School Board Update

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2009 HICKS MORLEY SCHOOL BOARD CONFERENCE – FRIDAY, NOVEMBER 20, 2009

On Friday, November 20, Hicks Morley will present its 2009 School Board Conference at the Holiday Inn Select (Toronto Airport). This full-day event will begin at 9:00 am with a whirlwind tour of current labour, education and employment law issues, to be followed by two in-depth plenary sessions. A complimentary luncheon will be provided. In the afternoon, attendees will be able to select from a variety of workshop presentations, concluding at 3:30 pm. Issues to be addressed will include:

- Arbitration Updates
- Safe Schools
- PDT Issues
- WSIB for School Boards
- Support Staff Issues
- Human Rights Updates
- Attendance Management
- Special Education
- School Board Governance
- Pay Equity

This Conference will be of interest to Directors of Education, Trustees, supervisory officers, labour relations practitioners, business officials and many others. Mark the date in your calendar. Further details regarding programme and registration will be distributed in the coming weeks.

DIVISIONAL COURT UPHOLDS TEACHING ASSIGNMENTS FOR PRINCIPALS

In *Elementary Teachers' Federation of Ontario v. Superior-Greenstone District School Board*, 2009 CanLII 46639 (ON S.C.D.C.), a decision released on September 8, 2009, the Ontario Divisional Court dismissed an ETFO application for judicial review of a decision of Arbitrator Steve Raymond and confirmed the ability of boards to engage principals in active teaching roles.

The grievance related to six principals and vice-principals of the Superior-Greenstone District School Board who had their assignments altered such that they would perform some teaching work and less administrative work. This resulted in some

teachers being displaced. However, no principal or vice-principal position was eliminated. Section 287.1(1) of the *Education Act* provides that a principal or vice-principal "may perform the duties of a teacher despite any provision in a collective agreement". The Board argued that, based on this clear language, it had the right to assign principals and vice-principals to perform teaching duties, regardless of any provisions in the Collective Agreement. Arbitrator Raymond agreed.

On judicial review, ETFO asserted that Section 287.1(1) is not as broad as it appears to be, arguing that it had to be interpreted in a way that respected the importance of seniority rights. ETFO also relied on a Regulation made under the *Act* which provides that "when a board declares the position of a principal or vice-principal to be redundant", the administrator can only be assigned to a position in the teachers' bargaining unit if the position is vacant. The arbitrator had held that the Regulation did not apply because there was only a reduction of administrative duties, not a redundancy.

The Divisional Court agreed with the Board's submissions (presented by Hicks Morley's Chris Riggs and Frank Cesario) that the arbitrator's decision was reasonable, and rejected ETFO's interpretation of the *Act* and Regulation. The Court confirmed that the *Act* gives boards a broad power to assign teaching duties to a principal or vice-principal, stating that Section 287.1(1) had "paramountcy" over any Collective Agreement provision as well as the Regulation. It emphasized that the statutory definition of "principal" includes the concept that every principal is "a teacher" assigned to perform the duties of principal.

The following quotes from the decision are particularly interesting:

In my view, s. 287.1(1) is intended to give school boards the flexibility to assign a mix of administrative and non-administrative work to principals and vice-principals to meet a school's changing needs and requirements both from day to day and from term to term.

To pose the question in another way: does the principal of a school who teaches part of the time cease to be the principal when he or she is in the classroom teaching? A reasonable answer, and arguably the only reasonable answer is 'no'.

If you have any questions regarding the assignment of principals and vice-principals, you can contact your regular Hicks Morley lawyer.

STUDENT EXPULSION FOR CYBERBULLYING UPHELD ON APPEAL

In a recent case of importance to school board administrators, the Durham Catholic District School Board was successful in an appeal of its decision to expel a student for engaging in "cyberbullying" *(R.T. v. Durham Catholic District School Board (EA s.311.7)*, 2008 CFSRB 94 (CanLII)).

In this case, the Child and Family Services Review Board emphatically found that the student's threats against another student through Facebook, although not occurring at school or during a school-related activity, were nonetheless "very detrimental" to the climate of the school under s. 310(1) of the *Education Act*.

