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Human Resources Newsletter

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SCC confirms right to strike is protected by freedom of association under the *Charter*

In 2007, the Government of Saskatchewan enacted two new statutes: *The Public Service Essential Services Act* (*PSESA*) and

the *Trade Union Amendment Act* (*TUAA*). The *PSESA* was introduced to limit the ability of public-sector employees who performed essential services from striking; unilaterally designated essential service employees were required to continue the duties of their employment in accordance with the last Collective Agreement. No alternative meaningful mechanism for resolving bargaining impasses was provided. The *TUAA* amended the certification processes for Unions and changed provisions dealing with permissible communications between employers and employees. The result of these changes was to make it harder for Unions to become certified as bargaining agents of employees.

Both pieces of legislation were challenged by the Saskatchewan Federation of Labour (Federation) as being unconstitutional. The Trial Judge found that the right to strike was a fundamental freedom under section 2(d) of the *Canadian Charter of Rights and Freedoms* (*Charter*), which guarantees the freedom to associate, and the prohibition substantially interfered with the rights of public-sector employees. The Judge declared the *PSESA* unconstitutional and suspended its validity for one year. The Trial Judge found the amendments brought about by the *TUAA* were valid and did not breach the *Charter*.

Both the Federation and the Province of Saskatchewan appealed the Decisions to the Saskatchewan Court of Appeal. The Court of Appeal unanimously overturned the Trial Judge's Decision regarding the constitutionality of the *PSESA* and upheld the Decision regarding the *TUAA*. Both parties appealed this Decision to the Supreme Court of Canada.

The Supreme Court of Canada released its Decision in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4. The Supreme Court of Canada overturned the Court of Appeal and held that the prohibition in the *PSESA* against striking substantially interfered with the meaningful process of collective bargaining. The right to collective bargaining necessarily required the right to strike where negotiations broke down. It was a necessary component of the process of collectively associating to pursue common workplace goals. "*This collective action at the moment of impasse is an affirmation of the dignity and autonomy of employees in their working lives*." The right to strike also promoted some equality in the bargaining process; as without the ability to strike, employers would have little impetus to negotiate and compromise with their employees. The Supreme Court held that, looking at the historical, international, and jurisprudential landscape, a meaningful process of collective bargaining required the ability of employees to strike or threaten to strike, for the purpose of negotiating the terms and conditions of a Collective Agreement. "*The ability to engage in the collective withdrawal of services in the process of the negotiation of a collective agreement is, and has historically been, the irreducible minimum of the freedom to associate in Canadian labour relations*."

This prohibition violated section 2(d) of the *Charter*; and the violation could not be saved under section 1 of the *Charter* as being a demonstrably justified reasonable limit on the rights in section 2(d). While the maintenance of essential public services was a pressing and substantial objective, the means chosen by the Government of Saskatchewan were not minimally impairing of the rights protected by section 2(d). The Supreme Court found that the designation of essential services was somewhat arbitrary, as a public employer had unilateral authority to decide, among other things, whether and how essential services would be maintained, the classifications of employees who must continue to work during strikes, and, for

public employers other than the Government of Saskatchewan, the essential services that were to be maintained. The *PSESA* went well beyond what was reasonably required to ensure that the delivery of essential services during a strike not be interrupted. The Supreme Court also found it relevant that no alternative mechanism to resolve a bargaining impasse was introduced; if the ability to strike was removed, then some other meaningful dispute resolution mechanism had to be put in its place. It could be argued that for the essential service sector, a less disruptive mechanism for resolving collective bargaining impasses should be used (eg., mandatory arbitration); however, it could not be argued that there should be no mechanism at all.

Two Judges of the Supreme Court disagreed with the majority. Those two Judges disagreed that the right to strike should be constitutionalized. They cited concerns that doing so would introduce great uncertainty into labour relations and inhibit a Government's ability to respond to the changing needs and dynamics of labour relations. "*While employees are granted constitutional rights, constitutional obligations are imposed on employers. Employers and the public are equally entitled to justice: true workplace justice looks at the interests of all implicated parties…The statutory right to strike allows both employers and employees to exercise economic and political power. Now by constitutionalizing only the ability of employees to exert such power, the majority disturbs the delicate balance of labour relations in Canada and impedes the achievement of true workplace justice.*" The right to strike was not required to ensure the constitutional guarantee of the freedom to associate, nor was it the motivation behind good-faith bargaining; bargaining in good faith was both a statutory and constitutional duty. Therefore, the *PSESA*, did not violate the right to meaningful collective bargaining protected under section 2(d) of the *Charter*.

The Supreme Court unanimously upheld the lower Court's Decisions that the *TUAA* did not violate the *Charter*; the changes introduced to the process by which Unions obtain or lose bargaining agent status, as well as the rules governing employer-employee communications, did not substantially interfere with the *Charter* rights. ■

SCC confirms distinction between maternity and parental leave and impact of the *Charter*

In *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2014 SCC 70, the Supreme Court of Canada (SCC) overturned the British Columbia Court of Appeal and upheld an Arbitrator's interpretation of a Collective Agreement that recognized there are different purposes for pregnancy benefits and parental benefits. In doing so, the SCC overturned the British Columbia Court of Appeal which found the Arbitrator erred when distinguishing parental leave from pregnancy leave.

The Collective Agreement in this case provided that the Employer would pay a pregnant employee who took pregnancy leave (pursuant to the pregnancy leave provisions of the *Employment Standards Act* of B.C.), or to a parent who qualified for Employment Insurance benefits for birth or adoption, 95% of the employee's current salary for the first two weeks of the leave. Thereafter, the employee was entitled to the difference between 70% of the employee's salary and the amount of Employment Insurance (EI) benefits the employee received for 15 further weeks. However, the Collective Agreement granted 17 weeks of

parental leave to qualified employees. The effect of the Collective Agreement was that it offset a pregnant employee's pregnancy leave benefits against parental leave benefits. The Federation complained that the Employer provided birth mothers with maternity (or pregnancy) leave benefits, but did not provide them parental leave benefits which were available to all other parents (including fathers and adopting parents). This meant that if birth mothers took 15 weeks of maternity leave, then they only had two weeks of parental leave benefits left. Adoptive parents and birth fathers were entitled to the full 17 weeks of parental leave.

The Employer argued that the Collective Agreement did not confer both pregnancy leave and parental leave benefits. Rather, there was a single 17 week "top-up" benefit consisting of a two-week waiting period followed by 15 weeks of payments for birth or adoptive parents who qualified for EI benefits. There was therefore no discrimination because birth mothers could access the parental leave benefit. They could elect to receive the benefit either during pregnancy leave or during parental leave and received the same benefit as birth fathers or adoptive parents.

The Arbitrator found that, based on previous Decisions, the Courts have found that maternity leave has a distinct purpose from parental leave. The purpose of maternity leave was not the encouragement of family formation. Rather, it was to protect the health and wellbeing of pregnant women and new biological mothers (not simply new parents) undergoing the health and other stresses of giving (and recovering from giving) birth, so that they could reasonably and effectively return to the work force. The Arbitrator therefore distinguished pregnancy leave (leave related to the physical stressors of giving birth) from parental leave (leave related to the stressors of entering parenthood):

"*Thus, there are distinct purposes for each of the two income-replacement benefits: one is to provide income while a woman is incapacitated from work due to pregnancy or recuperation; the other is to provide income while parents are caring for and bonding with their children.*"

The Arbitrator came to this conclusion after reviewing previous case law that had found it was not discriminatory for only women who had given birth to receive pregnancy leave as only this class of individuals experienced the physical stressors of giving birth.

The Arbitrator found that the maternity and parental leave were different benefits, with maternity leave intended to provide for birth mothers who took pregnancy leave and qualified for EI benefits, and parental leave was intended to apply to adoptive parents and/or birth fathers who took parental leave and qualified for EI benefits on that basis. Assuming that the Collective Agreement could have been interpreted so as to allow birth mothers to claim the benefit in association with parental leave (as the Employer suggested), this meant that they would have to forego their entitlement based on maternity leave — which, of course, was not available to other parents. While the Employer argued that this system created parity between everyone, the Arbitrator found that this in itself was discrimination. The intention of pregnancy leave was to provide extra time for recovery from giving birth so that birth mothers would return to the workplace in the same physical health as individuals on parental leave (and who had not physically given birth).

"*Exact parity between biological and adoptive mothers would result, in my view, in discrimination against biological*

mothers. In fact, maternity leave provisions are indispensible to ensure the equality of women in general, who suffer disadvantage in the workplace due to pregnancy-related matters."

The Decision affirmed that a birth mother's period of parental leave could not be reduced by any amount of maternity leave she took beforehand. Having found the benefits clause in the Collective Agreement discriminatory, the Arbitrator found that it violated the equality provisions of the *Charter of Rights and Freedoms*. As a remedy, the Arbitrator ordered the parties to negotiate an amendment that would comply with the *Charter*.

The SCC agreed with the Arbitrator and upheld the Arbitrator's Decision. As a result, parental leave is a different benefit than pregnancy (maternity) leave. ■

Court confirms principles applicable to wrongful termination and the rights related to family status

In *Partridge v. Botony Dental Corporation*, 2015 ONSC 343, Lee Partridge brought an action for damages alleging that she was wrongfully terminated by the Defendant Botony Dental Corporation (Botony) and that her "human rights" had been violated.

