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Human Resources Newsletter

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Court finds Ontario in breach of Teachers' *Charter* rights

In a recent decision, the Ontario Superior Court of Justice ruled that the provincial government had interfered with teachers' right to collective bargaining.

In September 2012, Ontario passed the *Putting Students First Act* (Act), often referred to simply as Bill 115. Bill 115 imposed a template contract that stripped entitlements from education workers, such as sick leave banks and retirement gratuities. Bill 115 also gave the Minister of Education the power to impose a collective agreement on education unions and school boards, and prohibited unions from taking legal strike action.

Bill 115 was introduced as a response to the expiring contracts of Ontario education workers. It imposed a two-year restraint period on education sector employees. The legislation required that any new contracts entered into between a board of education and a bargaining unit be consistent with the Memorandum of Understanding (MOU) that had been agreed to with the Ontario English Catholic Teachers' Association (OECTA). It also required that any collective agreement between a board and a bargaining agent that concluded before August 31, 2012, be "substantially similar in all relevant aspects" to the MOU agreement. Any agreement entered into after that date had to be "substantively similar." If no agreement was reached by December 31, 2012, the Lieutenant Governor in Council, under the direction of the Minister, could impose a collective agreement.

As a result, five unions (the applicants) filed a court challenge on October 11, 2012 (*OPSEU et al. v. Ontario*, 2016 ONSC 2197) arguing that Bill 115 denied free collective bargaining and the right to engage in legal strike action and violated subsection 2(d) of the Canadian *Charter of Rights and Freedoms* (*Charter*) (freedom of association). The applicants were successful.

In reviewing the issues before it, the court had to determine whether the applicants' *Charter* rights were violated, and if so, whether the breach was justified under section 1 as a reasonable limit on those rights. In his analysis, Justice Thomas Lederer found that Ontario had infringed the applicants' *Charter* right to meaningful collective bargaining because the process was fundamentally flawed. The court further stated that although the parameters that Ontario set would allow it to address its fiscal restraints, it also set a program that limited the other parties' abilities to take part in a meaningful way. The court highlighted a number of other issues with the process undertaken by the Province, such as: not meeting with the unions collectively; telling the unions that it was prepared to consider alternatives brought forward with respect to the parameters but then not doing so; and, failing to provide information on financial targets. The court also stated that each union had different interests, which was not taken into consideration. The court found that this approach was inflexible and intransigent in insisting that the unions respond on a sector-wide basis to sector-wide parameters that were set by the government, without any indication as to what was required from them individually. This resulted in a situation in which meaningful collective bargaining was impossible.

Furthermore, the court stated that not only had Ontario limited wages, but it had also set aside benefits, which had resulted from free and uninhibited collective bargaining. Additionally, the court highlighted the tension between Ontario's goal to continue with its early childhood education plan (Full-Day Kindergarten), which would increase costs, against setting aside the applicants' benefits and limiting movement on the salary grid, which would save costs. The cost savings were not as a result of a temporary two-year freeze on wages, but rather a fundamental restructuring of benefits. The court found that Ontario had implemented an *ad hoc* process without consulting the unions, and the initial approach was already underway before the employees who would be affected by it had even heard about it. As such, the court found that the government breached the applicants' *Charter* rights under section 2(d) by interfering with their rights to collective bargaining. The court next had to determine whether the breach was justified under section 1 of the *Charter* as a reasonable limit on section 2(d) rights.

Ontario had tried to distinguish this case from other cases in which a section 1 analysis was undertaken by arguing that the issue in the instant case dealt with temporary compensation restraints and not permanent collective bargaining structures, as in other cases. The court held that there are no definitive lines between permanent and temporary restraints, as each case must be decided on its facts. Regardless of the nature of the restraint, a section 1 analysis can be applied.

In applying the two-prong *Oakes* test, the court stated that the first criterion examines Ontario's objectives, which in this case was limiting wages and benefits. The second prong examines the relationship between the objectives and the process undertaken to achieve those objectives, and whether the process was appropriate and justified in furthering those objectives.

With respect to the government's objectives and whether it warranted interference with the applicants' freedom of association, the court noted that counsel for Ontario set the economic goal of wage restraint against the right to meaningful collective bargaining. However, the court found that the value of freedom of association was no longer protected if the degree to which society was prepared to go to protect this freedom was based on the substance of the concern about teachers' wages and benefits.

The court referred to the Supreme Court of Canada's (SCC) decision in *Newfoundland (Treasury Board) v Nape* (2004 SCC 66) to reaffirm that a *Charter* breach based on economic concerns is only justified in exceptional circumstances. In the instant case, there was no issue concerning immediate fiscal emergency. Moreover, the court stated that the question of whether economic considerations are demonstrative of a pressing and substantial objective should be determined on a case-by-case basis.

With respect to the second prong of the *Oakes* test, which requires an analysis of the rational connection, minimal impairment, and overall proportionality of the breach, the court found that measures that limit the right to freedom of association should not be arbitrary. The government's process was unilaterally established without consultation with the other parties. Notwithstanding that the government representatives assured the union members that they would be open to a review of the process, they changed direction and introduced it as an overview of the next steps without giving the unions an opportunity to ask questions. In addition, the court highlighted the fact that during a conference call, the questions and concerns raised by the Elementary Teachers' Federation of Ontario (ETFO) and the Ontario Secondary School Teachers' Federation (OSSTF) were not addressed. Additionally, at a meeting between the Ontario Public Service Employees Union (OPSEU), the Canadian Union of Public Employees (CUPE), and the government's negotiating team, the unions' concerns were not addressed. Instead, the Ontario Premier posted a note on the internet explaining what was expected of teachers, subsequent to receiving a letter from the five presidents of the five unions. Accordingly, the court found that the process undertaken by the government was arbitrary and did not include a careful design that would allow for meaningful collective bargaining. Accordingly, the court did not find that the means used to accomplish Ontario's goals were rationally connected to its objectives.

The court then examined the second factor under the second prong of the *Oakes* test: whether Ontario had a reasonable basis, on the evidence tendered, for concluding that the impugned breach interfered as little as possible with the protected right given Ontario's objectives. Ontario argued that if it had carried out a less intrusive method, it may not have achieved all of its objectives. The court was of the view that the government's scheme undermined the overall collective bargaining process and stated that, "by avoiding the statutory freeze on terms and conditions in the existing collective agreements, Ontario was acting to escape the impact of its own labour relations regime." Furthermore, the court added that, "the government could have passed legislation that was limited to preventing the effect of the freeze to a later date or until the negotiations ended." The court found that the process Ontario had embarked upon deviated from those in the past, and that Ontario should have known it would only complicate matters by connecting new, early education programs with a wage freeze and the restructuring of longstanding benefits. In addition, the government was of the view that if it were to cease its Full-Day Kindergarten plan in order to ensure that the education budget met the

fiscal plan – which the court opined would provide more flexibility and a more substantial bargaining outcome – it would not serve its early childhood education goal. However, the court dismissed this argument and found that given such constraints, the impugned measures chosen were not the least impairing with respect to the *Charter* right to a general process of collective bargaining.

The third factor under the second part of the *Oakes* test deals with overall proportionality, which required the court to weigh the benefits sought through the implementation of the government's disputed measures against their deleterious effects. The court reasoned that Ontario could have achieved its objectives by allowing a more fair process for collective bargaining and a more directed or targeted legislative or administrative action. The court stressed that the government's actions did not just impact the education workers' economic positions, but also their fundamental rights and freedoms. Therefore, it was found that Bill 115 had breached the rights of the applicants and could not be saved under section 1 of the *Charter*. The court noted that Ontario was attempting to address the fiscal circumstances of the province in imposing Bill 115, and that the problem addressed in the decision was the process and not the end result. The court opined, "[i]t is possible that had the process been one that properly respected the associational rights of the unions, the fiscal and economic impacts of the result would have been the same or similar to those that occurred." In this regard, the court was referring to the government's responsibility for policy decisions, including fiscal policy decisions. The court did not address the issue of remedy and encouraged the parties to resolve the issue of remedy amongst themselves.

