 65, despite the fact that he continued to work full time. He had relied on these benefits to support his wife, who had become gravely ill. He challenged the constitutionality of s. 25(21) of the *Code* under s. 15 of the *Charter*, and sought compensation for lost benefits, and for injury to dignity, feelings and self-respect.

Notwithstanding the prohibition since 2005 on mandatory retirement at age 65, subsection 25(2.1) of the *Code*, when read together with section 44(1) of the *Employment Standards Act*, S.O. 2000 c.41 (*ESA*) and section 7 of *O.Reg* 286/01 (Benefit Plans, made under the ESA), continued to allow employers to provide unequal benefits to workers age 65 years and older, on a non-actuarial basis, as compared to workers age 18 to 64 who could not be provided unequal benefits except in limited circumstances and on an actuarial basis.

The Tribunal found that the applicant had standing to advance a challenge against the constitutionality of section 25(2.1), both individually and as a member of the group of "65 and older" workers who experienced disadvantage through the loss of workplace benefits and the loss of *Code* protection. The Tribunal noted that an individual's personal financial circumstances, union membership, and access to other government benefits are irrelevant to determining the constitutional issue, including whether the individual experienced disadvantage sufficient to permit standing.

The Tribunal concluded that s. 25(2.1) of the *Code*, in conjunction with the relevant provisions of the *ESA* and its regulations, infringe the equality guarantee of section 15 of the *Charter* and disadvantage "65 and older" workers in the same way that the *Code* previously disadvantaged them by denying them protection against involuntary retirement. The effect of the impugned law imposes a burden on older workers, reinforces stereotypes against them, and does not reflect the fact that chronological age is not determinative of an individual's financial needs, or desire or ability to work. As a result of the termination of benefits at age 65, a worker would be indirectly faced with a decision to work while ill or to retire sooner than financially desirable, despite the prohibition on mandatory retirement.

The Tribunal further concluded that the infringement was not justified under section 1 of the *Charter*. The Tribunal was of the view that while the legislative objective of preserving the financial viability of workplace benefits plans was on its face pressing and substantial, the impugned law did not minimally impair the rights of workers 65 and older. It appeared that the legislature had not considered, instead of a blanket denial of *Code* protection, alternatives such as requiring age-based differentiation to be reasonable and *bona fide*, or on an actuarial basis.

Moreover, the Tribunal found that the policy choice to carve out workers 65 and older from *Code* protection relied on the insurance industry's assumptions, unsupported by empirical data, that costs would increase with age for all benefits plans. There was compelling evidence to the

contrary, however, that there was no close link between costs and age, and the Tribunal found that it was financially sustainable to include workers 65 and older in health care plans and modified insurance benefits, even with increases of 10-15% per year in plan costs.

Although the Tribunal cannot issue a general declaration of constitutional invalidity, it can refrain from applying the impugned section of the *Code* if, in its view, it offends the *Charter*. In this case, the Tribunal concluded that section 25(2.1) was not available to the respondent as a defence in this proceeding.

This decision is important since it will provide protection and access to benefits for employees 65 or older. ■

Court confirms accommodation of family status is obligation of employer and employee

In *Peternel v. Custom Granite & Marble Ltd.* 2018 ONSC 3508 the Court confirmed that accommodation of family status is not solely the obligation of the employer. The employee has an obligation to provide sufficient information and to work with the employer to find a solution.

The Plaintiff took maternity leave on December 13, 2013 – prior to the birth of her third child. She was set to return to work on December 15, 2014, but discussed with Custom Granite and Marble Ltd (Custom) the possibility of returning in January 2015, but no date was set. The Plaintiff met with Custom in January 2015 to discuss her return to work and an offer of employment was sent, which required that she be at work for 8:30am. Other than this condition, the offer was substantially the same as her pre-maternity position.

Prior to her maternity leave, the Plaintiff's mother lived with her and was available to assist with child care responsibilities. The Plaintiff had early morning responsibilities prior to her maternity leave. Custom indicated that prior to the Plaintiff's maternity leave, it spoke the Plaintiff on occasion about her tardiness, but she was never disciplined.

At the meeting in January 2015, Custom informed the Plaintiff that due to company changes she was required to be at work for 8:30am every day. Prior to her leave, the owner had assisted the Plaintiff with her scheduler role in the early morning. However, while the Plaintiff was on leave, the business slowed down, and the Owner needed to devote his time to developing new business rather than covering the scheduler role.

The Plaintiff informed Custom that her mother was no longer available to assist with childcare, and due to her assumption that she was working from 10am to 5:00pm she had only arranged after-care for her children. The Court accepted that the change in hours by the employer was *bona fide* and not designed to hinder the Plaintiff's return to work.

The Plaintiff did not return to Custom due to her inability to find childcare, and because she claimed Custom would not accommodate her.

The Plaintiff claimed that:

1. "Custom breached its obligations under the *Employment Standards Act* (ESA) to reinstate her to the position she held prior to maternity" (para. 13).

2. Requiring the plaintiff to attend work at 8:30am everyday was a unilateral change of a fundamental term that amounted to constructive dismissal.

3. Custom had an obligation under the *Human Rights Code* to accommodate her childcare arrangement and family obligations, which it failed to do.

The Court found that none of these claims were made out and dismissed the action.

The Court began by characterizing the employment relationship between the Plaintiff and Custom. The Plaintiff attempted to characterize the relationship as one in which her employer was, from the outset, hostile to her childcare needs. The Court rejected this and found that the Employer was accommodating, but understandably expected that the Plaintiff fulfill her obligations.

The Plaintiff's objection to the change in hours was the lack of consultation. She argued that Custom knew she would need to arrange child care and she should have been given more notice of these "change hours".