Ms. Partridge was a dental hygienist employed by Botony at the Big Bay Point Dentistry without a written employment contract for 7 years, and she eventually became the office manager. During her employment, she had taken two maternity leaves, each for about 13 months. As a dental hygienist, she worked from 10 a.m. to 6 p.m., Tuesday to Friday. As the office manager, she worked 9 a.m. to 5 p.m., Tuesday to Friday.

Balbinder Jauhal was the sole director, officer and shareholder of Botony. Prior to Ms. Partridge's return from her second maternity leave (in 2011), Ms. Jauhal texted Ms. Partridge to tell her that she would be returning as a dental hygienist, with shifts beginning at 8 a.m. Ms. Partridge reminded Ms. Jauhal of her obligations under the *Employment Standards Act*, to return her to the same or comparable position that she held before she began her leave. Ms. Jauhal responded by telling Ms. Partridge she was required to work until 6 p.m. on three of her four workdays, effective immediately. Ms. Partridge claimed that Botony was attempting to force her out as Ms. Jauhal knew these new hours conflicted with Ms. Partridge's daycare arrangements. She was subsequently terminated, without notice, which she felt was a reprisal for asserting her right to be reinstated to her previous position. Botony denied her allegations, and claimed that Ms. Partridge was harassing her co-workers. Botony also claimed Ms. Partridge was trying to establish a competitive dental practice, and had copied and stolen confidential and proprietary patient records and information, and also contacted, solicited and procured other dental hygienists employed by Botony to join her new business. Botony claimed that her conduct caused it to suffer damages through lost revenue and decreased resale value. Botony submitted that, in light of Ms. Partridge's conduct, it had just cause to terminate her employment without notice.

The Superior Court reviewed the principles for determining when there is just cause for termination of employment without notice. "*Dismissal without notice is such a severe punishment that it can only be justified by misconduct of the most serious kind. [It]…must be weighed against the entire context and history of that employee's performance, such that the 'misconduct must be of such magnitude as to overshadow the*

years, loyalty and efforts devoted by the employee to the employer'." Dishonest conduct, theft, misappropriation of employer's personal property, insolence or insubordination, and taking steps to compete with one's employer could all, depending on the circumstances, be just cause for termination without notice. The Superior Court concluded that the evidence failed to prove any of these though, and Botony did not have just cause to dismiss Partridge without notice. Her termination was therefore unlawful.

The Superior Court then, in assessing damages for an unlawful termination, considered the four principle factors for determining the appropriate notice period for a terminated employee (as set out in *Bardal v. The Globe & Mail Ltd*., 24 D.L.R. (2d) 1401), being: character of employment; length of service; age of the employee; and availability of similar employment, having regard to the employee's experience, training and qualifications. The Superior Court determined that the appropriate notice period for Ms. Partridge was 12 months' salary, less any income she earned during the 12 months immediately following her termination, and awarded her $42,517.44.

The requirement to begin working earlier, or to end her shift later, also triggered Ms. Partridge's right under the *Human Rights Code* not to be discriminated against on the basis of family status. In order to make out a *prima facie* case of discrimination on the ground of family status resulting from childcare obligations, Ms. Partridge had to demonstrate that: a child was under her care and supervision; the childcare obligation engaged her legal responsibility for that child, as opposed to a personal choice; she had made reasonable efforts to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution was reasonably accessible; and that the impugned workplace rule interfered in a manner that was more than trivial or insubstantial with the fulfillment of her childcare obligation. Ms. Partridge succeeded in making out a *prima facie* case, and Botony could not show there was a *bona fide* occupational requirement for changing her hours, nor was there undue hardship in accommodating her with her previous hours. For injury to her dignity, feelings and self-respect, taking into account Ms. Jauhal's wilful and reckless disregard for her legal obligations under the *Employment Standards Act* and that this form of discrimination is particularly harmful to individuals who require childcare arrangements out of economic motivation, the Superior Court awarded Ms. Partridge $20,000. The Superior Court concluded that its "*censure [was] warranted by way of an award that will act as a deterrent to employers who are unwilling to accommodate childcare arrangements, except where legitimate, justifiable grounds exist for being unable to do so*."

The Court provided useful guidance on both wrongful termination and the rights relevant to family status. ■

HRTO delineates requirements related to "family status" under the *Code*

In *Wing v. Niagara Falls Hydro Holding Corporation*, 2014 HRTO 1472, the Human Rights Tribunal of Ontario (HRTO) found that changing the meeting times of the Niagara Falls Hydro Holding Corporation's Board of Directors was not discriminatory when the new time directly conflicted with the parental obligations of one member.

Janice Wing was a municipal councillor and her duties included sitting on the Board of Directors (Board) of the Niagara Falls Hydro Holding Corporation (Corporation),

for which she received an additional honorarium. When she learned that the Board passed a resolution in her absence to (1) hold meetings earlier in the day (moving them from 4:00pm to 3:30pm); and, (2) to remove any directors who missed two consecutive meetings, she brought an Application before the HRTO. She claimed that these new requirements discriminated against her employment, on the basis of her family status contrary to the *Human Rights Code* (*Code*) as the new requirements interfered with her ability to pick her daughter up after school. She also claimed she was reprised against when a series of media articles were published discussing her absence from meetings; she believed the other members and officers of the Board were the only ones aware of her attendance.

The HRTO found that the resolutions had been passed by the Board to curtail absences at the meetings. Wing had missed every meeting in 2012 for various reasons (only one of which being her parental obligations). When Wing raised her concerns with the Board that she would not be able to meet at the new proposed time for 2013, she was offered either the opportunity to participate by phone or arrangements would be made for the supervision of her daughter at the office during the meetings. Wing refused both, insisting on her preferred accommodation of a later start time (4:30pm) for meetings. When the first meeting in 2013 was not rescheduled to accommodate her, she filed her Application with the HRTO. However, she did in fact attend the first meeting and only missed one further meeting after that. She was able to have her friend, another parent at the school, pick her daughter up for her. She proceeded with her Application though, as she felt isolated at these further meetings and reprised against when a series of articles were published online by a local news source which discussed her absences in 2012 and her Application to the HRTO.

The first issue the HRTO dealt with was whether there was an employment relationship. Without one, Wing could not claim she was discriminated against in her employment. The HRTO applied the "control and dependency" test, which looks at who is responsible for determining working conditions and financial benefits and to what extent does a worker have an influential say in those determinations.

Ultimately, the HRTO found Wing was not in an employment relationship with the Corporation: Wing's honorarium was not dependent on her attending meetings; the Board, and not the Corporation, determined meeting start times; she had an opportunity to make submissions and vote on the start time; and, she was a part of the Corporation as a director on its Board. As there was very little dependency by Wing on the Corporation, and very little control over Wing by it, she was not its employee. On this basis, Wing's Application was dismissed.

The HRTO further discussed whether the facts were capable of finding discrimination on the basis of her family status. It noted situations like these could amount to unintentional, or adverse effect, discrimination, and that the term family status includes substantive obligations owed by parents towards their children for childcare. However, the types of childcare needs which are contemplated under family status must be those which have an immutable (or constructively immutable) characteristic. Childcare activities that are protected under family status are only those activities that engage a parent's legal responsibility to a child. To prove discrimination on the basis of family status, the individual must show: (i) that a child is under his or her supervision; (ii) that the

childcare obligation at issue engages the individual's legal responsibility for the child, as opposed to personal choice; (iii) that he or 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. Wing's personal choices for after-school pick up and supervision therefore prevented her from establishing a *prima facie* case of discrimination under the *Code*. Based on all the facts, the HRTO could not find the earlier meeting time interfered with her parental obligations or family status.

As for the reprisal claim, the HRTO determined that someone on the Board or its officers had leaked the information. However, it adjourned deciding this issue and requested submissions from the parties to provide further argument as to: whether the HRTO should recognize this as a reprisal; whether the Corporation should be liable for its directors or officers leaking the information; and, what the appropriate remedy should be.

This Decision provides further guidance on the *Code* requirements related to "family status". ■

Grievance decision clarifies workload and scheduling issues with respect to family status under the *Code*

In *Seneca College of Applied Arts and Technology v. Ontario Public Service Employees' Union, Local 560 (Opatowski Grievance)*, [2014] O.L.A.A. No. 321, a Workload Resolution Arbitrator (WRA) was appointed to determine the workload Complaint of Professor Opatowski. Professor Opatowski claimed that the Seneca College of Applied Arts and Technology (Seneca) ceased to suitably accommodate his family status needs in formulating his Standard Workload Form (SWF) after having accommodated him for years. In addition to filing a Grievance for discrimination under the regular Grievance procedures, Professor Opatowski and the Ontario Public Service Employees' Union (OPSEU) brought a Complaint to Seneca's Workload Monitoring Group (WMG) to take advantage of the expedited process. The WMG was unable to informally resolve the Complaint and it was referred to the WRA. Seneca objected to the referral, claiming that the Complaint was not actually a Workload Complaint, but a Scheduling Complaint, which would mean the WRA did not have jurisdiction to hear the Complaint.

The WRA's jurisdiction here was to deal with *"an individual workload assignment"* which was defined in the Collective Agreement to include "*...teaching contact hours, accumulated contact days, accumulated teaching contact hours, number of sections, type and number of preparations, type of evaluation/feedback required by the curriculum, class size, attributed hours, contact days, language of instruction and complementary functions*." Seneca submitted that this definition did not encompass issues with timetabling or scheduling of teaching obligations. Seneca argued that this meant that a dispute over a teacher's timetable, over their work schedule, and not their workload, must then be dealt with under the normal Grievance procedure, not the expedited procedures for resolution of workload disputes. Therefore, Seneca argued, OPSEU could not ask a WRA to require Seneca to assign particular teaching hours to accommodate Professor Opatowski's family needs.