Bill 115 was repealed after the collective agreements were imposed and the process of collective bargaining in the education sector is now subject to a new and different legislative regime (Bill 122, the *School Boards Collective Bargaining Act, 2014*) itself the subject of multiple other court challenges. Nonetheless, this decision is instructive in respect of collective bargaining rights and government action in respect thereof. ■

New obligations for employers re: sexual violence and harassment in the workplace

On March 8, 2016, Ontario's Bill 132, the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2015*, received Royal Assent. The Act enhances employee protections from workplace harassment, including workplace sexual harassment, by amending various provincial statutes.

Of particular concern to employers should be amendments made to the *Occupational Health and Safety Act* (OHSA), with respect to the investigation and resolution of alleged incidents and complaints of workplace harassment and workplace sexual harassment. These amendments will take effect on September 8, 2016

The definition of "workplace harassment" in the OHSA is amended as follows:

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or

(b) workplace sexual harassment;

"Workplace sexual harassment" is further defined as:

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in

a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome

Note that the Act clarifies that reasonable actions taken by an employer or supervisor relating to the management and direction of workers or the workplace is not considered workplace harassment.

Employers are now required to develop a workplace harassment policy that also specifically addresses workplace sexual harassment. Employers are also required to develop and maintain a written program that implements the workplace harassment policy, developed in consultation with the employers' health and safety committee or a health and safety representative.

The written program must include the following:

- a procedure that enables workers to report workplace harassment incidents, including to a secondary individual if the alleged harasser is the person to whom an incident would normally be reported;

- a procedure for investigating incidents and complaints of workplace harassment;

- a procedure for ensuring that information about an incident or complaint, including identifying information about any individuals involved, is kept confidential unless disclosure is necessary for the purposes of the investigation, taking corrective action, or is required by law; and

- a procedure for informing both a complainant and an alleged harasser, if he or she is a worker of the employer, of the results of any investigation as well as any resulting corrective action that has been or will be taken.

Not only must the employer develop the written program, the employer must ensure it is implemented by:

- conducting investigations into incidents and complaints of workplace harassment;

- ensuring the complainant and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been or will be taken;

- reviewing the program at least annually to ensure that it adequately implements the workplace harassment policy; and

- providing workers with appropriate information and instruction on the contents of both the policy and program.

The amendments also empower OHSA inspectors to order an employer to hire an impartial third party, at the employer's expense, to conduct an investigation into alleged incidents and complaints of workplace harassment.

As noted above, employers must comply with the amendments to the OHSA by September 8, 2016. Although September 2016 may seem somewhat distant, employers should act as quickly as possible to amend existing Policies and programs, or to draft new Policies and programs as necessary to comply with the requirements of the Act. ■

Federal Court of Appeal finds that the personal choice to breastfeed does not provide basis for prima facie human rights

In a recent decision, the Federal Court of Appeal (Court) found that the employee failed to meet the test in establishing a *prima facie* discrimination case based on family status.

In *Flatt v Canada (Attorney General)* (2015 FCA 250), the applicant brought an

application for judicial review of a decision of the Public Service Labour Relations and Employment Board (Board) dismissing the applicant's grievance against her employer for discrimination.

The applicant held a unionized position as a spectrum management officer at Industry Canada. After her third maternity leave in 2012, the employee had requested a similar telework arrangement, which was agreed to by her employer after her previous maternity leaves. She initially requested a telework arrangement of five days per week, which would allow her to work from home and to continue breastfeeding her child full time. The employer denied this request as it was not "operationally feasible." As a result, the applicant requested an extended leave, which was granted, but she continued to seek a teleworking arrangement.

The employer agreed to accommodate her with respect to her needs by teleworking two days a week, and to authorizing the applicant to take two 45 minutes breaks during the remaining three days where she would attend her son's daycare in order to breastfeed him. While the employer generally agreed to this arrangement, issues were flagged relating to meeting the 37.5 hours per week requirement, and that the arrangement be for one year. The applicant did not address these concerns and abandoned this arrangement. Consequently and in light of the relevant Duty to Accommodate Policy, the employer offered the applicant three options; however, the parties failed to agree to an arrangement.

The applicant brought a grievance claiming that her employer's failure to accommodate was discriminatory on the basis of sex and family status. However, the Board dismissed the applicant's grievance. On judicial review, the Court held that there was no *prima facie* case of discrimination based on the facts and evidence presented. The Court relied on the four-part test established in *Canada (Attorney General) v Johnstone* (2014 FCJ No 455) with respect to making out a *prima facie* case of workplace discrimination on the prohibited ground of family status resulting from childcare obligations.

The *Johnstone* test requires a claimant to show the following: (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a 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 fulfillment of the childcare obligation. In applying the four-part test, the Court found that the applicant's evidence fell short on the second and third factors.

The Court held that, to make a case of discrimination on the basis of sex or family status with respect to breastfeeding, an applicant is required to disclose confidential information, such as the particular needs of a child or his/her medical condition requiring breastfeeding. The Court found that, absent such evidence and with only a few medical notes from a physician in support of the applicant's choice to continue breastfeeding, the applicant failed to meet the second prong of the *Johnstone* test. Accordingly, the Court found that it was the applicant's personal choice to breastfeed during her work hours, as opposed to an obligation.

Similarly, the Court found that the applicant failed the third prong of the test in making reasonable efforts to meet her childcare obligations through reasonable alternative solutions, as she simply abandoned the options that were provided to her by the employer.

Accordingly, the Court dismissed the application. In its concluding remarks, the Court stressed the fact that the reasons given in this case should not be construed as "trivializing breastfeeding" and that the issue regarding breastfeeding in the workplace should be analyzed on a case-by-case basis.

This case affirmed that breastfeeding accommodation can be brought under the protected ground of family status or sex; however the onus is on the working-outside-the-home mother to make a *prima facie* case of discrimination. ■

B.C. Supreme Court overturns Tribunal's high damage award

A recent decision from British Columbia's Supreme Court (Court) set aside a damage award for injury to dignity.

In *University of British Columbia v Kelly* (2015 BCSC 1731), the University of British Columbia (University), applied for judicial review of a Merits Decision and a Remedy Decision by the British Columbia Human Rights Tribunal (Tribunal), which found that the human rights complaint against the University by the respondent, Dr. Kelly, was justified.

Dr. Kelly was a medical school graduate who suffered from ADHD and a non-verbal learning disability. His disability caused him difficulties with keeping up and passing his residency program requirements. He sought medical help to try to meet the program requirements between November 2005 and August 2007. However, he performed below expectations despite having been accommodated by the University. As a result, the University found the respondent unsuitable for the program and discharged him with two months' severance pay. Six year later, the respondent was re-admitted to the program following an earlier Tribunal decision, which had found the University's treatment was discriminatory.

In determining lost wages, the Tribunal awarded the difference between what Dr. Kelly had earned and what he would have earned if he had continued with the program to completion. The Tribunal found that the difference amounted to approximately $385,000. The Tribunal acknowledged that this amount was high, but it added that it was due to the higher wages that doctors earn.

The Tribunal found that Dr. Kelly had not been adequately accommodated as required by the duty to accommodate and was awarded $75,000 in general damages for loss of dignity, self-respect, and hurt feelings. While the discrimination was ameliorated by Dr. Kelly being re-admitted into the residency program, the Tribunal found that the discrimination resulted in Dr. Kelly being disadvantaged from entering his profession.

On judicial review, the Court upheld the Tribunal's decision; however the Court set aside the amount awarded. The Court granted the Tribunal limited standing before the Court by permitting it to:

- outline the proceedings which were before it and the issues on judicial review;

- make submissions about the Court's role on judicial review, the standards of review, and the relief available on judicial review; and

- make submissions about whether the questions to be answered on judicial review were questions of fact, law, or mixed fact and law.

The Court found the following issues required findings of fact to be determined based on a reasonableness standard:

a) whether there is a nexus between adverse treatment and a prohibited ground of discrimination

b) whether a *prima facie* case of discrimination has been proven;

c) whether the duty to accommodate to the point of undue hardship has been met; and

d) the relevance and weighting of witness evidence.

The Court found the following issues involved findings of law, or mixed fact and law, which were reviewable on the correctness standard:

a) whether the Tribunal applied the correct analytical framework in deciding whether *prima facie* discrimination occurred; and

b) whether the Tribunal had proper regard for the procedural component of the duty to accommodate.

The Court also reviewed the appropriate remedy for a breach of the B.C. *Human Rights Code*, which involved discretionary findings, and were reviewable on the patently unreasonable standard.

