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# Human Resources Newsletter

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# Confusion and inconsistency in treatment does not necessarily mean bad faith

In *Albert v. Conseil Scolaire Francophone de la Colombie-Britannique*, [2009] B.C.J. No. 61 (C.A.), the plaintiff accepted a position as vice principal 2 (VP2) with the defendant School Board at a new school and when that position was amended she grieved the Board's decision not to grant her the new position. The grievance was eventually appealed to the Court of Appeal.

The VP2 position consisted of teaching and administrative elements. The teaching function was permanent and represented 80% of the position. The administrative element was temporary but automatically renewed each year and represented 20% of the position. At the time, there was no principal at the school.

Ms. Albert took stress leave following some conflict with parents and a teacher. Shortly thereafter, the Board decided to re-classify the VP2 position as a principal 5 (D5). This was an administrative restructuring and did not change the job description. It was decided that the position would first be internally posted and, if not filled by a union member, would then be posted externally.

After being on leave for just over a month and a half, Ms. Albert returned to work. She was summoned to a meeting with the Instructional Services Manager, the Assistant Superintendent and the Superintendent of the Board. In the meeting, Ms. Albert was told that there would be an investigation into complaints made by parents and staff and that she should go back on sick leave until further notice pending the results of the investigation. Ms. Albert was also told that her position would be phased out and that she could apply for the D5 position but would quite possibly not be selected. Despite doing an excellent job at the school, Ms. Albert was told that her leadership style was not suitable and stability within the school was paramount. Ms. Albert was also not returned to work after providing a doctor's note clearing her for work as requested during the meeting.

Ms. Albert was unsuccessful in obtaining the D5 position and was offered a teaching position at a school in another city. The Board paid for Ms. Albert's moving costs and an increased salary for the first year to match her salary in the VP2 position.

The Court of Appeal affirmed the trial judge's finding that an offer of permanent employment was not equivalent to an offer of employment until retirement unless expressly stated in the contract of employment. The collective agreement did not expressly state that the position was permanent until retirement and, therefore, Ms. Albert was not guaranteed the position of vice principal for the rest of her career.

The Court of Appeal also affirmed the trial judge's findings that the failure on the part of the Board to follow the procedure for terminating vice principals was merely a technical breach of contract and did not amount to wrongful dismissal. The collective agreement allowed for dismissal without cause so long as Ms. Albert was offered a teaching position. Ms. Albert was offered and accepted a teaching position.

Ms. Albert argued that she should have been formally evaluated before being terminated, as is required for principals under the collective agreement. At the time, there was no principal at the school. Ms. Albert

argued that she acted as the de facto principal and, as such, should be given the same procedural protections under the collective agreement. The Court of Appeal rejected this argument, because the evaluation policy did not apply to vice principals.

The Court of Appeal also noted that Ms. Albert, upon learning that her position would be phased out, did not demand that the Board follow the procedure established in the collective agreement. Ms. Albert was represented by counsel and chose to negotiate a resolution involving her new teaching position with an increased salary and moving expenses. Nominal damages were awarded to recognize that the Board had failed to follow the procedure set out in the collective agreement. The damages were only nominal, however, as Ms. Albert had not suffered a substantial loss. Ms. Albert had successfully mitigated her loss.

Under the legislative scheme, public employees were not entitled to severance pay for any period of time where they are otherwise employed. The Court of Appeal affirmed that Ms. Albert was not entitled to severance pay, as she had accepted another teaching position. The Court also stated that Ms. Albert's severance pay could not be classified as a retiring allowance and, therefore, exempt for legislative restriction, as Ms. Albert was not retiring.

The Court also affirmed the trial judge's finding that the Board had not acted in bad faith in terminating Ms. Albert. The Court noted that Ms. Albert remained an employee of the Board three years after her termination. While the Board may have been confused at times and inconsistent in its treatment of Ms. Albert, the conduct did not amount to bad faith.

The Court found that Ms. Albert was, however, entitled to be reimbursed for dental services for her husband, which had been preauthorized by the insurer in a plan of treatment prior to her termination. The expenses related to the benefit did not have to be incurred before termination as the dental work was preauthorized during her tenure as VP2.

