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Human Resources Newsletter

April 2012

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Court confirms right to strike protected by Charter

In *Saskatchewan v. Saskatchewan Federation of Labour,* [2012] SKQB 62, the Court of Queen's Bench for Saskatchewan held that the *Public Service Essential Services Act ("PSESA")* infringed the freedom of association of employees protected by s. 2(d) of the *Canadian Charter of Rights and Freedoms ("Charter")* in a manner that cannot be justified under s. 1 of the *Charter* (demonstrably justifiable) by prohibiting strikes. The *PSESA* was found to be of no force and effect. The declaration of invalidity was suspended for a period of 12 months in order to permit legislative amendments. The Court dismissed the plaintiff's claim for a declaration of invalidity of the *Trade Union Amendment Act, 2008 ("TUAA").*

The *PSESA* prohibited public-sector workers who perform essential services from striking, and required the parties to negotiate essential services agreements 90 days prior to the expiration of a collective agreement. Absent an agreement at least 30 days prior to its expiration, the employer had the unilateral right to determine the employees necessary to continue to work to maintain essential services. The employer designates the classifications of employees, number of employees in each classification, and names of the employees required to work with respect to essential services that needed to be maintained, as identified by the employer. At any time, the employer can further designate additional employees to work during all or part of the work stoppage to maintain essential services.

While the *PSESA* gives a minimal authority for the Saskatchewan Labour Relations Board ("SLRB") to review the numbers of employees required to work in each classification, it does not give authority to the SLRB to review the services designated by the employer or the specific persons required to work.

Essential services are broadly defined in the *PSESA* as services that are necessary to enable a public employer to prevent:

(a) danger to life, health or safety;

(b) the destruction or serious deterioration of machinery, equipment or premises;

(c) serious environmental damage; or

(d) disruption of any of the Courts of Saskatchewan.

With respect to the Government of Saskatchewan, in addition to the points listed above, there were additional services prescribed by legislation to be essential.

The Court concluded that the right to strike is a fundamental freedom protected by s. 2(d) of the *Charter* along with the interdependent rights to organize and to bargain collectively. Therefore, while governments may make laws that restrict or prohibit essential service workers from striking, in order to be valid, these restrictions must be justified under s. 1 of the *Charter* (i.e. which permits only such reasonable limitations as may be demonstrably justified in a free and democratic society).

The Court concluded that by giving employers a unilateral ability to determine the classifications and numbers of individuals who must work during a work stoppage, the *PSESA* substantially interfered with the freedom of public-sector employees in many workplaces to engage in meaningful strike action.

When considering whether the *Charter* violation could be saved under s. 1 of the *Charter,* the Court made the following determination.

The basic structure of the legislation is rationally connected to its objective (i.e. to

ensure the continuation of essential services during a labour dispute).

The Court noted that the *PSESA* transfers all of the power previously held by the unions to the public employers, who are backed by additional powers of the Legislature. The Court concluded that the provisions do not satisfy the s. 1 requirement that the right be minimally impaired. The Court found that the *PSESA* impairment of the s. 2(d) rights would be substantially less if it made provision for an effective, independent dispute resolution process to address the employer designations of employees during a work stoppage and if it provided *"compensatory access to adequate, impartial and effective overall dispute resolution proceedings in those cases where employer designations effectively abrogate the right of employees to engage in meaningful strike action".*

The Court concluded that the provisions of the *PSESA* go well beyond what is reasonably necessary to meet the Legislature's stated objective and that there were a number of options available which would reduce the Court's concerns about the *Charter* violation. Consequently, the violation of s. 2(d) could not be saved by s. 1 of the *Charter*, and therefore the *PSESA* was unconstitutional.

In the second part of the decision, the Court considered whether the provisions of the *TUAA* also violated s. 2(d) of the *Charter.* The *TUAA* was amended in 2008 to stipulate as follows:

"It shall be an unfair labour practice for any employer or employer's agent: (a) to interfere with, restrain, intimate, threaten, or coerce an employee in the exercise of any right conferred by this Act, ***but nothing in this Act precludes an employer from communicating facts and its opinions to its employees****". (emphasis added)*

The Court held that the provisions of the *TUAA* did not infringe on the freedom of employees to organize and collectively bargain through a trade union of their choice. The Court rejected the argument that the *TUAA* allowed employers to interfere with those protected freedoms by exercising their own freedom of expression under s. 2(b) of the *Charter*. The Court found that the purpose of the amendment was to declare that employers may communicate with employees in a manner that does not infringe upon the ability of the employees to engage their collective bargaining rights.

While, at first blush, this case appears to be precedent-setting in respect of its implications, it is important to note that it is decided in the specific context of the *PSESA* legislation and, as such, any future application of this case should be considered in light of this particular context.

Supreme Court confirms issues cannot be re-litigated to avoid 'forum-shopping'

In *British Columbia (Workers' Compensation Board) v. Figliola,* [2011] S.C.J. No. 52, the Supreme Court of Canada overturned a decision of the British Columbia Court of Appeal, and decided that the British Columbia Human Rights Tribunal's decision to hear a human rights complaint which had already been ruled upon by the Workers' Compensation Board was patently unreasonable.

The legal process involved in this case is somewhat convoluted, but the principles enunciated by the Supreme Court are significant.

Three workers who had suffered chronic pain had sought and received compensation from British Columbia's Workers'

Compensation Board (the "Board"). The Board's chronic pain policy provided for a fixed award for this pain. The Respondents challenged the award to the Board's Review Division, claiming that a policy which fixed amounts for chronic pain was patently unreasonable and unconstitutional. Upon review, the Review Officer found that only the Workers' Compensation Appeals Tribunal ("WCAT") could consider policies in respect of their patent unreasonableness. Because the law explicitly prevented WCAT from having jurisdiction over constitutional questions, neither did the Review Officer have such jurisdiction.

