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Human Resources Newsletter

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Tribunal reviews principles related to discrimination based on family status

In *Falardeau v. Ferguson Moving (1990) Ltd. (c.o.b. Ferguson Moving and Storage)*, [2009] B.C.H.R.T.D. No. 272 (Geiger-Adams), the complainant alleged that his employer discriminated against him on the basis of family status when the employer required him to work overtime; thereby, interfering with child care responsibilities.

The complainant had been employed with the respondent as a mover. He had acknowledged that "*his hours would be irregular and sometimes lengthy…*" The issue in dispute was whether or not the complainant had the right to decline an assignment if it required him to work overtime. With respect to this issue, the employer maintained that overtime was a condition of employment and that it could be required.

The complainant was a single father with sole custody of his 10 year old son. He did not allow his son to be on his own on weekdays after school. As such, the complainant had an ongoing arrangement with his son's day care centre such that, on occasions when the complainant or another member of his family could not care for his son after school, a member of the day care would pick his son up from school and bring him to the day care where he was provided with after-school care. The Tribunal noted that the complainant's day care arrangements had two benefits: 1) the day care was always 'on call' to provide after school care for his son when required; and 2) the complainant's girlfriend or parents could often care for his son until the complainant finished work.

On the date of the incident, the complainant had been informed that he might be needed to perform overtime work. The complainant refused, indicating that "*while he was willing to finish a job that started before 4:00 p.m. and went into the evening, … he was not prepared to start a new job at or after 4:00 p.m.*" The complainant further stated that he was going to choose the assignments that he performed based on his child care responsibilities. The employer found this response unacceptable and as such, terminated the complainant's employment.

A leading British Columbia case of discrimination based on family status had only discussed the concept of parental duties, it stated:

"*A* prima facie *case of discrimination is made out when a change in a term or condition of employment imposed by an employer results in a serious interference with a substantial parental or other family duty or obligation of the employee. I think that in the vast majority of situations in which there is a conflict between a work requirement and a family obligation it would be difficult to make out a* prima facie *case.*"

Despite the fact that the Canadian Human Rights Tribunal and Federal Court of Canada had criticized the approach of the leading B.C. case for being too narrow and for placing too high a burden upon the complainant, the B.C. Human Rights Tribunal in this case followed the decision, as it is the governing law in British Columbia.

In coming to its decision, the Tribunal noted that, by requiring the complainant to perform overtime work, the employer had merely enforced existing expectations in the belief that the complainant could find child care, as necessary. The Tribunal noted that the complainant's son did not have any special needs, nor was the complainant 'uniquely qualified' to care for his son. With respect to these factors, the Tribunal noted that there were no factors making the

complainant's obligations out of the ordinary. As such, the Tribunal had been unable to find, on the facts of this case, a '*serious interference with a substantial parental or other family duty or obligation*.' As such, the Tribunal dismissed the complaint.

At the present time there are two streams of case law regarding the standard to be applied in family accommodation cases. BC case law requires a "substantial obligation" and a "serious interference of parenting obligations", while the federal case law has not required the obligation to be substantial or the interference to be serious. It would appear from this case that being uniquely qualified to care for a child with special needs might meet the BC standard.

Accommodation might include different skill assessment

Davidson v. Canada Post Corp., [2009] F.C.J. No. 987 (N.B.), is the judicial review of a decision of the Canadian Human Rights Commission not to refer a human rights complaint against Canada Post to the Canadian Human Rights Tribunal for an inquiry. The complaint was filed by Ms. Davidson, a woman with Asperger Syndrome, who alleged discrimination on the basis of disability in Canada Post's hiring process. The Federal Court of New Brunswick allowed the application and referred the case back to the Commission to be reviewed by a different investigator in a manner consistent with the Court's Reasons.

In March 2006, Ms. Davidson applied for the position of casual / temporary inside or outside worker at a Canada Post facility in Saint John, New Brunswick. She identified herself as a woman, visible minority and a person with a disability of Asperger Syndrome. Canada Post placed her application in its equity database for applications from equity seeking candidates. In May 2006, Ms. Davidson was invited to write Canada Post's General Aptitude Test as part of the competition for a position on the "Temporary List" as part of the Canadian Union of Postal Workers.