OPSEU argued that timetabling forms part of workload assignment disputes because the timetable was an intrinsic feature of assigning a workload. OPSEU also argued that all workload matters must be dealt with under the expedited process, since once the semester ended, the harm to Professor Opatowski would have been done and the matter would essentially be moot.

The WRA found that Professor Opatowski's Complaint was founded in the *Human Rights Code* (*Code*) based on its general application to his employment. The timetabling he complained of was not related to his workload; it was a free-standing Complaint about the scheduling of his teaching. He was not complaining that the teaching hours exceeded what was permissible under the Collective Agreement; rather, he was complaining that the particular hours he was assigned unlawfully interfered with his family time to which he was accustomed. It was not proper to bring the dispute before the WRA; the convenience and expedience of the Workload Complaint procedure, and the arguments about harm and mootness, were not sufficient reasons to bring the Complaint into the WRA's jurisdiction. The proper forum for the Complaint was the regular Grievance procedure.

The Decision clarifies the distinction between workload and scheduling disputes with respect to family status under the *Code*. ■

School Board liable for harassment of Teacher by Student

The Alberta Human Rights Tribunal heard a Complaint by teacher Vienna Malko-Monterrosa (Complainant), who had been frequently harassed by a junior high school student over approximately two years, against her employer, a Francophone School Board (Conseil). In *Malko-Monterrosa v Conseil Scolaire Centre-Nord*, 2014 AHRC 5, the Tribunal held the Conseil liable for discrimination and awarded general damages of $7,500 for failing to take adequate measures to protect Ms. Malko-Monterrosa from harassment.

The Complainant is of Mexican descent and was born in Canada. The Complainant argued that the harassment amounted to discrimination in employment based on race, colour, ancestry, and gender, and that the Conseil should be held liable for the harassment. She also argued that the Conseil further discriminated against her on the ground of race because it would have taken further measures to prevent the harassment if she were of French or French-Canadian ancestry rather than Mexican.

The Tribunal dismissed the latter argument because it lacked any supporting evidence besides the Complainant's own perception. However, there was significant evidence with respect to the former. The evidence showed that much of the harassment involved offensive comments related to the Complainant's gender and race. There was also a great deal of evidence about the measures taken by the Conseil as well as measures contemplated by the Conseil or requested by the Complainant but not taken. As a result, the Tribunal found that the Complainant was discriminated against on the prohibited grounds of race, colour, gender and ancestry, contrary to s. 7 of the *Alberta Human Rights Act* (Act).

The harassment began with several "prank calls" in which the caller disconnected when the Complainant answered. The student "S" eventually identified herself as the caller. The Complainant took steps to convey to S and her parent that this behaviour must cease. The Complainant told the Principal about the conduct, who offered her some

advice on dealing with the conduct. Vice-Principal, Ms. Dallaire, also told S's parent that S may not call her teacher. Ms. Dallaire also offered to S the use of the school's counselling service. S met only once with the school counsellor and was unwilling to meet further afterwards.

A few months later, the Complainant began to receive more prank phone calls. S had given out the Complainant's phone number to other students. According to Vice-Principal Dallaire's evidence, this was because, in S's mind, the Complainant had formerly been nicer to S and S wanted a "tiny revenge" on the Complainant. The Complainant testified that Vice-Principal Dallaire advised her to change her phone number, which she did although she felt the Conseil should have taken steps to prevent this from being necessary.

About six months later, in the next school year, the Complainant began receiving Facebook messages from S. One message said, "*hey sexy bitch. You and me lets get it on grrrrr I know where you live*." Another said, "*god if you actually think this is S your so stupid. I actually feel bad that i'm framing her, NOT! lmfao*."

The Complainant told the other Vice-Principal, Mr. Potvin, about the messages. She testified that Vice-Principal Potvin told her that the school was not responsible as the messages were sent through Facebook. She later talked to the Principal, at that time Ms. Lafleur, who spoke with S. S admitted sending both messages. A few days later, the two Vice-Principals, the Principal, the Complainant, S's homeroom teacher, S's parent, and S, met and agreed that S would not contact the Complainant at school or otherwise and would not be permitted near the Complainant's classroom.

Principal Lafleur testified that she had a further meeting with the Vice-Principals and it was decided that Vice-Principal Potvin would provide closer support and supervision to S. Meanwhile, Principal Lafleur met several times with the Complainant and continued to check on her daily.

Nevertheless, in the next two months the Complainant received several emails from senders of various apparent identities, though most were from a sender identified as "Rachel Gibson" and one message was identified as coming from S. These emails referred to the Complainant using several highly offensive and sexist terms and one threatened, "*you can't run away from me cunt I'll just get coming. you'll never find out who I am*."

The Complainant forwarded the emails to the Vice-Principals and Principal. To her knowledge, they did not question S about the emails, although Principal Lafleur testified that a meeting was held with S concerning the emails and the consequences of sending them. The Principal had noticed by that time that the Complainant was suffering. Still the harassing emails continued. Steps were taken to block the sender "Rachel Gibson". Thereafter, two more emails from a sender identified as S arrived and another from a different name the Complainant did not recognize.

Soon afterwards, the Complainant asked Superintendent Henri Lemire to discuss steps the Conseil would take to resolve the situation. The Complainant was told that S would shortly be expelled and transferred to another school in the district, a school which the Complainant objected to because her mother was the receptionist at that school and she was concerned S might act inappropriately towards her. The Complainant testified that she was assured that if this happened, S would be moved to yet another school.

The next day, the Complainant received a handwritten letter of apology "*for all the emails I sent*" from S. The same day, the Complainant wrote a letter to the Principal with details of incidents she knew or believed had originated from S. The Vice-Principal was able to determine, by having a class in which S was a member submit an electronic assignment, that the IP address from which S sent in her assignment was the same as that from which the "Rachel Gibson" emails were sent.

S had not yet been expelled. She was given a five-day suspension. In the meantime the Principal recommended expulsion to the Conseil. A week later, the Conseil expelled S and transferred her to the school in which the Complainant's mother was the receptionist. Conditions were attached to the transfer, including a prohibition on any contact by any medium or in person with the Complainant and a prohibition on entering the property of her former school.

About a month later, the Complainant received two additional Facebook messages from S calling her "*little miss priss*" and saying "*You have no friends in common*." A few weeks later, a handwritten letter was slipped under the Complainant's classroom door, containing a list of insults and threats and including such phrases as "*slut*," "*puta*," "*illegal immigrant*," "*piece of Mexican shit*," and "*go back to your country*." It was confirmed the letter was written by S and others and slipped under the door by a student who attended the Complainant's school. The students from the Complainant's school who were involved were suspended.

In the Complainant's view, the letter was a violation of the conditions of S's transfer and the Conseil was bound by those conditions to transfer S to another district. However, she was suspended for three days instead. The Principal of S's school, Mr. Tremblay, consulted Assistant Superintendent Bugeaud before making a decision. Ms. Bugeaud knew about the conditions but was concerned about the effect of another expulsion on S. Accounting for the fact that S's academic performance had been good and it was close to the end of the school year, she judged it was in S's best interests not to expel her.

Ms. Bugeaud emailed Principal Tremblay her rationale for suspending and noted that S had now made criminal allegations against the Complainant. A police investigation followed. A few days later the Complainant was advised by Principal Lafleur that S had emailed two students alleging that the Complainant had sexually assaulted S.

A police investigation revealed the allegations to be groundless and made in retaliation for the expulsion. The Complainant then met with Superintendent Lemire and Mr. Préfontaine, counsel for the Alberta School Board Association (ASBA), and requested that the Conseil protect her against further harassment or false allegations by issuing a cease and desist letter to S. Instead, she was presented with three options. Mr. Préfontaine suggested, (1) that she seek a peace bond, (2) that a letter could be sent to S and her parent, or, (3) that she contact the Alberta Teachers Association to obtain a lawyer to support her and represent her interests in relation to S's misconduct.

Just three days later, S sent emails to two students in which she accused the Complainant of sexual assault. The next day the Complainant again asked Superintendent Lemire for a cease and desist letter, although this request was apparently based not on the emails but on S's attempt to deliver an envelope to the Complainant's mother, which she refused to accept. Mr. Lemire issued a cease and desist letter, but when he found out that it was an apology to the

Complainant's mother that S had tried to deliver, he retracted the letter.

A few days later Mr. Lemire expressed his frustration to the Complainant that she had not undertaken all of the options they had spoken about with Mr. Préfontaine earlier.

Finally, at the end of the school year, S transferred to another school district.

The first issue before the Human Rights Tribunal on these facts was whether this behaviour constituted harassment. The Tribunal reviewed the Supreme Court's definition of harassment from an employment law case and reasoned, "*In a human rights context, the test for workplace harassment can be restated as unwelcome conduct related to prohibited grounds of discrimination that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment*."

Irrespective of the reason for harassment, its effect is "*an attack on the dignity and self-respect of the victim as an employee*", which the Tribunal found to be the effect of S's behaviour.

The next issue was whether the harassment constituted discrimination based on prohibited grounds, since "*human rights legislation does not prevent bad behaviour*." Though the earlier incidents did not, the later incidents contained comments concerning prohibited grounds. They were "*populated with insults and innuendo based on race, colour, gender and ancestry*."

Next, the Tribunal had to decide whether the Conseil should be held liable for harassment and discrimination effected by the actions of a third party.