The Court noted that under the ESA, there is no requirement that an employee is reinstated following a maternity leave in the exact position they had. "An employee is entitled to return to a position which is 'substantive [sic] and qualitatively the same as the one she held prior to her leave'" (para. 37). The Court found that requiring the Plaintiff to be at work for 8:30am was not a substantial change in her employment and Custom fulfilled its obligation under the ESA to offer the same, or a substantively similar position following the Plaintiff's maternity leave.

Next, the Court looked at whether the Plaintiff was constructively dismissed. The Court began by asking whether the requirement to be at work no later than 8:30 every day constituted a change to the essential terms of the employment contract. The Court noted that unlike under the ESA, the reason for the change is not relevant.

The Court characterized the change as the Plaintiff not wanting to resume work on the previous terms of employment due to loss of childcare coverage. The Court found that while Custom had previously granted the Plaintiff latitude, the terms of employment were always such that the Plaintiff had to attend work by 8:30 if asked to do so or if there was a meeting.

The Court accepted that, when Custom asked that the Plaintiff attend work at 8:30 a.m., it was not a unilateral change, but rather enforcing what had been done throughout the Plaintiff's employment. The Court found that the Plaintiff was attempting to unilaterally change the employment terms by changing her daily start time. The Plaintiff also changed the terms by refusing to answer early morning calls, which she had done before.

The Plaintiff argued that Custom would not allow her to work through lunch in order to leave earlier. The Court rejected this argument, as there was a requirement in the ESA that an employee who works for 7.5 hours must be given a 30 minute break. The

Court concluded that a Plaintiff cannot succeed in claiming that the employer unilaterally changed the terms of employment when the change is based on the employer complying with the applicable employment law.

The Court concluded that the Plaintiff did not establish she was wrongfully dismissed.

The Court indicated that, in the alternative, if the Plaintiff was wrongfully dismissed, she would have been awarded three months' notice. However, the award would have been reduced by 40% to six weeks for failure to mitigate.

The Court next examined whether the Plaintiff had a claim under the *Human Rights Code (Code).* The Court began by recognizing that under s. 5(1) of the *Code* family status discrimination is prohibited in employment. This includes discriminating based on substantial obligations owed to children, including childcare obligations.

The jurisprudence indicates a four-part test for prima facie discrimination based on family status. The Plaintiff must establish:

"(i) the child is under her care and supervision;

(ii) that the childcare obligation at issue engages her legal responsibility for that child, as opposed to a personal choice;

(iii) that she has made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

(iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation" (para. 49 citing *Johnstone v. Canada*, 2014 FCA 110 at para. 93).

Custom conceded the first point. Custom also conceded the fourth – that if the Plaintiff could not obtain daycare, the requirement to attend work would interfere in a more than trivial manner with her obligations.

Custom disputed the second and third factors. With regard to the second factor, the Plaintiff argued she had to take her child to the bus in the morning and so she could not arrive at work before 10:00 a.m. Custom argued this was a personal choice. With regard to the third factor, the Plaintiff acknowledged that this factor was not met, if strictly interpreted. However, she argued that she did not know she was obliged to look for reasonable alternative solutions given that she was not informed of the "change" in employment.

The Court rejected the Plaintiff's contention that without a firm date, she could not look for day care. The Court found, in this case, she had a high paying job and an income property and could have afforded to cover daycare for a short time without undue hardship.

The Court then looked at whether the workplace rule requiring the Plaintiff to be at work for 8:30am had a negative impact on the parent/child relationship and whether that impact was significant. The Court found that no evidence was led that would show there was a negative impact of placing the two school aged children in before/after care – there were a number of options available in the community.

The Court then looked at accommodation. The Court recognized that accommodation is a joint-process that the Plaintiff must co-operate in. Until January 2015, Custom believed that the Plaintiff had child-care assistance from her mother. The Court found that the Plaintiff failed to provide Custom with information concerning her need for accommodation. Specifically, she did not tell Custom she had not found daycare, and could lose the spot or that daycare was difficult to find. She also did not tell Custom about the arrangements she was making for her other children, or that unless she was permitted to arrive at work by 10:00 a.m. (she alleged) she would forfeit her daycare spot.

Custom offered the Plaintiff a different job, that was similar in experience and salary, that would have allowed the Plaintiff to start at 10:00am. The Plaintiff did not respond to this offer as she indicated that Custom "would have known" that the Plaintiff could not accept this position as she would have had to work until 7:00 p.m. and on Saturdays which also would have presented issues with childcare.

The Court found that if the Plaintiff provided information about her childcare situation to Custom and then Custom refused to accommodate her, she might have been able to establish adverse treatment due to the work hours. But, the Court concluded this was theoretical because the Plaintiff did not provide this information and was not truthful to Custom. The Court found the Plaintiff frustrated accommodation efforts by failing to provide accurate information about her childcare needs.

The Court concluded that the Plaintiff failed to show the requirement she begin at 8:30 a.m. was discriminatory and dismissed the *Code* claim.

This case confirms an employee must participate in the accommodation process in family status cases. An employee cannot unilaterally impose terms on an employer and, when the employer refuses to abide by those terms, claim the employer is discriminating. ■

Employer's inability to measure residual impairment deemed undue hardship

In *Re Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard)*, the Grievor was diagnosed with Crohn's disease and osteoarthritis and was authorized to use medical cannabis. He consumed 1.5 grams in the evening and did not report feeling impaired in the morning. He applied for labourer positions on the Lower Churchill Projects. The employer hired him, subject to pre-employment drug screening. Ultimately, the company refused to assign him work because of his use of medical cannabis. The Grievor's physician was of the opinion that as long as he waited 4 hours he would be capable to work and thus using cannabis the night before posed no risk of impairment. The employer's consultant, on the other hand, was of the view that the Grievor could not use cannabis for 24 hours before work because of the inability to accurately determine impairment.

The union argued that the employer failed to accommodate the Grievor. The Grievor was qualified and had previously worked on

the project without conditions on his cannabis use. If the employer had concerns about his disability or his cannabis use, they had a duty to accommodate.