Further, the Review Board found there were no mitigating circumstances in the student's favour, even though she did not have a history of engaging in threatening behaviour and was generally a decent student.

In upholding the decision to expel her from the school, the Review Board determined that there were "no other steps" the School Board could have taken to fulfill its duty to ensure the physical and emotional safety of all students attending the school.

This decision is important because it is the first case in which the recent amendments to s. 310(1) of the *Education Act* have been applied to "cyberbullying". Thus, the expanded authority to expel students for conduct not directly related to school activities now includes the ability to address the rampant problem of bullying in cyberspace.

If you have any questions regarding this subject, you can contact Dolores Barbini ***(416.864.7303)*** *who argued the case for the*

Durham Catholic DSB.

PROGRESSIVE DISCIPLINE DURING PROBATIONARY PERIOD DOES NOT TRIGGER JUST CAUSE PROVISION

The Kawartha Pine Ridge District School Board discharged an employee just before the end of his probationary period. Prior to the discharge, the employee had been issued a "letter of expectation" in accordance with the Board's Performance Management Policy. CUPE grieved the discharge alleging that, by invoking the Policy, the Board had triggered the just cause provision of the Collective Agreement and was now estopped from relying on the probationary employee exemption.

Arbitrator Ian Springate concluded that, on its face, the Collective Agreement did not entitle the grievor to challenge his discharge as having been without just cause. The Arbitrator went on to reject the Union's estoppel argument. He found that the Board's application of its Performance Management Policy did not undermine the contract language which denied probationary employees access to the just cause provision. The Arbitrator stated:

When management's conduct is looked at in its entirety it reflects an effort on its part not to act in an arbitrary manner with respect to the grievor's employment. That, however, does not translate into a representation to the union or the grievor that the Board would not discharge him other than for just cause.

This Award, (*Kawartha Pine Ridge District School Board and Canadian Union of Public Employees* (6 April 2009, Springate)) supports the position that a Board may progressively discipline a probationary employee without compromising that employee's probationary status or triggering the just cause provisions of the Collective Agreement.

Kees Kort *of our Kingston Office successfully represented the Board in this matter. If you have any questions regarding this case, you can contact* Colin Youngman ***(613.541.4005)*** *or your regular* Hicks Morley lawyer.

EA TRAVEL TIME AND LUNCH BREAKS

Funding constraints for positions such as Educational Assistants have forced many school boards to schedule in creative ways. Increasingly, EAs are assigned to more than one school. Travel between assignments is often time-consuming and may interfere with a school board's hours of work obligations under its collective agreement. This was the situation faced by the Toronto District School Board in an Award issued recently by Arbitrator Paula Knopf (*Toronto District School Board v. Canadian Union of Public Employees, Local 4400 – Unit C*, 2009 CanLII 25126 (ON L.A.)).

Education Assistants at the TDSB normally work six hours per day. Many EAs work at two schools, three hours at each location. Assignments are based on seniority, with the result that more junior EAs often find themselves with long distances to travel between assignments. Most EAs rely on public transportation. The journey often takes more than an hour from door-to-door.

This created a problem for the TDSB since it faced an obligation under its collective agreement to provide EAs an unpaid lunch break of at least 30 minutes. Some EAs who had to travel between assignments were unable to have 30 minutes of completely free time. The union did not argue that travel time was "work" time. It was clear that the time was not paid work time. However, the union did argue that if EAs must travel to fulfill their job requirements, the travel time could not also be a "lunch period".

Arbitrator Knopf agreed. She found that a lunch period is a period of time where an employee should be completely free to do what he or she wants, and that the disputed travel time interfered with that ability.

Given the widespread historical use of these types of assignments at the TDSB, Arbitrator Knopf commented on the impact her conclusion might have on the TDSB's future management of its operations:

It is apparent that this declaration may have a profound impact upon the application and operation of assignments. This may have practical effects on the Educational Assistants [sic] choices of positions and the possibilities of their placements. Postings and choices for positions may well have to take travel and distances into consideration. Further complications will arise because of differing start and break times in the various schools. In addition, what will the parties do about the vagaries of weather, public transit effectiveness (or lack thereof) and/or urban gridlock?

