College Update

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The Colleges Practice Group at Hicks Morley is pleased to introduce our first *FTR Now* edition of College Update.

Our College Update is designed to provide you with timely legal updates on topics that are of particular interest to the Colleges community, as well as information about, and analysis of, key developments that impact your organizations.

In this issue, you'll find a variety of reports on arbitration cases featuring legal developments relating to student matters and your legal obligations in respect of file management.

This publication is for you, the reader, so we hope that you'll get in touch to let us know what you found useful, and what you might like to see in the future.

We look forward to hearing from you!

DISMISSAL OF STUDENT APPEAL UPHELD BY DIVISIONAL COURT

The courts have traditionally taken a cautious approach to reviewing academic decisions of post-secondary institutions. This principle was confirmed in a recent judicial review decision by the Ontario Divisional Court in *Kahsay v. Humber College Institute of Technology*, 2012 ONSC 138.

The applicant, a former nursing student at Humber College, applied to the Court for judicial review of the school's decision to suspend her from a clinical placement. The student's clinical placement preceptor had complained about various mistakes by the student that had allegedly placed patient safety at risk. As a result of her previous academic issues, the applicant was effectively on a last-chance agreement and her suspension from the clinical course resulted in her being withdrawn from the practical nursing program. The original decision to suspend the applicant from the course had been made by the Dean; the student appealed this hearing to an Appeal Committee which provided a full hearing confirming the Dean's decision.

The applicant's argument to the Court was that there had been breaches of the duty of fairness in the College's decision-making processes. First, the applicant argued that the actions of the Dean, in the initial process leading to the applicant's suspension, gave rise to "a reasonable apprehension of bias." Second, she argued that the College breached its duty of fairness by failing to apply its professional suitability policy. Third, she argued that the appeal was not a full re-hearing of the "hearing" she had had prior to the Dean's decision to suspend and did not cure the alleged defects in the fairness of the process.

The Court confirmed that the applicant "was entitled to a relatively high standard of procedural fairness given the issues at stake," but rejected each of the applicant's arguments.

On the question of whether the Dean was biased, the Court emphasized that the threshold of proof for establishing bias is high and found that none of the actions complained of met that standard, whether seen individually or cumulatively. The applicant's argument had focused on the fact that the Dean drafted a written statement for the preceptor in advance of the appeal. The Dean's intention was to replace the preceptor's email setting out her complaints about the student with a tidier and more formal document setting out the preceptor's concerns. The Court found that the differences between the email and the statement were not substantive, and that the statement was in any event submitted to the preceptor with clear instructions that she review it for accuracy.

The Court also found that the College had substantially complied with its professional suitability policy, which required meetings with the complainant and the student, and set out specific available penalties. The Court also noted that the professional suitability concerns about the student "relate to conduct that is assessed as compromising patient's safety." This serves as a reminder that the practical context of a school's academic decision should always be front-and-centre if that decision is called into question in court.

Lastly, the Court examined the hearing before the Appeal Committee and found that, even if there had been legitimate concerns raised about the hearing before the Dean, the appeal to the Appeal Committee provided the applicant with a fresh hearing at which there was oral testimony, an opportunity for cross-examination, full documentary disclosure and the opportunity to be represented by counsel. The Court concluded that the applicant "had a full opportunity to reply to the evidence adduced by the College" at the appeal hearing.

In addition to the specific points discussed above, an important point to note for college administrators is that the Court reinforced that deference is owed to academic decisions. As the Court put it, in the absence of breaches of procedural fairness, "the Courts take a very deferential stance in relation to the discretionary decisions of academic institutions concerning academic matters and the standard of review is one of reasonableness."

This case exemplifies the role of the Court in reviewing academic decisions: the Court will ensure that the process is fair, but it will not second-guess substantive academic decisions.

Frank Cesario of the Hicks Morley Litigation Group successfully argued this case for the College.