The employer argued that the positions were safety sensitive. The employer had an obligation to ensure the workplace was safe, and this included ensuring the grievor wasn't impaired at work.

The Arbitrator cited with approval the well-established principle in the case law that accommodation must be based on an individual assessment and the employer is required to provide accommodation to the point of undue hardship

The Arbitrator found there was a *bona fide* occupational requirement to be able to work safely. In respect of accommodation, the Arbitrator found the employer was entitled to have medical information and was entitled to ask the Grievor and the union for more information when the initial report provided by the Grievor was insufficient. The Arbitrator noted that the use of medication that might impair the worker is necessary information for the employer in order to provide accommodation.

The Arbitrator found that all the positions with the employer were safety sensitive. The Arbitrator then considered whether the Grievor could work safely in his desired position.

The medical / pharmacological evidence presented was far from determinative. The Arbitrator reviewed the evidence of various experts, as well as documents on cannabis issued by both Health Canada and College of Family Physicians of Canada. The Arbitrator concluded that impairment from cannabis can last anywhere from four to twenty-four hours after being consumed.

The Arbitrator accepted that lack of accurate methods to assess impairment was a legitimate concern for the employer as it would be difficult to manage a risk that cannot be accurately measured.

The Arbitrator found there was a significant safety concern in any position the Grievor would fill.

The Newfoundland *Occupational Health and Safety Act* and related regulations specifically prohibited working while impaired. The Arbitrator found that, because impairment could not be tested and thus ameliorated, undue hardship would arise because of an "unacceptable increased safety risk".

The Grievance was dismissed. The Arbitrator accepted that because impairment from cannabis cannot be accurately measured, there was undue hardship to the employer because of the inability to measure and manage the risk in the workplace.

This case demonstrates the uncertainty and challenges related to measuring impairment from medical cannabis. ■

Tribunal addresses parameters in accommodation of medical cannabis in the workplace

In *Aitchison v. L & L Painting and Decorating Ltd.* 2018 HRTO 238, the Human Rights Tribunal held that there is no absolute right to smoke medical cannabis at work.

The applicant worked as a painter on high rise buildings. The applicant had a degenerative disc condition in his back that he treated with the use of medical cannabis.

The employer had a clear zero tolerance policy in place due to the safety concerns in the work place. The employees were required to watch a training video that set out this policy as well as fill out a questionnaire.

The applicant claimed that he was allowed to smoke cannabis on his breaks and that his supervisor was aware of and condoned his use. The supervisor disputed this. The supervisor, when he discovered the applicant smoking cannabis at work, sent him home. The applicant was later terminated.

The Tribunal found no breach of the duty to accommodate.

The Tribunal found it unlikely that the supervisor would condone cannabis use at work given the safety sensitive nature of the work environment.

The Tribunal noted that there was no evidence that the applicant requested that his cannabis use be accommodated at work. Rather, the applicant unilaterally decided to use cannabis at work without authorization. The Tribunal found that one cannot fail to accommodate a request that is never made.

The Tribunal emphasized that the employer is not required to accommodate preferences that would amount to undue hardship. The Tribunal found in this case that the applicant's use of medical cannabis at work would present an undue hardship for the employer due to the health and safety concerns.

The Tribunal emphasized that there is no absolute right to smoke cannabis at work - regardless of whether it's for medicinal purposes, especially when it would present a genuine health and safety risk.

The Tribunal found that there was no requirement that there be actual evidence of impairment for the employer to take action.

The Tribunal concluded by analyzing the zero tolerance policy. The Tribunal noted that reliance on a zero tolerance policy to support termination does not equate to discrimination. There must be evidence that the employee's disability was a factor.

The Tribunal found that the zero tolerance policy was a *bona fide* occupational requirement, as it was reasonably related to the objective of health and safety – the workplace was clearly dangerous. The zero tolerance policy was adopted with an honest and good faith belief it was necessary – this policy was common in the construction industry due to the inherent risks. Finally, the Tribunal found that the zero tolerance policy was reasonably necessary – this specific policy only required that intoxicated employees leave the work site.

This case confirms that employers with safety sensitive work places can be justified in zero tolerance policies. It also confirms that an individual who has a prescription for medical cannabis is not allowed to consume medical cannabis at work without concern for the employer's policies and safety of the worksite or without disclosing the use to the employer. The principles applied can be applied or adapted to education. ■

Arbitrator reviews safety vs. accommodation re medical cannabis

Kindersley (Town) v. Canadian Union of Public Employees, Local 2740 (Desjarlais Grievance), [2018] S.L.A.A. No. 4 illustrates that there is a distinction between drug use and drug impairment. As well, this case highlights that an employer can be justified in terminating an employee who has consumes medical cannabis in a manner that is inconsistent with the accommodations that have been put in place.

The Grievor was employed by the Town, and part of his duties included operating the Town vehicle. Prior to this incident, the Grievor had a clean discipline record. The Grievor was prescribed to vape medical cannabis, but was restricted in that he could not operate heavy machinery for 20 to 30 minutes after vaping. The employer accommodated the Grievor by moving him to a position with less stress and public involvement and that did not require use of a vehicle (in this case, a Zamboni). The Grievor was allowed to vape for set times at work – subject to the time restriction to operate equipment.

The Grievor went on a work trip where it was alleged that the grievor used cannabis and was impaired while operating the Town vehicle. The employer considered this a serious major offence, and bypassed the progressive discipline in the Collective Agreement and dismissed the employee.

The Panel noted that, as this was a discipline grievance, the employer bore the evidentiary burden of proof. The employer was required to prove that the employee's conduct warranted discipline, including by establishing a factual basis for the impugned conduct and that there was just and reasonable cause to impose discipline.

The employer relied on the employee: (1) using cannabis while operating a Town vehicle; and, (2) operating a motor vehicle while impaired contrary to s 253(1)(A) of the *Criminal Code*.