In the end, the union agreed to delay seeking any "remedial impact" until the parties had an opportunity to "absorb the implications of this ruling".

This case is a good example of collective agreement provisions being "caught up" by changing operational realities. Over time, provisions of the collective agreement that were once easy to administer can become difficult. Therefore, it is recommended that school boards regularly review their hours of work obligations to ensure that compliance continues to be feasible.

SUCCESSFUL CHALLENGE TO LOSS OF EARNINGS (LOE) BENEFITS TO RETIREES

Section 43 of the *Workplace Safety and Insurance Act* ("*WSIA"*) sets out the fundamental entitlement to worker compensation under that Act. It states in part:

A worker who has a loss of earnings as a result of the injury is entitled to payments under this section beginning when the loss of earnings begins.

Entitlement is therefore premised upon a "loss of earnings" ("LOE").

The WSIB's interpretation of s. 43 of the *WSIA* was successfully challenged recently through a complaint to the WSIB's Fair Practice Commission, filed on behalf of the Toronto District School Board ("TDSB") by Hicks Morley's David Brady. The complaint was launched as a result of the WSIB's practice of awarding LOE benefits to retired workers after they have voluntarily left their employment and are in receipt of pension benefits. Generally, this would occur in situations where the worker is subsequently diagnosed with an occupational disease or undergoes surgery after retirement that is related to a compensable condition. Compensation is awarded despite the fact that the retired worker has no loss of earnings because he/she voluntarily retired from the workforce. Even where the worker is over 65 years of age, the WSIB grants entitlement to LOE benefits for two years.

The WSIB's practice flies in the face of three WSIAT decisions that have found that the WSIB was incorrectly interpreting s. 43 of the *WSIA* and that the WSIB did not have the statutory authority to award LOE benefits where the worker had no loss of earnings. However, the WSIB has refused to follow these WSIAT decisions, taking the position that it is not bound by legal precedent. This has forced employers to appeal every decision to WSIAT, resulting in significant costs to the compensation system and to the parties involved in the appeals.

As a result of the TDSB's complaint, the WSIB has now undertaken an expedited policy review to be completed by the end of September, 2009. Appeals involving the TDSB have been put on hold pending completion of the policy review.

Should you have any pending appeals involving the WSIB's interpretation of s. 43 involving retired workers, you may wish to consider placing your appeal in abeyance pending the WSIB's policy review.

For further information about the status of the WSIB's policy review, please contact your regular Hicks Morley lawyer.

SALARY GRIDS: THE PAY EQUITY HEARINGS TRIBUNAL WEIGHS IN

In a disappointing but important decision issued on July 31, 2009, the Pay Equity Hearings Tribunal overturned the method used by the Brant Haldimand Norfolk Catholic District School Board in distributing pay equity adjustments across multi-step salary grids (*EA/OCT/CYW Bargaining Unit v. Brant Haldimand-Norfolk Catholic District School Board*, 2009 CanLII 41201 (ON P.E.H.T.)). The decision was unexpected in light of the Board's earlier success in respect of its non-union employees and the Pay Equity Commission's earlier finding that the Board's approach to the plan in question did not contravene the *Pay Equity Act*. The impact of the decision is not limited to the Board, or even to the school board sector. This decision has potentially serious pay equity and compensation implications for any employer that has implemented multi-layer salary grids.

The issue can be described as follows:

Where a female job class paid on a multi-step grid requires pay equity adjustments, is it permissible under the *Pay Equity Act* to pro-rate the adjustment made at each step of that grid based on the relationship between the rate of compensation attaching to that step and the highest possible rate of compensation (the pay equity job rate) for that job class?

In other words, if the grid consists of 4 steps, where Step 4 is the maximum rate (100%) , Step 3 is 97% of max, Step 2 is 95% of max and Step 1 is 91% of max, can the monetary pay equity adjustment (in dollar terms) also be pro-rated in the same manner?