MARKETING MANAGER PROPERLY EXCLUDED FROM SUPPORT STAFF BARGAINING UNIT

In a union challenge to the exclusion by a College of a Marketing Manager from the Support Staff bargaining unit, an arbitration board chaired by Jane Devlin has found that the Marketing Manager position in question fell within Schedule 1, section 5(d) of the *Colleges Collective Bargaining Act, 2008* ("employed in a managerial or confidential capacity [to a manager]") and was therefore properly excluded from the bargaining unit.

Writing for the majority, Chair Jane Devlin provided an in-depth review of the Marketing Manager's role within the College. While the Marketing Manager did not have actually supervise staff or exercise traditional managerial functions, it was found to be significant that the Marketing

Manager was regularly consulted by members of management regarding the introduction of new programs or services or changes to existing programs or services. The evidence established that the Marketing Manager has "input and influences decisions that are made regarding changes to programs and services." Of significance was the fact that she was a member of various committees which dealt with issues that could impact on staffing levels, both support staff and academic, in respect of implementing new programs. Chair Devlin stated (the union nominee dissenting on this point):

"In the Board's view, the evidence indicates that [the Marketing Manager] is involved to some degree in the formulation of organizational objectives and policy in relation to the development and administration of programs. Moreover, to the extent that she regularly provides strategic advice and guidance to members of management in the Community Services and Health Sciences Division, we find that her exclusion from the bargaining unit is justified under section 5(d) of Schedule 1. In particular, we find that she is employed in a position confidential to persons described in clause (a) who are involved in the formulation of organizational objectives and policy in relation to the development and administration of programs."

Reviewing earlier jurisprudence, the Chair wrote that section 5(d) was not limited to persons occupying positions such as a private or executive secretary but also covered persons such as the Marketing Manager who was regularly consulted by management about changes to programs or the introduction of new ones and whose input was clearly considered to be significant.

The Chair also considered the applicability of section 5(f) of Schedule 1, which excludes from the bargaining unit "a person who is not otherwise described in clauses (a) to (e) but who, in the opinion of the Ontario Labour Relations Board, should not be included in the bargaining unit by reason of his or her duties and responsibilities to the employer." On this point, the Board unanimously agreed that this provision makes no reference to a "Board of Arbitration" and therefore if a person is not described in clauses (a) to (e) of section 5, the Board has no discretion to exclude that person under section 5(f).

Brenda Bowlby (Retd) successfully argued this case for the College.

G*eorge Brown College and OPSEU, Local 557* (13 February 2012, Devlin)

PARTIAL LOAD FACULTY ARE NOT ENTITLED TO "AUTOMATIC" ENROLMENT IN BENEFITS

An arbitration board chaired by Owen Shime, in a unanimous decision, has found that the language of the Academic Collective Agreement does not require the College to automatically enrol partial load faculty into benefits plans.

The issue arose as a result of the fact that, despite being informed of the right to enrol in benefits and the application process at the point of employment, and despite being sent a follow-up e-mail with an invitation to contact the individual at the College who was responsible for enrolment of academic staff into benefits, some partial load employees simply did not follow-up and contact the College to fill out the application forms. The union maintained that these employees should simply be "automatically" enrolled in benefits by the College without filling out any application forms.

The arbitration board reviewed the Collective Agreement provision, which provides that "The College shall pay 100% of the billed premium of the extended health care plan for partial load employees … *subject to the application procedures for this benefit*." [Emphasis added.] The Collective Agreement also states that "the College shall provide for access to" certain other benefits for partial load faculty, "provided that the premium is paid by the employee."

The arbitration board concluded that the College's primary responsibility was to pay the premiums for the insurance and the Collective Agreement did not require automatic registration of partial load employees into the plan; rather since participation in the plan was subject to application procedures, employees first had to fill out an application form before being enrolled. The arbitration board reasoned that if coverage was automatic, the Collective Agreement would not have envisioned an application procedure.

The arbitration board also rejected the union's argument that the College had not fulfilled any obligation it had to notify employees of their entitlement.

The grievance was dismissed.

Humber College and OPSEU (29 December 2011, Shime)

ACCOMMODATING SCENT SENSITIVITIES IN THE WORKPLACE

In an arbitration between the Corporation of Quinte West and CUPE, Local 759, (decision released on October 21, 2011), Arbitrator Paula Knopf considered whether an employer has an obligation to accommodate an employee who suffers from allergies that are caused, at least in part, by scented products in the workplace. The employer in this case was a city, but Arbitrator Knopf's finding that the employer had a duty to accommodate is significant for employers across Ontario.

