School Board Update

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ETFO BARGAINING SUPPORT

Public district school boards have less than a month in which to reach PDT-compliant settlements with ETFO. As you may be aware, lawyers from Hicks Morley have been directly involved in the negotiating process to date, at the level of Provincial discussions, as spokespersons at ETFO tables and supporting board negotiators by providing behind-the-scenes advice. We appreciate that the process can take place around the clock, and we are more than willing to assist you in your negotiations, whatever your needs may be. If you would like to establish a point of contact regarding your ETFO negotiations, please call your regular Hicks Morley lawyer.

PAID RELIGIOUS LEAVE

In the recent case of *Toronto District School Board and CUPE* (December 10, 2008), Arbitrator Kevin Whitaker has provided very helpful guidance to Boards in the area of religious leave. In addition, he has characterized the duty of accommodation in a manner which emphasizes the obligation of employees to work in order to receive compensation.

The grievor in this case was an ESL instructor. He felt obliged by his religion to observe a number of non-Christian holidays. The Board provided him with unpaid leaves of absence in order to accommodate his beliefs. The grievor observed that a number of Christian holidays (Christmas, Good Friday and Easter Monday) were paid holidays, and that Christian observers lost no paid time from work by observing them. He asked for paid leave of absence for his holy days.

Arbitrator Whitaker treated the matter as one of accommodation. He stated as a general principle that the duty of accommodation was never intended to alter fundamental aspects of the employment relationship. He then accepted that the most fundamental aspect of the employment relationship is the notion of being paid for work performed.

In this case, the desired accommodation would result in pay for work not performed. Moreover, if the grievor's request was granted, he would receive the same amount of pay as those who did not observe his holy days while working on considerably fewer instructional days.

Arbitrator Whitaker agreed that if the Board could have feasibly rescheduled the grievor's workload so as to allow him to make up the days lost to his observances, it would have been obliged to do so. However, given the inflexible scheduling

demand Brenda J. Bowlby's inherent in the grievor's job as an instructor, this could not have been done without undue hardship. Accordingly, the grievance was dismissed.

Brenda Bowlby successfully defended the TDSB in this arbitration.

MANAGEMENT'S RIGHTS

In *Halton Catholic District School Board v. OECTA*, released on February 17, 2009, the Divisional Court has strongly re-affirmed the rights of school boards to require teachers to perform duties that are not expressly identified in either the *Education Act* or the Collective Agreement.

The dispute involved the workload of Special Education Resource Teachers ("SERTs") as it related to monitoring the overall progress of special education students whom the SERTs did not actually teach. OECTA took the position that this monitoring function constituted "instruction", and so counted toward the contractual instructional time obligations of the SERTs.

The Arbitrator disagreed, but also rejected the Board's position that "monitoring" was properly characterized as "preparation time". Since the function was neither instruction nor preparation (nor "supervision", the final function specifically recognized in the Agreement), he held that the Board had no authority to assign the work at all.

The Board took the matter to judicial review. The Divisional Court accepted OECTA's submission that the Award could only be overturned if it was clearly unreasonable, but nevertheless held that this exacting standard had been met. The Court found the Arbitrator's management's rights analysis to be "so fundamentally flawed as to fall outside an intelligible line of reasoning".

In reaching this conclusion, the Divisional Court adopted an analysis put forward in 1975 by the Supreme Court of Canada in the *Winnipeg Teachers* case**,** breathing fresh life into a decision that teacher federations have characterized as out of step with current labour relations realities. The Divisional Court said that one should not treat the Collective Agreement as a statement of the totality of the teacher's activities and obligations:

"The reasonable expectation of the parties … is that the board will manage and the teachers will teach, performing all of the obligations that the profession entails from time to time within the particular environment…"

If you have any questions regarding this decision, contact Michael Hines *who successfully argued this case before the Divisional Court.*

JOB QUALIFICATIONS OF TEACHERS

The case of *Algoma District School Board v. ETFO* (October 7, 2008) should prove helpful in affirming a Board's right to hire the teachers of its choosing for vacant positions. The grievor, an occasional teacher, applied for a permanent .5 Junior Kindergarten position. The grievor was a qualified teacher but did not possess a university degree (having received her accreditation in 1970). On the basis of her lack of a degree and some performance-related issues, the Board did not hire her for the position, but rather awarded the position to an unqualified candidate employed as an Early Childhood Educator. The grievor and the successful applicant were the only applicants for the position.

Ultimately, the Board did not receive the required Letter of Permission for the individual hired because there was an available (if unacceptable) teacher willing to take the job. Rather than repost the position, where the grievor would be the only applicant, the Board combined the Junior Kindergarten class with the Senior Kindergarten class so that no vacancy existed. ETFO grieved on the basis that the grievor, as the only qualified applicant, was entitled to the job and that combining the positions to prevent the grievor from applying was improper.

Under the Occasional Teacher Collective Agreement, the grievor had no rights with respect to vacant permanent positions and therefore had no greater right to consideration for a permanent teaching assignment than an external applicant. Although Arbitrator Barry Stephens found in this circumstance that hiring an unqualified applicant breached the Letter of Permission provisions of the *Education Act*, he found that there was no remedy available to ETFO under the Occasional Teacher agreement.