The OSSTF argued that pro-rating the maximum pay equity adjustment was not permissible and that the *Act* compelled the employer to give each step the same pay equity adjustment in dollar terms. It was the Board's position that to provide equal dollar adjustments to the female job class salary grid would create a different shadow grid to the male comparator salary grid. Incumbents in female job classes would therefore move through a different salary grid and in a different manner than incumbents in male job classes. In the Board's submission, the goal of the *Act* was to ensure that the incumbents in female job classes moved through *the same* salary grid as incumbents in the male comparator job class. Surprisingly, the Tribunal disagreed.

The decision turns on the definition of "position" under the *Act.* Section 9(3) of the *Act* requires that all *positions* in the job class receive the same adjustment *in dollar terms*. The Board argued that the provision was not violated by applying a pro-rated adjustment to each step in the grid based on the relationship between steps, because salary levels (and incumbents) are distinct from "positions".

The Tribunal determined that a "position" can never be filled by more than one incumbent, since "position" refers to the work that any one individual employee will perform. Accordingly, the Tribunal determined that each pay step in a multi-step salary grid must receive the same adjustment in dollar terms, notwithstanding that this would change the salary levels and relationships between salary levels between female and male job classes.

The Tribunal's decision is not only inconsistent with any ordinary understanding of the employment and labour relations meaning of "position" but it also wreaks havoc with traditional administration of salary grids by most school boards and other employers. It compresses the salary grids for female job classes, creates different salary grids for female job classes and their male comparators and ultimately rewards unions with advantages for which they did not bargain. It is difficult to see how the Tribunal's determination was necessary to meet the *Act*'s objective of eradicating gender discrimination in wages.

The Tribunal's decision also appears to be at odds with its own jurisprudence. For example, in 2006, Hicks Morley's Lauri Reesor successfully argued the same issue for the Board in respect of its non-union pay equity plan and non-union salary grids.

A similar issue involving the definition of "position" is currently before the Tribunal. It is hoped that the Tribunal will re-visit the issue and its own inconsistent definition of "position". Pending the Tribunal's decision in that case, the Board is reviewing its options for reconsideration at the Tribunal level as well as by way of judicial review to the Divisional Court.

If you have any questions regarding this case or other pay equity obligations, you can contact Lauri Reesor ***(416.864.7288)*** *or*

Carolyn Kay ***(416.864.7313)***.

CALCULATION OF RETIRING GRATUITIES

What does the term “annualized earnings” mean when calculating the retirement gratuity of a half-time elementary teacher? In a decision involving the Trillium Lakelands District School Board, Arbitrator Dana Randall was called upon to interpret a provision in the collective agreement that generated a gratuity based upon “annualized earnings … at the rate received by the Member immediately prior to retirement” (*Trillium Lakelands District School Board v. Elementary Teachers’ Federation of Ontario*, 2009 CanLII 22795 (ON L.A.)).

ETFO argued that the Board had incorrectly calculated the grievor’s gratuity when it used her actual annual salary based on her half-time status. In dismissing the grievance, the Arbitrator rejected the union’s argument that “annualized salary” ought to be interpreted as equivalent to the annual grid salary of a full-time teacher. He found that while s. 180 of the *Education Act* permits parties to negotiate contractual language that grants part-time employees a gratuity of up to half the full-time teacher salary rate, the *Act* did not mandate that result.

ETFO also argued that the Board’s use of the grievor’s part-time salary amounted to a “double devaluation” of her gratuity payment. This position was based on the fact that the grievor initially accumulated only half of the sick leave credits earned by full-time teachers, only to have those credits “devalued” a second time by the inclusion of her actual half-time salary in the final calculation. Arbitrator Randall rejected this argument as well.

If you have any questions regarding retirement gratuity calculations, please feel free to contact your regular Hicks Morley lawyer *or* Carolyn Kay ***(416.864.7313)****, who successfully argued this case for the TLDSB.*

SCHOOL BOARD GOVERNANCE REVIEW

The question of “who does what” within the school board sector has traditionally been an interesting (and sometimes contentious) issue. This is largely attributable to the vagueness of the current governance provisions of the *Education Act.*On November 28, 2008, the Minister advised boards of the Government’s plans to modernize and clarify these provisions. She appointed a Governance Review Committee (“GRC”) comprised of leaders in the education community. The GRC Report, issued on April 22, 2009, set out 25 recommendations for change.

