School Board Update

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HICKS MORLEY NEGOTIATION SUPPORT SERVICES

Did you know that more than a dozen lawyers in our School Board group have extensive experience in advising boards in their various collective agreement negotiations? We have been extensively involved in the various 2008 PDT processes, particularly as they have related to provincial teacher issues and the early termination of support staff agreements. We are equally up to date with the current arbitral case law and legislative changes. Whether it involves acting as your spokesperson, providing advice in the caucus room or over the telephone or crafting language to meet your local needs, we have the experience and expertise necessary to provide the legal support you require. If you would like more information concerning our negotiation support services, please call your regular Hicks Morley lawyer.

HUMAN RIGHTS TRIBUNAL OF ONTARIO DEFERS TO SPECIAL EDUCATION TRIBUNAL

BY: HICKS MORLEY

In a decision which should prove to be extremely helpful to school boards, the Human Rights Tribunal of Ontario (HRTO) has held that it will not “re-try” issues which have been previously determined by Ontario’s Special Education Tribunal.

In the case of *Human Rights Commission and Campbell v. Toronto District School Board* (2 September 2008, HRTO), a parent brought a human rights complaint against the TDSB while at the same time formally appealing the Board’s IPRC decision to change her son’s placement from a regular class to a special education class. In her human rights complaint, the mother alleged that the Board had discriminated against her son by failing to provide him with certain special education services and by changing his placement from a regular class to a special education class.

The mother’s special education appeal proceeded to a Special Education Tribunal (“SET”) where she made the same allegations as those set out in her human rights complaint. The SET found that the Board had provided the services in question to the student. The SET also concluded that the placement in the special education class would be in the student’s best interests.

The mother’s human rights complaint took several years to process. The Ontario Human Rights Commission ultimately

decided, notwithstanding the SET's decision, to refer the Complaint to the HRTO for adjudication.

The TDSB objected to the attempt by the Commission and the parent to relitigate issues which had already been determined by the SET. The TDSB's argument in support of the objection was two-fold. It argued first that it was an abuse of process for the HRTO to re-try issues which had been litigated and determined by another tribunal. Second, the TDSB argued that Rule 45.1 of the HRTO's rules of practice applied. This rule states that "The Tribunal may dismiss an application, in whole or in part, in accordance with its rules, if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application."

The HRTO accepted both of the arguments made by the School Board and declared that it would not permit the Commission and the parent to relitigate the issues which had already been determined by the SET. The HRTO was clearly not prepared to become a forum for parents to get a "second kick at the can" where they have not been successful before the SET, unless exceptional circumstances exist which would justify this. It should be noted that the Human Rights Commission has asked the HRTO to reconsider its decision in this matter.

The case may well serve as a precedent beyond the special education context. For example, in the labour context, a grievor whose grievance claiming discrimination has been dismissed by an arbitrator may find, if he then tries to bring the matter before the HRTO, that the HRTO will decline to permit the matter to be relitigated, absent exceptional circumstances.

If you have any questions regarding the issues raised in this case, contact your regular Hicks Morley lawyer.

OCCASIONAL TEACHER TIMETABLES

BY: CAROLYN KAY

Many boards will recall the provincial strategy of the Elementary Teachers' Federation back in 2004 to negotiate "same timetable" language into collective agreements covering occasional teachers. While several boards agreed to language that entitled an occasional teacher to follow the exact timetable of the teacher being replaced, including preparation periods, a number of boards resisted that position. Trillium Lakelands District School Board was one such board.

In a recent arbitration involving Trillium, ETFO argued that the Board violated the collective agreement when it called in occasional teachers and assigned those teachers to perform on-calls during what would have been the preparation periods of the teachers initially being replaced. Although the language agreed to in the 2004 round of bargaining was not the model language tabled around the province, ETFO argued that the effect of the language was nonetheless the same.

The decision turned primarily on the meaning of the following statement agreed to in collective bargaining: "It is understood by the parties that the responsibility of the Occasional Teacher is to fulfill the teaching and supervisory duties of a teacher being replaced." ETFO argued that that language was akin to the "same timetable" language that it had negotiated elsewhere in the province.

Arbitrator Mary Ellen Cummings disagreed and dismissed the grievance. Although both parties called evidence of negotiating history, the Arbitrator ultimately found the evidence to be of no probative value, particularly since the agreed-upon language came about at the end of a conciliation meeting where the parties were never actually face to face. As a result, it could not be said that the parties had reached a mutual understanding as to what the collective agreement language meant.

In her Award (released August 2008), Arbitrator Cummings relied heavily upon the ETFO's acknowledgement that a principal has wide discretion in deciding whether to call in an occasional teacher at all, for an entire day or for part of a day. As a result of the shared understanding that a principal is not required to replace an absent teacher on a "one for one" basis, the Arbitrator ruled that the language in question "strongly suggests that more than one teacher could be replaced by the occasional teacher". The principal was entitled to make assignments over the course of the day to meet the school's needs and the Board's statutory obligations.