The Panel found that there was no basis to conclude on a balance of probabilities that the employee was impaired while operating a vehicle. An RCMP officer investigated the incident after the fact – he did not meet with the Grievor face to face or observe the conduct first hand. He could not provide evidence about whether or not the Grievor was impaired while he was operating the vehicle.

There were other employees in the vehicle at the time – they did not give evidence the Grievor was driving recklessly or without care. They did not indicate that there was a concern for their safety while the Grievor was driving.

While the Grievor's doctor indicated he should not drive for 20 to 30 minutes after vaping, the Panel found that this did not speak to impairment. The Panel was not prepared to make the assumption that because the Grievor had driven within 30 minutes of vaping, that he was necessarily mean he was impaired.

The Panel did find that, based on the evidence, the Grievor was vaping and driving. The Panel also found that this was sufficient to impose discipline, as it was contrary to the Employer's policy and the agreed

accommodation. There was also a safety issue.

The Collective Agreement mandated progressive discipline, unless there was a serious major offence.

The Panel found that the use of cannabis justified bypassing progressive discipline. The Grievor was accommodated. The Panel found that the Grievor took unfair advantage of his use of medical cannabis. The Grievor's agreed accommodation required he not mix cannabis with operating motorized equipment. He completely disregarded the safety of his coworkers when he drove while vaping cannabis.

The Panel found there was no medical need to mix driving with use of medical cannabis.

The grievance was dismissed. The Panel found that the decision to dismiss the Grievor was not excessive discipline in the circumstances. ■

Court confirms duty of good faith in applying termination clause

In *Mohamed v Information Systems Architects Inc.* 2018 ONCA 428, the Court confirmed that in an agreement with an independent contractor, the other contracting party has a duty to perform a termination clause in good faith.

The Respondent, Mitchum Mohamed, entered a contract with Information Systems Architects Inc (ISA) for a six-month project with Canadian Tire. The parties agreed that the Respondent would be an independent contractor. The Respondent resigned his full time position in order to work full-time under the contract.

Canadian Tire had an agreement with ISA that they would only send a consultant who had a criminal record on Canadian Tire's consent.

Before the contract was signed, the Respondent informed ISA he had a dated criminal record from high school and agreed to a background security check. He also completed a declaration of criminal record form. He began work at Canadian Tire, but when the security check came back a month later, Canadian Tire requested a replacement for the Respondent. The Respondent asked he be considered for other roles, but ISA refused and terminated him.

The Parties contract stated:

"This agreement and its Term shall terminate upon the earlier occurrence of:

I. ISA, at their sole discretion, determines the Consultant's work quality to be substandard.

II. ISA's project with Customer gets cancelled, experiences reduced or altered scope and/or timeline.

III. ISA determines it is in ISA's best interest to replace the Consultant for any reason.

IV. Immediately, upon written notice from ISA, for any breach of this Agreement by the Consultant" (para. 2).

The Respondent sued for breach of the contract and claimed six months remuneration. As a fixed term contract, he claimed there was no duty to mitigate.

The motion judge found that ISA "breached the duty of good faith performance [...] by failing to use the termination clause in good faith" (para. 4). In the alternative, the motion judge found the clause was void for vagueness. The motion judge found that the Respondent was entitled to damages "based on the balance of the fixed term contract with no duty to mitigate".

The ISA appealed the decision of the motion judge, on the basis that the motion judge had erred in his approach to contractual interpretation, had erred in finding the termination clause void for vagueness, and had erred in concluding that the employee was not required to mitigate his damages.

The Court of Appeal (Court) began by looking at the principles of contractual interpretation and noted that deference was owed to the trier of fact on findings of interpretation. The motion judge found that read literally, ISA has an "unfettered right to terminate" the contract. However, the motion judge concluded that based on the contra proferentum rule and the doctrine of good faith performance, it was unclear that the right to terminate could be exercised in an unfettered manner. The Court concluded that "the clause was vague and uncertain and therefore unenforceable". Specifically, he found it problematic that the contract required notice of termination when terminating for breach, but not the other reasons. He found that the ISA breached the contract when it did not exercise its termination rights in good faith. In the alternative, the motion judge found that the termination clause was void for vagueness.

The Court found that the motion judge made two errors of law. First, the contra proferentum rule can only be applied to resolve ambiguity. When the motion judge found the contract was clear, he could not use the *contra proferentum* rule. As well, the motion judge found the termination clause was clear, he could not subsequently conclude it was vague because of the notice provisions.

The Court, however, found that nothing turned on these two errors because of the other finding that the termination rights had to be exercised in good faith.

In his reasons, the motion judge recognized that good faith performance was not an interpretive principle but rather "an operative principle in the performance of contracts". The Court agreed that while the contract on its face provided for an unfettered right, there was an obligation to perform the contract in good faith, including with regard to the termination right. The Court saw no error in the motions judge's conclusion on this point.

The Respondent disclosed his criminal record to the ISA before signing the contract and commencing the project. Therefore, the Court found that ISA's reliance on the criminal record to terminate the contract a month later was not an exercise of good faith under the contract, without trying to negotiate with Canadian Tire or find the Respondent another project.

The motion judge recognized that the Respondent was an independent contractor, but indicated that because it was a fixed term contract, the employment status did not matter. Damages in the case of a fixed term

contract are based on the unexpired term of the contract, with no duty to mitigate.

The Court agreed that under these circumstances, the principle that damages in a fixed term contract are based on the unexpired term with no duty to mitigate should apply. The Court recognized that while the Respondent agreed that he could be terminated without payment, he was entitled to expect that the termination clause would only be exercised in good faith. The Court concluded that if the termination clause was not exercised in good faith, the parties would have intended that damages "would be based on the wages owed for the remaining term, without a duty to mitigate" (para. 29). The Court concluded that there was no error in the motion judge's decision in this regard.