Section 7 of the *Alberta Human Rights Act*, the provision on discrimination in employment, does not, unlike section 5 of Ontario's *Human Rights Code*, explicitly require an employer to maintain a workplace free of harassment. However, the Tribunal stated Alberta's Act should be read broadly so as to include such a duty. The Tribunal also observed, "*In a number of Canadian jurisdictions, courts and tribunals have found that the obligation to provide employment free of discrimination extends to include acts of third parties who are not employees*."

The Conseil had a duty to prevent discrimination including discrimination resulting from the acts of third parties in the workplace over which it had control and authority. The Conseil was best positioned to take effective remedial action to stop the harassment.

The Tribunal noted that the Conseil had taken several steps to reduce the harassment and restore the workplace which "*were for the most part reasonable*." However, crucial to the outcome was the fact that the Conseil lacked a coordinated or centralized approach, which resulted in a failure to grasp the seriousness of the harassment considered in its entirety and in light of the increasing severity of the individual harassing acts over time.

While several different people were involved in different ways — including three principals, two vice-principals, a superintendent, and an assistant superintendent — who each individually "*may indeed have been applying reasonable efforts, they often were responding to individual incidents without appreciation for the growing accumulation of events*." A clear example of this was the retraction of the cease and desist letter based on a misunderstanding of one event, which might have been reasonable if it were an isolated event, but it clearly was not.

The Tribunal went on to comment on what the Conseil ought to have done. It should have taken steps earlier "*to put greater distance between the complainant and S, to avoid putting S in direct contact with another of the complainant's family members, and to keep her from mingling with students of [her former school] after the expulsion.*" Moreover, the Tribunal suggested: "*If one office or individual had been made aware and given authority to coordinate the efforts to address S's behaviour toward Ms. Malko-Monterrosa, it seems likely that the Conseil would have apprehended the growing problem and recognized the individual incidents as pieces in a pattern of increasingly objectionable conduct. In turn, this would likely have shaped a more effective response to eliminating it.*"

As a result, the Tribunal found the Conseil liable for discrimination against the Complainant for failing to take appropriate steps to deal with the harassment, and awarded damages of $7,500.00 to the Complainant.

The Complainant "*also sought a number of non-financial remedies to educate school administrators and others in human rights*". However, the Tribunal found that the administrators and the Conseil "*understood their responsibilities and took action to remedy the situation. While a coordinated approach to the situation would have benefitted all of the parties, I am unable to see that further educational remedies are warranted*".

This decision reinforces the interplay between Student Discipline and Human Resources where staff are harassed by a student(s) and the importance of dealing with such situations in an appropriate centralized manner with an effective plan of action. ■

Human Rights Board confirms principles for workplace discrimination

In *Cromwell v Leon's Furniture Limited*, 2014 CanLII 16399, a Nova Scotia Human Rights Board of Inquiry (Board) heard Ms. Cromwell's Complaint that her former employer, Leon's Furniture Limited (Leon's), discriminated against her on the basis of her race while she was employed by Leon's in its Dartmouth location.

Ms. Cromwell, an African-Canadian, alleged that, due to her race, she was subjected to considerable differential treatment compared to other staff. Such treatment included: racial comments made by her supervisor and the store manager's husband; unusually harsh disciplinary measures by her supervisor and other management; impeded career progression; unfair denial of sales commissions; being referred to as "Contessa", "Condoleezza Rice", "Sunshine" or spoken to in "black lingo"; touching her hair and commenting on its texture being like wool; and making the comment, "*Clear the room, there's going to be a lynching*" at the outset of her performance evaluation. Though she did not complain about the comment to Leon's, it was this final comment which prompted Ms. Cromwell to resign and bring a formal Complaint to the Board.

Despite Leon's' claim that it properly investigated her complaints and that all disciplinary measures were *bona fide*, the Board found that Ms. Cromwell had been discriminated against and that Leon's was responsible for not appropriately responding to her complaints. The Board found almost all of Ms. Cromwell's allegations were proven by the facts and that she received differential treatment on numerous occasions and, for the most part, her race was an underlying factor. Particularly, in

regards to the lynching comment, the Board found the statement "*harmed the Complainant's self-identity at its core on the basis of her race*". Its hurtfulness was exacerbated by her experiences with her managers. The comment was objectively offensive and constituted direct discrimination and Ms. Cromwell was not under an obligation to voice her objection to what was an objectively offensive comment associated with her race. "*It should have been perceived and understood by the managers present to be objectively offensive and to have a racial connotation*". Considering that there were other managers in the room who failed to respond to the comment, she could not be faulted for not voicing her objection to it. Ms. Cromwell's resignation was found to be a reasonable response to this comment.

The Board noted that attitudes and presumptions about race are rarely vocalized in the workplace and that the Board's task was to determine if race was to be inferred as the reason, or part of the reason, for Ms. Cromwell's differential treatment. Based on the selection of comments directed at Ms. Cromwell, the Board found there was a heightened awareness of Ms. Cromwell's racial differences.

Disrespectful conduct can lead to an inference of discrimination on the basis of race when an employee is treated differently than other employees and possesses a characteristic that is a protected ground under human rights legislation. In these circumstances, where disrespect is accompanied by an overtly racial threat, whether intended as a joke or not, such an inference is clearly more probable than not. The on-going negative commentary and differential treatment with respect to disciplinary actions constituted a form of discriminatory harassment based on race.

Leon's attempted to defend itself from liability for the actions of its employees by pointing to its detailed workplace safety and harassment policies and training programs. While comprehensive, the Board noted the harassment policies and training lacked sufficient detail and focus in terms of addressing discrimination, particularly with regards to race. It is unclear whether or not a more comprehensive policy would have allowed Leon's to avoid liability for its employees misconduct.

Leon's also claimed it had made suitable and appropriate efforts to investigate Ms. Cromwell's complaints of racial discrimination. Leon's claimed it was only informed of her concerns upon her resignation, and that it responded immediately to determine if any discrimination, racial or otherwise, had occurred. The Board found that the investigation conducted by Leon's was considerably flawed. The employee who performed the investigation and reported that there was no discrimination had been in a romantic relationship with Ms. Cromwell during the time leading up to her resignation and which only ended during the investigation. While Ms. Cromwell and the investigator had kept their relationship secret from Leon's (it only came to light during the Hearing), the Board could not look past this conflict of interest. The investigation was not conducted with sufficient effort to be discreet or to avoid backlash against Ms. Cromwell. Even if there was no conflict, the Board was very critical of the conduct and results of the investigation. The flaws with the investigation were egregious enough to disregard any defence it could provide to Leon's. The Board found that the action taken by Leon's following the report was inadequate and Leon's was not in a position to provide a healthy, discrimination-free work environment had Ms. Cromwell

chosen to return to work after her resignation. If anything, the investigation and response to the report had only increased the hostility she would have faced in the workplace.

The Board awarded Ms. Cromwell $8,000.00 in general damages, plus pre-judgment interest, for the discrimination she suffered. The Board considered whether she should receive damages for lost income. Rather than find she was constructively dismissed and have to consider if it had the ability to award damages for constructive dismissal, the Board determined it was in fact assessing damages for breach of a statutory right to be free from discrimination, and not for breach of an employment contract. It found it could then award damages for loss of income, and awarded 18 months' gross income, less any income she received from employment during the 18 months following her resignation. The Board also ordered Leon's' Dartmouth location to undertake cultural competency training.

While this case is not from the education sector, it provides further insight into the expectations for employers, including School Boards, with respect to human rights. ■

Mental health issues not addressed with respect to teaching deficiencies

In *Fernandes v. Peel Educational & Tutorial Services Ltd. (c.o.b. Mississauga Private School)*, 2014 ONSC 6506, the Ontario Superior Court (Court) heard Mr. Fernandes' claim that he was wrongfully dismissed by the Peel Educational & Tutorial Services Ltd. (c.o.b. Mississauga Private School) (Employer). Mr. Fernandes had worked for his Employer for a little over ten years. Eventually, his Employer began noticing: that his record-keeping and calculations were sloppy and inconsistent, resulting in undue bonuses or penalties that impacted student marks; that he was still marking missing assignments with zeros despite directions not to; and that he committed academic fraud by fabricating marks for assignments that were not submitted. The Employer concluded he had "*failed to uphold the standards and expectations of the profession, and has hurt students and the school's reputation in the process*…", and dismissed him for cause.

Mr. Fernandes did not dispute these allegations. He denied, however, that he had committed academic fraud and claimed that he was unfairly investigated and treated badly by his Employer leading up to his dismissal. He did not attempt to explain his actions before the Court. Instead, Mr. Fernandes listed a series of events that he claimed proved that his Employer and its staff treated him unfairly and inconsiderately. The Court disagreed; it found Mr. Fernandes was being "*overly sensitive*". When Mr. Fernandes complained to his Employer, the Court found the responses by the Employer and its staff were reasonable and responsive in the situations, and that Mr. Fernandes had not been subjected to any inappropriate behaviour. He was provided sufficient warnings and directions, as well as time, to correct his mistakes.

The Court found that he gave incorrect marks, that the marks he gave were late, and that he allowed the students to hand in overdue assignments. The Court also found he lied to his Employer about how the marks were calculated, he lied to the Court about how the student presentations were marked, and he admitted falsifying marks on students' records. The Court was left with the determination of whether what he did was sufficient to terminate him for cause and without notice.