The Court found that the Tribunal applied the correct analytical framework.

The University asserted that the Tribunal erred by improperly considering a procedural duty to accommodate. The Court accepted the Tribunal's analysis with respect to the law when it stated that, "it is relevant to consider both the accommodation process and the reasons for Dr. Kelly's dismissal in assessing, in a holistic manner, whether UBC has satisfied its duty to accommodate".

The Court noted that the wage loss remedy the Tribunal awarded to Dr. Kelly was not patently unreasonable, however the award for injury and dignity was found to be patently unreasonable. While there is no statutory cap regarding the amount awarded with respect to injury and dignity, the Court disagreed with the Tribunal asserting that Dr. Kelly's case was "unique" and should be awarded $75,000. The Court also did not find the award to be "reasonably proportionate" to the injury suffered by Dr. Kelly, in view of a similar cases, notably *Senyk v WFG Agency Network (B.C.) Inc.* (2008 BCHRT 376) (*Senyk*), which awarded the complainant $35,000.00.

Having compared similarly situated cases, the Court added that: the Tribunal is afforded "great deference" in awarding the amount of damages it sees just, and that previous decisions should not necessarily limit or determine the damages award if it does not serve to adequately compensate the complainant. The Court emphasized that the remedy should be based on evidence and reason, which it did not find in the case before it. The Court struggled with upholding a damages award of more than double the amount of the previous highest award in *Senyk*, which was for a similar injury. It added that the Tribunal's decision to award $75,000 was not supported by the evidence and it was not based on principle, and applied settled law and ordered the Tribunal to reconsider the award.

This case re-affirms the principles applicable to damages for loss of income as well as injury to dignity. ■

Small Claims Court awards damages to dismissed employee, post-maternity leave

The Ontario Superior Court of Justice, Small Claims Court recently concluded that an employee was constructively dismissed and discriminated against on the grounds of sex and family status, after she returned from maternity leave and was not reinstated to her original position with the same hours and salary.

In *Bray v Canadian College of Massage and Hydrotherapy* (2015 CanLII 3452), the plaintiff was employed by the Canadian College of Massage and Hydrotherapy (defendant) for nine years as a massage therapy instructor. In October 2012 she had taken maternity leave, and two months following her return, she was advised that her services were no longer needed.

A few months prior to her return from maternity leave, the plaintiff emailed the defendant to follow up regarding her schedule. She was advised that upon her return, she would be assigned to a different position. The plaintiff notified the defendant that as per Ontario labour laws, she was entitled to return back to the position she held

prior to taking maternity leave. However, the defendant responded by saying, "let's see how this term goes and see if you find it ok with even being in 4 classes and having to be a mother at the same time. It will be a big adjustment." Consequently, the plaintiff filed a complaint with the Ministry of Labour.

Upon her return to work, the plaintiff's schedule for the September 2013 term, as set by the defendant, was reduced from 25 hours to 19 hours per week. In addition, she was not given her previous lead teaching position for the treatment 1 class. Instead, she was given a Teaching Assistant position, and her gross weekly pay was reduced by one-third, from $832 to $558.

In early December 2013, the plaintiff followed up with the defendant about her work schedule for the January term, but was told that she will not be put on the schedule for any classes as her services were not required. Consequently, the plaintiff brought an action for constructive dismissal.

The Court considered a number of issues in this case. The first issue the Court examined was whether the plaintiff was constructively dismissed. It was found that the plaintiff had been constructively dismissed for the new term. The Court rejected the defendant's position that Ms. Bray was not terminated. The judge added that there had been a unilateral fundamental change to the terms of employment which resulted in the plaintiff having been constructively dismissed. Accordingly, the judge found that the plaintiff was entitled to reasonable notice and 8 months' pay in lieu of notice.

On the issue of reprisal with respect to the plaintiff's complaint to the Ontario Ministry of Labour, the judge stated that the reduction of her hours upon her return from maternity leave and the termination of her employment were acts of reprisal for her complaint to the Ministry of Labour. However, the Court had no source for a civil court's potential jurisdiction to award damages regarding reprisals, pursuant to section 74 of the *Employment Standards Act* (*ESA*), which prohibits such reprisals and puts the onus on the employer to prove that section 74(1) was not contravened. As such, the plaintiff's claim for a damages award for reprisal was dismissed.

Next, the Court dealt with the issue of damages for breach of the Ontario *Human Rights Code* (*Code*) sought by the plaintiff. The Court stated that the plaintiff claimed she was discriminated against on the *Code*-protected grounds of sex and family status by her employer. Additionally, it was noted that the *ESA* deals with rights to employees who take leave and it provides that they are to return to the same or comparable position upon the conclusion of their leave. The Court found that the plaintiff was discriminated against based on her sex and family status contrary to the *Code*, which was evidenced by her decreased responsibilities, hours, and adverse treatment after she returned to work following her maternity leave. She was awarded $20,000 for injury to feelings, dignity and self-respect.

Finally, the Court assessed the plaintiff's claim for aggravated and punitive damages. The Court dismissed the aggravated damages claim as there was no medical evidence to indicate that the plaintiff had suffered mental distress. As for punitive damages, the defendant argued that it had reduced the plaintiff's hours to zero due to a complaint by a former student against the plaintiff alleging that she had left class early on one occasion. However, the Court found that the complaint was hearsay, and the defendant made no effort to investigate the complaint. Accordingly, the plaintiff was awarded the Small Claims Court's monetary limit of $25,000.00, notwithstanding that the damages claimed were assessed to a total $42,700.00.

This decision reminds employers of the potential risks for not reinstating employees to the same or comparable position following a maternity leave. ■

Court finds employer liable for terminating employee following maternity leave

The recent Superior Court decision in *Partridge v Botony Dental Corporation* (2015 ONSC 343) (CanLII) awarded the plaintiff a total of $62,000.00 in damages for wrongful dismissal and breach of the Ontario *Human Rights Code* (*Code*) for discrimination based on family status.

The plaintiff, Lee Partridge, worked as a dental hygienist for the defendant employer, Botony Dental Corporation for seven years, until her employment was terminated in July 2011. In 2007, the plaintiff became the office manager and was responsible for the general operations of the practice, which included patient bookings, staff scheduling, answering the phones, supervising employees and taking care of accounting related matters.

The plaintiff had taken two maternity leaves during her employment, one in June 2007 and the second in June 2010. Upon her return to work after her second maternity leave in June 2011, she was told by the sole director, officer and shareholder of Botony Dental Corporation, Balbinder Jauhal (Bo), that she was booking the plaintiff into the hygienist schedule, which led to a series of events and interactions between the plaintiff and the defendant that culminated in the plaintiff's termination.

The plaintiff received a severance payment of $7,605.50 for seven weeks' pay. On her Record of Employment, the defendant provided comments, alleging that the plaintiff engaged in various acts of misconduct that resulted in the end of the working relationship.

At trial, the Court had to determine whether the plaintiff was wrongfully terminated, what notice period she was entitled to if it was found that she was wrongfully terminated; whether the plaintiff was subject to reprisal as a result of her complaint, and whether the defendant's conduct with regard to the plaintiff was contrary to the *Code*.

The first issue the Court dealt with was the issue of just cause termination. The Court stated that, before terminating a contract, an employer has to provide adequate notice or pay in lieu thereof. If an employer alleged just case for terminating an employee, they bear the onus to establish, on the balance of probabilities that there was cause for terminating the employee. The Court relied on the Ontario Court of Appeal's decision in *Dowling v Ontario (Workplace Safety and Insurance Board)* (2004 CanLII 43692), which cited the ground-breaking Supreme Court of Canada decision in *McKinley v BC Tel* (2001 SCC 38) (CanLII), which set out the test for assessing whether an employee's conduct gives rise to just cause for dismissal.

The three-part test to determine if dismissal is justified consists of: (1) determining the nature and extent of the misconduct; (2) considering the surrounding circumstances; and (3) deciding whether dismissal is warranted. The Court weighed the evidence against the facts in the instant case and found that each of the allegations advanced by the defendant did not constitute just cause. The Court stated that the evidence provided by the plaintiff was credible, and that the defendant had congratulated and positively reinforced the plaintiff's work. Furthermore, it was noted that the plaintiff was never given a written performance appraisal or warning throughout her

employ, and was considered a high-performing, reliable and valued employee.