This case confirms that even if a contracting party is given wide latitude to terminate an independent consultant, there is still an implied term that this termination clause must be performed in good faith. If it is not, the Court can award damages for the remaining portion of the fixed term, and the consultant has no duty to mitigate. ■

Teacher with anxiety and depression resigns; grieves was forced to resign

The Arbitrator in *Peel District School Board v. Ontario Secondary School Teachers' Federation, District 19* (L.C. Grievance), [2018] O.L.A.A. No. 16 found that determining if a resignation is valid is a highly fact specific endeavour. There must be subjective intention and objective conduct to support that intention. It is not sufficient for an individual to raise a history of mental illness in order to invalidate their resignation.

The Grievor began teaching at the School Board in 2003, and had a positive record from 2003, until 2008. From 2008 – 2012 he was absent for a significant portion of the year (100+ days in some years) due to his depression and generalized anxiety. The School Board accommodated the Grievor through lengthy unpaid absences after his sick days were exhausted, allowed modified schedules, and hired a long term occasional teacher to assist the Grievor.

In 2012, as a result of a miscommunication, the Grievor was under a mistaken apprehension that the School Board placed a perfect attendance condition on his employment due to his extreme attendance issues. Under this apprehension, the Grievor resigned his full time position in order to hopefully find a position as an occasional teacher.

OSSTF argued that because of his mental health issues, the Grievor lacked the subjective intention to resign. OSSTF also argued that given that the School Board was aware of the Grievor's mental health issues, the Board should have recognized his purported resignation as the Grievor requiring further accommodation; the Board should not have accepted it without consulting the Grievor or OSSTF. OSSTF argued that the imposition of the perfect attendance condition amounted to constructive dismissal as it was an unreasonable condition of employment.

The Board argued that the Board accommodated the Grievor, and never gave

any indication his job was in jeopardy. The resignation demonstrated the appropriate subjective intention, which was supported by the fact that he did not attempt to challenge it until several months after he tendered it, and after he failed to find an occasional teaching position.

The Arbitrator set out the test in the case of resignations which is "to discern whether the person truly or voluntarily intended to sever the employment relationship" (para. 102). There must be evidence of a subject intention, as well as objective conduct carrying the intention into effect.

The Arbitrator noted that in this case there was both subjective intention and objective conduct indicating the intention to resign. Thus, the issue was whether the Grievor's anxiety negated his ability to make a voluntary decision to resign.

The Grievor bears the onus of proving that a medical condition exists and that this condition is connected to the resignation. The amount of time an employee takes to try and reverse the resignation is a relevant consideration.

The Arbitrator concluded that while the Grievor felt he could not miss a single day of work, the School Board never imposed this as a condition of his employment. The Arbitrator found that a condition of this kind would be inappropriate and invalid. While the Grievor still operated on this mistaken assumption, the Grievor was never actually misled by his employer.

The Arbitrator found that the Grievor was appropriately accommodated and that there was nothing, prior to the grievor's resignation, to indicate that the Grievor's position was in jeopardy.

The Arbitrator noted that resignation is a private decision and there was no contractual obligation for the employer to alert OSSTF of the Grievor's resignation. The Arbitrator also noted that absent some extreme emotional upset or distress, there is no obligation on an employer to question what appears to be a clear resignation. In this case, the Grievor's history was not enough to obligate the Board to question his resignation.

The Arbitrator determined there was evidence to support the Grievor's subjective intention to resign. The resignation letter itself was clear and rational and gave cogent reasons why the Grievor was resigning. The Arbitrator found that a resignation cannot be invalidated because it was inadvisable or because the employee failed to explore other options.

The Grievor's course of conduct over the months following his resignation also demonstrated this intention. The Grievor spoke to OSSTF a few times in the months following his resignation, and confirmed the resignation, but did not request it be set aside. The Arbitrator found that the Grievor had many timely opportunities to change his mind and did not. His first attempt to try and undo the resignation was filed almost a year after his resignation.

The Arbitrator touched on the fact that the Grievor's anxiety may have impaired his ability to make this decision. He noted, however, that the decision made rational sense given the Grievor's impairment. As well, the decision was made at a time when there

was medical evidence to indicate the Grievor was not suffering from anxiety. The Arbitrator also found it significant that the resignation was made during the summer, and not during the school year when the Grievor's anxiety was usually higher.

The Arbitrator concluded that the Grievor's resignation was valid. The Grievor's resignation was not a rash decision. There was no evidence the Board pressured the Grievor into resigning. The Arbitrator found that the Grievor's misunderstanding was unfortunate but not enough to nullify his resignation. Ultimately, the Arbitrator found that the attempts to undo the resignation could be characterized as a change of heart and did not invalidate his decision. ■

Teacher may have contravened MFIPPA after disclosing to spouse names of students with IEPS

Peel District School Board (Re), 2018 CanLII 47173 (ON IPC), demonstrates that Boards must be proactive in ensuring that student's confidential information is protected.

The Information and Privacy Commissioner of Ontario (IPC) received a complaint that a teacher at the Peel District School Board (Board) disclosed names of students with Individual Education Plans (IEPs) to her spouse to assist him with his investment business. The teacher received the names from the Special Education Teacher under false pretenses.

The Board was informed of the breach when a parent complained that their child brought home a package about Registered Disability Savings Plans (RDSPs) that was personally addressed and included the card of the teacher's spouse. The teacher was suspended with pay.

Personal Information is defined in s. 2(1) of the *Municipal Freedom of Information and Protection of Privacy Act (*Act) to mean:

"recorded information about an identifiable individual, including,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved.

...

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual."

In order to be personal information, the individual must be able to be identified if the information were disclosed. The IPC found that the information about students who have IEPs qualifies as personal information.

Section 31 governs the use of personal information – it sets out a general prohibition on use, as well as exceptions. In order to use personal information, it must fall under one of the listed exceptions. Section 31(b) allows information to be used for the purpose for which it was collected, or for a consistent purpose.