Arbitrator Knopf found that the grievor, who was a long-service employee, suffered from severe allergies and experienced symptoms of a medically disabling nature that seemed to be triggered by exposure to scented products. The employer had an existing Scent Sensitivity Program in place prior to the grievance being filed.

The arbitrator held that the grievor's condition was disabling and that she should be accommodated through proper enforcement of the Scent Sensitivity Program. Significantly, she also held that the union shared in the accommodation process and was therefore required to work cooperatively with the employer to ensure that bargaining unit members complied with the Scent Sensitivity Program.

Arbitrator Knopf ordered that the grievor's future accommodation would consist of the following:

- the grievor would remain assigned to two offices on a rotational basis and any change in the rotation would be done on reasonable notice and with consultation with the union;
- the grievor would be given access to one particular washroom that was to be monitored to ensure that no scented products were allowed therein;
- a portable air filter was to be placed as close as possible to the grievor's workplaces in both offices;
- if the grievor were to detect or be affected by a co-worker or manager wearing a scent, she would report it and the employer's Health, Safety and Employee Services Officer would investigate and, if necessary, enforce the Scent Sensitivity Program. Enforcement could include suspension of the person who was non-compliant; and
- in the event the grievor were to experience symptoms of a temporarily disabling nature in the workplace, she was to be given the opportunity to take a short break to refresh and relieve herself from the symptoms.

In addition to the foregoing measures, Arbitrator Knopf ordered the union to meet with its members to explain the purpose and importance of compliance with the Scent Sensitivity Program, as well as the consequences of non-compliance.

This award confirms that the duty to accommodate under the *Human Rights Code* may extend to allergic reactions that can be caused by scented products in the workplace. It is extremely significant as well that Arbitrator Knopf recognized that both the employer and the union have an obligation to work together to ensure suitable working accommodations are provided to employees who are negatively affected by scented products.

The issue of scent sensitivities in the workplace has been raised by employees with increasing frequency in recent years. Arbitrator Knopf's decision confirms that this issue is something employers should now be thinking about as they organize their workplaces.

Kees Kort of Hicks Morley's Kingston office successfully argued this case for the employer.

ONTARIO HUMAN RIGHTS TRIBUNAL ENDORSES EMPLOYER CONTROL OVER ACCOMMODATION PROCESS

We often remind our clients not to rush to the conclusion that they must accommodate every disability presented by an employee. In an important decision, the Human Rights Tribunal of Ontario ("HRTO") has emphasized that accommodation is

only required where discrimination is first established. The Tribunal has also reaffirmed the requirements placed on employers and employees within the accommodation process. While the case deals a secondary school teacher, it does have resonance for Colleges dealing with members of their faculties.

In *Baber v. York Region District School Board*, 2011 HRTO 213, the applicant Rozana Baber claimed that the York Region District School Board failed to accommodate her disability by not granting her a teaching assignment as a teacher/librarian and by refusing to exempt her from a Teacher Performance Appraisal ("TPA"). Ms. Baber was diagnosed in June 2007 with anxiety disorder and depressive disorder, along with chronic lymphocytic leukemia.

At the start of the 2008/2009 school year, Ms. Baber was assigned two periods of a Grade 11 computer programming course and one Grade 9 information technology course. A superintendent also informed Ms. Baber that she would be scheduled for a TPA during the 2008/2009 school year due to concerns about her performance during the previous year. On October 29, 2008, Ms. Baber asked her principal to defer her TPA based on the Board's policy of postponing TPAs in the event of illness or pregnancy. Ms. Baber claimed that she was incapable of participating in the TPA process due to illness, stating simply "[i]t will kill me."

The medical documentation available to the Principal at the time stated that Ms. Baber suffered from illness but nevertheless was capable of performing the regular duties of a teacher, and so she decided that Ms. Baber would undergo the TPA. However, she did allow Ms. Baber to substantiate her claim that she was too ill to perform the TPA. After suffering an anxiety attack at home, Ms. Barber decided she was too ill to return to the workplace.