The applicant requested and received extra time to complete the aptitude test to accommodate her needs related to Asperger Syndrome. On May 18, 2006, the applicant was advised that she had passed the test. On May 24, 2006, the applicant was invited to an oral job interview as the next step in the competition. The applicant's father called Canada Post to ask about the nature of the interview in order to assess the applicant's need for accommodation. He was told that the interview would involve situational questions. The applicant's father did not specifically request any accommodations for the applicant, but rather asked Canada Post whether accommodation would be required for the applicant to compete fairly. The applicant did not speak to anyone at Canada Post prior to the interview and did not request any accommodations.

On May 30, 2006, the applicant was interviewed by Canada Post. On June 16, 2006, the applicant received a letter advising her that she had failed the aptitude test, contrary to what was communicated May 18th.

The applicant's mother called Canada Post for clarification of the letters and was told that the applicant had passed the aptitude test, but failed the oral interview, and the letters were being corrected. The applicant and her mother subsequently met with one

of the women on the interview panel. The applicant also met with Canada Post's Human Rights Atlantic Officer, who launched an internal investigation into the matter. The internal investigation concluded that the applicant had not requested or suggested accommodations for the oral interview, or an alternative method of assessment; that the competencies and suitability component of the oral interview was rationally-connected to both internal and external positions; that the applicant failed the oral interview because she lacked experience, not because of her disability; and that Canada Post's recruitment process included appropriate efforts to accommodate candidates.

On July 21, 2006, the applicant filed a human rights complaint against Canada Post. In June 2007, the applicant received the investigator's report recommending that the Commission dismiss the complaint. This report was referred to the Commission for a decision. On May 20, 2008, the applicant received the Commission's decision that her complaint would not proceed to an inquiry by the Tribunal. The applicant sought judicial review of the Commission's decision.

The Court was not satisfied that the Commission's investigation into the complaint considered the problems inherent in the applicant being hired by Canada Post, given her disability, and found that the Commission's investigation and decision not to refer the complaint were unreasonable.

The Court found that the investigator's report was flawed because it did not provide an analysis of the interrelationship between providing accommodations, the applicant's disability and Canada Post's hiring practices. The report did not show that the investigator understood the perspective of both parties, or the individual challenges of the applicant's disability. Instead, the investigator relied on generalized information about Asperger Syndrome to determine that a tribunal hearing was unwarranted. According to the Court, this approach was not reasonable.

Finally, the Court found that, the Commission's conclusions that the suggested alternatives were rejected because the Applicant believed that any social skills evaluation was discriminatory, failed to recognize that the accommodations offered to the applicant all involved an evaluation of her social skills for which the applicant needed accommodation. Canada Post argued they could not accommodate the applicant by not evaluating her social skills, because, if hired pursuant to terms under the under the collective agreements, the applicant would be able to apply for other positions requiring social skills, based solely on seniority. Moreover, Canada Post argued that the position being sought required socialization with co-workers and supervisors. However, the Court accepted the applicant's submissions that Canada Post's reliance on its collective agreements and general practices were not consistent with the developing jurisprudence on accommodation.

The Court held that, as an equity seeking employer, Canada Post should have discussed altering agreement terms and might be required to alter their collective agreement. Moreover, the Commission failed to consider whether Canada Post employees could receive sensitivity training to assist with the successful employment of the applicant. The Court also rejected Canada Post's argument that the applicant was not successful in the hiring process because of her lack of experience, not because of her social skills. The Court pointed out that the applicant's disposition and disability was not a deficit, but a range

of skills and aptitudes that, while different from the non-Asperger Syndrome population, would be valuable in the position of inside postal worker. The Court also held that, "*if Canada Post had truly been alive to her situation as an equity seeking individual, they may have considered that the applicant may have been precluded from other jobs by way of her disability*".

While the Court acknowledged that the applicant had a duty to be involved in determining the accommodations, which would be appropriate, the Court found that Canada Post did not respond to the applicant's father's initial inquiry with dialogue, and that, Canada Post was in the best position for suggesting accommodations.