On the issue of reasonable notice, the Court noted that, given the level of responsibility the plaintiff was given and years of service, the plaintiff would be entitled to 12 months' notice, awarding her $42,517.44 in damages for wrongful dismissal. The Court reasoned that, the plaintiff was in charge of supervising 10 employees, she reported directly to the owner of the company, and was a trusted employee which warranted a longer notice period.

With respect to the defendant's statutory obligations, specifically dealing with the issue of reprisal, the Court found that the defendant was in violation of the Ontario *Employment Standards Act* (*ESA*). The *ESA* provides employees with the right to take unpaid maternity leave and to return to the same or comparable position following the end of their leave. Additionally, the *ESA* also prohibits an employer from engaging in any acts of intimidation, dismissal or penalty as a result of an employee's request to be reinstated. The Court was of the view that despite the office manager job being available upon the plaintiff's return back to work after her maternity leave, she was forced to take the dental hygienist position.

The Court referred to the *Canada (Attorney General) v Johnstone* (2014 FCA 110) decision (summarized in *Bray* above), with respect to family status, which provided for parental obligations, such as childcare, in determining discrimination based on family status as per the *Code.* The Court found that the defendant failed to establish a bona fide requirement for the plaintiff's reduction of hours, or that she could not be accommodated without undue hardship on the part of the defendant. The Court found that the plaintiff was discriminated against on the basis of family status, which resulted from the defendant's willful and reckless neglect to meet their legal obligations as an employer. She was awarded $20,000.00 for injury to her dignity, feelings and self-respect.

Similar to the Small Claims Court decision in *Bray v Canadian College of Massage and Hydrotherapy* (see above), this decision confirms the protections afforded to employees from discrimination on the ground of family status. ■

Claim against school board alleging discrimination based on language proficiency job requirement dismissed

In *Vyas v Peel District School Board* (2015 HRTO 1336), the Human Rights Tribunal of Ontario (HRTO) dismissed an application alleging that the Peel District School Board (Board) discriminated against an employee for failing its language proficiency test required for the job.

The applicant, Ashvin Vyas, commenced employment with the Board as an attendant in 2005 on a part-time basis. He became a full-time attendant in 2008 and wanted to obtain a custodian position with the Board.

The Board required applicants who wish to apply for the custodian position to complete a written test, followed by a five-day course, also known as the Basic Custodial Training (BCT) course, with a final assessment on performance of the duties assigned. The test is in English and it aims to test both the language proficiency of candidates, as well as the basic knowledge of the aspects of maintenance and cleaning of schools.

The applicant failed the written test the first time he took it in 2008, but passed the second time in 2010 after filing a complaint with his union. However, he did not pass the written or performance component of the BCT test. The Board was of the view that his failure to pass the BCT test was attributed to his limited proficiency with the English-language, and his inability to clearly read and understand instructions. The Board offered the applicant the opportunity to review his results, in order to find out what he could improve on in the future, should the applicant choose to re-take the test.

The applicant testified that he had a conversation with Kent Murray, who was in charge of administering the BCT course and that Mr. Murray had advised the applicant that it was necessary for him to improve his English proficiency. However, Mr. Murray disagreed, testifying that this was not true, and that he may have said something to the applicant with respect to communication issues, as it related to following instructions.

The applicant filed two grievances as a result. The first grievance was filed at the conclusion of a meeting at the union offices. At the meeting, the applicant believed that the Board confirmed that he had been discriminated against on the basis of English proficiency based on a telephone conversation the Local President had with the applicant's supervisor, Mr. Musial. However, Mr. Musial testified that he could not recall the conversation and denied having told the applicant that he required a specific ESL level for the custodian position.

The second grievance dealt with the issue of the applicant having been denied the opportunity to re-write the BCT test. The Board agreed to allow the applicant to re-write the test, and the parties also agreed that this would fully and finally resolve the grievance. Nevertheless, the applicant declined to re-write the test at the scheduled time. The test was re-scheduled for a second time, but the applicant failed to attend. The applicant explained that his failure to re-write the test was attributed to him feeling anxious and his belief that the Board had discriminated against him. Accordingly, he brought a claim before the Tribunal alleging discrimination on the protected grounds of race, colour, ancestry, place of origin, ethnic origin, creed, sex, family status, age, and association with person under the Ontario *Human Rights Code* (*Code*).

At the hearing, the applicant argued that while language proficiency is not a protected ground under the *Code*, the applicant claimed discrimination on the basis of place of origin. Furthermore, the applicant contended that he was provided inconsistent information with respect to the level of English proficiency required to pass the test, and stated that he was subject to a "moving target" of English proficiency.

The Tribunal held that even if the Board had changed its English proficiency requirements, the applicant was not offered the custodian position due to his BCT test results, and not discrimination on the basis of place of origin on the part of the Board. The Tribunal also found that the Board's decision to not allow the applicant to re-write the BCT test was due to the fact that the applicant had not taken any steps to improve his BCT scores.

The Tribunal also stated that the applicant's claim about having been told that his failure on the BCT test was due to his English proficiency was not advanced in any of the applicant's previous claims, nor substantiated in any of his materials or evidence before the Tribunal.

The Tribunal also noted that, even if it found that the applicant was discriminated against based on arbitrary and changing English proficiency level, which prevented him from becoming a custodian, this would not suffice in establishing discrimination under the *Code*. The Tribunal reiterated that English-proficiency is not a *Code*-protected ground, and while a requirement of English proficiency that is not established as necessary in a job posting may lead to the possibility of discrimination contrary to the *Code*, the onus lies on the

applicant to prove that discrimination did in fact occur.

This decision confirms that there needs to be a connection between an individual's difficulties communicating and a *Code*-protected ground, in order to establish discrimination on the basis of a language proficiency job requirement. ■

Court sends clear message on the legal risks associated with sexual assault in the workplace

In *Silvera v Olympia Jewellery Corporation* (2015 ONSC 3760), the Ontario Superior Court awarded a former employee over $300,000 in damages against Olympia Jewellery and her supervisor, Morris Bazik ("Bazik") (collectively, the defendants), arising out of alleged wrongful dismissal, and a series of sexual assault and battery. The plaintiff's daughter also brought a claim for $25,000 in damages against the defendants under the *Family Law Act* ("*FLA*") as a result of the loss of guidance, care and companionship from her mother.

The plaintiff, Ms. Michelle Silvera, was employed by the defendants in August of 2008 as a receptionist / assistant administrator, earning $28,000 per year. Raphael Bazik was the sole owner of Olympia, and his brother Bazik was in charge of operations and directly supervised the plaintiff. Over the course of her employment, the plaintiff was subjected to a myriad of inappropriate acts, such as sexual assault, sexual harassment, battery, racial harassment, and derogatory comments, all perpetuated by Bazik. Despite this, the plaintiff continued to work at Olympia because she felt "trapped" as a single mother who heavily relied on her job to support her and her daughter.

On February 23, 2010, the plaintiff had an emergency dental surgery for a tooth extraction and informed Bazik that she required a week off work to recover. However, her tooth ache worsened and she informed Bazik, who seemed sympathetic and requested that she update him after her planned visit to her dentist on March 2, 2010. Three days later, Bazik requested the plaintiff to provide him with the contact information of her dentist in order to confirm that she was missing work as a result of dental surgery. On March 8, 2010, the plaintiff returned to work and despite having provided two medical notes, Bazik requested a detailed letter from her dentist, which the plaintiff provided that same day. On March 12, 2010, the plaintiff phoned to follow up on her job and was told that she was terminated as of March 10, 2010. The termination letter stated that the plaintiff was fired due to a prolonged absence from work; numerous unsuccessful efforts to establish contact with the plaintiff; and the plaintiff's indifferent disposition to the defendants' request to discuss her return to work, which was found to have no factual basis.

With the defendants failing to appear at trial, the Court granted the motion brought by the plaintiffs to strike the defence and admitted all the factual allegations pleaded in the Amended Statement of Claim. The trial judge also accepted the evidence of a clinical psychologist, who provided that given the plaintiff's history of sexual assault, the conduct of her supervisor triggered memories of abuse, which had a severe impact on the plaintiff. Consequently, she was diagnosed with major depression, chronic post-traumatic stress disorder, and substance abuse.