With respect to rejecting the grievor's initial application, the Arbitrator found that the Board was entitled to consider the grievor's work record and lack of degree since both issues bore a reasonable connection to the job. Similarly, with respect to combining the classes rather than reposting the .5 position, the Arbitrator found that this option was available to the Board. Importantly, the Arbitrator found that in a circumstance where the only qualified teacher applicant is unacceptable to a Board, it is not compelled to hire that applicant but may implement other options.

If you would like to discuss this case, please contact Lynn Thomson *of our Ottawa office who successfully represented the Algoma District School Board in the matter.*

UNION DUES

Employees often fill temporary positions outside of their bargaining unit, while still maintaining some rights under a Collective Agreement, such as the accrual of seniority and the right to return to the bargaining unit. In a recent case (released January 12, 2009) involving the CUPE bargaining unit at the Toronto District School Board, Arbitrator William Kaplan found that in these situations, union dues are not owing to the Union and should not be deducted from the employee.

Under the Collective Agreement, the employees were considered to be on an unpaid leave of absence while they worked in the positions outside of the bargaining unit. The Collective Agreement called for dues deduction on any earnings "within the bargaining unit". Arbitrator Kaplan found that retaining some limited rights under the Collective Agreement, such as seniority accrual, did not amount to an obligation to pay union dues and that dues will only be owing on salary earned while actually working in a bargaining unit position.

Paul Jarvis acted for the TDSB in this matter.

TRUSTEE CONFLICT OF INTEREST

In a decision released on February 6, 2009, Justice Kelly of the Ontario Superior Court of Justice exercised a rarely-used power under the *Municipal Conflict of Interest Act* (*"MCIA")* and removed a sitting trustee from office. While the facts in the case were somewhat extreme, the decision nevertheless reinforces the sensitivity that the judiciary holds regarding perceived and potential conflict of interest involving public office holders.

The case of *Baillargeon v. Carroll* was initiated by a ratepayer under Section 9(1) of the *MCIA.* The defendant Carroll was the Chair of his Board's Budget Committee and the former Chair of the Board. His daughter was a very junior teacher employed by the Board.

The Board found it necessary to make significant cuts to its expenses. Not surprisingly, consideration was given to a Board-wide reduction of teaching staff. Any such reduction would almost certainly have had an impact on Carroll's daughter.

The *MCIA* prohibits trustees from involving themselves in Board matters where they have a "pecuniary interest". Specifically, they may not take part in any discussions concerning or vote on any such matter, nor may they attempt in any way to influence the voting on any such matter. A trustee's "pecuniary interest" is defined to include the pecuniary interest of any of the trustee's children. The test as to whether a trustee has a pecuniary interest is an objective one.

In the case at hand, the evidence accepted by the trial judge disclosed that Carroll had been present at Board meetings when

the Board's lawyers (both in-house and external) had made it clear that budget issues which could affect the overall number of teachers would give rise to a conflict of interest for those trustees whose children were employed as teachers.

Carroll's evidence was that he understood this to mean that he was only disqualified from involvement in discussions directly concerning teacher layoffs, but that he could continue to participate in more general discussions as to whether the Board should run a budget deficit at all. The trial judge rejected this evidence, finding that the connection between running a deficit and his daughter's job security was explained to and understood by Carroll.

Despite the legal advice provided, Carroll continued to participate in the Board's deliberations in a variety of ways. The judge found that even on the occasion when he disqualified himself from discussions regarding layoffs, Carroll attempted to influence the Board's process through informal comments to another trustee. Carroll was also held to be in conflict when he moved that the Board adopt a policy to pay the defence costs of trustees charged with conflict of interest.

In finding that Carroll had breached the *MCIA*, Justice Kelly stated that:

"…conflict of interest legislation must be interpreted harshly to control members given the highest level of trust. [Trustees] must be honest, forthright and open, acting in complete good faith."

He made it clear that Carroll had to declare a conflict of interest even if there was only a possibility that the decision in question could affect his daughter's pecuniary interests. Carroll's asserted defences of inadvertence and error of judgment were rejected.

As a consequence of his findings, Justice Kelly exercised his power under the *MCIA* to remove Carroll from office. He declined to bar Carroll from re-election for a period of up to seven years, as he might have done.

According to the decision, Carroll received but ignored numerous warnings which were available to him, and for that reason the case should not raise particular concerns among trustees. At the same time, the Court's statements regarding the need for a harsh interpretation of the *MCIA* should certainly be taken seriously.

If you have any questions regarding this case or the Municipal Conflict of Interest Act*, please contact your* regular Hicks Morley lawyer*.*

DAMAGES FOR MAXIMUM CLASS SIZE VIOLATIONS

The issue of damages for breaches of a maximum class size provision of a Secondary Collective Agreement has again been litigated in a recent case. The generally accepted formula for determining compensation arises from a 1999 decision and is calculated as follows:

Formula for Determining Compensation

The formula is an attempt to place a per pupil “value” on the increased workload of the teacher affected by the class size violation. The damages do not “punish” the Board, nor do they compensate the Federation for loss of work opportunities by requiring the Board to pay the cost of additional teachers.