The Court also acknowledged the challenges identified by the Commission in the process of finding a suitable accommodation. However, the Court held that it was unreasonable for the investigator not to identify the fundamental problems with Canada Post's offers of accommodations and did not appear to consider that changes to the standard altogether might be necessary for the applicant to be treated equally under human rights legislation.

Ultimately, the Court found that that the Commission's investigation and the decision not to refer for an inquiry were not done in accordance with human rights legislation and jurisprudence because they failed to undertake an individualized assessment of the interrelationship between Ms. Davidson's disability in regards to her social skills and the necessary modifications to standards in hiring practices, as well as, failing to consider how corporate rules and collective agreements, while neutral on their face, excluded Ms. Davidson because of her need for accommodation. The Court allowed the judicial review on these grounds, referred the matter back to the Commission for review by a different investigator, and granted costs to the applicant.

This case arguably takes the duty to accommodate a step beyond the current jurisprudence, which allows a company to insist that the bona fide requirements of a role be assessed. It is unknown yet whether the standard articulated in this case will be adopted federally and across Canada.

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Arbitrator award for wrongful termination significant

In *Greater Toronto Airports Authority v. Public Service Alliance Canada, Local 0004* (Shime), Arbitrator Shime upheld a grievance for wrongful dismissal by a long-standing employee of the GTAA. In this case, the grievor claimed that she was unjustly suspended and wrongfully dismissed by her employer, the GTAA. In response, the GTAA maintained that the grievor was terminated for cause due to her alleged dishonesty with respect to her absences and her continued dishonesty when accounting for her absences. As such, the GTAA submitted that there was an irreparable loss of trust. Importantly, in upholding the grievance, the Arbitrator created a precedent by awarding the grievor damages in excess of $500,000 for lost income, mental distress, pain and suffering and punitive damages.

At the time of termination, the grievor was employed by the GTAA as a fleet co-ordinator. The grievor was 47 years of age and had been employed by the GTAA for approximately 23 years. She was a 'well liked and respected employee' and had no record of discipline or history of absenteeism. In late October of 2003, the grievor sustained a knee injury at work. As a result, she was referred to a medical clinic in the airport by the GTAA. Dr. Nagpal, the doctor at the airport clinic who was employed by the GTAA, prescribed six months of physiotherapy treatment. Dr. Nagpal also referred the grievor to Dr. Gordon, an orthopaedic surgeon. Despite the physiotherapy, in February 2004, the grievor underwent arthroscopic surgery on her knee, which was performed by Dr. Gordon. Subsequent to the surgery, Dr. Gordon issued a medical note stating that the grievor "*would be off work for four weeks as a result of the surgery*."

It is important to note in this case that the grievor lived with a fellow employee of the GTAA, Mr. Townshend, which was unknown to the employer. At the time immediately preceding the grievor's termination, Mr. Townshend was off work on sick leave and under surveillance by the GTAA. In late February 2004, the grievor was observed on Mr. Townshend's surveillance when Mr. Townshend drove her to a physiotherapy appointment. As a result of the grievor's appearance on the Townshend surveillance, the employer decided to place the grievor under surveillance at the beginning of March 2004. On the first day, the surveillance video showed the grievor attending physiotherapy and running a few minor errands on her way home. The grievor was subsequently observed driving 27 kilometres from her home to the airport where she picked up a passenger and then returned to her home, which she did not leave for the remainder of the day. On the next day, the grievor was observed attending physiotherapy and subsequently picking up some groceries. The grievor then returned home and did not exit her house for the remainder of the day.

As a result of the early March 2004 surveillance, the GTAA requested that the grievor provide information from her physician explaining the need for four weeks recuperation and "*whether she could return earlier with or without restrictions*." The grievor was unable to obtain a note from Dr. Gordon, as he was on vacation. As such, she requested and obtained a note from her physiotherapist. The GTAA did not accept the physiotherapist's note on the basis that it was not a doctor's note. The grievor subsequently obtained a note from Dr. Gordon which permitted her to return to work with restrictions. As a result, she returned to work in mid-March of 2004. Upon returning to work, the grievor was advised that there would be a meeting in a couple days time. The grievor attended this meeting with a Union representative. The grievor was placed on suspension at the end of the meeting and eventually terminated.