The Court found that Bazik engaged in several acts of battery, breached his fiduciary duty, and failed to fulfil his duty to take care, as is reasonable to ensure that the plaintiff was reasonably safe while in the premises of the employer under the *Occupiers' Liability Act*. The Court also found Bazik liable under the Ontario *Human Rights Code* for breaching the plaintiff's rights, specifically under s. 5(1) to equal treatment with respect to employment

without discrimination because of race or sex, ii) under s. 5(2) to freedom from harassment in the workplace by the employer or agent of the employer because of race, and iii) under s. 7(2) to freedom from harassment in the workplace because of sex. The Court further found that the severity of the assaults committed on the plaintiff resulted in a diminished closeness with her daughter, and a compromised earning capacity, as she no longer felt comfortable working with older men in close proximity or supervisory roles.

In assessing the quantum of damages, the Court relied on ADGA Consultants Inc. v Lane, 2008 CanLII 39605 (Div. Ct.), where the Court stated "… there is no ceiling on awards of general damages under the Code …". The Court also noted that the effects of the direct supervisor's conduct had a heightened impact on the plaintiff because, among other reasons, there were no sexual harassment policies in place or other mechanisms to address the conduct.

A number of other remedies were awarded to the plaintiff, including general and aggravated damages, punitive damages, costs of future therapy care, and future lost income. The employer was also held vicariously liable for the acts of Bazik because he was the "operating mind" of the corporation and because there was a strong link between his operation of the corporation and his ability to assault the plaintiff. Accordingly, the employer was jointly and severally liable for damages arising from Bazik' conduct, as well as being liable for wrongful dismissal damages. The plaintiff's daughter was also awarded damages.

This decision re-affirms the seriousness of this type of conduct in the workplace, and the Court's willingness to award high damages, which should serve as a caution to employers. ■

Court hands down a hefty penalty to employer for deceiving an employee

The Ontario Superior Court's decision in *Antunes v Limen Structures Ltd.* (2015 ONSC 2163), found that the defendant corporation breached its duty of honest performance and fair dealing owed to the employee.

The plaintiff, John Antunes, commenced employment with the defendant employer, Limen Structures Ltd. (Limen) in May 2012 as a Senior Vice President of Operations / Concrete Forming. Prior to joining the company, the plaintiff and Mr. Lima at Limen discussed their respective expectations regarding the plaintiff's position, responsibility, as well as salary and company shares. Mr. Lima advised the plaintiff that the company was worth $10,000 million and that the shares he would be offered would be worth $500,000. The plaintiff's employment contract provided that he would receive an annual salary of $150,000, which would increase to $200,000 after his first year of employment. Additionally, the plaintiff was to receive 5% of Limen's shares, with the potential for another 5% of the shares of Limen's Residential Division within a year after he was hired. Finally, the employment contract provided up to 12 months' pay in lieu of notice for termination.

At trial, the plaintiff claimed that sometime in August 2012 he was asked to work on delay claims and outstanding changes for five projects full-time, as opposed to the operational duties he was initially hired for. He testified that the delay claims were substantial, and were in the millions as potential receivables, which led him to conclude that the company was not in fact worth $10,000 million. Once the review and quantification of the delay claims had ended, the plaintiff had the intention to speak to Mr. Lima about going back to his original duties. However, Mr. Micciola, the Controller-Finance and Operations at the defendant corporation, advised the plaintiff that his position as Vice

President was no longer available and he was no longer needed by the corporation.

In finding that the employment contract was valid, and that the plaintiff was terminated without cause, the Court had to determine the appropriate pay in lieu of notice to which the plaintiff was entitled. In determining the amount of reasonable notice, Justice Brown applied the factors set out in *Bardal v Globe & Mail Ltd.* (1960) 23 DLR (2) 140. The trial judge considered the character of the employment, the plaintiff's length of service, his age and the availability to similar employment, as well as the plaintiff's training and qualifications. The Court noted that the plaintiff held the position of a project manager with supervisory responsibilities, his length of service was for 5 months and 11 days, he was 50 years of age, and that there was no evidence of any comparable positions available at the material times which the plaintiff could have pursued.

Next, the Court looked at misrepresentation on the part of the defendant and the duty of good faith dealing. The Court provided that there is a general duty of honesty in contractual performance and that parties must not lie or knowingly mislead each other about matters directly linked to the performance of a contract. The Court was of the view that the defendant did not deal with the plaintiff honestly during the contractual negotiations. The Court relied on the Supreme Court's decision in *Bhasin v Hrynew*, 2014 SCC 71, which stands for the proposition that parties must be able to rely on a minimum standard of honesty from their contracting partner in relation to performing the contract as a reassurance that, if the contractual terms are not honoured, the parties would have the opportunity to protect their interest. Consequently, the Court found that there were misrepresentations made, which the plaintiff relied on in accepting employment with the defendant with respect to the value of the company and the company's shares. Furthermore, there were promises made in relation to shares of a non-existent company by the defendant's claim that there was a Residential Division at Limen.

Accordingly, the Court found that the plaintiff was entitled to eight months' notice based on the plain wording of the contractual provision, the defendant's failure to act in good faith *vis-à-vis* the employment contract, and the misrepresentations on which the plaintiff relied. The Court also drew an adverse inference against the defendant for its failure to call Mr. Lima to testify or to defend the action in a meaningful way. In addition to the eight months' notice, the plaintiff was awarded damages in the amount of $500,000 for the value of the shares the defendant had represented to him.

This case should serve as a caution for employers who misrepresent employment offers to potential candidates. ■

Ontario Court of Appeal confirms that an employer's financial circumstances has no bearing on notice entitlements

In *Michela v St. Thomas of Villanova Catholic School* (2015 ONCA 801), the Ontario Court of Appeal confirmed that an employer's financial circumstance is not a factor in determining reasonable notice.

The three appellants were employed by St. Thomas of Villanova Catholic School on a series of one-year contracts. The three appellants, Domenica Michela, Sergio Gomes, and Catherine Carnovale were hired as teachers by the respondent for a period of eleven, thirteen and eight years respectively.

In May 2013, each appellant received a letter from the respondent stating that their contracts would not be renewed due to low enrolment in the upcoming academic year. As a result, the appellants commenced an action for wrongful dismissal, and the parties agreed to proceed by way of a summary judgment motion.

The respondent's position was that the appellants were employed for fixed-term contracts and were not entitled to notice. The motion judge found that the appellants were in fact employed for an indefinite period and were entitled to reasonable notice. However, the motion judge reduced the twelve-month notice period to six months, taking into consideration the respondent's poor financial situation and alternative teaching positions that the appellant's could seek.

On appeal, the appellants raised three issues. First, they argued that the motion judge erred in taking into consideration the respondent's financial position. Next, they argued that the motion judge erred in law for presuming that there may be employment opportunities available. Finally, the appellant's claimed that the motion judge erred in finding that the enrolment issues constituted a financial problem which resulted in the appellants' notice periods being reduced to half.

The Court of Appeal found in favour of the appellants, stating that the motion judge speculated in his reasoning to reduce the notice period to six months. The Court reasoned further by stating that the financial circumstances of the respondent should not be considered as part of the "character of employment." The Court explained that the character of employment refers to the nature of the position that was held by the employee, such as an employee's level of responsibility and expertise. In addition, the Court stated that an employer's financial circumstance may justify terminating a contract employee, which would give rise to the employee's right to reasonable notice. However, an employer's financial situation is not relevant for determining reasonable notice. The Court found that the motion judge misinterpreted the analysis provided in *Bohemier v Storwal International Inc.*, (1982) 40 OR (2d) 264 (HC), which held that the difficulty in securing replacement employment should not have the effect of increasing the notice period unreasonably. Instead, the motion judge interpreted this to mean that the economic circumstance of the employer should be taken into account when considering the case for each party.

The Court concluded that the motion judge erred in finding that the period of notice to which the appellants were entitled should be reduced, as this is not only inconsistent with the nature and purpose of an employee's right to notice, but it is also not required by the case law.