The Act prohibits disclosure of personal information. However, s.32 sets out exceptions. In this case, the relevant exception is set out in s. 32(d) which states:

"if the disclosure is made to an officer, employee, consultant or agent of the institution who needs the record in the performance of their duties and if the disclosure is necessary and proper in the discharge of the institution's functions."

The IPC found that teacher did not need the list of students to perform her duties, and thus disclosure was not permitted under the Act.

The information in this case was collected to educate students. The information was used to solicit business which is not consistent with this original purpose. Therefore, the use of this information did not comply with s. 31 and did not fall within the exception in s. 32.

The Board, after it determined there was a breach, wrote a letter of discipline, which was placed in the teacher's file. The teacher was transferred to another school and reported to the Ontario College of Teachers.

The Board notified the parents of those students affected by the breach with a phone call from the principal, and a follow up letter apologizing, signed by the Board's Director of Education. The Board added additional privacy training for principals.

Due to this breach, the Board changed its practice with regard to confidentiality agreements. All staff who may have access to students personal information, including those in regulated colleges, must sign confidentiality agreements when they are hired, and annually thereafter.

The Investigator found that the Board's response to the breach was adequate. ■

Arbitrator confirms confidentiality of proceedings

In *University of British Columbia and University of British Columbia Faculty Association, Steven Galloway Arbitration – Supplemental Award*, 2018 CanLII 101985 (BC LA), the Arbitrator emphasized the importance of confidentiality in arbitration proceedings.

The University of British Columbia and the Faculty Association were engaged in a labour arbitration regarding, among other things, the Grievor's dismissal from the University.

There were numerous confidentiality provisions governing the Arbitration, including a Consent Order that the proceeding be held "in camera", and a subsequent letter that indicated parties cannot "comment on the proceeding or the reasons for the Grievor's dismissal" (p. 16). The letter provided a mechanism where a party that intended to make public disclosure could provide advance notice and disagreements could be referred to the Arbitrator for a determination, before the public disclosure.

The Arbitrator provided two subsequent clarifications on the scope of the confidentiality terms. The Grievor specifically sought clarification on what was permissible for him to publish. Specifically, "the Grievor was precluded from commenting publicly on

the [...] award, 'but was not restricted from commenting on the effect of this process on his life and career, so long as the comments do not touch on what happened during the proceeding'" (p. 5).

When the award was published, the Grievor made a number of statements to various media outlets. The University subsequently responded to these comments – and it was these comments by the University which the Grievor alleged breached the confidentiality terms. The Arbitrator accepted that the comments by the University were a direct consequence of the public remarks made by the Grievor.

The specific statements alleged to be problematic were:

"1. From the UBC News Release Statement of media coverage of Steven Galloway Case.

(i) Characterizations that these faculty and staff [charged with management of this matter] engaged in a flawed process ... are simply false.

(ii) In February 2018 during the arbitration proceedings ...

(iii) [W]e cannot, without Mr. Galloway's consent, disclose the reasons for our decision to terminate him, or the details of the processes that led to this decision.

(iv) ... all we can say is that we are confident that the investigation of the complaints against Mr Galloway was fair and principled, and that the decision to terminate him was fully justified.

2. From the Vancouver Sun article UBC responds to Steven Galloway's first-person account of the sexual allegations that derailed his career.

(i) In an interview, Steenkamp said he was confident UBC followed the proper process and made the correct decision when it fired Galloway. The allegations of sexual misconduct were not the only issues the university examined during its review of his employment.

(ii) It was everything taken together, [Steenkamp] said" (p. 16).

The Arbitrator examined the labour relations case law and highlighted the vital role played by confidentiality agreements. Specifically, many parties rely on confidentiality provisions in deciding whether to settle. The Arbitrator noted that breach of confidentiality provisions harms the grievance settlement process as grievances are settled for a variety of reasons – and confidentiality ensures that agreements will not be misconstrued.

The Arbitrator was critical of the University for using a "self-help" method when it believed the Grievor breached the provisions rather than following an established procedure.

The Arbitrator examined the Grievor's public statements and noted that they addressed the allegations and resulting investigation, but not the arbitration proceeding. The Arbitrator found it significant that the Grievor sought clarification about what could be disclosed.

The Arbitrator highlighted that a critical part of the process was that the University could not comment on the proceeding or reasons for the Grievor's dismissal. The

Arbitrator noted that if the University had responded to the Grievor's criticisms without mentioning the dismissal there would not have been a basis for the complaint.

The Arbitrator rejected the University's argument that it did not contravene the confidentiality agreement because it did not disclose the reasons for the decision to terminate. The restriction was framed in broad terms – not qualified by terms such as "specific reasons".

The Arbitrator concluded the confidentiality terms were breached when the University "told the Vancouver Sun reporter that the allegations of sexual misconduct were not the only issues the University examined during its review of the Grievor's employment" and "The confidentiality terms were additionally breached when [the University] said [it] could not say what other issues were considered, but stated: It was everything taken together" (p. 17).

Regarding the other grounds, the Arbitrator found that the phrase "during the arbitration proceeding" amounted to a minor infringement – especially because the Grievor reported similar matters in another article.

The Arbitrator also took issue with the assertion by UBC that the investigation was fair and principled as this was contested during the arbitration.

Regarding remedies, the Arbitrator indicated it was necessary to consider the surrounding circumstances. The Arbitrator indicated that the Award was abundantly clear. The Arbitrator found the magnitude of damages sought by the Grievor, double the amount of the Award, excessive. however, the Arbitrator did find that a substantial monetary amount was appropriate.

The Arbitrator recognized a factor that the University could have sought the clarification of the Arbitrator to determine the matter. Instead, the University ignored this and made a deliberate choice to speak publicly.

The Arbitrator found the breach was "a new and continuing violation of the Grievor's privacy rights". As well, the commitment to remain silent regarding the reasons for dismissal was "a key and integral part of the bargain" (p. 20).