The employer argued that the grievor was suspended and eventually terminated for committing sick leave fraud and continual dishonesty with respect to her answers during the March meeting. The employer had not requested an independent medical evaluation in this case due to the fact that the surveillance video, in the employer's opinion, showed the grievor performing activities she could have performed at work. In addition, the employer had not called the grievor's doctor for clarification of her restrictions due to the employer's opinion that doctors would write what a patient wanted. The GTAA had a problem with

employees abusing their sick leave policy, which they were trying to deter.

As a result of the surveillance, the grievor felt betrayed, and stalked. The grievor had previously been in an abusive relationship and stalked, which the GTAA was aware, because they had removed the individual from GTAA property and had allowed the grievor to take two months off subsequent to that event.

During the course of the hearing, both Dr. Gordon and the grievor's physiotherapist provided evidence that the grievor's actions and movement on the surveillance tapes were consistent with her restrictions. In addition, both concluded that the grievor was either limping or walking with an abnormal gait on the tapes. Dr. Gordon testified that the grievor should have been off work for six weeks and that he had provided her with the note allowing her to return to work with restrictions due to the fact that the grievor was afraid of losing her job.

In reply to this evidence, the employer called an independent doctor as a witness who concluded that the grievor was not limping or walking with an abnormal gait on the surveillance videos. The Arbitrator rejected this testimony on the basis that the employer's doctor was not consulted to provide an opinion prior to the hearing or the grievor's termination.

With respect to the surveillance evidence, the Arbitrator held that the surveillance evidence supported the grievor's testimony due to the fact that the grievor remained in her home for most of the day other than attending her physiotherapy appointments, running minor errands and picking up a friend from the airport. According to the Arbitrator, the grievor "*did not fit into the profile of people abusing sick leave symbolized by [the employer's] description of a person playing golf or a person who is frequently absent*." In addition, the Arbitrator was unimpressed with the employer's failure to make further medical inquiries into the grievor's absence due to the fact that the grievor's regular attendance at her physiotherapy appointments was shown on the surveillance tapes and "*ought to have at least prompted some further medical inquiry by the GTAA as to the status of her recovery*." The Arbitrator concluded that the video surveillance footage did not support the employer's opinion that the grievor was able to return to work with modified duties. The Arbitrator was particularly persuaded by Dr. Gordon's and the physiotherapist's evidence due to the fact that both had "*dealt directly with and examined the grievor [and] were in a position to assess her movements and her gait on the surveillance tapes.*" In rejecting the GTAA's conclusions based upon the surveillance tapes, the Arbitrator held that "*the extent to which a person may modify their gait or their posture to compensate for an injury is outside the expertise of an ordinary lay person.*" As such, the Arbitrator concluded that the GTAA managers "*were not doctors and they ought not to have arrogated to themselves the medical knowledge which was necessary to assess the medical condition of the grievor based on an examination of the tape.*"

With respect to the physiotherapist's note obtained by the grievor, the Arbitrator held that, despite the GTAA's cynical view of doctors and doctors' notes, the note provided by the physiotherapist should have put the employer "*on notice of the possibility that the grievor's medical condition was not what appeared to them on the videotapes and at the very least ought to*

have prompted further medical inquiries as to the grievor's condition."

With regards to the March meeting, the Arbitrator concluded that the employer was biased against the grievor prior to scheduling the meeting. This was evidenced by the fact that during the meeting, any answers given by the grievor that were favourable to her case were disregarded. The Arbitrator concluded that the meeting was "*an interrogation and not a genuine or reasonable attempt to discover the truth about the grievor's condition.*" As such, the Arbitrator rejected the employer's inferences and conclusions resulting from the meeting on the basis that they were unreasonable and not credible.

In conclusion, the Arbitrator reasoned that "*employees, particularly those such as the grievor, who have been long term local employees, are entitled to both a reasonable consideration of their seniority and work record and to a reasonable investigation of their conduct before being discharged and accused of dishonesty.*" Based on the foregoing, the Arbitrator found that the employer's conduct warranted an award of damages for the grievor.