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# Arbitration restricts discretion in teacher performance appraisals

In *Elementary Teachers Federation of Ontario (Greater Essex County Local) v. Greater Essex County District School Board (Innes Grievance)*, [2008] O.L.A.A. No. 540, the Grievor had received a satisfactory evaluation for the 2005-2006 year but was notified that he would be re-evaluated because he was teaching in a new school in the 2006-2007 year. Mr. Innes had been successfully evaluated twice in the 2005-2006 year, his first year with the Board, and, as such, was not a new teacher pursuant to the *Education Act*. At the time, the evaluation cycle for teachers was three consecutive years. It should be noted that the evaluation cycle has since been extended to five consecutive years.

The Arbitrator held that the discretion provided to principals under s. 277.29(4) of the *Education Act* and s. 5(2) of Ontario Regulation 99/02 did not grant principals the authority to conduct additional performance evaluations. Rather, the discretion granted by the provision was found to relate to the interval between the evaluations. Principals were granted the discretion to determine the timing of evaluations; not to perform additional evaluations.

Under s. 6(1) of Ontario Regulation 99/02, a principal has discretion to perform additional performance evaluations where the principal "*considers it advisable to do so in light of circumstances relating to the teacher's performance*". The Arbitrator found that this discretion cannot be exercised merely because the principal thinks that a performance evaluation may be beneficial or a valuable form of professional development. The principal must be able to identify actual, and not speculative, issues related to the teacher's performance. In this case, the principal had decided to perform the evaluation because Mr. Innes was new to the school and not as a result of concerns regarding Mr. Innes' performance. The Arbitrator rejected the argument that deficiencies in a teacher's performance would go undetected, putting students at risk, if a performance evaluation was not performed once a teacher joined a school. The Arbitrator considered the testimony of the principal which indicated that such issues would likely be discovered by the principal before an evaluation year. If such issues were discovered, s. 6(1) would allow the principal to conduct a performance evaluation.

The arbitrator also compared a manual prepared by the Ministry of Education to the legislation and found that the general language of the manual must give way to specific provisions of the legislation, as the manual was only a summary.

This decision clarifies the way in which a principal may apply his/her discretion with respect to performance appraisals. It is now clear that, in accordance with the regulations, only where there are real performance concerns may a principal conduct an appraisal before the next appraisal period.

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# Arbitration Board's reinstatement of teacher of special-needs students upheld on Judicial Review

In *Simcoe County District School Board v. Ontario Secondary School Teachers' Federation*, [2009] O.J. No. 227, ("*SCDSB v. OSSTF*"), the Simcoe County District School Board (the "Board") sought judicial review of an Arbitration Board's decision to reinstate a teacher who was found responsible for three incidents of misconduct in her treatment of special needs students. She was reinstated by the Arbitration Board.

The Board had terminated the teacher. All three members of the Arbitration Board issued different decisions, so pursuant to the terms of the collective agreement, the Chair's decision governed. The Chair reinstated the teacher with full seniority, effective for the start of the 2008-09 school year, but did not grant her back pay, which was effectively a suspension for 4½ years. On judicial review, the Court found that the Arbitration Board's decision was reasonable and upheld the decision. The Board's application was dismissed with costs to the Ontario Secondary School Teachers' Federation (the "Union") as fixed by the parties.

In 1999 the teacher was hired to develop and teach a life skills program for students between the ages 14-21 who had mental and/or physical challenges. Some of the students were non-verbal and functioned at a young age level. The students required constant individualized attention and were very vulnerable. In addition to the teacher, three to four educational assistants worked

with the class. The teacher ran the program until December 2003, when the Board suspended her for acting in an unprofessional manner and being verbally and physically abusive to students. The Board terminated her in January 2004. The Union grieved the termination.

The grievance arbitration was held over 30 days (25 days of evidence and 5 days of submissions) between March 2006 and May 2008. Although the Board had terminated the teacher for numerous allegations, the Chair found that only three incidents were substantiated. The Chair found that the teacher had had an inappropriate argument, including unnecessary physical contact, with student J during a class trip to a skating rink in January 2003. However, due to conflicting evidence, the Chair made no finding regarding the severity of the physical contact.

The Chair also found that there were two inappropriate incidents with student V. The first incident occurred while the class was at the skating trip outing, V was given a "time out" in the kitchen for more than one hour, which the Chair found to be inappropriate. The Chair also found that there was a physical confrontation between V and the teacher, but it was not as violent as another witness testified. The second incident with V occurred in March 2003. The Chair found that there was "*serious professional misconduct*" in the teacher's response when V did not stand for the National Anthem one morning. The teacher yelled at V, pulled her to her feet and took her to a study carrel for a time out. The Chair accepted other witnesses' evidence over the teacher's evidence and found that "*there was no justification for the use of physical force and for loud and aggressive language"*.