The Court took into consideration his ten years of service with his Employer and the fact that, until the incidents in question, he had been a well-regarded teacher. He had generally positive employment reviews, volunteered to coach student teams, and had few student complaints. The Court noted that the Employer had also knowingly allowed the report cards, with the falsified marks, to be sent home with the students. Having done so, the Employer could not now argue that it was an egregious failing by Mr. Fernandes. Referring to the falsification as academic fraud was too dramatic, in the Court's opinion; a few students were marked on presentations that they had not yet given and those presentations were only one part of one course which made up only one part of the overall grade. Also of relevance to the Court was that Mr. Fernandez had admitted his conduct to his Employer during its investigation. The Court concluded:

In balancing all of those considerations, I am satisfied that immediate termination was not the appropriate sanction for this misconduct. The [Employer] could have fashioned a reprimand and a warning that such conduct, if repeated, would lead to summary dismissal … This rather abrupt change in Mr. Fernandes' professional behavior should have led the [E]mployer to make more of an effort at enquiry to assist Mr. Fernandes rather than to terminate his employment without proper notice.

The Court found that Mr. Fernandes was wrongfully dismissed; the punishment outweighed the seriousness of his infractions. The Court awarded Mr. Fernandes $51,918.00 in damages for lost wages, as well as additional damages for long-term disability benefits he would have been entitled to (in an amount to be calculated by the parties). It declined to award him damages for intentional infliction of mental distress (through the manner of the termination) as the conduct of his Employer, and its staff, was not flagrant, outrageous or plainly calculated to harm him.

This Decision assists with the principles applicable to academic responsibilities for teachers. The Court did not deal with the apparent mental health issues. ■

Court confirms damages and reinstatement in termination matter

In *Hamilton-Wentworth District School Board v. Fair*, 2014 ONSC 2411, the Hamilton-Wentworth District School Board (Board) brought an Application to the Ontario Divisional Court for Judicial Review of a Decision of the Human Rights Tribunal of Ontario (Tribunal). In *Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440, the Tribunal had found Sharon Fair had been discriminated against by the Board when it failed to accommodate her disability-related needs and terminated her employment. (The Tribunal Decision was reviewed in the KC LLP Human Resources Newsletter, April 2013).

The Tribunal awarded Ms. Fair $450,000.00 in monetary damages, as well as reinstatement to her employment with the Board. The Board believed that the Vice-Chair, in making this Decision, erred in three respects: there were breaches of procedural fairness and natural justice; there were unreasonable findings of fact and law; and, the remedy was unreasonable.

The Board argued before the Divisional Court that there were four reasons the Vice-Chair's Decision denied the Board procedural fairness and natural justice. The first was that there was a reasonable apprehension of bias respecting the Vice-Chair, who should have recused herself upon request. The Board cited comments

made by the Vice-Chair which the Board claimed proved she had prejudged the matter and did not have an open and impartial mind during the Hearing. The Vice-Chair disagreed with the Board and did not recuse herself and the Divisional Court agreed and found there was no reasonable apprehension of bias. There was "*nothing inappropriate in a discussion between parties as to what might happen in various potential scenarios. This is even more so for an institutional and sophisticated litigant in workplace litigation as the Board is*".

The Board's alleged second denial of procedural fairness and natural justice occurred when the Vice-Chair initiated settlement discussions during the Hearing, which is not permitted without the parties' consent under the Tribunal's Rules. The Divisional Court found that the Vice-Chair, in soliciting the Board's submissions on reinstatement, had not initiated settlement discussions. There was no breach of the Tribunal's Rules, and even if there was, it was insufficient to overturn the Vice-Chair's Decision; "*...it did not create a substantial wrong which affected the disposition of the matter*".

The third alleged denial occurred when the Vice-Chair allowed Ms. Fair to amend her requested remedy to include reinstatement. This amendment occurred approximately 5 years after she first filed her Application. The Divisional Court found this was not inappropriate. Ms. Fair had filed her Application during a time of transition for the Tribunal, and it was during this transition when she was first asked to specify a requested remedy. Ms. Fair requested that she be assigned to a "supervisory position" with the Board, so it could not be said that the Vice-Chair exceeded her jurisdiction in considering this as a request for reinstatement.

The last allegation by the Board that it had been denied procedural fairness and natural justice was that the Vice-Chair's written Reasons were insufficient. The Divisional Court found there was no basis for this allegation, and it appears that the Board did not aggressively argue this point. The Divisional Court found that the Vice-Chair's Reasons were comprehensive, transparent, intelligible and with justification.

The Divisional Court then turned its mind to whether the Vice-Chair's Decision was reasonable. The Board attempted to restate many of its previous arguments for why the Board felt it had reasonably accommodated Ms. Fair, attempting to persuade the Divisional Court to find differently than the Tribunal. The Divisional Court agreed with the Vice-Chair's reasoning on each point finding that the Vice-Chair's conclusion that the Board never had any real intention to accommodate Ms. Fair was amply supported by the evidence.

The Board also argued that reinstatement was unreasonable considering both its uniqueness and how much time had passed since her termination. The Divisional Court was not persuaded that made the Award unreasonable: "*The Code provides the Tribunal with broad remedial authority to do what is necessary to ensure compliance with the Code. It is fair to say that while reinstatement is unusual, there is no barrier or obstacle to this remedy in law"* and "*… the goal of the remedial provisions of the Code ought not to be thwarted because of the passage of time that was largely beyond the control of [Ms.] Fair*". The Vice-Chair's Decision with respect to reinstatement was intelligible, transparent, and with justification; the outcome therefore was within the range of reasonable expectation. The Board's Application for Judicial Review was accordingly dismissed, and the Board was ordered to pay Ms. Fair a further $15,000.00 for her legal fees.

The Decision of both the Tribunal and the Divisional Court has significant implications. In the first place, reinstatement after such a significant period of time creates a number of dilemmas for an employer. Further, the quantum of the damages is a further significant risk for an employer. Finally, the Divisional Court effectively reinforces the deference which the Court will apply to Decisions of the Tribunal. ■

Arbitrator imports Provincial MOU into local Collective Agreement

In *Ontario English Catholic Teachers' Assn. v. St. Clair Catholic District School Board (Chaulk Grievance)*, [2014] O.L.A.A. No. 317, an Arbitration was conducted resolving several Grievances arising from the St. Clair Catholic District School Board's (Board) denial of a teacher's request to use a personal day with full pay to attend a medical appointment. The Board required the teacher to use a sick-leave day in order to attend a medical appointment. The Union, in filing its Grievances, sought, among other things: an acknowledgement by the Board that it had violated the Collective Agreement; approval of the teacher's original requests for a personal day to attend appointments; and, reinstatement of the sick-leave day taken by the individual teacher. This distinction was important to the Union and teachers because unused sick days would be calculated into a teacher's retirement gratuity.

By way of background, the Ontario English Catholic Teachers' Association (OECTA) and the Ministry of Education (Ministry) had executed a Memorandum of Understanding (MOU) on July 5, 2012, to create a template for the bargaining that would be taking place between OECTA and Catholic Boards across the Province. The Province of Ontario later introduced Bill 115, which would become the *Putting Students First Act 2012* (*PSFA*), that showed its intention to use the MOU as a template for bargaining the renewal of all teachers' Collective Agreements which expired on August 31, 2012. The *PSFA* was repealed after the Collective Agreements for all teacher units and Boards were finalized, under its authority, in the beginning of 2013.

Although the Province of Ontario did not, by passing the *PSFA*, directly impose a Collective Agreement on the parties for the 2012-2014 renewal, it made it very clear that any new Collective Agreement agreed upon had to fall within clearly prescribed limits in terms of compensation, sick leave and retirement gratuities. To the extent any terms were inconsistent with those prescribed limits, the Agreements would be ineffective, and ultimately the parties could have an Agreement imposed on them that was consistent with the prescribed limits. Where the parties were unable to arrive at an agreement that was consistent with the MOU and the legislation, such as the case here, the Agreement had to be pieced together in patchwork fashion by looking at the expired Agreement, the MOU and the subsequent legislation. To address the merits of this Grievance, the Arbitrator had to first determine the final terms that remained after fitting the various pieces of the Agreement together and then interpret those terms as they applied to the specifics of the expired Agreement of these parties.

The decision came down to whether or not Section D2 of the MOU was satisfied by the 2008-12 Collective Agreement that had been in place. Section D2 required that "*[a]ny leave provision under the local 2008-2012 Collective Agreement that utilizes deduction from sick leave, for reasons other than illness, shall be granted without loss of salary or deduction from sick leave to a*

maximum of five (5) days per school year. Local collective agreements that currently have less than five (5) days shall remain at that number. Local collective agreements that have more than five (5) days shall be limited to five (5) days. These days shall not be used for the purpose of sick leave nor shall they be accumulated from year-to-year".

The Arbitrator found that these requirements were not satisfied by the provisions of the 2008-12 Collective Agreement when considered in light of the established past practice of the Board. OECTA ultimately failed to establish that the Board violated the provisions of the Collective Agreement by its refusal to grant paid personal leave days simply because, for section D2 to apply, the Arbitrator must have been able to find that there was a "*leave provision under the local 2008-12 collective agreement that utilizes deduction from sick leave, for reasons other than illness...*". If there was such a provision in the expired Agreement, then it would have been granted in the renewal Agreement without loss of salary or deduction from sick leave to a maximum of 5 days per school year (and it would have been breached by the Board). However, the Arbitrator was unable to find any such provision in the expired Agreement. Any long standing practice or conduct of the Board to the contrary did not alter the plain ordinary meaning of the provision contained in the expired Collective Agreement. In compiling a new Collective Agreement out of the expired Collective Agreement, the requirements of the MOU, and the *PFSA* and other legislation, the Arbitrator was unable to import into the Collective Agreement the requirements of section D2.