In refusing to reinstate the grievor, the Arbitrator held that the high handed conduct of the employer in combination with the grievor's feelings of betrayal had "*resulted in a legitimate lack of trust and confidence by the grievor such that, if she were to be reinstated, she would not be treated respectfully and with dignity to which she is entitled as a result of her honest and diligent service.*" As such, the Arbitrator decided to award the grievor compensation in lieu of reinstatement.

The Arbitrator found that the grievor was entitled to damages for mental distress due to the breach of the collective agreement and the fact that "*the object of the collective agreement to both secure a psychological benefit and also mental security was within the reasonable contemplation of the parties.*" The Arbitrator concluded that the grievor's mental distress and suffering were reasonably foreseeable so as to warrant compensation in the form of damages due to the fact that the GTAA knew of the grievor's specific vulnerability due to her past with her ex-husband. As such, it was "*reasonably foreseeable that terminating the grievor without cause, without proper investigation and without regard to her record of service would be especially devastating in a way that was beyond what is usual in the event of a termination.*" In addition, the grievor was forced to stop her physiotherapy treatment subsequent to her termination due to the fact that she could no longer afford to attend. Based on the foregoing, the Arbitrator awarded the grievor damages in the amount of $50,000 for mental distress and extended pain and suffering to her knee.

The Arbitrator further held that the grievor should be compensated for the loss of compensation and benefits from termination to the date of the award, less six months due to the fact that counsel for the Union had taken a six month leave of absence.

With respect to future economic loss, it was submitted on behalf of the grievor that her wages at her current job were approximately $20,000, which was significantly less than her wages at the GTAA, which were approximately $50,000. The grievor also claimed damages for loss of seniority, loss of pension, and loss of a unionized job. The Arbitrator held that, the financial circumstances would have been in the reasonable contemplation of the employer, as a result of the breach of the collective

agreement and termination of the grievor. The Arbitrator awarded the grievor damages for loss of seniority and benefits including pension from the date of the issuance of the award until age 55, the age of retirement in the pension plan.

Finally, with respect to punitive damages, the Arbitrator concluded that the grievor was entitled to punitive damages due to the fact that the GTAA's conduct had "*an added dimension that goes beyond the mistreatment of the grievor; the GTAA's failure to deal with the grievor in a reasonable manner stripped the collective agreement of any meaning.*" As such, the Arbitrator concluded that an award of punitive damages would serve as a deterrent "*to any future misconduct by the GTAA in administering the collective agreement and dealing with other employees.*" Specifically, the Arbitrator reasoned that, in order to deter the GTAA from "*exploiting the vulnerability of employees who are dependent on their employment with the GTAA*," a significant award of punitive damages was required. As such, the Arbitrator awarded the grievor $50,000 in punitive damages.

This award has a number of significant components. Certainly, the findings with respect to the conduct of the employer provide guidance on what not to do, as well the decision sets out expectations for employers.

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Court confirms privacy requirements

In *Eastern School District v. Prince Edward Island (Information and Privacy Commissioner)*, [2009] P.E.I.J. No. 45, the Eastern School District sought judicial review of a Decision by Prince Edward Island's Information and Privacy Commissioner. The Court held that the appropriate standard of review for IPC decisions was correctness for questions of law and reasonableness for mixed questions of fact and law. Based on the correctness standard, the Court set aside two portions of the IPC's decision against the District.

The case arose from the District's decision to place one of its employees, a school bus driver, on paid administrative leave, and its request that the bus driver undergo a driving evaluation and submit to an independent medical examination to assess his fitness to perform his duties. The District had received concerns from other employees and the Union about the bus driver's escalating behaviours and fear that he may "Go Postal". The District suggested to the bus driver that it was "incumbent" upon him to cooperate fully with the requests for a driving evaluation and an IME. The bus driver refused to attend the driving evaluation; no date was ever set for an IME. The District suspended the bus driver without pay for his failure to attend the driving examination, and ultimately terminated him shortly afterwards.

The bus driver filed a complaint with the IPC and alleged that the District violated Part II of the *Freedom of Information and Protection of Privacy Act* by disclosing the bus driver's personal information to a third party without his consent, and by attempting to collect personal information from the bus driver without providing him with the purpose and authority for the collection, as required by the *Act*.