The Chair found that the teacher's conduct warranted a "*significant disciplinary response*" by the Board, but that termination was not justified. The Chair considered a number of positive and negative factors in reaching this decision, including the excellence of the life skills program that the teacher had developed, staff tensions that school administration had failed to sufficiently address as well as the teacher's reluctance to admit that there was anything wrong or unprofessional in her actions. The Chair also found there was no evidence of actual harm to any student, though the teacher may have caused mental distress and upset to a couple of students. Both counsel agreed that the teacher had no intent to cause harm to any student. In conclusion, the Chair found that in light of all of the evidence, the teacher should be given a second chance.

The Board Nominee dissented on the ground that there was just cause for discharge. He found that, in addition to the incidents with students J and V, there was further misconduct in the form of excessive physical force with student B. The Union Nominee also dissented with the Chair's Decision on the basis that the penalty was too harsh; she would have substituted a letter of reprimand as the appropriate discipline.

The Court decided that reasonableness was the appropriate standard to review the decision of the Chair of the arbitration panel.

On judicial review, the Board argued that the Arbitration Board's Decision was unreasonable on three grounds.

The first ground argued by the Board was that, based on other labour decisions, employees are not reinstated unless the employee has acknowledged the misconduct and shown remorse, and the Chair's rationale for giving the teacher a second chance was not supported by his findings regarding her conduct and her lack of acknowledgement or remorse. The Board

also argued that given the vulnerability of the group of students concerned, the concept of a second chance was inappropriate.

The Court held that, although remorse is one of a number of factors to be considered in determining whether there is just case for discharge, it is not the determinative factor and the decision depends on the overall circumstances of the case. The Court found that in the present case, the Chair had considered a number of factors and there was evidence to support his reasons for choosing a lesser penalty. The Court held that it was not the role of the Court on judicial review to re-weigh the evidence.

The Board's second argument was that the Chair's decision was unreasonable because it failed to address the special role of teachers in society and the vulnerability of the group of students who would be affected by the teacher's reinstatement. The Court disagreed that the Chair did not consider both of these factors. The Court found that the vulnerability of students was clearly in the Chair's mind, as he had described the students in the Life Skills program at the start of his Decision and the individual students when dealing with specific allegations against the teacher. The Court also found that the severe penalty imposed on the teacher recognized the importance of the role of teachers and the seriousness of the professional misconduct. The Court found that the Chair, having heard 25 days of evidence, was in a much better position than the Court "*to assess the gravity of the misconduct, the harm caused, the grievor's potential for rehabilitation and other relevant factors*". The Court held that a suspension without pay for 4½ years was severe and could not be said to be unreasonable.

The third reason argued by the Board turned on the interpretation of a statement made by Union counsel in his opening arguments. The Board Nominee's Dissent stated: "*In the opening part of his argument, Union Counsel postulated that, if the Arbitration Board determines there is* ***just cause for termination****, he would be making no argument about mitigation of penalty. (Board Nominee's Dissent, pp. 3-4)*" (emphasis added). On judicial review, the Board argued that there was only one reasonable interpretation of this sentence: "*Union counsel conceded he would not seek mitigation of penalty if the arbitration board determined there was 'just cause for* ***discipline****' (emphasis added)*". The Court did not accept the Board's interpretation of this concession. The Court noted that the Chair had found there was not just cause for termination after considering all of the circumstances and in light of his findings on misconduct. The Court held it was not unreasonable for the Chair not to address this alleged concession in the Decision.

As a result of these findings, the Court dismissed the Board's application for judicial review and ordered the Board to pay costs to the Federation as fixed by the parties.

Teacher misconduct cases are fact driven. Thus, despite the reinstatement Order, it would be inappropriate to identify this case as the standard for reinstatement. Moreover, as noted by the Court, the suspension without pay for 4½ years was a significant penalty.

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# IPC denies access to Police investigation records

An appeal from a request for access to police records by a school board under the *Municipal Freedom of Information and*

*Protection of Privacy Act* ("*MFIPPA*") was recently considered by the Ontario Information and Privacy Commissioner in *Order MO-2361 Re: Halton Regional Police Services Board*, [2008] O.I.P.C. No. 199, which granted partial release of investigation records held by the Police.