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In response to this Report, on May 7, 2009, the Government tabled Bill 177, the *Student Achievement and School Board Governance Act, 2009.* The Bill contains a number of provisions clarifying and supplementing the roles and responsibilities of school boards, trustees and directors of education. It contemplates the establishment of Codes of Conduct for trustees containing both provincial and local obligations. It also adds several provisions dealing specifically with the role of board chairs.

Shortly after tabling Bill 177, the Ministry issued a Consultation Paper concerning what it referred to as an anticipated Provincial Interest Regulation (“PIR”). The PIR would create extensive new public reporting obligations for school boards that are designed to enhance transparency and accountability. In addition, the PIR would speak to conditions under which and methods by which the Ministry might intercede in the administration of a struggling board.

If you have any questions regarding these or other governance issues, you can contact Michael Hines ***(416.864.7248)*** *or your regular* Hicks Morley lawyer*.*

ARBITRATOR HOLDS FEDERATION ESTOPPED FROM GRIEVING GROUPED CLASSES

School boards increasingly find themselves under pressure to identify ways of achieving efficiencies in the delivery of curriculum. A recent arbitration award involving the Grand Erie District School Board addresses the strategy of creating “grouped classes” in which more than one subject is taught (*Grand Erie District School Board and Ontario Secondary School Teachers’ Federation, District 23* (18 June 2009, Devlin)).

Article 12.06 of the Grand Erie Collective Agreement with OSSTF provides that “no teacher shall be assigned more than 3.0 courses per semester unless there is an agreement by the teacher, the Bargaining Unit and Board”. In the 2006-2007 school year, a teacher was assigned a grouped class in which she taught a Grade 11 business accounting course to 18 students and a Grade 12 business accounting course to three students. Each course had its own course code and curriculum and required the preparation of different lessons, tests and assignments. Despite this, the teacher (in her capacity as head of the Business Department) recommended that the Grade 11 and 12 business accounting courses be taught in a grouped class. She had concluded that if the Grade 12 course were not taught in the school in question, Grade 11 students might leave the school in order to take both courses elsewhere. The school had an enrolment of only 300 students.

The Federation filed a policy grievance. It argued that both terms, “course” and “class”, were used in the Collective Agreement, suggesting that the Article 12.06 limitation on “courses” could not be avoided simply by combining courses within one class. It also relied on the fact that the teacher was responsible for the delivery of curriculum associated with two distinct course codes, albeit within the same “class”.

The Board led evidence that it had been creating grouped classes since 2004, the year in which the school’s in-school staffing committee had been created, without any suggestion that such classes generated two “courses” for the purposes of Article 12.06. Furthermore, the Board established that there had been grouped classes at the school board and its predecessor dating back to the early 1990’s, always without complaint.

The Board argued that the past practice was reflective of a shared understanding of Article 12.06 that course codes were not the determining factor for the purposes of identifying “courses”. Rather, a single “course” for the purposes of Article 12.06 could involve two closely related areas of the Board’s curriculum.

Arbitrator Jane Devlin agreed with the Federation’s interpretation of the Collective Agreement, holding that the involvement of two distinct course codes would reflect two “courses” in all but a few exceptional cases. She did acknowledge that a rigid or inflexible approach was not appropriate in all cases, and that in some cases it might be necessary to consider the particular circumstances to determine if the delivery of more than one “course” was involved.

Although the Arbitrator concluded that Article 12.06 had been violated, she nevertheless dismissed the grievance. She held that the Federation, having been aware of the practice of grouping classes over several years, had led the Board to believe that it did not intend to rely upon its strict rights under the Collective Agreement. Accordingly, the Federation was estopped from asserting a violation of the Collective Agreement.

If you have any questions regarding this subject, you can contact your regular Hicks Morley lawyer*.*