This decision makes clear that the financial challenges of an employer should not diminish their obligations to provide adequate notice entitlements to employees. ■

Adjudicator re-affirms the test for an abandonment of position

In *Horseman v Horse Lake First Nation* (2015 CLAD No 252), the complainant, Tina Horseman, commenced employment with Horse Lake First Nation (Band) in 2003 as an Arena Worker, and then a Recreation Attendant on a full-time basis. She then obtained a position as a Teaching Assistant for a pilot E-learning Program, which was to run for a term of six months. The program arose out of concern for student absenteeism, whereby the Band and Peace Wapiti School Division (Peace Wapiti) met to address this issue by developing an E-learning Program (Program) in October of 2014.

The complainant commenced her position as a Teaching Assistant on December 8, 2014, assisting Victoria Wanihadie, the teacher hired for the Program, in various duties such as cooking, cleaning and driving the students. The complainant received remuneration by both the Band and Peace Wapiti. Notwithstanding the fact that she was paid for five hours per day as a Teaching Assistant, her tasks took up majority of the working day. As a result, she was unable to continue her duties as a Recreation Attendant, which she brought to the attention of the Band's Chief

Administrative Officer, who seemed understanding of the circumstances.

On January 23, 2015, Ms. Wanihadie was fired from her position as a teacher, which put the complainant's employment in jeopardy. Consequently she sought clarification about her job as a Teaching Assistant. Since she was not able to speak to the CAO, the complainant spoke to an individual by the name of "Eugene" regarding her job and whether or not she would be compensated in full. Eugene reassured the complainant that she would be paid and that she was not getting fired from her Recreation Attendant job. However, in January 2015, the complainant was only paid by the Band for her Recreation Attendant position, which was one-half of her salary.

On January 29, 2015, the complainant suffered a mental breakdown and was hospitalized as a result. Following her hospitalization, she spoke with someone from the Band's payroll department about taking a sick leave. On the sick leave request form, she had listed her position with the Band as "Recreation Assistant/Arena Worker". She also provided the CAO with her sick note on February 9, 2015 and the sick leave request form. She also informed the Peace Wapiti's Human Resources Department that she was on a stress leave and that she would be in touch at the end of March. Subsequently, the complainant received a Record of Employment (ROE), which gave the reasons for Ms. Horseman leaving her employment with Peace Wapiti as "Quit". On February 13, 2015, the complainant went to pick up her paycheque from the Band, but to her surprise, she was told that she no longer worked there. She requested an ROE on two occasions, and after not receiving it, she made a third request to the CAO, who told her that he was under the impression that she had quit.

The Adjudicator applied the test for an abandonment of a position, and affirmed that an employee is free to quit their employment at any time subject to any required statutory or contractual notice to their employer. The Adjudicator further noted that the test requires that the employee had intended to quit their employment, and that they performed some act which evidences an intention to quit their employment. Applying the test to the case before him, the Adjudicator found that the complainant had not in fact abandoned her position as a Recreation Attendant. Moreover, the Adjudicator found that it would be highly unlikely that the complainant would have accepted a temporary six-month position if she was aware that her employment with the Band would be terminated or that she would be employed for only one hour per day after the expiry of the six-month term. The Adjudicator found the complainant's expectations with respect to returning to her full-time position as a Recreation Attendant after the six-month pilot project concluded to be reasonable, as her placement in the Teaching Assistant position was akin to a secondment. Furthermore, the Adjudicator added that if the Band's position was that the complainant had quit, she would have been issued an ROE and given the reason "Quit", similar to Peace Wapiti.

Whilst the Band did not formally dismiss the complainant, the Adjudicator was of the view that its actions showed that she was constructively dismissed, amounting to an unjust dismissal under the *Canada Labour Code*. The Adjudicator found that the Band ought to have returned the complainant to her position as a Recreation Attendant, or another suitable position, which a reasonable person in the same position would expect. The complainant was entitled to wages in lieu of notice, severance pay and compensation pursuant to the provisions of the *Canada Labour Code*.

This decision reaffirms that unless an employee intended to quit or abandon their employment, and has acted as such to evidence this intention, employers may be held liable for wrongful termination. ■

SCC rules evidence from an in-camera meeting admissible

In *Commission scolaire de Laval v Syndicat de L'enseignement de la region de Laval* (2016 SCC 8), the Supreme Court of Canada (SCC) had to determine whether it was proper for an arbitrator to allow the examination of witnesses from an in camera meeting.

In June 2009, the grievor worked as a vocational training instructor for the Commission scolaire de Laval (Board), and was asked by his principal to send a declaration concerning his judicial record to the Board's human resources unit. The grievor indicated that he had been convicted for possession of a prohibited weapon, possession of narcotics for the purposes of trafficking, and proceeds of crime in 1980, 1995, and 1996, respectively. The grievor had applied for a pardon under the *Criminal Records Act* (*CRA*), which he expected to receive sometime in June 2009. The union also advised that the principal who the grievor reported to was aware of his record when he was hired nine years earlier.

The 2006 amendments made to the *Education Act* (*EA*) require a board to ensure that "persons who work with minor students and persons who are regularly in contact with minor students…have no judicial record relevant to their functions within that…board" (s 261.0.2). In the event a school board finds out that a person holding a teaching licence has a record it considers relevant to that person's functions, the Minister must be informed (s 261.0.7). The Minister has the power to refuse to renew the licence or may suspend or revoke it, or attach conditions to it (s 34.3). The verification of records provides for an exception for an offence that a "pardon" has been obtained (s 34.3 para 1(1) and s 258.1 para 1(1)). The *EA* therefore reflects the protection provided for in s 18.2 of the *Quebec Charter of human rights and freedoms* (*Quebec Charter*).

The grievor attended a meeting with the Board's executive committee, whereby the grievor and his union representative were asked to leave for an *in camera* meeting, in order for the Board to consider the matter. After a short deliberation, the Board decided to terminate the grievor. Four days following the termination, the National Parole Board granted the grievor a pardon.

The union grieved the dismissal on several grounds, but specifically, they noted that the collective agreement provided for the dismissal of a teacher "only after thorough deliberations at a meeting of the board's council of commissioners or executive committee called for that purpose." The grievance was subject of an arbitration hearing in May 2010, where the Board raised an objection regarding the union's witnesses, which were three members of the executive committee who attended the *in camera* meeting. The arbitrator dismissed the objection, finding the witness's testimony relevant as to whether they thoroughly considered the matter before them.

The Quebec Superior Court applied the correctness standard, and found that the executive committee deliberations *in camera* were confidential, notwithstanding the fact that the witnesses testified about the formal process and the final decision, which was made in the public meeting.

On appeal, the Quebec Court of Appeal also applied the correctness standard, but it set aside the lower court's decision and restored the arbitrator's interlocutory ruling. The Court of Appeal was of the view that the *Dunsmuir* principles applied with respect to private employment law. It was found that the committee's deliberations were relevant for the arbitrator to determine whether the questions asked would assist with deciding the grievance.

The SCC dismissed the Board's appeal and found that the standard of review was reasonableness and not correctness, as the evidentiary issues fell within the jurisdiction of the arbitrator. Furthermore, the SCC stated that an interpretation of the collective agreement by the arbitrator must be reviewed

on a standard of reasonableness. The SCC also noted that, "it was reasonable for the arbitrator to rule that he needed to know what had taken place in camera in order to determine whether the executive committee's deliberations had been thorough".

The SCC rejected the principle of "unknowability" of a decision-making body's motives provided in *Consortium Developments (Clearwater) Ltd. v Sarnia (City)* (1998 3 SCR 3). In *Clearwater*, a land developer had argued the invalidity of a number of municipal resolutions and was unsuccessful in summoning individual council members and city officials to testify about their discussions in the closed sessions. The SCC found the summonses to be irrelevant by stating that, "the motives of a legislative body composed of numerous persons are 'unknowable' except by what it enacts." In this case, the court clarified that the rule is only applicable to decisions made by a public body when it carries out acts of a public nature.

The majority also considered the deliberative secrecy principle, which protects the deliberations of members of an adjudicative tribunal. It was found that it has no application in this case due to the fact that the Board was an employer determining whether the grievor should be dismissed and not acting as an adjudicator.

The minority rejected the reasonableness standard of review and agreed with the lower courts finding that the correctness standard of review applied. In their reasoning, the minority indicated that the legal issues dealt with general law, despite having conceded with the majority that the dispute surrounded a grievance arbitration, giving arbitrators jurisdiction over evidentiary issues and deference. ■

Arbitrator finds covert surveillance admissible in the workplace

In *Ottawa-Carlton District School Board v Ontario Secondary School Teachers' Federation, District 25 Plant Support Staff*, the arbitrator considered the issue of covert surveillance records and, in particular, whether the evidence obtained through surveillance should be admitted into evidence.