The IPC rejected the District's argument that the attempted collection of the bus driver's personal information from the driving

evaluation and IME was authorized by s.32(1)(j) of the *Act*, which states:

"*A public body shall collect personal information directly from the individual the information is about unless . . .*

(j) the information is collected for the purpose of managing or administering personnel of the Government of Prince Edward Island or a public body."

The IPC found that the District did not provide the bus driver with the opportunity to consent to the collection of information when the District sent him a letter advising that it was "incumbent" on him to fully cooperate and participate. The IPC also found that the District failed to provide further information to respond to the bus driver's request about the purpose of the evaluations.

The Court held that the IPC had failed to consider the exemption set out in subsection 32(1)(j) of the *Act*, and that the failure was fatal to the IPC's analysis on the first issue. The Court set aside that portion of the IPC's decision.

The District also sought judicial review of a recommendation in the IPC's decision that the District provide education and training to management and its employees regarding Part II of the *Act*, to make them aware of the importance of protecting employees' personal information and the importance of consistently advising employees of the purpose and authority for the collection of employees' personal information. The recommendation also included a requirement for the District to report to the IPC when the "recommendation" was completed. On judicial review, the District alleged that the "recommendation" was really an order and beyond the IPC's jurisdiction.

The Court held that, while the IPC relied on the incorrect subsection of the *Act* when making the "recommendation" for education and training, another section of the *Act* did permit the IPC to make recommendations. As a result, the Court upheld the IPC's recommendation for education and training. However, the Court found that the IPC exceeded its jurisdiction when imposing the requirement for the District to report back to the IPC, and set aside that portion of the IPC's Decision.

Despite what might appear to be clear language permitting the collection of personal information, the decision of the Prince Edward Island IPC found otherwise. In Ontario, the legislation is further complicated by a provision exempting some personal information of employees. As a result, the decisions of Ontario's IPC are quite fact specific, which can make prior decisions difficult to apply as precedent.

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Court confirms teaching responsibilities for Principals and Vice Principals

The assignment of principals and vice-principals to classroom teaching duties was the focus of a recent application for judicial review of an arbitrator's decision in *Elementary Teachers' Federation of Ontario (ETFO) v. Superior-Greenstone District School Board*, [2009] O.J. No. 3713.

The grievance related to six principals and vice-principals who, due to declining enrolment in various schools of the Superior-Greenstone District School Board

(the "Board"), were assigned to teaching duties for portions of the day. As a result, six teaching positions were made partially redundant. The Federation grieved the Board's decision, arguing that the Board had no right to assign teaching duties to non-bargaining unit employees and that the reassignment granted principals and vice-principals "super-seniority". The arbitrator dismissed the grievance based on a plain reading of Section 287.1(1) of the *Education Act*, which provides that, a principal or vice-principal may perform the duties of a teacher despite any provision in a collective agreement.

On the judicial review, the Federation challenged the arbitrator's interpretation of s. 287.1 (1) of the *Act* arguing that an administrator could only be assigned to a bargaining-unit teaching position if the position was vacant and the assignment respected the seniority right provisions in the collective agreement.

The Court disagreed with the Federation. Reviewing the arbitrator's decision on a standard of reasonableness, it concluded that the decision was a reasonable interpretation and application of the *Act.* Dismissing the application, the Court noted that: "*subsection 287.1(1) is intended to give to school boards the flexibility to assign a mix of administrative and non-administrative work to principals and vice-principals to meet a school's changing needs and requirements from day to day and from term to term*."

Given the declining enrolment in many school boards, utilization of s. 287.1(1) is likely to become more prevalent. The Court's interpretation provides school boards with clear authority to make mixed appointments.

Bus driver terminated for prank

In *Nechako Lakes School District No. 91 v. Canadian Union of Public Employees, Local 4177 (Bowerbank Grievance)*, [2009] B.C.C.A.A.A. No. 98 (Burke), the grievor had been a school bus driver and alleged that she was unjustly dismissed by the School District.

The grievor had given two high school students on her bus each a plastic bag containing mothballs and had indicated that they were treats. The mothballs were given as a 'humorous' way to enforce the 'no eating' rule on her bus.