The Review Officer did accept jurisdiction over the Human Rights Code *("Code"),* and found that the chronic pain policy did not breach section 8 of the *Code* (freedom from discrimination on prohibited grounds) and was not discriminatory. Based on legal amendments, the Respondents' appeal could no longer be heard by WCAT because at that point, WCAT no longer had authority to apply the *Code*, but the Respondents had the remedy of judicial review available to them. Instead of pursuing judicial review, the Respondents filed new complaints with the Human Rights Tribunal (the "Tribunal") repeating the arguments made before the Review Division.

The Board moved to dismiss the new complaints claiming that the complaint was not within the Tribunal's jurisdiction and the substance of the complaint had appropriately been dealt with in another proceeding (the Review Division). The Tribunal rejected these arguments and found that the complaints had not been appropriately dealt with by the Review Division. The Respondents appealed this decision to the B.C. Court of Appeal. Upon judicial review, the Tribunal's decision was set aside, based on the fact that the same issues had already been "conclusively decided" by the Review Officer. Upon appeal, the Court of Appeal restored the Tribunal's decision, concluding that it was not patently unreasonable. Leave to appeal was granted to the Supreme Court of Canada.

The Supreme Court allowed the appeal unanimously (all finding that the Tribunal's decision was patently unreasonable), but split 5 to 4 on the legal analysis as to how the conclusion was reached. The majority decision of 5 to 4 was written by Justice Abella, who ruled that the Tribunal could not hear the case. The other four Judges ruled that the matter should be sent back to the Tribunal for reconsideration in line with the reasons set out in the minority decision.

In the majority decision, the Court noted that rather than challenging the Review Officer's decision through judicial review, the respondents commenced new proceedings before a different tribunal, seeking a more favourable result.

Justice Abella noted that s. 27(1)(f) of the *Code* codifies the following principles to prevent unfairness by preventing *"abuse of the decision-making process":*

"It is in the interests of the public and the parties that the finality of a decision can be relied on…

Respect for the finality of a judicial or administrative decision increases fairness and the integrity of the courts, administrative tribunals and the administration of justice; on the other hand, relitigation of issues that have been previously decided in an appropriate forum may undermine confidence in this fairness and integrity by creating inconsistent results and unnecessarily duplicative proceedings…

The method of challenging the validity or correctness of a judicial or administrative decision should be through the appeal or judicial review mechanisms that are intended by the legislature…

Parties should not circumvent the appropriate review mechanism by using other forums to challenge a judicial or administrative decision…

Avoiding unnecessary relitigation avoids an unnecessary expenditure of resources…" (emphasis added)

The Court held that because the Tribunal decided to proceed with the complaints and have them relitigated on generally irrelevant factors, and ignored its real mandate under s. 27(1)(f) of the *Code* (the relevant provision for consideration), the decision was patently unreasonable. The majority of the Court, therefore, allowed the appeal, set aside the Tribunal's decision and dismissed the complaints.

Justice Cromwell, writing for the minority on the Reasons (but concurring in the result), noted different principles regarding the Tribunal's decision, and concluded that the matter should be remitted to the Tribunal for reconsideration based on the principles set out in the Reasons. Cromwell J. explained that unless there are exceptional circumstances, the Court should not make a decision that has been delegated to an administrative body (and this case did not present exceptional circumstances). Therefore, the minority dissented from the majority's decision to dismiss the complaints (and not sending the matter back to the Tribunal.)

This decision provides helpful jurisprudence to rely upon when a party is faced with an opposing litigant who appears to be "forum shopping". That being said, it will be interesting to see to what extent the majority reasons (or minority reasons) are picked up in future case law.

Court reviews range of damages for wrongful dismissal

In *Greater Toronto Airports Authority v. Public Service Alliance Canada, Local 0004*, [2011] O.J. No. 358, the Ontario Superior Court of Justice allowed in part an application by the Greater Toronto Airports Authority ("GTAA") for judicial review of a grievance award which overturned the GTAA's dismissal of the grievor and awarded the grievor damages for past and future economic loss, $50,000 for mental distress and pain and suffering, plus $50,000 in punitive damages.

The 47-year-old grievor with 23 years seniority had been dismissed on the basis of dishonesty after being caught on surveillance doing certain errands and driving a significant distance which, according to the employer, was contrary to the grievor's workplace modifications for medical reasons. The only reason that the grievor was subject to surveillance was because she lived with another employee who the GTAA had placed under surveillance. The GTAA decided to conduct surveillance on the grievor when it learned that she cohabitated with the other employee under surveillance, having observed her on the other employee's surveillance video.

The Arbitrator found that the GTAA had acted unreasonably and in bad faith in two ways:

(1) by associating the grievor with another employee and terminating her based on this association; and,

(2) by not assessing the grievor's situation independently, particularly after many years of faithful and diligent service.

The Arbitrator concluded that this was not an appropriate case for reinstatement, and awarded significant damages, including damages for past and future economic losses (almost 8 years salary less future earnings, including 2 years for future economic loss), $50,000 for mental suffering and pain and suffering, and $50,000 in punitive damages.

The Court reviewed the damages award on a standard of reasonableness and found that the Arbitrator had reasonably concluded that the remedial authority had no contractual limitation. The Arbitrator had a wide-ranging power to find a remedy that is *"just and reasonable"* in all of the circumstances. **There was no error in quantifying the damages attributable to economic loss**. Further, the fact that the Arbitrator did his own legal research to update the jurisprudence of the parties did not lead to a denial of natural justice.

The Arbitrator made a reasonable finding that absent the unjust dismissal, the grievor would likely have remained employed at GTAA until her earliest retirement opportunity. **An award of two years salary for future economic losses (less amounts earned) was fair and reasonable in the circumstances, and this award would place the grievor in the position that she would have been in if the contract had been performed**.

The Arbitrator did not, however, act fairly regarding the punitive damages claim. The GTAA did not have fair notice of the basis for the punitive damages or the opportunity to respond. **There was no mention made regarding the GTAA having committed an independently actionable wrong which was troublesome to the Court for two reasons: firstly, it is an important requirement for punitive damages; and secondly, there was a lack of notice to the GTAA as to the basis for the claim to which the GTAA should have had the opportunity to respond.** The Court further noted that there was no explanation as to why the damage award (before the addition of punitive damages) was not a sufficient deterrent on an employer, or why an amount less than $50,000 would not have been a sufficient deterrent. Therefore the award for punitive damages could not stand.