While the Arbitrator determined that the Provincial MOU applied, it did not assist OECTA or the teachers with respect to the sick-leave at issue. ■

Another Arbitrator imports Provincial MOU into local Collective Agreement

In *Catholic District School Board of Eastern Ontario v. Ontario English Catholic Teachers' Assn. (Grievance 12211-EOO-KOD Collective Agreement)*, [2014] O.L.A.A. No. 343, an Arbitration was commenced to determine if the Catholic District School Board of Eastern Ontario (CDSBEO) had violated its Collective Agreements with the Ontario English Catholic Teachers' Association (OECTA) in failing to print and distribute a copy of the Collective Agreements.

In deciding this, the Arbitrator found that the real issue between the parties was whether a Memorandum of Understanding signed on July 5, 2012 (MOU) between OECTA and the Ministry of Education of Ontario (Ministry) formed part of the Collective Agreements. OECTA sought a declaration and ruling that the terms and conditions of the MOU were included in the Collective Agreements, and an Order to either append the MOU to the Collective Agreements or insert the terms and conditions, clause by clause, directly into them.

OECTA relied on its interpretation and application of Bill 115, the *Putting Students First Act 2012* (*PSFA*) to advance its argument. OECTA submitted that when the *PSFA* is read in the context of its stated purpose (namely, to give effect to the Government's goal for fiscal restraint in the education sector), it is clear that it required all teacher Collective Agreements to include the terms and conditions of the MOU, and rendered inoperative any term or condition inconsistent with the MOU. Although the MOU had no legal force of its own, the *PSFA* gave it binding effect. The background of the *PSFA* and the MOU is reviewed more fully in *Ontario English*

Catholic Teachers' Assn. v. St. Clair Catholic District School Board (Chaulk Grievance), [2014] O.L.A.A. No. 317, which precedes this summary.

CDSBEO argued that the *PSFA* operated like any other employment-related statute, and while it could restrain, supplement, supplant or inform the interpretation of Collective Agreements, it was never intended to operate to append the MOU to any Collective Agreements. It would be an extraordinary result for the Government to require parties to a Collective Agreement to append or incorporate a document that neither had signed nor agreed upon; there was no explicit direction in the *PSFA* to do so: "*…the Government's intention, to leave the parties with bargaining 'flexibility to "craft local solutions to local issues" so long as they arrived at agreements "substantially identical" to the July 5, 2012 MOU., … does not suggest that the MOU was to be "simply stapled to all collective agreements".*"

The Arbitrator found that the *PSFA* was not general application legislation; it was a statute with a specific focus and application; namely, education-sector fiscal restraint through specific limitations on employee (i.e. teacher) compensation. The Arbitrator quoted sections of the *PSFA*, including the Preamble, to conclude that the Government's intention was to manage compensation costs in the publicly-funded school system by imposing Collective Agreement compensation restraints which "*reflected the framework negotiated in the Memoranda of Understanding between the Government and some employee bargaining agents*". This clearly included the MOU between the Government and OECTA referred to in the *PSFA*, and reflected a legislative intention that the MOU be appended to or incorporated into the Collective Agreements. Although the *PSFA* referenced the terms of the MOU, and not the document itself, as being included in the Collective Agreement, in the context of the *PSFA* read as a whole and the dispute between the parties in this case, the result was that the MOU formed part of single document Collective Agreements between the parties. ■

Arbitrator determines Grievor has right to representation at meeting with Principal

In *Ontario Secondary School Teachers' Federation v. Keewatin-Patricia District School Board (Perozak Grievance)*, [2014] O.L.A.A. No. 301, a Grievance was brought by the Ontario Secondary School Teachers' Federation (Federation) after the Keewatin-Patricia District School Board (Board) refused to allow a Federation representative (Representative) to accompany a teacher (Grievor) to a "debriefing" in relation to the Grievor's unsuccessful application for an internal job posting for a Position of Added Responsibility (PAR).

The Grievor mainly taught math and science classes at the Queen Elizabeth District High School (High School). She had also taught special education, a program for at-risk students, and essential level math and science classes. The High School posted an advertisement for a PAR for math and science. The Grievor was the only applicant for the position, but following her interview, she was informed by the Principal that she had not been successful. The Principal requested that she attend a debriefing discussion to provide her with feedback from the interview. In scheduling the discussion, the Grievor indicated she wished to have her Representative attend the debriefing with her. The Principal informed the Representative that he was not to attend with her because the meeting "*was not disciplinary and not grievable*". The

purpose of the debrief was simply to be a "*professional conversation to debrief [her] interview*." The Grievor declined to attend the meeting without her Representative on advice from the Federation. The Federation brought a Grievance requesting, among other things, an order that the debrief meeting be held.

The Arbitrator examined the wording of the Collective Agreement. It provided "*[a]n employee has the right to request representation from the Union during any meeting with the employer*." The Arbitrator noted that there was no guarantee the request shall be granted in each instance, nor did it put any restrictions on the types of meetings for which the request could be made or specify when the Board (or the Principal, in this case) could refuse a given request, if ever. It did not explicitly grant the Principal discretion in his choice to grant the request, nor did it require reasonableness on the Principal's part in deciding not to grant the request. The Arbitrator came to this conclusion after comparing this provision to others where there were express grants of rights or requirements for reasonableness in exercising discretion.

The Arbitrator, in interpreting the provision, found that it provided something more than no Collective Agreement right at all, but it was also less than a completely unrestricted right to have representation at any and all meetings with the Principal. There was a substantial right which made the clause more than a mere reminder that members could simply ask for representation at meetings; the right had to be read as giving greater substance, and this was achieved by granting representation in appropriate circumstances. The problem then was to determine, on the instant facts, whether it would have been objectively appropriate to grant the Grievor's request for representation at the debrief.

The Arbitrator found the intention of the parties could not have been to afford members the right to demand a Representative at each and every meeting that occurred in the course of conducting school business. In reviewing the nature of the PAR, which was set out in great detail in the Collective Agreement, the Arbitrator found that while there was no entitlement to a debrief, once granted, the right to request representation was triggered. The Arbitrator found there could be non-disciplinary meetings to which an employee is summoned, where Collective Agreement rights may possibly be affected, where representation, upon request, would be in order. The Arbitrator found "*the 'debrief' was to take the form of the gathering of the Grievor and her principal in person and therefore it was a "meeting" for the purposes of [the collective agreement]*." This was not an everyday, "*run-of-the-mill*" meeting of Principal and teacher. It was not occurring in the "*ordinary conduct of the employer's business*", and it was not a "*mundane work-related matter*." Rather, it entailed the application and interpretation of the contents of a complicated provision of the Collective Agreement having a direct impact on a significant employment interest of a member. The Grievor's request for representation should therefore have been granted. The Representative could provide assistance by observing, advising and arguing for the Grievor's rights upon hearing the Principal's explanations. The granting of representation at the debrief meeting would not sow chaos or disrupt the everyday business of the school. In conclusion, the Arbitrator found "*[t]here was a distinct and articulated Article of the collective agreement whose application was of particular and individual application and whose possible misapplication was of critical interest to the Grievor from both professional and monetary points of view. Such is a circumstance of where union*

representation ought to be granted upon the request of a member".

This Decision provides some guidance on the issue of representation at meetings, but is circumscribed by the wording of the clause at issue. ■

Court confirms principles of fair representation by Teaching Federations

In *Ayangma v. Prince Edward Island Teachers' Federation*, 2014 PECA 9, Mr. Ayangma, requested that his Union, the Prince Edward Island Teachers' Federation (Federation), file two Grievances on his behalf against his employer, the Eastern School District (ESD). Before the Federation could do so, Mr. Ayangma informed the Federation that he had signed a Release with the ESD, releasing it from all of Mr. Ayangma's past and future actions and grievances and settled all outstanding actions, in exchange for $370,000.00. Between 1998 and 2011, Mr. Ayangma had commenced numerous legal proceedings against the ESD and other various parties. Despite the Release, Mr. Ayangma insisted the Federation proceed with filing his Grievances.

The Federation declined to do so because it believed that the Grievances concerned matters discharged by the Release. Mr. Ayangma then brought a Statement of Claim against the Federation alleging that it breached its duty of fair representation when it declined to file the Grievances. The Federation brought a Motion for Summary Judgment to dismiss the Claim on the basis that there was no genuine issue for Trial. Mr. Ayangma also brought his own Motion for Summary Judgment. The Motions Judge dismissed Mr. Ayangma's Motion; there were contested issues of fact that required a full hearing be conducted. However, the Motions Judge also found that the Federation did not breach its duty of fair representation and that the Release acted as a bar against grieving the ESD's actions, and allowed the Federation's Motion. Mr. Ayangma's Claim against the Federation was subsequently dismissed. Mr. Ayangma appealed both Decisions to the Prince Edward Island Court of Appeal (Court of Appeal).

The Court of Appeal dismissed Mr. Ayangma's Appeal. The Court of Appeal determined that the Decision of the Motions Judge that there was no genuine issue for Trial concerning the Federation's representation and the application of the Release could only be upheld if it was correct. The Court of Appeal reviewed the two-part test for Summary Judgment. The first part requires the moving party (the Federation, in this case) to show there was no material fact at issue which would create a genuine issue for Trial. The second part of the test requires that when the moving party discharges this onus, the responding party must then adduce evidence to establish that the position taken in his pleading has a real chance of success.