The school board's request arose due to allegations relating to a teacher of the school board. The Police and the Children's Aid Society ("CAS") initiated an investigation of the allegations. During that time, the Board suspended any school investigation to ensure that the Police and CAS investigations would not be compromised. Following a determination by the Police and CAS investigations that no criminal charges would be laid, the school subsequently commenced its investigation into the same allegations.

As part of the investigation, the school board requested a copy of the Police Report related to their investigation.

The Police contacted the teacher and the student's parent under the notification provisions of *MFIPPA*, and advised them of the school's request. The teacher objected to the release of any information contained in the record relating to him. The mother, on behalf of herself and her child, consented to the disclosure of the information they provided to the Police.

The Police then issued a decision letter to the school board denying access to the record.

The school board appealed the decision to the IPC. At the inquiry stage, the board provided further detail about the records requested stating that it sought disclosure of the witness statements (written or otherwise) of each student interviewed by the Police and/or investigation notes resulting from the interview, but only with prior written consent of the respective student or his/her parent. The board did not seek records relating to the witness statement of the teacher or the investigation notes of the officers who interviewed the teacher.

The Adjudicator found that the board's written request did not specifically include copies of written statements and electronic or video recordings of the interviews conducted by the Police. The board's initial written request to the Police did not state, with such specific detail, the information it sought from the Police, and the Police only located a single "occurrence report" in its decision. It appeared, however, that in the course of the Police investigation, the Police contacted over one hundred (100) students, the majority of whom were subsequently interviewed in the presence of their legal guardian(s) and school administrators. The actual notes derived from the witness interviews and video tapes did not form part of the record. The information contained in the record appeared to have been provided by a small segment of the students interviewed by the Police during their investigation and the student information was summarized or in point-form notes. In several instances, the student witness was not identified by name.

Another issue raised in the appeal by the school board, was whether the Police had an obligation to notify every student they contacted during their investigation to obtain their opinions on disclosure. Dismissing this issue, the Adjudicator determined that the Police were under no obligation under *MFIPPA* to notify the student witnesses unless they intended to grant the requestor access to their information.

Lastly, the board in its appeal raised the possible application of the public interest override pursuant to section 16 of *MFIPPA*, which allows for disclosure of a record covered by an exemption if a compelling

public interest in the disclosure clearly outweighs the purpose of the exemption.

The Adjudicator reviewed each of the exemptions the Police alleged to apply to the police occurrence report.

The Police claimed that the entire occurrence report qualified for the exemption to disclosure pursuant to a three-part test under s. 8(2). The exemption was provided to: (i) a record that is a report; (ii) prepared in the course of law enforcement, inspections or investigations; (iii) by an agency which has the function of enforcing and regulating compliance with a law.

The Adjudicator found that the occurrence report was not a "report" for the purposes of section 8(2) exemption because it documented observational and factual recordings rather than an evaluation or formal statement of the investigating officer's conclusions. The Adjudicator did, however, order that information contained in the police occurrence report relating to administrative matters regarding the investigation be disclosed to the school board.

With respect to the exemption of personal information under s. 14(1), the Adjudicator determined that the information provided by the complainants should be disclosed to the school board because the student's parent had provided consent. The Adjudicator concluded that disclosure of the remaining personal information of students who had not been contacted to consent constituted an unjustified invasion of personal privacy of the individuals under section 14(3)(b) and qualified for exemption from disclosure under section 14(1).

Lastly, the Adjudicator considered whether the public interest override, pursuant to section 16, provided for the disclosure of the record due to compelling public interest.

In order for the public interest override to apply, there must be (i) compelling public interest in the disclosure of the record and (ii) the interest must clearly outweigh the purpose of the exemption. The Adjudicator held that the appellant had not satisfied the first "public interest" stage, finding that there was no evidence that disclosure would serve the purpose of informing the public of the Police's activities. The Adjudicator upheld the Police's decision to withhold the information determined to be exempt from disclosure under section 14(1) and the section 16 override provisions were found to not apply.

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The Police and CAS have much more legislative authority than school boards in conducting investigations. Inability to access such information is a significant block to effective informed decision-making by school boards in dealing with such matters.