The Court held that the Arbitrator had reasonably concluded that he had jurisdiction to award mental distress damages. However, the Court found that the Arbitrator's first justification for an award of mental distress damages was unreasonable (i.e. the conclusion that the collective agreement *"secured a psychological benefit"* and that such damages were within the parties' contemplation.) **On the other hand, the Court found the Arbitrator's alternative grounds to award mental distress damages was within a range of reasonable outcomes (i.e. to award damages for significant mental distress caused to a particularly vulnerable person, given that the GTAA was aware of that vulnerability)**. That being said, the Court also found that the award for mental distress was improperly blended with damages for pain and suffering. In addition, the damages for pain and suffering were not supported by the evidence, and it was not shown what quantum of damages would have been in the reasonable contemplation of the parties when they made the contract. Therefore, the award of mental distress damages was found to be unreasonable and was set aside.

As a result, the Court remitted the issue of determining the quantum of damages for mental distress (after separating out the pain and suffering award) and the punitive damages issue to the Arbitrator for reconsideration. The Court rejected the GTAA's request to send these issues to a different Arbitrator (as is frequently done) finding that requiring the parties to start fresh on these points would not be in their best interests given the further delays it would entail.

This decision provides some guidance on the issue of damages for mental distress and punitive damages. More importantly, it confirms that damages for wrongful dismissal can be significant.

Arbitrator applies Bill 168 and confirms termination of employment for death threat

In *Kingston (City) v. Canadian Union of Public Employees, Local 109 (Hudson Grievance),* [2011] O.L.A.A No. 393, the Arbitrator upheld the termination of a 47-year-old employee with 28 years experience for having uttered a death threat against her colleague (also the local union president) in light of her previous history of angry outbursts.

In the context of a 'return to work' meeting following the grievor's absence, the grievor had a preliminary discussion with her local union president to prepare for their meeting with the employer. During her discussion with the union president, the grievor became agitated and began making comments that another union representative was *"trying to fuck her"* and that another former representative *"always tried to fuck her too"*. This latter comment was directed at a friend of the union president who had recently died. When the union president commented *"Don't talk about Brian – he's dead",* the grievor stated: *"Yes, and you will be too."* The grievor was terminated following this exchange as a result of this threat made to her colleague, and in light of the grievor's history of angry outbursts and her failure to rehabilitate despite having recently completed anger management training.

When reviewing the termination, the Arbitrator considered the impact of the Bill 168 modifications to the *Occupational Heath and Safety Act* on the analysis, and summarized these changes in four key principles.

Firstly, the Arbitrator confirmed that it is necessary only to prove the utterance of the threatening words (which must not have been made in jest), and the fact that they were intended to make the individual fearful. There is no need to prove ability to cause immediate harm, or the intent to cause harm.

Secondly, since Bill 168, following the threat of workplace violence, the parties are required to act (i.e. to report, investigate, and address the situation). This requires a full and fair approach involving thorough and appropriate investigation and decision-making.

Thirdly, the Arbitrator reiterated the following factors applicable in a determination of whether the discipline was reasonable in the case of a threat: Who was threatened or attacked? Was this a momentary flare-up or a premeditated act? How serious was the threat or attack? Was there a weapon involved? Was there provocation? What is the grievor's length of service? What are the economic consequences of a discharge on the grievor? Is there genuine remorse? Has a sincere apology been made? Has the grievor accepted responsibility for his or her actions?

The Arbitrator indicated that following Bill 168, the factor of seriousness of the event should be afforded more weight in the analysis.

Fourthly, the Arbitrator added "workplace safety" as a further factor to be considered when determining reasonableness of the discipline imposed, explaining that the question to be asked is: *"To what extent is it likely that this employee, if returned to the workplace, can be relied upon to conduct*

himself or herself in a way that is safe for others?" (i.e. to what extent is there a chance of repetition of the misconduct?)

When reviewing these factors, the Arbitrator found that in light of the grievor's prior record of angry outbursts, the lack of apology or remorse on the grievor's part, and a failure to demonstrate meaningful steps to rehabilitate, the termination was an appropriate and proportionate response.

The Arbitrator noted that her conclusion would have been different if the grievor's actions or evidence had reflected any acceptance of responsibility for her actions, an appreciation for the seriousness of the act, or her plans to gain control over these angry impulses.

This decision demonstrates the importance of the post-misconduct actions of a grievor on the outcome of a grievance, as well as providing a modified framework for the analysis of workplace threat cases in the wake of Bill 168.

HRTO issues Interim Decision re racially-based discrimination

In *Khatkur v. Peel District School Board*, (HRTO, March 6, 2012), the Human Rights Tribunal (the "Tribunal") issued an Interim Decision regarding an Applicant's allegations of discrimination involving the promotional process of Principals within the Peel District School Board (the "Board").

The Applicant alleged that the Board's failure to promote her to the position of Principal was due to discrimination on the basis of her race, colour, place of origin and ethnic origin and association with *"racialized, minoritized and/or equity seeking groups".*

The promotional process involving the position of Principal entailed:

(1) obtaining experience at two schools serving as Vice-Principal;

(2) obtaining support from the Principal and/or Superintendent who is responsible for the given school; and

(3) *"undergoing a performance evaluation".*

The Applicant stated that she was unable to obtain support from the Principal and/or Superintendent, and that the reason for this was linked to her race as well as to the activities in which she was involved, which activities supported racialized groups.

The Applicant stated that she had been discouraged from transferring schools to gain a second Vice-Principal experience in 2000, and that she was denied *"exceptional case status"* to go through the Principal process upon her request to the Board in 2004. She was advised by the Board's Human Resources Superintendent that the Board would ensure that Principals of any school she was placed in would be aware of her interest and provide her with mentoring, but the Applicant stated that she did not receive any support.