Finally, the Arbitrator recognized that deterrence was a factor given that the University ignored the "safety valve" that was in the agreement. The Arbitrator also recognized the extent of the Universities resources as a factor.

The Arbitrator recognized that a significant part of what was said by the University was already in the public domain – due to the University's other violations. But indicated this did not lessen the impact.

The Arbitrator awarded $75,000 in damages - $60,000 to the Grievor for the "continued breach of his privacy rights and ongoing harm to his reputation" (p. 21) and $15,000 to the Faculty Association for failure to honour its commitment.

The Arbitrator also ordered that the Statement be removed from the University's website, and if requested, must post the reasons of this decision in its place without editorial comment.

This case confirms that confidentiality provisions are an important part of the arbitration process. Arbitrators can be

justified in awarding significant penalties for parties that breach these provisions. ■

Court determines employment frustrated

Roskaft v Rona Inc 2018 ONSC 2934 confirms that an employer can be justified in dismissing an employee for frustration of contract if the employee has a disability that makes their return to work in the foreseeable unlikely, provided there are no human rights issues to contend with.

The Plaintiff started employment with a predecessor of Rona Inc. on September 16, 2002. He started a medical leave of absence on September 28, 2012. The employee was provided short- and long-term disability benefits (LTD) through SunLife. SunLife is independently administered – Rona did not have access to medical documentation submitted to the company.

On October 20, 2014, the Plaintiff completed a Return to Work form which indicated he did not know when and if he could return to work. SunLife informed Rona that the Plaintiff could not return to work. In September 2015, Rona reviewed the Plaintiff's file and decided that it was unlikely the Plaintiff would return to work within a reasonable time.

On September 15, 2015, the Plaintiff was terminated due to frustration of contract. The Plaintiff would continue to receive disability benefits, and Rona would pay him his *Employment Standards Act, 2000 SO 2000 c. 41* (ESA) entitlements.

The Court indicated that "the doctrine of frustration applies because the Plaintiff's permanent disability made his performance of the employment contract impossible".

The Plaintiff abandoned his human rights claims in this matter and thus there was no argument about reasonable accommodation.

Rona argued that the Plaintiff did not provide any evidence to support a conclusion that he would be able to return to work in a reasonable period of time. The Plaintiff argued that Rona needed to consider that he might return to work. The Plaintiff indicated he was starting to feel better when he was terminated, but Rona never inquired. The Plaintiff was never asked for updated medical information by Rona.

The Court noted that there was no evidence to support this assertion by the Plaintiff given that he continued to receive disability benefits and did not return to work. As well, the Plaintiff filled out forms for SunLife on January 4, 2016 and February 21, 2017, where he indicated his condition had not improved.

The Court noted that the issue to be determined was whether, at the time of termination, there was no reasonable likelihood that the Plaintiff could return to work in a reasonable period of time. The Court found that the post-termination evidence contradicted the Plaintiff's assertion that he could have provided evidence at the time of his termination which have proved his ability to return to work. This is also evidenced by the fact that the Plaintiff was still receiving disability benefits at the time of the trial.

The Court found that Rona could not rely on the letter from SunLife in December 2014 to determine the Plaintiff was permanently disabled as this letter did not reference the Plaintiff having a permanent disability. However, the Court indicated there was enough evidence based on: "(1) the Plaintiff qualifying for LTD benefits, (2) the Plaintiff's continued representations he could not return to work and (3) the Plaintiff continuing to receive LTD for the Rona to conclude that there was "no reasonable likelihood that the plaintiff would return to work within a reasonable period of time" (para. 26).

This case confirms the evidence that an employer can rely on in justifying the termination of an employee for frustration of contract. This case also confirms that if there are no human rights issues, an employer can be justified in terminating an employee who has no reasonable prospect of returning to work. ■

Termination for breach of 'last chance' agreement upheld

In *Toronto District School Board v. Canadian Union of Public Employees, Local 4400 (Termination Grievance)* (2018 OLAA No. 119), the arbitrator dismissed a termination grievance following an employee's breach of a "last chance" agreement, finding that the employer had accommodated to the point of undue hardship.

The employee was a caretaker with 22 years of service and an unblemished record. She developed an alcohol addiction in 2015 after finding herself in an abusive relationship. As a result, her work attendance suffered, and she missed approximately 40% of her scheduled shifts in 2015, 25% in 2016 and 87% in 2017. During this time, the employee entered various treatment programs but failed to complete them.

In 2017, the parties executed a "last chance" agreement, which required the employee to submit to random drug and alcohol testing, and to complete specific treatment programs with proof of a prognosis for continued abstinence. The parties agreed that any breach of the agreement's terms by the employee would satisfy the "just cause" provision of the parties' Collective Agreement, and that an arbitrator would not have jurisdiction to substitute a lesser penalty.

After executing the "last chance" agreement, the employee continued to miss work without contacting her supervisor. The employer arranged a meeting with a technician to administer a urine test, and refused the employee's request to reschedule the test to a date after her doctor's appointment. The employee in turn responded that such a request amounted to "harassment" and that she refused to submit to the employer's test and would instead provide her own. When the employee failed to attend the test that the employer had scheduled, the employer issued a termination letter.

In this termination grievance, the employer took the position that, absent extraordinary circumstances, the "last chance" agreement should be given effect. The Union argued that the point of undue hardship had not yet been reached, as the grievor in this case had

20 years of unblemished service and was taking steps to seek treatment.

The arbitrator confirmed that the "last chance" agreement cannot be determinative, as the parties to a collective agreement cannot contract out of the statutory duty to accommodate an employee's disability to the point of undue hardship. However, the arbitrator found that in this case, the grievor had already been accommodated to the point of undue hardship at the time the "last chance" agreement was executed, and the agreement itself constituted further accommodation. The employer had supported the grievor through various relapses with leaves of absence, sick pay and changes in work location.