The grievor prepared the plastic bags of mothballs prior to her afternoon shift. She put holes in the bags so the smell would be obvious. The grievor had no specific knowledge of the toxicity of the mothballs, but did acknowledge she knew mothballs should not be eaten. During the afternoon bus route, the grievor gave the students the bags containing the mothballs, and then drove off. She did not remain to ensure that the students did not consume the mothballs. The grievor had considered phoning the parents of the students, but did not follow through.

The following day, the parents of the students who were given the mothballs complained about the incident to the school's principal. The principal forwarded the concern to the Director of Facilities who conducted an investigation. At the conclusion of the investigation, it was decided that the grievor's employment with the School District would be terminated.

In deciding to terminate the grievor's employment, the School District considered the seriousness of the incident and

determined that it outweighed the grievor's otherwise clean disciplinary record and length of service.

The issue before the arbitrator was the appropriateness of the termination. The employer submitted that the grievor "*was in a position of trust as a school bus driver, and she must live up to a high standard of conduct*." In this respect, the grievor's actions had "*seriously jeopardized the public confidence in the school system and was detrimental to the reputation of the School District*." The School District acknowledged that an apology or acknowledgement of wrongdoing could be a factor mitigating discipline; however, in this case, the School District did not accept the sincerity of the grievor's apology, because it minimized the misconduct.

In response, the union had argued that the dismissal was unjust because the School District removed the grievor's livelihood in uncertain economic times for a mistake that did not place anyone in danger. In addition, the union maintained that the grievor could be rehabilitated. The union had further submitted that the grievor had often, over the course of employment, employed humour as a mechanism to enforce the School District's policies without any negative consequences. Finally, the union argued that the grievor was remorseful, acknowledged her mistake and admitted the inappropriateness of her actions. The union had acknowledged that the grievor's actions warranted discipline, but argued that termination was excessive.

In coming to its decision, the arbitrator agreed with the parties that the grievor's conduct deserved discipline. The arbitrator noted that the misconduct in this case "*damaged the School Board's reputation and the trust that is essential to be maintained in those responsible for the safety of the school bus children*." The arbitrator concluded that, when viewed through the eyes of the public, the grievor's actions had damaged the employer's reputation.

The arbitrator found that the grievor's lack of specific knowledge about the toxicity of the mothballs was not significant, because she was aware that they should not be eaten. The arbitrator also noted that the grievor considered calling the students' parents, but did not do so.

With respect to the grievor's apology, the arbitrator agreed with the School District that the apology did not outweigh the grievor's misconduct. The arbitrator also shared the School District's concern about the grievor's references to the incident as a 'joke' minimizing the conduct.

The arbitrator found that the grievor's actions had indicated a disregard for the students' health and safety.

On all of the facts of the case, the arbitrator held that the employment relationship was unlikely to be repaired. As such, the arbitrator dismissed the grievance.

This case further demonstrates that the health and safety of students is paramount, and employees must make it a priority.

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Right to additional pay must be explicit

In *Toronto District School Board v. Canadian Union of Public Employees, Local 4400 (Mirijello Grievance)*, [2009] O.L.A.A. No. 596 (Kaplan), the arbitrator dismissed a grievance, which had claimed

that the Board failed to pay the employee the appropriate rate of pay.

In this case, the grievor had been employed by the Board as a special needs educational assistant ("EA"). The dispute had arisen over the interpretation of the Minutes of Settlement previously entered into between the parties. In particular, the Minutes of Settlement provided that the Board would "*adjust the rate of pay of Educational Assistants required to perform catherization of pupils…*"

With respect to the disputed issue, the union and the grievor argued that the training, rather than duty to perform catherizations, attracted the premium rate of pay. The employer maintained that the premium rate applied only when an EA had catherization duties.