In 2004, the Applicant filed an internal human rights complaint against both the former and new Principals of her school on the basis of discrimination. The Applicant withdrew her complaint, as she stated that she was advised that one complaint was late against one individual and the other individual was ill. She was further advised that she could file a complaint with the Ontario Human Rights Commission (the "Commission").

Upon returning from a pre-arranged, self-funded leave of absence for the 2004-2005 year, the Applicant stated that she was denied her request for support to enter the

promotion process from the Superintendent responsible for the school. The Applicant went on medical leave in 2008.

The Board requested that the allegations of any event before July 2004 be dismissed as they were untimely. The Applicant argued that these incidents were part of a *"series of incidents within the meaning of s. 34(1)"* of the Human Rights Code (the *"Code").* The Tribunal found that these incidents were not a part of a *"series of incidents"* within the *Code* that continued into 2008. The Tribunal stated that the Applicant did not pursue a complaint with the Commission when she was advised that she could do so and that it would be hard to view the individual actions of Principals and Superintendents over time *"as a pattern of conduct".* The Applicant had argued that the failure to support her in the promotional process was *"based on a broader culture at the Board which disadvantaged individuals of her race".* However the Tribunal stated that if this played any role in the decision-making of individuals within the Board, it could be adequately examined through a hearing of the evidence. The Tribunal noted that while it should not encourage Applicants to file *"premature applications by taking a narrow view of a series of incidents"*, it would not be fair to encourage *"expansive litigation about an accumulation of events"* under s. 34(1) *"without good reason".* The Tribunal also acknowledged that evidence of an event prior to July 2004 may be necessary to include for background information regarding a given specific incident.

The Board also asked for the Applicant's claims of *"systemic discrimination"* to be dismissed on the basis that no *prima facie* case had been established within the pleadings and in their view, no causal connection existed between the promotion process and the allegations of discrimination. The Tribunal however, stated that the Applicant's identified components of *"systemic discrimination"* did not seem to be able to proceed independently of the alleged claims of discrimination against herself. The Tribunal thus stated that it could not dismiss the Applicant's *"systemic discrimination"* claims at this stage as the Applicant would be relying on the description of the contextual evidence to establish discrimination against herself under the *Code*. The Tribunal noted that the Board's concern could be dealt with during documentary disclosure, witness statements and preparation for the hearing.

The Tribunal concluded that it could not conclude that there was no reasonable prospect of success of the Applicant establishing that the Board's promotion process violated her rights under the *Code*.

The Tribunal noted it was sympathetic to the Board's concern about the potential prejudice in having to respond to a broad scope of evidence without assessments of relevance and necessity. The Tribunal proposed hearing the evidence in two phases, with the first phase including evidence regarding the Applicant's efforts to obtain support in 2005, 2008 and her allegations of not receiving said support. The Tribunal stated that after hearing such evidence, it would receive submissions from the parties regarding the necessity and relevance for *"broader contextual evidence"* that the Applicant would wish to rely upon.

The challenge for the Board in this case, and for other Boards in similar cases, will be the assimilation of statistics which can meaningfully respond to the allegation of systemic discrimination. A further challenge will be demonstrating that practical anomalies occur without discrimination when there are insufficient minority candidates and demonstrating that the Board has made reasonable efforts to attract candidates who reflect the community of students.

HRTO finds Board did not accommodate disability

The Ontario Human Rights Tribunal (the "Tribunal") in *Fair v. Hamilton-Wentworth District School Board* (2012 HRTO, 350), made a determination on whether the Hamilton-Wentworth District School Board (the "Board") failed in its duty to accommodate the Applicant who alleged that she had been discriminated against in employment on the basis of her disability.

The Applicant was employed with the Board from October 1988 until July 2004, and became a permanent employee in September 1994 in her role as *Supervisor, Regulated Substances, Asbestos*. The Applicant developed anxiety disorder in the Fall of 2001, and was discharged after hospitalization in January 2002. She was subsequently diagnosed with post-traumatic stress disorder and depression, which constituted a mental disability within the *Human Rights Code* (the *"Code").* Her disability was noted by the Tribunal as a reaction to the stressful nature of her employment and the fear of potentially being held personally liable under the Ontario *Occupational Health and Safety Act* in making any mistake.

The Applicant received long-term disability benefits ("LTD") through the Ontario Teachers Insurance Plan ("OTIP"). Although she was not able to return to work, her benefits were terminated two years later when she was deemed *"capable of gainful employment"* through assessment. The Applicant resumed sick-leave benefits through the Board, but her employment was subsequently terminated in July 2004 when the Board did not identify another suitable position for her. The Board did not seek medical information from her during the time she was receiving LTD. OTIP contacted the Board to discuss the Applicant's return to work in April 2003, but the Disability Management Co-ordinator (the "Co-ordinator") did not meet at the time as she felt she did not have enough information regarding the Applicant's limitations and restrictions in order to discuss accommodation.

The Applicant filed a Complaint with the Ontario Human Rights Commission in November 2004, under the *Code* process existing at the time. The Complaint was "caught-up" in the transition process, in the amended *Code*, from the Commission to the Tribunal. The matter was further delayed by motions to amend the Complaint. The matter finally proceeded to a hearing and the Decision was released in February 2012, and is reviewed herein.

At the Tribunal hearing, the Board submitted that the Applicant had failed to provide the Board with medical information regarding her restrictions and limitations until December 2003. The Board had obtained a report from its own physician who had interviewed the Applicant and her treating physician, dated in May 2004. The physician had stated that she would not be able to function in a job involving responsibility for health and safety issues but that she was *"otherwise capable of gainful employment"* and not deemed at the time *"to suffer from psychiatric impairment sufficient to render her totally disabled".* There was indication that the Board was aware of the Applicant's treating physician's opinion as early as July 2003.

The Tribunal concluded that the Applicant had stayed in constant communication with the Board, and provided information promptly when asked. The Tribunal further concluded that the Board did not *"actively, promptly, and diligently"* seek possible solutions to accommodate the Applicant. The Tribunal was careful to note that this analysis was based on the cumulative effect of various matters involved and it was not suggesting that each matter on its own would support this determination.