This decision highlights the limits that negotiating history may have on the interpretation of collective agreement language and reinforces the reluctance of arbitrators to fetter management rights in the absence of clear and unambiguous language.

If you would like more information regarding this award or the "OT replacement issue", please contact Carolyn Kay (***416.864.7313***) *who successfully represented the TLDSB in this matter, or your regular Hicks Morley lawyer.*

DUTIES OF PRINCIPALS

BY: DOLORES BARBINI

In these challenging times, boards have had to rethink how they deploy administrative staff within their system. The duties of principals have been the subject of recent litigation involving two different issues.

CENTRAL POSITIONS

The first issue concerns the ongoing debate as to whether principals can be assigned central or system-wide duties. Boards have unsuccessfully asserted the ability to create such central positions in *Re Huron Superior Catholic District School Board and OECTA* (2000, Shime), *Re Algonquin and Lakeshore Catholic District School Board and OECTA* (2005, Watters) and *Re Dufferin Peel Catholic District School Board and OECTA* (2006, Charney). In the first two cases, the arbitrators relied upon the narrow definition of "principal" in the *Education Act* to conclude that the positions in question belonged to the teacher bargaining unit.

In the third case, Arbitrator Charney came to the same result, but by applying a more traditional labour relations analysis, concluding that the central position was not managerial in nature and therefore could not be excluded from the bargaining unit. Mr. Charney specifically found that the Special Education Program Principal in question did not spend "any significant time managing teachers" and that her core duties were similar to those of the bargaining unit's "coordinator" position. This decision has been upheld on judicial review and therefore its reasoning should still leave open the possibility for an excluded central principal position, provided that the core duties are managerial in nature.

This issue has now been arbitrated for a fourth time, but involving a slightly different twist. In *Re Ottawa Carleton Catholic District School Board and OECTA* (26 August 2008, Goodfellow), the school board argued that amendments to the *Education Ac*t had narrowed the definition of "teacher", thus restricting the scope of the statutory bargaining unit to the traditional group of classroom teachers "employed *to teach*". The school board argued that it could therefore create excluded, system-wide positions that did not involve the narrow statutory teacher duties.

In an interim ruling, Arbitrator Goodfellow quickly rejected this argument, refusing to attribute such a significant meaning to a rather subtle change in the legislation. He also pointed out that even traditional "coordinator" bargaining unit positions would be excluded under this interpretation. It should be noted that the case has not yet concluded, and it remains open to the Board to argue that, pursuant to the *Dufferin Peel* approach, the position should be excluded on the basis that it is managerial in nature.

PRINCIPALS AS TEACHERS

The flip side of the issue (i.e. the extent to which a principal can teach) has also recently been arbitrated. In *Re Superior-Greenstone District School Board and ETFO* (30 July 2008, Raymond), the Board decided to alter the assignment of the administrators in six of its elementary schools by including a specified amount of teaching. This reassignment led to a teacher being declared partially redundant in each of the schools. ETFO argued that the Board was not allowed to erode the bargaining unit by displacing teachers in this manner.

Arbitrator Raymond rejected this argument and allowed the Board's reassignment as a matter of straightforward statutory

interpretation. Section 287.1 of the *Education Act* clearly allows principals and vice-principals to *"perform the duties of a teacher despite any provision in a collective agreement"*. Moreover, the arbitrator saw no conflict with the redundancy provisions in Regulation 90/98 because no administrators were in fact declared redundant; their hours were simply reduced. The Arbitrator went so far as to state that there was nothing that the Federation could have bargained that would have prevented the Board from being able to make these reassignments.

School boards should find this decision helpful, particularly if they are being forced to assess the redeployment of staff.

If you have questions regarding this issue, contact your regular lawyer.

BURDEN OF PROOF IN DISCHARGE CASES

BY: HICKS MORLEY

When an employer discharges an employee for misconduct, the employer bears the onus of proving that it had "just cause" to do so if the discharge is challenged at arbitration. While arbitrators have long accepted that the civil standard of proof, known as the "balance of probabilities", is the standard the employer must meet, there has been a difference of opinion about the level and quality of the evidence an employer must establish in order to prove its case to this standard. A recent decision of the Supreme Court of Canada has now settled this issue.

In proving a discharge case, the onus of "balance of probabilities" requires an employer to demonstrate that it is "more likely than not" that the alleged misconduct occurred. Where the misconduct is proved on a balance of probabilities, the employer has met its onus and the burden shifts to the union to demonstrate that discharge is not an appropriate penalty in the circumstances.