The union submitted that the Minutes of Settlement clearly established that training to perform catherization attracted the premium rate due to the fact that the Minutes of Settlement referred to the EA's 'duties'. According to the union, the plural form of the term had been significant, as this had indicated "*a 'package' of duties and training was an important element in the performance of catherization.*" In response, the Board submitted that most, if not all, of the duties described were already part of the grievor's ordinary position. Furthermore, these duties had been enumerated in both the grievor's job posting, as well as in the Board's training manual entitled *Role and Responsibilities of Teachers and Educational Assistants*. Finally, the Board submitted that the Minutes of Settlement had not explicitly stated that catherization training would attract the premium rate. The parties could have negotiated for such a term and it was significant that they had chosen not to.

In deciding this case, the arbitrator reasoned that the Minutes of Settlement had not specifically provided that catherization training would attract the premium rate of pay. The arbitrator paid deference to the jurisprudence and governing authorities which establish that, except in exceptional circumstances, the union has the burden of establishing "*in clear, specific and unequivocal terms, that an asserted monetary benefit has been agreed upon.*" Of significance to the arbitrator was the fact that the parties had the opportunity to negotiate a training rate and had chosen not to. Rather, the parties had "*expressed clearly and unequivocally, that the premium was to be paid when catherization was required to be performed.*" In addition, the arbitrator noted that catherization could only be performed by an EA subsequent to having successfully completed the training. Further, the arbitrator was persuaded by the fact that the catherization training fell within the duties in the posting, and the Role and Responsibilities of Teachers and Educational Assistants manual. On the basis of the foregoing, the arbitrator dismissed the grievance.

This case further confirms a long standing labour law principle. And, while the school board was successful, school boards might give consideration to expressly addressing the issue of training, if there could be a wage related issue.

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Defamation claim allowed

In *Stuart v. Hugh*, [2009] B.C.J. No. 551 (C.A.), the British Columbia Court of Appeal allowed the appeal of a suspended secondary school teacher from the dismissal

of his defamation action against a vice-principal and the Surrey School Board arising from alleged comments made by the vice-principal to an RCMP officer.

In January 2002, Mr. Stuart was on a stress-related medical leave. Shortly thereafter, he began making a series of telephone calls to a female student that resulted in the Board conducting an investigation. The Board advised him that, as a result of the investigation, he was suspended and prohibited from attending the school without prior notice.

On June 17, 2002, the last day of classes for the 2001/2002 year, Mr. Stuart came to the school, unannounced, to retrieve some of his personal belongings. While at school his behaviour was erratic and the school security guard contacted the office to call the police. Mr. Stuart entered the school holding a broken beer bottle, using profanities and making inappropriate comments about the school principal. Mr. Stuart was arrested shortly after following an altercation with the officer.

Following discussions with the vice-principal, the police officer made an entry in his notebook: "*ex-teacher – had been suspended due to misconduct with student – has been at school and he is not supposed to be on premises*."

Mr. Stuart's teaching certificate was indefinitely suspended, on conditions, as a result of the incident. Mr. Stuart commenced a defamation action against the Board and the vice-principal.

In response to the defamation action, the Board argued that the action should be dismissed on jurisdictional grounds, as the dispute was governed by the collective agreement between the British Columbia Public Schools Employers' Association and the British Columbia Teachers' Federation.

The Court reviewed the case law in determining whether the courts have jurisdiction over a dispute between an employer and employee whose relationship is governed by a collective agreement and concluded that, notwithstanding the fact that the incident occurred on school premises, the incident was properly described as a "*problem at the workplace*" rather than a "*workplace problem*". The Court highlighted that the focus of such a review is a consideration of the nature of the dispute and the ambit of the collective agreement and whether the provisions of the collective agreement contemplate the factual circumstances or not.

The Court noted that, in this instance, the police responded and became involved due to a disturbance at the school, and anyone acting in a similar erratic manner would have been dealt with the same way. The information shared by the vice-principal, which allegedly contained false statements related to the teacher's status, did not make the essential character of the dispute a matter of employer- employee relations, and thus, should not be dealt with under the collective agreement. The appeal was allowed with costs, and remitted to the Supreme Court for trial.

Courts have traditionally refused to take jurisdiction over matters that arise in the context of an employment relationship. Key to the Court's decision in this matter seems to be the fact that the teacher could have been anyone and would have been dealt with by school administration in a similar manner.

— KC LLP —

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The impact of Bill 168 between staff and students
Friday, October 22, 2010

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