The Tribunal noted the Board had not been open to canvassing all possibilities in accommodating the Applicant. This included: the Co-ordinator's refusal to meet with the OTIP Vocational Rehabilitation Consultant because the Co-ordinator felt she did not have information about the Applicant's limitations; the Co-ordinator's failure to provide a copy of *"essential duties"* of the Applicant's role as Supervisor when requested by the Applicant; the delay in arranging a meeting at the Applicant's request with the Controller of Plant Services; the Board's failure to seek clarification from the Applicant's treating physician about her capacity to take alternate positions; the Co-ordinator's attempts to influence expert reports (from its expert witness); and, the Controller's non-open attitude to accommodating the Applicant in any other position.

Further, the Tribunal concluded that there were other available positions in which the Applicant could have been placed, even if, as stated by the Board, the Board believed the Applicant could eventually return to her pre-absence position. The Tribunal stated that if the Board truly had any concerns about placing the Applicant in any of the available positions, it should have sought *"clarification from her treating psychiatrist"*.

The Tribunal further noted that the Board led no evidence about its attempt to consider alternative positions after it received the expert's report in May 2004.

The Tribunal held that the Board discriminated against the Applicant on the basis of disability in failing to uphold its duty to accommodate. The parties were left to try to resolve the issue of remedy amongst themselves, and if that was not possible, a hearing on remedies arising from the Decision was to be scheduled.

This decision reiterates the importance of Boards to ensure that they fulfil their duty to accommodate, take all information into consideration, and canvass all possibilities in relation to accommodation as carefully as possible.

Arbitrator confirms 'prep' time cannot be unilaterally eliminated by Boards

In *Avon Maitland District School Board v. ETFO*, [2011] O.L.A.A. No. 473, the Elementary Teachers Federation of Ontario ("ETFO") filed grievances on behalf of a number of teachers alleging that the Avon Maitland District School Board (the "Board") had failed to provide the teachers with their full preparation time in accordance with the Collective Agreement, and required them to attend Professional Learning Community meetings ("PLCs") during their preparation time.

The PLCs that the teachers attended were mandatory and were held approximately eight times a year. Some of these PLCs conflicted with some of the teachers' pre-scheduled preparation time, but the Board had advised the teachers that any preparation time lost as a result of attending the PLCs would not be rescheduled or compensated.

ETFO filed grievances on behalf of a number of teachers on the basis that this violated the 'Preparation Time' provisions of the Collective Agreement, which required the Board to provide 210 minutes of preparation time within each cycle of five instructional days, and that missed preparation time *"shall only be rescheduled where a teacher is required by the principal to provide instruction during his or her scheduled preparation time for a teacher absent from work"*. The Agreement further required this rescheduling to occur as soon as administratively feasible, but no later than three months after the loss of the

preparation time and, in any event, within the same school year.

ETFO argued that the Board could only have teachers mandatorily attend PLCs if it maintained the minimum number of preparation minutes that were contractually provided for within the Collective Agreement. Teachers were entitled to 210 minutes in a five-day period, and ETFO argued that any reduction in this time was a violation of the Teacher Preparation provision as well as the Management Rights provision within the Collective Agreement.

The Board stated that it was generally accepted that school boards could have teachers perform other duties, including attending PLCs, and that such a requirement did not necessarily warrant rescheduling preparation time or providing compensation. The Board argued that the Collective Agreement clearly provided that missed preparation time would only be rescheduled when a teacher was required to replace an absent teacher, by the Principal. The Board made reference to decisions of arbitration awards that resulted in the negotiation of this particular provision within the Collective Agreement. The Board made further reference to an arbitral decision whereby an Arbitrator decided that a Board had not breached the Collective Agreement by cancelling some preparation time and failing to reschedule as a result of professional development activities.

The Board took the position that the "only" time cancelled preparation time had to be made up or rescheduled was if a teacher lost their preparation time to substitute for another teacher on the Principal's request. The ETFO, however, argued that all cancelled preparation time, including cancelled preparation time for PLCs, had to be made up.

The Arbitrator stated preparation time has been a significant issue over the years between teachers, federations and school boards. The Arbitrator stated that the word "shall" with reference to teachers receiving a set amount of preparation time over a five-day instructional period could not be ignored, as it gave effect to the agreement the parties had reached upon bargaining. The Arbitrator stated that if the Board had an *"unfettered right to eliminate preparation time for whatever reasonable reason",* the Board could have included a provision within the Collective Agreement to this effect.

The Arbitrator noted that school boards can instruct teachers to attend PLCs during their preparation times and the Board can also reschedule preparation times. However, in doing any such things, they will be governed by a standard of reasonableness and with consideration of fairness to the employee. In this instance, the Arbitrator ruled that the Board's requirement that the teachers attend the PLCs during their preparation time and then not repaying or rescheduling this preparation time was unreasonable, unfair and in contravention of the Collective Agreement provisions.

This decision is a further confirmation of the importance of preparation time in collective agreements, and the limited parameters for cancelling or reducing same.

Court determines disability benefits subject to grievance process

In *Pawlak v. Public Education Benefits Trust,* [2012] B.C.J. No. 320, the Trustees of the Public Education Benefits Trust (the "Trustees") were successful in their application for an order dismissing the action of the plaintiff Pawlak ("Pawlak") based on a lack of jurisdiction of the British Columbia Supreme Court (the "Court")

since the claim was subject to the grievance procedure in a collective agreement.

Pawlak was a member of the Canadian Union of Public Employees ("CUPE") and was employed with the Delta School District (the "District"), subject to a collective agreement between the District and CUPE. Long-term disability ("LTD") benefits and a grievance procedure were set out in the collective agreement, which also called for the establishment of a Trust to provide benefits to plan members. The Trust was established in 2002 and provided that the Board adopt a Plan Text setting out the benefits to be provided under the Plan, the eligibility requirements and such other terms deemed necessary. The Plan Text was adopted by the Board of Trustees, effective March 1, 2003 and provided for an appeal to the Trustees from a decision by the administrator. The Plan Text contained no reference to the collective agreement's grievance procedure.