The arbitrator reasoned that the grievor had breached the "last chance" agreement by effectively treating it as though it did not exist, and did not begin to make efforts to improve her situation until after she was terminated. Even then, although she expressed a willingness to submit to drug and alcohol testing, and took steps to disassociate from her abusive partner, stabilize her housing situation, and seek assistance, the assistance she sought was not the residential rehabilitation treatment that was required by the "last chance" agreement. Furthermore, the evidence from her assistance providers did not support a finding of a favourable prognosis for recovery, as might support overriding the "last chance" agreement on the basis that the undue hardship threshold had not been met.

The arbitrator noted the importance of a "last chance" agreement as a tool that allows an employer, prior to resorting to termination, to drive home to an employee the serious consequences that will follow from addiction or attendance issues. Arbitrators should not second guess such agreements absent compelling evidence of post-termination rehabilitative potential, as to do so would have the effect of inhibiting their use or effectiveness.

This case serves as a reminder that "last chance" agreements cannot be determinative; however, arbitrators will give deference to these agreements if the terms are reasonable, and absent compelling evidence to override them. ■

Failure to grant adjournment leads to overturning of decision to revoke licence

In *Spence v. Ontario College of Teachers* (2018 ONSC 3335), the Divisional Court overturned a decision to revoke a teacher's license and remitted the matter back to the Discipline Committee for a new hearing, holding that the Member had been denied procedural fairness when his second adjournment request was refused, despite medical evidence which reflected his serious mental health diagnosis.

Christopher Spence (Spence), was a member of the Ontario College of Teachers (OCT) and had been employed as the Director of Education by the Toronto District School Board (TDSB). Disciplinary proceedings were brought against Spence by the OCT, alleging that he had plagiarized published and oral work from 2002 to 2013. The OCT and Spence exchanged numerous emails and letters addressing upcoming hearing dates and Spence's inability to attend

the proceedings. A medical note from Spence's family doctor was provided to the OCT and the Discipline Committee. It indicated that Spence was in a state of precarious mental health and was unable to attend the hearing as a result.

The note also indicated that Spence would be undergoing a psychiatric assessment. Spence also wrote the OCT's legal counsel advising that a medical report would be provided following his psychiatric assessment and asking for an adjournment of the hearing.

On August 24, 2016, the Discipline Committee met and granted a short adjournment on condition that Spence provide, by October 19, 2016, the report from the physician conducting the psychiatric assessment, consent allowing the OCT to communicate directly with that physician, and that the hearing reconvene no later than October 31, 2016.

Mr. Spence met the first two conditions. The psychiatric report diagnosed Spence as having a major depressive disorder which had significantly impacted his functionality.

The hearing was then scheduled to reconvene on October 21, 2016, however, Spence asked for a second adjournment of the hearing stating he was unable to participate in it due to his mental health.

Despite having received Spence's consent, the OCT did not contact the physician who had conducted his psychiatric assessment. Instead, an internet search was conducted by a law clerk on behalf of the OCT's counsel which found that Spence was working as a Director of Youth Engagement for an organization in Chicago. However, the search provided no information regarding his role. The results of this search were not provided to Spence so that he could respond to it.

The Discipline Committee rejected Spence's request for a second adjournment on the basis that the adjournment was not supported by his medical issues and evidence, that it would unduly prejudice the OCT, and that it was in the public interest to have the hearing conducted in a timely manner. The hearing then proceeded despite Spence not being present. The Discipline Committee ultimately found Spence guilty of professional misconduct and revoked his teaching license.

Spence appealed the Discipline Committee decision to the Divisional Court, arguing that he was denied procedural fairness as

(1) the Discipline Committee failed to recognize his medical evidence;

(2) the Discipline Committee came to a conclusion which lacked supporting medical evidence; and

(3) the Discipline Committee had failed to provide him with the internet search evidence so that he could respond to it.

In order to determine the requisite level of procedural fairness and whether it had been met, the Court considered the following factors:

(1) the nature of the decision being made and the process followed in making it;

(2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

(3) the importance of the decision to the individual affected;

(4) the legitimate expectations of the person challenging the decision; and

(5) the choice of procedure selected by the tribunal.

The Court held that, while the Discipline Committee has a broad discretion to decide whether to adjourn its proceedings, it is limited by the rules of procedural fairness. In this case, the Discipline Committee failed to consider the entirety of the medical evidence and incorrectly dismissed the medical report which demonstrated why Spence was unable to participate in the hearings. If the College was skeptical of this medical evidence or needed further clarification, it could have requested additional information from Spence's doctor, as it had been granted permission to do so.

The Court also rejected the evidence of the internet search concerning Spence's potential current employment. The Court found that the Discipline Committee had minimal information regarding Spence's employment, and improperly relied on information from a basic internet search despite the medical evidence, to support its conclusion that Spence was able to attend the hearing.

Additionally, the OCT's failure to disclose the internet search results to Spence so that he could respond to it was found to be procedurally unfair.

The Court also commented that if the adjournment had been granted, as Spence was no longer employed by the TDSB, he posed no risk to his school community.

As a result, the Court found that the second adjournment should have been granted and that Spence had not been afforded procedural fairness given the significance the discipline proceedings had for him — specifically the potential revocation of his teaching licence. The Court set aside the Discipline Committee's decision and remitted the matter back to it for a re-hearing.

This decision confirms that:

1. tribunals must remember that while they have a broad discretion to decide whether to grant an adjournment, that discretion is subject to the rules of procedural fairness;

2. a medical report indicating that a person suffers from a serious mental health condition is evidence that should not be taken lightly and should be considered in its entirety, especially when deciding to proceed with or to adjourn a disciplinary hearing;

3. evidence which a tribunal intends to rely upon in reaching its decision must be disclosed to the member so that the member has an opportunity to respond to it. ■

— KC —

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Education Law Newsletter

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