The Court of Appeal then reviewed the principles applicable to the Federation's duty of representation in respect of a Grievance: the Federation must fairly represent all employees in the bargaining unit; the employee does not have an absolute right to have a Grievance brought to arbitration; and, the Federation has considerable discretion in its decision to initiate a Grievance. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the Grievance and the case, taking into account the significance of the Grievance and of its consequences for the employee on the one hand, and the legitimate interests of the Federation on the other. The decision to not

initiate a Grievance therefore cannot be arbitrary, capricious, discriminatory or wrongful: The Federation's representation must be fair and genuine; undertaken with integrity and competence; without serious or major negligence; and, without hostility towards the employee.

The Court of Appeal found that there were no flaws in the reasoning of the Motions Judge, and his Decision to dismiss Mr. Ayangma's Motion and allow the Federation's was correct. Mr. Ayangma had not satisfied the test for Summary Judgment, whereas the Federation had. The Federation had not acted arbitrarily, discriminatorily, capriciously, or in bad faith and had therefore met its duty of fair representation. Its investigation into whether there were grounds to bring the Grievances was carried out genuinely, diligently, and competently and without serious negligence. In any event, the Federation was barred from filing a Grievance because of the Release. Quoting the Motions Judge, "*This release is one that [Mr. Ayangma] signed and it very, very, very clearly releases the Eastern School Board ... from, amongst other things, any and all causes of action and grievances which exist now …*". Mr. Ayangma's final argument that the Federation could not rely on the Release because it was not a party to it also failed; the duty of fair representation concerns the process followed by the Federation, and not its conclusions. The issue of privity of contract in relation to the Release did not arise.

Mr. Ayangma was also ordered to pay the costs of the Federation in both the Motions and the Appeal. ■

BCCA provides analysis of issues relevant to prejudice due to delay

In 1976, Mr. Robert Robertson, a teacher then with the Richmond School Board (RSB), had allegedly engaged in sexual misconduct with some of his students. The misconduct had been reported in 1976, and Mr. Robertson was suspended and resigned from the RSB shortly thereafter. Within days of his resignation, he applied to the Vancouver School Board (VSB) and failed to disclose that he was under investigation for sexual misconduct when he left the RSB. The investigation in 1976 did not advance any further and the issue lay dormant until, in 2005, one of his victims complained to the VSB when she learned Mr. Robertson was still a teacher. The VSB investigated the complaint and reported the matter to the British Columbia College of Teachers (College). In 2007, the Commissioner of the College commenced an investigation, but Mr. Robertson resigned before its conclusion and took a teaching position with a high school in China. In 2011, the investigation concluded and the College's Discipline Hearing Sub-Committee (Committee) issued a citation notifying Mr. Robertson that a hearing would be held to inquire into his misconduct and misrepresentations.

Mr. Robertson applied to have the proceeding stayed, claiming, among other things, that the inordinate delay was an abuse of process. The 35-year delay between the time of the allegations and the issuance of the citation would cause him considerable prejudice. The Committee disagreed and dismissed his Application for a stay; it did not find there was prejudice of such a magnitude that a finding of abuse of process was warranted and "*grant[ing] him a stay 'would negatively affect the public's sense of decency and fairness and bring the*

TRB's regulation of teachers in this province into disrepute'."

Mr. Robertson applied for Judicial Review of the Decision, and the Judge, on review, decided the Committee erred in its analysis of whether the delay was an abuse of process in regards to sexual misconduct allegations. The Reasons for the Decision can be found at 2013 BCSC 1699. The Judge concluded that: "*there was evidence of significant prejudice both to the fairness of the hearing process itself and to Mr. Robertson personally in having to address matters now that he reasonably concluded had been put behind him over 30 years ago ... [T]he Commissioner's wish to re-activate the matter after so long has damaged the public interest in the fairness of the professional disciplinary process*". The Judge, rather than dismiss the Complaint, remitted the matter back to the Committee to reconsider it in accordance with the Reasons.

The Commissioner appealed the Judge's decision to the British Columbia Court of Appeal (Court of Appeal), which released a split decision in *Robertson v. British Columbia (Teachers Act Commissioner)*, 2014 BCCA 331. The Commissioner claimed that the Judge erred in not showing deference (as required by BC's *Administrative Tribunals Act*) to the Committee's Decision or by improperly applying the reasonableness standard of review to the Committee's findings of fact and substituting her own views for the Committees.

The Court of Appeal reviewed the relevant legislation and case law on Judicial Review, and found that the Judge had erred in her interpretation of the *Administrative Tribunals Act*. The majority of the Court of Appeal found it did apply to the Committee's Decision and that the task of the reviewing Court is to assess whether the impugned decision-maker correctly applied the legal principles.

The majority of the Court of Appeal held that for delay to amount to an abuse of process, there must be proof of substantial prejudice to the individual. "*Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy*". The prejudice caused by delay was described as having two aspects. There is the type of prejudice caused by delay which affects a person's ability to answer the Complaint and to have a fair hearing. This aspect of prejudice also encompasses the effects on the individual in his/her personal life. The second type of prejudice is one that embraces the concept of a community's sense of fair play and decency. The prejudice caused by this delay amounts to an abuse of process where proceeding would impugn the integrity and community's confidence in the Court. "*For there to be abuse of process, the proceedings must ... be 'unfair to the point that they are contrary to the interests of justice'."*

The majority of the Court of Appeal ultimately agreed with the Committee and concluded Mr. Robertson could have a fair hearing notwithstanding the delay. Whatever stress and stigma he was facing was a result of the allegations against him; not the delay in bringing the matter forward. The absence of witnesses would likely be favourable to Mr. Robertson and, in any event, it was not significantly important as Mr. Robertson had already admitted to most of the allegations. Also of relevance, part of the blame for the delay could be placed on Mr. Robertson for lying about the investigation in 1976 to the VSB. In fact,

the delay allowed Mr. Robertson to pursue his profession as a teacher for potentially 30 more years. As for the public prejudice, the Court of Appeal found that the Commissioner holds the very public responsibility of determining fitness for teaching in public schools: "*Permitting Mr. Robertson to avoid facing a disciplinary hearing in these circumstances would carry with it a serious risk of bringing the regulatory process into disrepute*". The majority of the Court of Appeal allowed the Appeal and restored the Committee's Decision to dismiss Mr. Robertson's Application to have the proceedings stayed for abuse of process. The dissenting Judge of the Court of Appeal found that the 30-year delay in commencing the investigation was not appropriately considered by the Committee. The dissenting Judge would have dismissed the Appeal and upheld the lower Judge's Decision to remit the matter back to the Committee to more fully consider the issue of delay.

The Court of Appeal provides a helpful analysis of the issues relevant to alleged prejudice caused by delay. ■

Court confirms application of personal privacy and use of information in proceedings

The Calgary Board of Education (CBE) applied for Judicial Review of a Decision of the Office of the Information and Privacy Commissioner (OIPC) regarding the CBE's use and disclosure of information about Harold McBain under the Alberta *Freedom of Information and Protection of Privacy Act* (*FIPPA*). In *Calgary Board of Education v. Alberta (Office of the Information and Privacy Commissioner)*, 2014 ABQB 189, the Alberta Court of Queen's Bench (Court) released its Decision.

Mr. McBain was a former employee of the CBE and was the subject of harassment complaints. The Complaints were eventually settled. Mr. McBain was then called upon to be a witness in an unrelated proceeding before the Board of Reference (Board); the CBE attempted to use documents and information from the harassment allegations to impugn his credibility. The Board ordered the documents be fully disclosed to all the parties and the CBE obtained the documents from its human resources department. The Board, following the disclosure of the documents to all the parties, determined that they were inadmissible. Mr. McBain complained that the CBE had used, disclosed and failed to protect his personal information in violation of the *FIPPA*.

The Adjudicator who heard the Complaint determined that a public body would not be "using" personal information by merely reviewing it for its own purposes. However, she determined that Mr. McBain's information was used because the CBE went further and decided to apply or employ the information for a particular purpose (i.e. to impugn Mr. McBain's credibility before the Board). The Adjudicator found that this use was not authorized under the *FIPPA*. "*[I]n the absence of a discovery process, a direction or order from a body with the power to compel the production of information, or a similar process or order, a public body may use personal information to build its case for a legal proceeding only if the proceeding is sufficiently related to the purpose for the collection…, if the individual has consented, or if the information was disclosed to the public body by another public body under [the FIPPA], for that purpose*". The information had been collected to manage Mr. McBain's employment and respond to the harassment allegations; not to be used in a later proceeding involving completely different

complaints and to which Mr. McBain was not even a party. There was no reasonable or direct connection between the collection and use of Mr. McBain's information that would justify the actions of the CBE. The disclosure to the Board was made without any requirement to do so in a proceeding where Mr. McBain was not a party. The prevention of such a use and disclosure is one of the fundamental policies underlying privacy legislation.

The Adjudicator concluded that the CBE had used and disclosed Mr. McBain's personal information contrary to the *FIPPA*. It is this decision that the CBE sought to judicially review, arguing that was incorrect or, in the alternative, unreasonable.

The Court determined that, in reviewing the Adjudicator's Decision, it was required to show deference to that Decision. This was a Decision within the Adjudicator's area of specialized expertise. The Decision was solely about the collection, use and production of information in the particular circumstances of a Board that did not have a pre-existing statutory regime for the production of documents. More importantly, the Adjudicator's Decision was primarily concerned with the improper use, disclosure and failure to protect Mr. McBain's personal information. The Decision was not about an issue of central importance to the legal system, so it did not necessarily have to be correct, nor did it have to be the most reasonable Decision in order to be upheld. The Court concluded it would only overturn the Adjudicator's Decision if that Decision was found to be unreasonable. After reviewing the Adjudicator's Decision, the Court found that the determination that the *FIPPA* applied to the Board was reasonable, and that the Adjudicator's conclusions that the *FIPPA* did not authorize the purpose for which the CBE used and disclosed Mr. McBain's information were also reasonable. It dismissed the Application for Judicial Review.