Damages in accordance with this formula were ordered by two separate arbitrators in cases between Bluewater District School Board and OSSTF, relating to the 2004/05 and 2005/06 school years.

In a recent case between the same parties regarding 2006/07 class size violations, OSSTF argued that because this was the fourth successive year of violations, the formula should be abandoned since it was not adequate to deter further violations. OSSTF sought damages that reflected the value of the wages the Board would have paid to additional teachers to have the work performed if it had complied with the agreement. Specifically, for each oversized class, OSSTF sought one-sixth of a teacher’s annual salary, prorated by the number of days during which each class was over the maximum. OSSTF also sought punitive damages and a compliance order.

Arbitrator Robert Howe found the class size violations only occurred in 0.35% of the Board’s classes. This violation was both minimal and a decrease from previous years. While the Arbitrator did leave open the possibility of more draconian remedial consequences for future violations, he ultimately affirmed the use of the accepted formula, which amounted in this case to total damages of approximately $7,000. The Arbitrator also refused to award punitive damages or issue a compliance order regarding future violations.

ACCESS TO ADVERSE REPORTS

Pursuant to regulations made under the *Teaching Profession Act*, all teachers are required to inform a fellow teacher when they make an “adverse report” about that teacher. In a recent case involving the Limestone District School Board (released on December 31, 2008), four teachers informed a fellow teacher, in writing, that they had made an adverse report to ETFO about her relating to their general dissatisfaction with her as a colleague.

In the course of an arbitration, the Board sought disclosure of the communications between the teachers. However, ETFO resisted disclosure on the basis that the documents were privileged. The Board then sought an order from Arbitrator Brian Sheehan, compelling production.

The reports themselves triggered an internal dispute resolution process within the Federation. ETFO argued that fundamental to the working of such an internal process is the assurance that participants in the process not be fearful of discussions being disclosed to third parties. The potential damage to the internal process, ETFO argued, outweighed the evidentiary value of the communications or reports. ETFO also sought to resist production on the basis that disclosure of the internal communications would have a “deleterious impact on labour relations”.

The Board argued that there was nothing inherently “privileged” about the requested documents. Importantly, what the Board sought was only the initial communications and not any of the records produced in relation to ETFO’s internal dispute process.

The Arbitrator agreed with the Board and ordered ETFO to disclose the documents. Importantly, Arbitrator Sheehan found that the disclosure of the documents would not have a “chilling effect” on future efforts of the Federation to resolve conflicts between teachers, nor would it have a deleterious impact on labour relations.

Production of adverse reports (if they exist) may be quite helpful to Boards in grievances involving discipline or teacher performance. If you would like to know more about this issue, contact Vince Panetta of our Kingston office, who acted for the Board on this file.

WORKERS' COMPENSATION CLAIMS AND THE *HUMAN RIGHTS CODE*

A recent decision of the Workplace Safety and Insurance Board illustrates the possible inter-relationship between claims made under the *Workplace Safety and Insurance Act* and the *Human Rights Code,* as well as the advantages of a co-ordinated defence to both types of claims.

A female employee claimed entitlement for traumatic mental stress, alleging that she had been subject to harassment in the workplace. She alleged that she was harassed by her supervisor, whom she claimed had made inappropriate comments of a sexually suggestive nature, both verbally and in writing.

The employee also filed a claim which is currently pending before the Human Rights Tribunal, alleging sexual harassment, sexual solicitation and a failure to accommodate her disability.

The employer was forced to defend itself in two separate forums. The situation was compounded by the fact that the employer is a Schedule 2 employer, and so is liable under the *Workplace Safety and Insurance Act* to pay loss of earnings benefits directly. This raises the very real possibility that the employer may be required to pay overlapping claims in two different proceedings.

A considerable amount of evidence was called on the issue of harassment. Fortunately, the employer had been able to recover emails between the employee and her supervisor, which were reviewed by the Appeals Resolution Officer. While the emails from the employee's supervisor were sexually suggestive, her responses did not tell him to cease and desist. Rather, the responses were jovial and sometimes intermixed with business emails.

Evidence was also presented about the social functions attended by the claimant after work and her participation at these functions. In addition, the employer relied upon a number of pictures of the employee at social functions that were "sexually suggestive in a playful way".

After considering all the evidence, the Appeals Resolution Officer concluded that the employee had participated in and encouraged the "office banter". The ARO found that the evidence did not establish that the worker was sexually solicited or harassed.

Clearly, much of the evidence called at the WSIB hearing will be relevant in any hearing before the Human Rights Tribunal. This highlights the importance of ensuring that all relevant evidence is gathered, preserved and placed before the WSIB in a manner consistent with the employer's theory of the human rights case. The opportunity presented by the WSIB hearing to explore the employee's claims in preparation for the human rights process also should not be overlooked.

Hicks Morley has lawyers who specialize in both workers' compensation and human rights law, and who also have an extensive background in labour arbitration. Several of these lawyers have experience in representing school boards in all three dispute resolution contexts.