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# B.C. Labour Board determines teachers obliged to administer provincial tests

A union's direction to its members not to administer or supervise the Provincial Foundational Skills Assessment ("FSA") tests was the subject matter of a concise interim decision of the British Columbia Labour Relations Board ("Labour Board") in *British Columbia Public School Employers' Association v. British Columbia's Teachers' Federation*, [2009] B.C.L.R.B.D. No. 25.

The British Columbia Public School Employers' Association ("BCPSEA") brought an application alleging that the British Columbia Teachers' Federation's ("BCTF") declaration to its members not to administer the FSA tests constituted authorization of a strike contrary to section 57(1) (strike provisions) of British Columbia's *Labour Relations Code* (the "Code") and sought an Order cancelling this direction.

The Labour Board held that administering or supervising the FSA tests was work that teachers were obligated to perform and accordingly, ordered on an interim basis, that the teachers maintain "*the status quo*" that existed prior to the Union's direction. It was clear, however, that this Order of cancellation was to apply only in the case of FSA tests, and did not require either party to perform any different work than it had done in the past. The Labour Board ordered a cancellation of the union's direction to its members not to administer/supervise FSA tests and to cease and desist from authorizing or directing its members not to administer/supervise FSA tests. The Order was set to remain in effect until such time as an determination was found to affect the Order; the BCPSEA withdrew its complaint; or until such time as the parties settled the dispute.

Similar principles would apply to provincial initiatives in other Provinces, such as EQAO testing in Ontario.

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# Court considers breach of union representation clause with respect to subsequent conduct

In *Limestone District School Board v. Ontario Secondary School Teachers' Federation*, [2008] O.J. No. 4855 ("*LDSB v. OSSTF*"), the Limestone District School Board (the "Board) sought judicial review of an Arbitrator's decision to quash the discipline imposed on an adolescent care worker (the "Grievor").

The Arbitrator found that the Board had proven the Grievor's serious misconduct, but that due to the Board's breach of the Grievor's right to Union representation, the discipline could not stand, including the Board's decision to transfer the Grievor to another school. On judicial review, the Court found no reason to interfere with the Arbitrator's factual findings, but held that the reasons for quashing the discipline and the outcome were not reasonable. Ultimately, the Court upheld the Arbitrator's decision except for the revocation of the transfer, which was quashed.

The Grievor was an adolescent care worker employed by the Board to work with at-risk teenagers. On October 11, 2006, he was asked to meet with the Principal and Vice Principal. The administrators had discovered students using the weight room without supervision, contrary to school policy, and wanted to remind the Grievor of the policy. When the Vice Principal expressed concerns to the Grievor about leaving students unsupervised, he reacted negatively. He informed the administrators that he was dealing with an allegation of sexual assault at the time and that he felt the

concerns about unsupervised students were misplaced. The Vice Principal was concerned that the Grievor did not appear to be getting the message, so he reiterated the message and told the Grievor that it must never happen again.

Later that day, the Grievor confronted the Vice Principal and became aggressive. The Grievor swore at the Vice Principal and shouted at him, "*Don't you ever fucking do that again! You don't bully me!*". The Vice Principal testified that he felt physically intimidated by the Grievor and vulnerable in this situation. That same day, the Grievor confronted the administrators in the Principal's office and repeated his angry outburst, alleging that they were negligent and incompetent. That afternoon and the next morning, the Grievor sent emails to the Director of Education and several others attacking the administrators. As a result of the Grievor's actions, the Board held a disciplinary meeting with the Grievor, with a Union representative present, and imposed a two day suspension without pay and a disciplinary transfer to another school. The Union grieved the discipline imposed by the Board.

The Arbitrator accepted the administrators' evidence that the purpose of the first meeting was not disciplinary, but to find out the facts about the students in the weight room. She also accepted the administrators' evidence about the tenor of the first meeting and what was said. She rejected the Grievor's evidence that he had apologized for leaving the students unattended, as well as his evidence that the Vice Principal was angry, red-faced and condescending. However, the Arbitrator also found that when the Vice Principal pressed the point that the students should not be left unattended and demanded the Grievor's future compliance with the policy, the purpose of the meeting went beyond fact-finding and counselling, and became disciplinary in nature. She found that the Board had imposed a warranted verbal reprimand. However, the Arbitrator held that the Board breached the collective agreement by not giving the Union fair notice that discipline might be imposed and by not allowing the Grievor the opportunity to have Union representation.