This Decision reinforces the importance of utilizing an appropriate process before using any personal information in any proceedings. In this case, the CBE should have obtained an order from the Board of Reference to access and use the information. ■

Privacy Commissioner issues Decisions on GPS devices

The British Columbia Office of the Information and Privacy Commissioner (BCIPC) has recently released a series of Decisions clarifying whether the collection, retention and use by employers of information transmitted by Global Positioning System (GPS) devices in their employees' equipment violated British Columbia's privacy laws.

ThyssenKrupp Elevator (Canada) Limited (Re), 2013 BCIPC 24 (CanLII) and *Kone Inc (Re)*, 2013 BCIPC 23 (CanLII) were released contemporaneously and are the most recent Decisions in the series. However, each follows the analysis laid out by the BCIPC in *Schindler Elevator Corporation (Re)*, 2012 BCIPC 25 (CanLII).

The facts in each Decision are fairly similar. In both *Schindler* and *ThyssenKrupp*, the Employers provided mechanical services for elevators and escalators. Their mechanics were dispatched to client sites as needed, and were assigned a service vehicle, which they often kept at their homes overnight rather than return them to the Employers' facilities. These service vehicles were equipped with monitoring devices that transmitted information to the Employers, including vehicle location, speed, idling, rapid acceleration/breaking, etc. The Employers used this information to verify

mechanics time on site, compliance with traffic laws and safe driving requirements. In *Kone*, the Employer worked in the same industry, but its mechanics were assigned GPS-equipped cell phones which provided the location of the phone when the mechanic was on site. In each case, the employees challenged the collection of this information claiming that they had a privacy interest in it under British Columbia's *Personal Information Protection Act* (*PIPA*).

The BCIPC first looked at whether this information was 'personal' as *PIPA* only applies to 'personal information'. In *Schindler*, the BCIPC defined 'personal information' as:

"information that is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information, and is collected, used or disclosed for a purpose related to the individual."

The BCIPC clarified that the definition was not restricted to information about an individual's personal or private life; it also encompasses information about an individual in their employment, business or professional capacity. The BCIPC was satisfied that the GPS generated information was 'personal' under *PIPA*.

The BCIPC next looked at whether this information was 'employee personal information' (EPI). Under *PIPA*, organizations are authorized to collect and use EPI without consent. The BCIPC found that EPI had four distinct elements: the information must be 'personal information'; it must be collected, used or disclosed for purposes that are reasonably required to establish, manage or terminate an employment relationship; it must be collected solely for those purposes; and, it must not be personal information that is not about an individual's employment. For the second criteria, the BCIPC in *Schindler* identified legitimate purposes to include: managing productivity; managing hours of work; and, ensuring employees drive safely and lawfully.

In all three Decisions the BCIPC found that all four requirements were satisfied. Each Employer was authorized to collect the EPI. However, *PIPA* provided a further requirement: the collection or use of EPI must be "*reasonable for the purposes of establishing, managing or terminating an employment relationship between the organization and the individual*". The BCIPC distinguished this requirement from the second criteria listed above; while the second criteria for EPI was whether the purpose for collecting the information was reasonably required, the focus of this analysis was whether the collection or use of the information by the employer was reasonable. *Schindler* provided a lengthy list of relevant factors to consider in determining if the purposes for collecting, using and/or disclosing EPI were reasonable, including: sensitivity of the information; the amount of information; the likelihood of effectiveness; the manner of collection and use of the information; and, whether less privacy-intrusive alternatives were available. After reviewing all of the factors, the BCIPC found in each case that each Employer's collecting and using of the information was reasonably required to manage the employment relationship, that a reasonable person would consider it appropriate in the circumstances to collect this information, and that the collection and use of the GPS information by each Employer was reasonable.

PIPA also requires an organization to inform its employees if it is going to collect EPI before the information is collected. In *ThyssenKrupp*, the Employer was found to have failed to comply with *PIPA's* notice requirements; it was insufficient to notify

employees that it intended to collect and use EPI for one purpose, when it would in fact be used for other purposes as well. The Employer was required to notify the employees of all of its uses and purposes for the GPS information, such as reviewing its employees' locations and multiple aspects of its employees' operation of company vehicles. It was ordered to provide proper notice in compliance with *PIPA* and develop satisfactory written policies stating what information it collected and the purposes for which it may be collected, used and disclosed. Until it did so, it was prohibited from collecting any further information. In *Kone*, on the other hand, the Employer had provided its employees with the required notice during a presentation, though the BCIPC recommended it develop a comprehensive policy that could be provided to new employees. Similarly, the BCIPC found in *Schindler* that the Employer had met its notice requirements, but recommended that it also revise its collection of information policies to provide more clarity for future employees.

These Decisions assist in clarifying privacy expectations in the workplace. ■

Court confirms breach of confidentiality clause in settlement

In *Jan Wong v. The Globe and Mail Inc.*, 2014 ONSC 6372, the Divisional Court (Court) heard an Application for Judicial Review of an Arbitral Decision which concluded that Ms. Wong breached the terms of a Memorandum of Agreement (MOA) which settled Grievances filed on her behalf with the Globe and Mail.

Ms. Wong, at the time of the signing of the MOA, was planning to write a book about her experience suffering depression in the workplace. She was concerned about her ability to speak freely about this and negotiated to have the MOA incorporate a clause that prevented either party from disparaging the other only until a set date in the future. The MOA also contained a confidentiality clause preventing the disclosure of the terms of the settlement. If breached, "*…the Grievor will have an obligation to pay back to the Employer all payments paid to the Grievor*…".

Ms. Wong eventually self-published her book. The Globe and Mail immediately applied for a determination by the Arbitrator that 23 phrases in the book breached the confidentiality clause. Ms. Wong had written, for example, that "*…I can't disclose the amount of money I received", "I'd just been paid a pile of money to go away*…", "*Two weeks later a big fat check landed in my account",* and *"even with a vastly swollen bank account*…". The Arbitrator found that these four phrases did disclose that a payment had been made by the Globe and Mail to Ms. Wong, and the MOA had therefore been breached. As a result, the Arbitrator ordered her to repay $209,912.00, which she had received as part of the settlement.

On Judicial Review, the Court determined that the appropriate standard for evaluating an Arbitrator's interpretation of a settlement agreement arising out of a labour grievance, and of whether there was a breach thereof, is reasonableness. The Court would only then overturn the Arbitrator's Decision if it found that the Decision was unreasonable.

However, the Court did not get to the review of the Arbitrator's Decision. Instead, it found that Ms. Wong's Application failed as she did not have standing to bring the Application in the first place. The MOA was a labour arbitration matter and in labour arbitrations, such as grievances, the only parties to the arbitration are the Union and

the Employer. Ms. Wong, as the Grievor, was represented by the Union at the Grievance, but was not a party to it or the subsequent Hearing into whether the MOA, which settled the Grievance, was breached. Since she was not a party to the second Hearing, she could not bring the Application before the Court to have that Decision reviewed.

The Court did note that there were three exceptions to this general rule which would allow a Grievor to bring an Application: where the Collective Agreement conferred a right on the Grievor to pursue a matter to Arbitration; where the Union takes a position adverse in interest to the Grievor; and, where the Union's representation has been so deficient that the Grievor should be given a right to pursue Judicial Review. Ms. Wong claimed she fell into the third category. As such, her Union was named as a Respondent to her Application for Judicial Review, and had to defend itself against allegations of deficient representation. The Court found that Ms. Wong's situation did not fall into any of these three exceptions. While she provided considerable evidence of the fact that she and her Union's counsel disagreed about nearly all aspects of the handling of the Arbitration, it did not find any fault in the manner in which the Union's counsel represented Ms. Wong. Refusing to follow Ms. Wong's every direction was not deficient representation.

Despite finding that Ms. Wong had no standing to bring the Application, the Court chose to decide issues raised in it. First, it opined on whether or not the order to repay the $209,912.00 was unconscionable (and possibly unreasonable). Ms. Wong argued the penalty was unfair, disproportionate to the harm suffered by the Globe and Mail, and should be set aside on those grounds. The Court held that the Arbitrator's Order was not actually a penalty. It was actually a forfeiture; a contractual provision agreed upon by both parties that was put in the MOA to ensure a benefit for one party. Since Ms. Wong, with the aid of both the her own and the Union's counsel, had negotiated this forfeiture clause and understood it would be invoked if she breached the confidentiality clause, it could not be said to have been unconscionable or unreasonable for the Arbitrator to enforce it.

The Court examined whether the Arbitrator's Decision that the MOA had been breached was reasonable. Ms. Wong argued it was not breached because she believed she could disclose that there was a payment as long as she did not specify how much she had been paid. The Court disagreed; it held that the clause simply stated the terms of the settlement could not be disclosed. Even if she was correct, she had made references to the size and quantum of the award. The Arbitrator's Decision that she breached the MOA was not unreasonable.

In fixing the costs of the Application, the Court noted that while the Globe and Mail took the lead on the main issue of the interpretation of the MOA, the Union was required to respond to the allegations of inadequate representation. The Court therefore ordered Ms. Wong to pay $15,000.00 in costs each to the Globe and Mail and the Union.

The Decision confirms the issue of parties to a grievance as well as the application of a confidentiality clause. ■

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