The grievor worked as a custodian for Ottawa-Carlton District School Board (Board) and was terminated after having been identified on surveillance for smoking marijuana in his work uniform. The grievor was aware of the Board's "zero-tolerance" policy for the use of controlled or restricted drugs. The Board also had a detailed policy and procedure regarding video surveillance. Notably, the Board and OSSTF incorporated a requirement for compliance with the procedure into the collective agreement, which would apply to all employees. It is important to note that the Board' policy and procedure did permit for covert surveillance, but only in certain circumstances.

In April 2012, the acting evening supervisor, Michael Davidson phoned the Supervisor of Operation on the Facilities Department, David Mallette, informing him that he had answered his cell phone after being "pocket dialled." He overheard a conversation between a custodian he recognized to be the grievor who worked the evening shift and another man. Mr. Davidson explained that he had overheard the grievor say that there would not be enough drugs to share that night, and that they would be on their own.

Upon hearing this, Mr. Mallette attempted to observe the area of the suspected activity from the nearby rooftop. He also asked the area supervisor to visit the school; however these measures did not result in anything. He relayed his concerns to his manager, and suggested to follow up with third party covert surveillance. Higher approval had to be

sought with respect to the Employer's Video Surveillance Policy and Procedure, which Mr. Davidson had acknowledged. After speaking to the Chief Financial Officer, authorization was granted to install video surveillance, in order to gather more evidence with respect to the suspected activity. However, given the fact that there was a policy in place, and notwithstanding that the CFO did not believe the policy applied in this particular case, as the cameras would not be fixed installations, he obtained approval from the Director of Human Resources. The Director approved a third-party contractor to conduct video surveillance. The Board asserted that safety was their primary concern, and that the custodian would not be able to safely perform his job if impaired, which is why the covert surveillance was installed.

The union argued that the Board took no steps between April and May to deter the use of marijuana at school premises. Moreover, the union stated that if the main concern of the Board was safety, they could have applied more supervision and attempted to remove the suspected employees from the workplace.

The arbitrator considered the following issues: (1) in what situations surveillance may be undertaken; and (2) whether or not the Board's actions were supported by case law dealing with this issue.

The arbitrator reviewed the following in attempting to balance the privacy rights of the grievor with the employer's operational interests as it related to safety:

- whether it was reasonable to request surveillance in all circumstance

- whether the surveillance was conducted in a reasonable manner

- whether there were alternative, less intrusive ways in obtaining the evidence.

In the analysis, the arbitrator noted that the Board's policy and procedure incorporated the grievor's right to privacy, and the Board's interest, which permitted the use of surveillance in specific circumstances. The arbitrator also found that the grievor had no reasonable expectation of privacy when he engaged in the smoking of marijuana, as he was doing so in a public space next to the school and on his break. Accordingly, the arbitrator found that the Board's interest outweighed the privacy expectations of the grievor.

The arbitrator found that the Board's request for the surveillance was justifiable based on the information it had received regarding employees smoking marijuana. It was also found that the infringement on the employees' privacy was not to an unreasonable degree. The arbitrator was of the view that the video surveillance was conducted in a reasonable manner, in particular, taking into account the fact that the surveillance lasted three days, and the recording was specifically taken of the employees smoking marijuana. The arbitrator also noted that less intrusive methods were sought by the Board, however they were unsuccessful. For example, Mr. Davidson was told to go on a rooftop and observe, however, a good vantage point could not be found.

With respect to whether the video surveillance evidence should be admissible at a hearing and whether it was in accordance with the Board's own policy, the arbitrator raised concern that the rationale for conducting the video surveillance was not properly documented and a third party provider was not made aware of or required to comply with the Board's own privacy rules. The arbitrator stated that these were minor procedural errors, and notwithstanding these errors, there was no serious prejudice caused to the grievor. Accordingly, the arbitrator admitted the surveillance into evidence. Additionally, it was found that video surveillance was the only practical way to obtain the evidence necessary to ensure a safe working environment and to determine whether drugs were being trafficked on the Board's premises, especially since the police had refused to investigate until there was more substantial evidence.

This case strikes a balance between an employee's privacy rights in the workplace

and an employer's obligation in ensuring a safe working environment. It clarifies the use of covert surveillance in the workplace, which should be limited when other less intrusive measures are unsuccessful. ■

Divisional Court sets aside discipline committee's decision as tainted by error

In *Novick v Ontario College of Teachers* (2016 OJ No 1207), the Court found significant errors by the Discipline Committee (Committee) in dealing with allegations of unprofessional conduct by two teachers. The Court found that the decision to reprimand the two teachers for allegedly engaging in unprofessional conduct was unreasonable and unfounded, and therefore set aside the decision of the Committee.

Alyssa Novick and Ian Middleton worked as teachers at Ashbury College (College), which operated as an independent private school in Ottawa. In the fall of 2007, Ms. Novick and Mr. Middleton attended a four-day school trip to Boston with 40 students from the school between the ages of 16-18.

On the third night of the trip, a 16-year old male student (Student A) called Mr. Middleton and reported that he believed he had been sexually assaulted. He explained that four students had entered his hotel room where one student restrained him while another student sexually assaulted him and the third student videotaped the act. It was unclear as to what involvement the fourth student had. Mr. Middleton confiscated the videotape before it could be disseminated, and informed the school's Headmaster, Mr. Matthews, who suggested that the two main perpetrators be flown back to Ottawa with Ms. Novick and the videotape. Student A's parents were notified, and despite that the incident that had occurred, Student A carried on with the remainder of the trip. Ms. Novick had no contact with Student A, notwithstanding that she was the main organizer of the trip.

Two years later, the parents of Student A brought a complaint against the four teachers who attended the Boston trip, as well as the Assistant Headmaster of Ashbury, Mr. Ostrom. Since Mr. Matthews was not a member of the College he could not be subjected to a discipline procedure.

The Investigation Committee dismissed the complaints against everyone except for Ms. Novick and Mr. Middleton. The Investigation Committee referred all the complaints against Ms. Novick and Mr. Middleton to the Committee for a hearing, except for the complaint relating to professional misconduct for failing to obtain medical assistance for Student A. The allegations before the Committee included: failure to maintain the standards of the profession; failure to comply with the *Education Act* (*EA*); commitment of an act that would reasonably be seen as "disgraceful, dishonourable or unprofessional" by the profession; and, engaging in conduct unbecoming a member.

On February 28, 2014, after eight days of deliberations, the Committee issued a brief "Decision on Finding". It concluded that both Ms. Novick and Mr. Middleton were guilty of breaching professional conduct. It was established that they did not contravene the *EA* or engage in conduct unbecoming a member. The reasons for their findings were that Ms. Novick and Mr. Middleton failed to "immediately notify" Student A's parent of the sexual assault, which ultimately was a breach of their "duty of care". Consequently, the teachers attended a penalty hearing before the College and were reprimanded. They were also enrolled into a program on ethical standards and reporting obligations. It was further recommended by the Committee to have the teachers' names published and the reprimand remain on their public records for one year.

On appeal to the Divisional Court (the Court), the appellants submitted that the Committee erred in determining what constituted the professional standard by which the teachers' conduct was to be measured. The Court found that the standard of review is one of

reasonableness, where a specialized tribunal is determining the professional standards of its own profession, which typically is a question of mixed fact and law, or just law. The Court noted that the Committee's findings on various questions of law, such as the independent rights of a 16-year-old who has been the victim of a sexual assault, or the duties of a teacher to immediately report a sexual assault, have broad implications, and are not issues that fall within the expertise of the Committee. The Court agreed with the appellants that the standard of reasonableness is the correct standard to be applied to the issues in this case.

The Court then looked at the standards of the profession and, in particular, the finding of professional misconduct. The Court noted that the Committee did not specifically set out the applicable professional standard in this case or make reference to the provisions referred to under *Ontario Regulation 437/97* subsections 1(5) and 1(18), which deal with professional misconduct of teachers. The Court also referred to the Committee's explanation regarding the term "in loco parentis", which means putting a teacher in the place of a parent, requiring the teacher to do what is in the best interest of the child. As such, the Court stated that, by definition, the Committee misapprehended the term "in loco parentis" by applying it in a context where the "standard" was when to call a parent.