Pawlak claimed she became disabled in December, 2007, at which time she filed a disability claim and supplied medical proof of her disability. She received LTD benefits until May, 2010, at which time they were terminated. Pawlak claimed her LTD benefits were terminated *"arbitrarily, wrongfully and without proper authority and in breach of the Plan"*. Pawlak did not appeal the insurer's decision to terminate her LTD benefits to the Trustees, as provided for in the Plan Text.

The issue in this case was whether Pawlak's claim for disability benefits fell within the scope of the collective agreement.

In determining the issue, the Court cited *Paller v. Great-West Life Assurance Co.,* [2003] BCSC 582, in which the Court stated "*Whether a disability insurance plan forms part of a collective agreement … is ultimately a question of the intentions of the parties. Those intentions are discerned by examining the particular collective agreement, the benefit plan, and the applicable labour relations legislation"*.

In this case, the LTD plan was not set out in the collective agreement or attached to it. However, the Court held this was only one indicia of the intention of the parties and not a deciding factor in that regard. The Court held that the intention of the parties to handle disputes regarding the LTD plan under the collective agreement was indicated by several factors.

First, the Plan Text made participation in the LTD program a condition of employment. This was an important factor as such a provision could not properly be contained in the Plan Text unless the parties had accepted and recognized it as part of the collective agreement.

Second, the parties agreed in a 2011 Agreement that disputes over long-term-disability benefits would not be subject to the grievance procedure. This demonstrated that the parties thought the grievance procedure had previously applied to the LTD benefit plan.

Third, the plan itself was created through the collective bargaining process and would not exist without the collective agreement.

As a result, the Court concluded the parties intended the grievance procedure to apply to disputes regarding LTD benefits. Therefore, the Court did not have jurisdiction to hear the dispute as it required grievance arbitration.

This decision demonstrates the principle that grievance arbitration may be found to be the presumed process for employment disputes notwithstanding that the process itself does not officially form part of the collective agreement.

Arbitrator deals with scope of arbitration and disclosure issues

Toronto District School Board v. Elementary Teachers' Federation of Ontario, [2011] O.L.A.A. No. 446, dealt with a motion by the Toronto District School Board (the "Board") in a grievance arbitration dealing with a claim of unjust discipline and discrimination. The Board brought a motion raising preliminary concerns about the scope of the grievances.

The grievor began employment as a teacher with the Board in 2006. In 2007, the grievor was diagnosed with Adult Attention Deficit Hyperactivity Disorder, following which he was seen regularly by a psychiatrist. In July 2008, the grievor advised the Board of recommendations from his psychiatrist for accommodation. Discussions ensued between the grievor and the Board regarding the issue of accommodation. In August 2008, the Board advised the grievor that he was required to undergo an assessment by a physician of the Board's choice, and that he was to remain off work pending the outcome of that assessment. In September 2009, the grievor returned to work. The Union contended that thereafter, the Board only partially accommodated the grievor's disability, that the accommodation was inadequate and inconsistent, and that there continued to be issues regarding the accommodation provided to the grievor.

The grievor filed two grievances. The first grievance, dated December 1, 2008, alleged he was subject to harassment, discrimination, intimidation and bullying by the Principal of his school. The second grievance, dated March 3, 2009, alleged he had been subject to discrimination.

The Board argued the Union was improperly attempting to expand the scope of the grievance by focusing on the matter of accommodation. The Union argued that since accommodation was one of the remedies sought in the grievance, it was properly part of the subject matter of the arbitration.

In rejecting the Board's argument and dismissing the motion, the Arbitrator held that "*while a Board of Arbitration is bound by the written grievance before it, a grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the provisions of the collective agreement.*"

The Arbitrator further held that accommodation was an issue that was encompassed by and flowed naturally from the grievance in this case since the grievance itself requested medical accommodations be set in place on the grievor's return to work. Since the grievance referred specifically to medical accommodation, it could not be concluded that the grievance related solely to returning the grievor to work. Accommodation was clearly an aspect of the Union's claim and it is the content of the grievance, including the remedy requested, that determines the scope of the dispute between the parties.

The grievance filed on behalf of the grievor dated March 3, 2009 specifically referred to a request for accommodation. As a result, the Arbitrator could not conclude that the Union's claim of ongoing failure to accommodate the grievor involved an improper expansion of the grievance.

OLRB deals with reprisal and unfair representation claims

In *Parsons v. Simcoe County District School Board,* [2012] O.L.R.D. No. 39, the Ontario Labour Relations Board (the "OLRB") dismissed two complaints brought

by the applicant Daniel Parsons ("Parsons"). Parsons brought an application alleging unfair reprisals under s. 50 of the *Occupational Health and Safety Act*, (the "OHSA"), as well as an unfair labour practice complaint alleging a breach of the duty of fair representation under s. 74 of the *Labour Relations Act* (the "LRA").

Parsons was a teacher with the Simcoe County District School Board (the "Board"), and claimed he was the subject of harassment by two female teachers ("W.R. and C.D.") who taught alongside him in the science department of a Barrie high school. Parsons claimed he tried unsuccessfully to resolve matters with the teachers on his own, following which he complained to the school's Principal and unspecified officials of the Ontario Secondary School Teachers' Federation (the "Union") who failed to provide him with any assistance. Parsons claimed he was subsequently subject to reprisals with respect to scheduling and course selections.

In September, 2009 Parsons filed a Workplace Objectionable Behaviour Formal Complaint (the "Complaint") with the Board, which was summarily dismissed. In February, 2010, W.R. and C.D. filed a Complaint with the Board against Parsons, which resulted in a finding that Parsons engaged in behaviour that might reasonably be known to be unwelcome, and a one-day unpaid suspension was imposed. The Union filed a grievance on behalf of Parsons in October 2010, challenging his suspension and requesting removal of the discipline from his file. Parsons was ultimately reimbursed for the one day of wages and the suspension was removed from his file.