However, some arbitrators have, for decades, not accepted a strict application of this civil standard. Instead, they have chosen to apply a "sliding scale" of probabilities in which the employer's evidentiary burden increases in keeping with the seriousness of the alleged misconduct. In other words, it was the expectation of some arbitrators that an employer must lead evidence establishing a higher degree of probability that the misconduct occurred where the alleged offence was, for example, theft, fraud or sexual harassment rather than where the allegation of misconduct was based on a less morally-culpable act such as negligence.

The "sliding scale" assessment of evidence has been frustrating for employers because, from a practical perspective, it effectively voided the civil standard of proof in cases where the alleged misconduct was potentially criminal or quasi-criminal. In its place, some arbitrators have imposed an onus approaching the criminal standard of "proof beyond a reasonable doubt". This has created a considerable amount of uncertainty about the requisite level of evidence an employer must establish in order to justify its decision to discharge an employee for serious misconduct.

On October 2, 2008, the Supreme Court of Canada released a decision in a civil appeal which definitively resolves this issue. In *F.H. v. McDougall*, the Court has expressly rejected the intermediate or "sliding scale" of the civil standard of proof, stating: "…it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities."

While the decision arose in the context of civil litigation (involving an alleged sexual assault), the Court's rationale applies to the concerns that have arisen for employers in labour arbitration. In particular, the Court recognized the practical problems created by the existence of an intermediate standard of proof between the civil standard and the criminal standard. Simply put, there is no objective way of scrutinizing evidence differently depending on the seriousness of the allegations at issue. In the Court's view, the only way a trier of fact in a civil or arbitral context may reach a factual conclusion is to decide whether it is more likely than not that the allegation occurred as a matter of fact.

If you have questions regarding this issue, please feel free to contact your regular Hicks Morley lawyer.

ACCOMMODATION OF RELIGIOUS HOLIDAYS

BY: HICKS MORLEY

With the increasing diversity of Ontario workplaces, employers (including school boards) are now called upon to accommodate an increasingly diverse array of religious holidays. While many employees request only one or two days of religious leave in a year, others may request 10, 15 or more days of leave. Accommodating these diverse needs can be a challenge, but it is not an insurmountable challenge. We have reviewed below two recent decisions which provide some helpful guidance to school boards in managing this complex and sensitive issue.

Many times when an employer receives a request for religious leave, there will be no reason to doubt the legitimacy of the request. However, when there are questions about the legitimacy of the need for leave, it may be difficult to determine how far to go in questioning the employee about his or her religious needs. This issue was addressed in a recent school board arbitration case, *Re York Region District School Board and OSSTF, District 16* (11 August 2008, Tacon).

The school board had developed an electronic process for dealing with requests for religious leave. The process included a “drop-down menu” of presumptively legitimate “significant faith days”, which included several of the more widely-known religious holidays. Employees who requested leave for a religious holiday which was not on the menu were required to prove the legitimacy of the need for leave.

Arbitrator Tacon held that if an employee has a sincerely held belief which has a connection to religion and honestly believes it is obligatory or customary to observe a religious holiday, then the employee should be considered entitled to religious leave. The employee’s belief need not be supported by official religious dogma or the position of religious officials in order for the request for leave to be legitimate.

At the same time, she agreed that an employer is not required to “blindly accept” requests for religious leave for days on which members of the employee’s faith are not generally required to refrain from working. The Arbitrator noted that “[w]hile the religious beliefs of individuals may well be personal and private, in each instance, the claimant has … to prove his/her claim”. Accordingly, Arbitrator Tacon endorsed the school board’s practice of treating leave requests for the “significant faith days” for the various religious faiths as presumptively legitimate, and accepted the Board’s practice of requesting further information from the employee in other cases to verify the legitimacy of the need for leave.

Another issue which has come up recently in several different employment contexts concerns pay for religious leave. Since 1996, the Ontario Human Rights Commission’s *Policy on Creed and the Accommodation of Religious Observances* has stated that employees who are members of religious faiths, other than Western Christian faiths, are entitled to two paid days of religious leave to parallel the statutory holidays on Christmas Day and Good Friday, unless the employer can establish that providing two paid days of leave would cause undue hardship.

In *Markovic v. Autocom Manufacturing Ltd.,* 2008 HRTO 64, the Human Rights Tribunal of Ontario held that, contrary to the Commission’s *Policy,* there is no blanket requirement to provide two days – or any number of days – of *paid* religious leave. Vice-Chair Sherry Liang concluded that an employer’s obligation under human rights legislation is to design its workplace standards or policies in a way that recognizes and accommodates religious differences between employees. This can be done by rescheduling work assignments in ways which allow employees to avoid loss of pay. She held that, “where available, adjustments to work schedules provide an appropriate accommodation at least partly because they do not require an alteration of the essential employment bargain” (that is, “the exchange of services for pay”).