The Arbitrator also accepted the administrators' evidence of the Grievor's behaviour after the first meeting, and she found it to be "*gross insubordination*" that was not merely spontaneous misconduct.

The Arbitrator found that the Grievor's misconduct after the first meeting was triggered by the first meeting and that the absence of a Federation representative was a significant contributing factor in the subsequent behaviour.

The Arbitrator found further that the impact of the Grievor's misconduct was serious, had detrimental effects on the administrators and broad consequences for the school and the Board. The Arbitrator acknowledged the reasonableness of the discipline imposed, especially the disciplinary transfer to another school. She specifically found that it was not workable to have the Grievor and the Vice Principal in the same school and noted that she observed open hostility between them at the hearing. However, relying on case law and based on her findings that the Board breached the Grievor's right to Union representation at the first meeting and that this meeting triggered the Grievor's misconduct, the Arbitrator held that the discipline imposed at the second meeting could not stand. She noted that she could uphold the Grievor's transfer on administrative, rather than disciplinary grounds, but rejected that option, citing the Federation's request for and entitlement to a full remedy.

Relying on the recent decision from the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9 ("*Dunsmuir*"), the Court held that the appropriate standard of review of the arbitrator's decision was reasonableness.

The Court found that there was no reason to interfere with any of the Arbitrator's factual findings, and the Court upheld the Arbitrator's findings that the Board breached the collective agreement in the first meeting and that what happened at the first meeting was a "*significant contributing factor*" to the Grievor's subsequent behaviour. The Court also found that the Arbitrator had made clear findings of fact regarding the misconduct of the Grievor, which amounted to just cause for discipline. However, the Court held that the Arbitrator's reasons were flawed when she decided that, having made these findings, she had no alternative but to set aside the discipline imposed by the Board. Specifically, the Court pointed out three reasons that the Arbitrator's decision failed to meet the reasonableness test:

1. the Arbitrator failed to properly consider that the discipline was solely the consequence of the Grievor's conduct subsequent to the first meeting and, more appropriately dealt with as a "just cause" issue, with the Board's conduct being taken into account as a factor contributing to the conduct of the Grievor;

2. setting aside the discipline imposed is not a mandatory remedy for breach of a union representation clause; and

3. having failed to consider all of the relevant circumstances and balance the competing concerns, the Arbitrator reached an unreasonable result.

The Court found that the discipline at issue in the grievance was imposed at the second disciplinary meeting, where there was union representation. This discipline was for the Grievor's conduct after the first meeting and the reprimand from the first meeting was never grieved.

The Court relied on the Ontario Divisional Court's finding in *Toronto (City) v. C.U.P.E., Local 79 (1997)*, 147 D.L.R. (4th) 548, and held that:

" *... provisions in collective agreements requiring the employer to advise an employee of the right to union representation is* '***rooted in a concern for procedural fairness in the disciplinary process'***. *Discipline imposed as a result of a meeting where the employee was not afforded procedural fairness can be vitiated for that reason alone, regardless of whether there was just cause for discipline, and sometimes without even inquiring into whether there was just cause. However, in this particular case, the denial of procedural fairness occurred in respect of a meeting at which the discipline imposed was a reprimand. There was no procedural unfairness in respect of the meeting at which the suspension and transfer penalties were imposed*." (emphasis added)

The Court accepted the Board's argument that the Arbitrator should have factored the employee's misconduct into her analysis of whether there was just cause for the discipline imposed at the second meeting, rather than analyzing the situation within the framework of the classic breach of union representation clause cases:

*"However, as was submitted by the School Board the appropriate manner for dealing with this is no different from any other misconduct by an employee that is 'triggered' by some wrong committed by the employer. The conduct of the employee should be analyzed within the context of what led up to it, including any wrongdoing*

*by the employer, the length of time between the employer's wrongful act and the misconduct by the employee and the comparative severity of both wrongs".*

The Court held that the Arbitrator's analysis was unreasonable as a result.