The Board transferred Parsons to a different school during the course of the 2010-2011 school year. Parsons claimed this transfer also constituted a reprisal for having made the Complaint against W.R. and C.D. He further claimed that the Union did nothing about the transfer, but failed to demonstrate he requested the Union's assistance.

In response to Parson's allegation that he had been the subject of unlawful reprisals because he complained of harassment by his co-workers, W.R. and C.D., the Board argued that it has no jurisdiction to make a finding of reprisal based upon an allegation of workplace harassment.

In dismissing the s. 50 OHSA Complaint, the OLRB concluded that it was unnecessary to comment on the jurisdiction of the Board to deal with the matter since the conduct Parsons complained of did not constitute workplace harassment.

Parsons complained of conduct including: the teaching methods and style of W.R.; W.R. allegedly spreading gossip about another teacher; W.R. and C.D. confronting him or declining his suggestions regarding departmental issues; and, W.R. shouting at him once in the course of a meeting.

The OLRB concluded that none of these complaints amounted to the definition of workplace harassment under the OHSA, namely *"a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcom*e." The OLRB held that, at best, the instances may indicate a personality conflict between Parsons and W.R., the kind of problem that *"can and should be resolvable as between adult professionals".*

As a result of finding no workplace harassment, Parsons had no case for relief under the OHSA and the application was dismissed.

In dismissing the s. 74 LRA complaint of unfair representation, the OLRB noted that Parsons consulted with the Union several times and followed their recommendations in dealing with the inter-personal conflict he

was experiencing. The Union turned its mind to the issues raised by Parsons and tried to be of assistance, including filing a grievance on his behalf to challenge the unpaid suspension he had received. The OLRB also considered the issue of the school transfer, noting that the Union had considered filing a grievance on behalf of Parsons but in the circumstances decided not to do so. The application did not disclose any violation of s. 74 of the LRA for unfair representation.

This decision reflects the difficulty of multiple applications. The OLRB deals with a variety of similar applications which involve both a Board and the Union.

Arbitrator confirms class size reports not arbitrable

In *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn. (Class Organization Grievance)*, [2012] BCCAAA No. 112, the Arbitrator allowed an objection by the British Columbia Public School Employers' Association ("BCPSEA") to a grievance regarding class size and organization brought by the British Columbia Teachers' Federation ("BCTF").

The BCTF lodged a grievance regarding class size and organization, alleging that a school superintendent's class organization report for 2010 was not in compliance with the class size requirements under s. 76.3(3) of the *School Act*. The BCTF sought to use grievance-arbitration to assert its interpretation of the obligation of superintendents under the *School Act* to prepare annual class organization reports to be submitted to boards of education each October.

The BCPSEA objected to the matter being subject to grievance arbitration. It was their position that the superintendent's reports to boards of education were not under the jurisdiction of a collective agreement and therefore not subject to grievance arbitration.

The issue for the Arbitrator to determine was therefore whether a grievance asserting a superintendent's failure to comply with s. 76.3(3) of the *School Act* is subject to arbitration under the collective agreement.

This grievance was not the first on the topic of class size and organization, or the arbitrability of school superintendents' reports failing to fulfil legislative requirements. In 2010, the BCPSEA was successful in objecting at arbitration that this subject matter was not within the jurisdiction of grievance-arbitration (*British Columbia Public School Employers' Association,* [2010] BCCAAA No. 186). In that Decision, the Arbitrator set out a two-part test to determine which provisions in the statutory scheme are under the jurisdiction of arbitration and which are not, stating:

"is the statutory provision a significant part of the employment relationship? Second, applying a flexible and contextual approach, is there a real and contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement?"

The Arbitrator concluded that s. 76.3(3) of the *School Act* did not meet the test and that matter was therefore not arbitrable.

In reconfirming the principles set out by the Arbitrator in that Decision and finding the grievance in this case was not arbitrable, the Arbitrator considered the submissions of both the BCTF and BCPSEA. The BCPSEA argued that the Arbitrator's decision was determinative on the issue as he concluded the required contextual

connection did not exist as between s. 76(3)(3) of the *School Act* and the collective agreement. The BCPSEA further submitted that no collective agreement provision had been violated, nor had their been an allegation of a violation of the collective agreement; that the *School Act* is not an employment-related statute and that s. 76.3(3) in particular is a process provision and not an employment provision, and; that the BCTF claim relates to the content of the reports, which is not an employment matter but an internal process which has never been the subject of collective agreement.

The BCTF argued that it was seeking only to have superintendents comply with their statutory obligations under the *School Act* and that the Arbitrator's decision was incorrect and cannot be determinative of the jurisdictional issue because the dispute is about statutory interpretation, not a negotiated provision of an agreement, and therefore requires a review using the standard of correctness. The BCTF further submitted that the reports contained a substantive term and condition of employment for teachers, therefore falling within the jurisdiction of grievance-arbitration.

The Arbitrator held that *"superintendent class organization reporting to boards of education is fundamentally an organizational and governance process."* While of interest to the BCTF, the superintendent class organization report was not a condition of employment for teachers, nor did it have an implicit or express connection to the collective agreement. Therefore, the sufficiency of the superintendent's 2010 class organization report under s. 76.3(3) of the *School Act* was not a subject matter within the jurisdiction of grievance arbitration.

Court confirms termination of bus driver

In *Giza v. Sechelt School Bus Service Ltd.*, [2012] B.C.J. No. 37, the British Columbia Court of Appeal (the "Court") considered the legal effect of an employer's termination of an employee's contract with inadequate notice, as well as the effect of the employee's failure to work during the notice period given.

The appellant, Giza ("Giza"), was a bus driver employed by the respondent Sechelt School Bus Service Ltd. ("Sechelt") from September 2004 to September 2009. On September 30, 2009, Sechelt terminated Giza's employment by leaving a notice of termination, among other things, on the seat of the bus Giza was to drive. The notice provided that Giza would receive five weeks notice as compensation. Giza read the letter, drove the bus back to Sechelt's bus terminal and left work permanently.