In the school board context, accommodation through scheduling changes may be more difficult because of the fixed school calendar and the reality that teaching staff are not as interchangeable as employees in some other workplaces. Accordingly, a school board must consider whether it has an obligation under a collective agreement or as a result of its past practice to provide leave with pay. If there is no such obligation, or the employee has already exhausted his or her entitlements to compensation for the leave, the board may consider providing unpaid leave. With its strong emphasis on maintaining the

integrity of the employment “bargain” of services in exchange for pay, and its rejection of the notion that there is a general requirement to provide paid religious leave, the *Autocom* decision strengthens the argument that unpaid leave may be appropriate in such a case.

At the time of this writing, Brenda Bowlby, who acted for the York Region DSB in the case described above, is awaiting a further school board decision for a different board concerning the “two paid days” requirement articulated in the Commission’s Policy.

TPA ARBITRATION AND MOTION FOR NON-SUIT

BY: COLIN YOUNGMAN

In a recent discharge arbitration concerning teacher performance, the OSSTF sought, *before* calling any witnesses, to overturn the termination on the basis of procedural defects in school board’s performance appraisal and disciplinary process.

The Toronto District School Board had already completed 24 days of evidence, having introduced extensive facts regarding the teacher’s performance and the process that ultimately lead to the termination of employment. Following the conclusion of the Board’s evidence, OSSTF attempted to bring a “motion for non-suit”. A non-suit is an argument that the party bearing the onus of proof (in this case the TDSB) has failed to present enough evidence to meet its onus. Where successful, the party bringing the non-suit motion wins outright and is relieved of the need to call any evidence of its own. Traditionally, where arbitrators have been asked to consider non-suit motions, they have obliged the moving party to agree not to call any evidence if they are unsuccessful. For this reason, non-suit motions are typically regarded as a risky strategy.

In this case, OSSTF sought to reserve its right to call evidence should the motion for non-suit fail, arguing that it should be permitted to base its challenge on admitted aspects of the TPA process. The Board resisted OSSTF’s right to bring a motion for non-suit and then call evidence should the motion fail.

In a decision released October 3, 2008, Arbitrator Pamela Picher reviewed much of the jurisprudence on the subject and decided that OSSTF was only entitled to bring the motion for non-suit if it elected to not call any evidence in the case. The Arbitrator agreed that, even if procedural defects existed, the Board was entitled to argue that the deficiencies in the teacher’s performance were such that the termination should stand. Furthermore the arbitrator found that the OSSTF would gain an unfair advantage if it were able to first argue a non-suit and, if unsuccessful, then continue with its case, having already heard the Board’s full argument on the merits of the termination.

If you have questions regarding the non-suit procedure, please feel free to contact your regular Hicks Morley lawyer.

SCHOOL SECURITY AND OFFICE STAFF

BY: MICHAEL HINES

In a decision released on October 6, 2008, Arbitrator Robert Herman has provided helpful guidance to school boards who wish to change the duties of support staff workers in response to the availability of new technology.

Historically, elementary school secretaries in the Toronto District School Board had been responsible for “meeting and greeting” visitors to the school – indeed, that was an express component of their job description. In response to growing safety considerations, the TDSB decided to install security cameras and “buzzers” at the main entrances to many of its elementary schools. These were connected to monitors located in the head office. The new security system also involved an intercom which allowed visitors to communicate with the head office. All other doors to the school were locked during the school day.

The initial responsibility for the use of the new system and for assessing requests for access to the school was given to the school's secretarial staff. CUPE grieved, arguing that this new task differed from the former process of "meeting and greeting" in that school secretaries would now be responsible for determining whether or not the visitor obtained access to the premises at all. CUPE argued that it was unfair to place such decision-making authority on the shoulders of those employees, claiming that the responsibility should be given either to in-school administrators or to "safety monitors" (an existing classification within the TDSB's secondary school support staff workforce).

The TDSB pointed to the "meet and greet" component of the job description, saying that the grievance simply described an old function being performed in a new, modern way. It pointed as well to the "performs other duties as assigned" component of the job description and a provision in the collective agreement that stated that such clauses were to be interpreted as meaning "other *related* duties as assigned". Arbitrator Herman accepted that there had been a qualitative change in the function formerly required of the office staff, based upon the new kinds of decisions they were being asked to make. However, he observed that even in the absence of collective agreement language, employers are free to assign new duties to employees, provided they are reasonably related to their normal job functions. In the TDSB context, he accepted that the new functions were clearly "related" to the original job description, and so were unobjectionable, particularly when (as before) the office staff could always obtain guidance from an administrator (or designate) in doubtful cases. Any incremental increase in responsibility or workload could be addressed in negotiations.

If you are facing issues regarding the implementation of new technologies or job duties, please contact your regular Hicks Morley lawyer or Michael Hines *(416.864.7248), who represented the TDSB in this case.*

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