The Court noted that the Committee does not have the authority to create standards of the profession. It is the governing body, the College, which sets such standards by which members are to comply by virtue of the *Ontario College of Teachers Act*. The Court stated that the Committee provided no basis for recognizing immediate notification of parents as a standard of the profession, notwithstanding other standards such as, Ethical Standard for the Teaching Profession, and Standards of Practice for the teaching Profession, as set out by the College. The "Ethical Standard" delineates four headings, "Care, Trust, Respect and Integrity", which were not considered by the Committee. In particular, the Court specified that the Committee failed to recognize the relationship of trust with the parent, while counter-balancing duties to the student in terms of trust, compassion, emotional well-being and confidentiality.

Next, the Court assessed the Committee's reasoning based on its own specialized knowledge pursuant to subsections 16(a) and (b) of the *Statutory Powers Procedure Act* (*SPPA*). In its review of the Committee's basis for establishing the standards of the profession, the Court noted that this was not clear, and it appeared that the Committee had made contradictory statements in referring to section 16 of the *SPPA*. Moreover, the Court stated that the Committee may have confused the principle of judicial notice with respect to facts that were notorious and well-known, which do not require proof (ss. 16(a)). This is different from the kind of specialized information known to a tribunal because of its own expertise under ss. 16(b).

There was also no single authority the College relied on to substantiate that the duty to immediately notify parents is a professional standard, but also a notorious one, which the Committee ruled in favour of. The Court stated that "immediately" is also impossible to define in this context. It was not for Mr. Middleton to call the parents of Student A immediately before confronting the perpetrators, nor to notify the parents before ensuring the Student was safe. The Court added that the Committee did not define the professional standard, rather criticized the teachers for not "immediately" notifying the parents. Accordingly, the Court dismissed the Committee's ruling that the teachers violated the standards of the profession and were guilty of unprofessional conduct.

The issue of unprofessional conduct was also addressed by the Court, where it provided that the Committee made no mention of its reasons regarding professionalism and made no explicit reference about conduct of its members to be considered as unprofessional.

The only allegation of an act or omission with respect to unprofessional conduct was the

failure to notify the parents. The Court emphasized concern with a number of findings by the Committee, such as: the fact that it was not the job of the teachers to advise the students of their legal rights; whether the Boston police were called was beyond the Committee's scope; and that the teachers going out for breakfast was another act of Ms. Novick's omission to provide continual care and support to Student A. The Court opined that the Committee's conclusions were unjustified and irrelevant as the facts were misapprehended.

In regard to the adverse findings against Mr. Middleton and Ms. Novick, the Court reasoned that it is difficult to know precisely what adverse inference was drawn by the Committee, but based this on a measure of the teachers' credibility. The decision to send the two perpetrators home was the decision of Mr. Matthews, and the Court found difficulty with the Committee's finding of adverse credibility against Mr. Middleton for reasons that Mr. Matthews did not testify. Similarly, the Court stated that the Committee erred in its analysis regarding Ms. Novick's testimony. The Committee found that Ms. Novick obtained legal advice in order to escape personal liability, and this was scrutinized by the Court. Further, the Court added that it is rare for a reviewing Court to interfere with the findings of a tribunal, however it was found to be appropriate in this case, seeing the countless examples that point to the unreasonableness of the Committee's decision as a whole.

It was also established that the Committee failed to take into account relevant evidence as to the surrounding circumstances. Such evidence related to, for example: the Committee ignoring the rights of Student A; the Committee's finding that the teachers engaged in improper conduct by not calling the police; the parents retaining their rights to make decisions regarding the safety and well-being of their children by signing the permission form, which the Court found to be somewhat correct, but the Committee noted further that the students did not have autonomy to make decisions, which the Court did not seem to support. Lastly, the Court stated that there was no safety issue at play as there were no injuries to Student A requiring immediate medical intervention.

The issue regarding good faith exercise of judgment was also considered. The Court raised the fact that no specific time is prescribed in law as to when a student's parents should be notified. Rather, a contextual approach must be taken. As such, the Court was of the view, based on the evidence, that the teachers gave considerable care to the decisions they made, and acted throughout in good faith and in what they believed to be the best interests of Students.

In its conclusion, the Court found that the cumulative effect of the errors to be overwhelming and accordingly, set aside the Committee's decision. The Court also urged the College to provide training to its Committee members regarding substantive issues they will be addressing in the future, as well as guidance on writing effective reasons. ■

Arbitrator finds school board in violation of collective agreement by failing to calculate and pay out teachers' non-vested retirement gratuity

In *Limestone District School Board v Elementary Teachers' Federation of Ontario, Limestone Local (Non-Vested Retirement Gratuity Grievance)* (2015 OLAA No 378), the Arbitrator had to determine whether the Limestone District School Board (Board) violated the collective agreement regarding teachers' Non-Vested Retirement Gratuity.

The collective agreement entered into by the parties from 2008–2012 provided for cumulative sick leave and gratuity plans for teachers. The plan provided full-time teachers with a credit of 20 sick leave days for each school year; banked or unused leave credits

up to a maximum of two hundred days; and a Retirement Benefit Plan.

The Ontario Government issued a Memorandum of Understanding (MOU) to the Elementary Teachers' Federation of Ontario (ETFO) dated June 12, 2013, which provided for a Gratuity Wind-Up Payment for teachers with less than 10 years of service (also referred to as the Non-Vested Retirement Gratuity). The Gratuity Wind-Up Payment was to be calculated as the lesser amount calculated under the Board's 2008-2012 collective agreement or the formula that is set out in the MOU.

In June 2013, the Board sought to implement the payment of the Non-Vested Retirement Gratuity. The Board sent eligible teachers letters advising them of the calculation of their Non-Vested Retirement Gratuity, and it provided teachers with their entitlements.

The union asserted that the Board's calculation of the Non-Vested Retirement Gratuity and the MOU had the effect of altering or amending the collective agreement. Furthermore, the union stated that the MOU amended and formed part of the current collective agreement. The MOU aimed to eliminate the old sick leave provisions, which were replaced by a new sick leave plan. Essentially the old sick leave accumulated days were frozen and those teachers who had vested entitlements (10 years or more) were to have their retirement gratuities paid out upon their retirement. For teachers who did not have their entitlements vested (less than 10 years of service), they would be entitled to a gratuity payment that would effectively eliminate their former banked sick leave. The union was of the view that the Retirement Benefit Plan did not provide a formula for calculating and paying out a retirement gratuity to employees with less than ten years of service in the collective agreement.

The union also argued that the Board also pro-rated the minimum Years of Service Factor down in order to come up with a Years of Service Factor to be applied to those employees with less than ten years of service. The union argued that this unilaterally changed the collective agreement, in violation of the agreement between the parties. The union contended that the formula to calculate the Non-Vested Retirement Gratuity payment should be the formula provided for in the MOU.

The Board asserted that the MOU required the Board to apply the collective agreement formula to those teachers who would not otherwise be entitled to receive a retirement gratuity. The Board was of the view that teachers with less than 10 years of service will receive nothing based on the formula provided for in the collective agreement. It was the Board's position that the calculation provided for in the collective agreement that results in no payment was less than the formula provided for in the MOU, and as such, it did not violate the collective agreement.

The arbitrator found that the Board's new formula for calculating the Non-Vested Retirement Gratuity was not contemplated by the MOU. The arbitrator added that the MOU did not permit the Board to unilaterally create their own formula after the fact, which violated the collective agreement.

The arbitrator reasoned that if the collective agreement did not provide for the calculation, the Board should not make up a new formula for the calculation. Thus, the only formula that should be used is the MOU formula. The arbitrator acknowledged that applying the MOU formula (rather than applying the new formula) would result in greater liability for the Board, but noted that hardship was not a relevant factor here. The arbitrator also noted that the MOU provided nonetheless that a payout could be as high as but no higher than the MOU formula. The arbitrator concluded that the applicable calculation for payment was the formula provided under the MOU, and that the Board was in violation of the collective agreement by failing to calculate and pay out the teachers' Non-Vested Retirement Gratuity. ■

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