The Trial Judge held that five weeks notice was inadequate, but that Giza had repudiated his employment contract by failing to work throughout the notice period and was therefore not entitled to damages.

In allowing the appeal, the Court agreed that the five-week notice period was inadequate but held that an inadequate notice period does not result automatically in constructive dismissal. The Court further held that failing to work during the notice period did not mean that Giza lost his entitlement to reasonable notice or damages in lieu thereof.

An employee terminated with notice is required to work during the notice period. Whether an employer's conduct amounts to constructive dismissal is a question of fact which must be resolved on the evidence of the circumstances of each case surrounding the terms of the notice.

In this case, Sechelt and Giza engaged in discussions regarding Giza's conduct and attitude, and discussions regarding a proposed wage increase. The Trial Judge preferred the evidence of Sechelt that there was no specific date by which Sechelt had agreed to a wage increase, that the decision to terminate Giza was based on an accumulation of problems, and that the termination letter left for Giza was intended to be working notice. The Court agreed with and gave deference to the Trial Judge's finding that the evidence did not support a finding of constructive dismissal. Further, the fact that Sechelt hired a bus driver on a temporary basis during Giza's notice period suggested it kept open Giza's opportunity to work.

The Court held that despite Giza repudiating the employment contract by failing to work during the notice period, he was entitled to damages for the respondent's breach of contract in giving him inadequate notice. Repudiation of the contract does not affect the rights and obligations that have accrued under that contract to the time of repudiation. In this case, Giza's right to damages in lieu of reasonable notice accrued at the time he was given inadequate notice. His repudiation did not remove his right to damages in lieu of reasonable notice, nor did it remove Sechelt's right to Giza's services as a bus driver during the notice period given.

The Court held that the period of reasonable notice for which damages could be recoverable was the period of reasonable notice to which Giza was entitled, less the period of notice actually given during which Giza should have worked and been paid.

A review of reasonably comparable case law indicated the range of notice would be somewhere between 3 and eleven months. In this case, Giza was 61 years of age at the time of termination. He had been employed by Sechelt for 5 years and had previously worked as a professional forester. Giza had little success in obtaining alternate employment. The Court concluded a reasonable notice period in this case would have been 6 months.

To calculate damages, the Court had to deduct the period of actual notice during which Giza could have worked and been paid from the 6-month reasonable notice period. The appropriate damage award was therefore calculated based on a notice period of 5 months times Giza's monthly rate of pay at the time of termination.

The Court applied generally accepted principles to the facts of the employment termination. Of note is the fact that the school bus company is the employer and responsible and not the school board.

Tribunal confirms bus driver not Board employee

In *Jurek v. Rocky View School Division No. 41*, [2012] AHRC 6, a preliminary matters decision of the Alberta Human Rights Tribunal (the "Tribunal"), the Tribunal dismissed the complaint of Charles Jurek ("Jurek"), holding that the Rocky View School Division No. 41 was not Jurek's employer and could therefore not be named as a respondent in the Complaint.

Jurek was a school bus driver employed by Southland Transportation Limited ("Southland"), which contracted with various school boards, including Rocky View School Division No. 41 (the "School Division"), to provide transportation services. Southland's contract with the School Division provided that Southland would abide by the School Division's policy that school bus drivers transporting students in the School Division's territory must be under 66 years of age as of September 1st of the school year.

In January, 2007, Jurek filed a complaint with the Tribunal against Southland alleging discrimination in the area of employment practices on the basis of age. Jurek alleged he was discriminated against as he was prohibited from bidding on Southland's bus routes under the jurisdiction of the School Division as a result of his age. In January, 2009, the Complaint against Southland was dismissed as Southland had accommodated Jurek in his employment by assigning him to bus routes other than those under the School Division's jurisdiction and where there was no such age restriction.

Jurek then filed this Complaint against the School Division again alleging age discrimination in the area of employment, and specifically alleging that the School Division's age policy was discriminatory and, as a result, he was not permitted to bid on the bus routes under their jurisdiction.

Since Jurek was alleging discrimination in the area of employment, the preliminary issue arose as to whether the School Division was Jurek's employer.

In deciding this issue, the Tribunal relied heavily on the principles set out by the Alberta Court of Appeal in *Lockerbie & Hole Industrial Inc. v. Alberta (Human Rights and Citizenship Commission, Director)*, 2011 ABCA 3 ("Lockerbie"). The Tribunal noted that, pursuant to *Lockerbie*, Jurek bore the onus of establishing that the School Division was his employer. Further, establishing an employment relationship with the School Division required a consideration of several criteria outlined in *Lockerbie* and an application of the criteria to the facts using a contextual approach.

The Tribunal first applied the *Lockerbie* criteria and determined that Southland clearly had employer status. Factors leading to this finding included that Jurek was hired and paid by Southland; that Southland established rules and responsibilities applicable to all drivers (including scheduling, work assignments, vacation, maintenance, and discipline); that Southland continuously referred to the School Division as an entity with which it contracted; and that Southland bore the financial burden for meeting the requirements of school bus contracts, including the contract with the School Division. The Tribunal also held that Jurek's initial complaint against Southland for age discrimination in employment practices, as well as Southland's subsequent accommodation of Jurek, supported the conclusion that both parties perceived Southland to be Jurek's employer.

The Tribunal then turned to the issue of whether the School Division could be considered a co-employer of Jurek based on the *Lockerbie* criteria. The Tribunal held that the required nexus to establish a party as a co-employer was absent as there was no contractual relationship between Jurek and the School Division. Southland had agreed to provide a service to the School Division on a contractual basis, and it was Southland and not the School Division that directed Jurek's work. The employment relationship could therefore not be stretched to include the School Division as Jurek's co-employer.

Although the facts of this case did not warrant a finding of the School Division as a co-employer, the Tribunal noted that "*this does not mean that with a different set of facts, perhaps even similar facts, an entity appearing to operate at arm's length might not be regarded as an employer*".

This Decision is important for boards in Ontario with a third-party transportation provider.

— KC LLP —

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Human Resources Newsletter

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