The Court also held that the Arbitrator's application of the principles from the breach of the union representation clause cases was unreasonable as this particular remedy was not mandatory. The Court held that maintaining the Arbitrator's discretion is important in these types of situations and stated:

*"Reasonable decision-making, particu-larly in the consideration of remedy, requires the application of legal principles to the particular facts of a case. There is no absolute rule that a breach of a union representation clause renders all discipline void. That determination must be made on a case by case basis by the Arbitrator; it cannot be a formulaic response".*

The Court held further that the employer's breach cannot be viewed as a complete license for the employee to engage in "*extreme acts of misconduct with impunity*". The Court held that is was open to the Arbitrator to consider whether the Board's breach of the union representation clause at the first meeting caused or provoked the Grievor's subsequent misconduct.

The Court found that the Arbitrator recognized that it would not be workable to have the Grievor return to the school and that the relationship between the Vice Principal and the Grievor had seriously broken down. The Court took issue with the Arbitrator's reasoning that the Union was entitled to a complete remedy and held that "*[t]here is no 'entitlement' to a remedy that is unreasonable*".

The Court held that the Arbitrator's decision to revoke the transfer of the Grievor was unreasonable and the Court quashed this aspect of the Arbitrator's decision. However, because the Court upheld the Arbitrator's factual findings, all other aspects of the Arbitrator's decision were found to be reasonable and were upheld, including the Arbitrator's decision to revoke the suspension and compensate the employee for any financial losses flowing from the suspension, as well as the requirement for the Board to post a notice with respect to the union representation clause. Because the Board was successful on the issue of the transfer penalty, costs were ordered against the Union in an amount agreed to by the parties.

This decision provides insight into two fundamental principles. First, it reiterates and clarifies the impact of a breach of the union representation clause. Second, it provides insight into how courts will apply the reasonableness standard in reviewing labour arbitration decisions.

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# Arbitrator agrees with Board on interview process

A job posting grievance was recently considered in *Canadian Union of Public Employees, Local 4400 v. Toronto District School Board*, [2008] O.L.A.A. No. 488. The Canadian Union of Public Employees ("Union") filed a grievance with respect to a job posting for a Literacy and Basic Skills ("LBS") instructor position alleging that the Toronto District School Board ("Board") violated the collective agreement by failing to interview qualified candidates for the position. Specifically, the Union grieved the Board's failure to

interview two (2) senior applicants who had casual experience tutoring adult students regarding ESL and literacy issues, arguing that the Board violated the collective agreement by not considering the applicant's related experience.

The job posting for a LBS instructor included a requirement for "*successful teaching experience in an adult literacy program*". The Union alleged that this requirement could be met by individuals who had experience teaching adults English as a Second Language ("ESL") or as a Language Instruction for Newcomers to Canada ("LINC") instructor. The Union stated that both programs had teaching experiences "*sufficiently similar*" to make teaching ESL or LINC "*related experience*" within the meaning of the posting. Further, the Union alleged that Seniority List A applicants who had that experience should have been interviewed for the posted position.

The Board responded stating that it properly exercised its management rights by determining what job qualifications and work experience, including requiring successful teaching in an adult literacy program, would meet the qualifications for the posted position. The Board submitted that the LBS position was an entirely different program than ESL and LINC, and was not considered teaching experience in an adult literacy program.

Following a review of witness testimony and documentary evidence relating to the various teaching programs, the Arbitrator reviewed the collective agreement provisions that addressed posted vacancies. The collective agreement between the parties required that, if a vacancy was to be filled by an interview, the Board was required to first interview qualified applicants based on their seniority. Members of the bargaining unit on Seniority List A were to be given first consideration at posted vacancies. If there were no qualified applicants from among List A, then consideration was to be given to those qualified applicants from Seniority List B.

The Arbitrator affirmed the Union's position that the LBS, ESL and LINC programs were sufficiently similar to bring ESL or LINC teaching experience within the scope of "*related experience*" required by the posted position. That said, the Arbitrator was not persuaded that the Board was required to take that "*related experience*" into consideration in determining whether to interview a Seniority List A applicant for the position. The concept of "*related experience in adult teaching*" was one of a number of criteria to be weighed in the competitive process at the interview stage. Thus, applicants, List A or List B, would not be entitled to an interview if they did not have the qualifications listed in the posting. Moreover, the Arbitrator focused on the fact that none of the candidates had that experience and thus the grievance could not succeed.

While the decision is very fact-specific, it does provide some corroboration for the discretion of management in the selection of interview candidates, provided there is compliance with procedures or the process set out in the collective agreement.

— KC LLP —

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Keel Cottrelle LLP
Human Resources Newsletter

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