While away from work, Ms. Baber asked the Principal for accommodation by changing her teaching assignment to teacher/librarian. The Principal responded by requesting medical information to support the need for this accommodation. In response, Ms. Baber sent two doctors' notes simply stating that she could return to work and that "due to health issues" she should be allowed to be a teacher-librarian. The School Board did not accept these notes as establishing a need for the requested changes and directed Ms. Baber (who was still absent) either to apply for LTD, to allow the Board's occupational nurse to contact her doctor, or to submit to an independent medical examination ("IME"). Ms. Baber did not consent to any of these options, stating that she could in fact return to work if only she were accommodated in the teacher/librarian position.

Over the next several months, the School Board continued to write and meet with Ms. Baber in order to elicit medical information which showed the nature of her disability as well as the need for her requested accommodation. Ms. Baber refused to provide further justification for her absence, claiming that the Board had all the information it needed in order to act on her requests. As a consequence of her failure to provide medical support for her absence, the Board terminated Ms. Baber's employment in October 2009.

Ms. Baber brought an application before the HRTO, claiming that the Board had breached its duty to accommodate her disability by failing to exempt her from the TPA process during the 2008/2009 school year, by failing to change her teaching assignment to that of a teacher/librarian and by terminating her employment. After engaging in a thorough review of the evidence and the law, the Tribunal dismissed all of the applicant's claims.

The Tribunal started its analysis by addressing the misconception that there is a freestanding duty to accommodate a person with a disability under the *Human Rights Code* ("*Code*"). Rather, the duty to accommodate only arises once an individual has established that he or she has been disadvantaged by a workplace rule or requirement because of his or her disability. Where any disadvantage experienced by the employee is not demonstrably caused by his or her disability, no "discrimination" exists and no duty to accommodate arises.

Even where a causal connection between a proven disadvantage and a proven disability has been established, the employer may still avoid liability under the *Code* by showing that the rule or requirement giving rise to the disadvantage is reasonable and bona fide and that the individual's disability-related needs could not be accommodated without undue hardship. It is only at this point that the duty to accommodate is engaged.

The Tribunal went on to articulate and apply a number of other important propositions that are helpful to employers in managing such claims:

- Once the duty to accommodate arises, both the employer and the employee have roles to play:
    - The employer must take steps to determine the disability-related needs and restrictions of the employee and consider making the necessary modifications to the workplace.
    - The employee must provide a reasonable amount of medical information that shows the nature of his or her disability-related needs and restrictions.
- It is the employer, not the employee or his or her doctor, who decides how the employee's disability-related needs and restrictions are to be accommodated. An employer does not have to accept a doctor's conclusion that a employee should be given a specific job in order to be accommodated.
- An employer is not required to act on medical information setting out "recommendations" or proposals that would "assist" or "benefit" the employee. The duty of accommodation is focussed on responding to actual medical needs.
- An employer does not have to tolerate an employee's continued refusal to provide the reasonable medical information necessary to establish a need for accommodation and what the accommodation should be.
- On the other hand, an employer may not unreasonably restrict the type of medical information it will accept as proof of a disability-related need or restriction (e.g., insisting on an IME prematurely where additional information might be obtained from the employee's own healthcare givers).

In applying these principles to the applicant's case, the Tribunal found that she had not presented enough evidence to support her claim that she was medically unable, due to a disability, to undergo a TPA evaluation or to perform her regular teaching assignment. While there were doctors' notes which recommended that the applicant be assigned duties as a teacher/librarian, they did not state that the applicant had disability-related needs that prevented her from participating in the TPA process or from fulfilling her regular teaching assignment. The connection between a proven disability and a proven disadvantage had not been established. In other words, there was no evidence of "discrimination" and consequently the duty to accommodate was not engaged.

Further, the Tribunal found that even if it accepted that the applicant was adversely affected by her disability, the School Board had fulfilled its duty to accommodate by requesting medical documentation that clarified her disability-related restrictions. Because the applicant failed in her reciprocal duty to provide this information, the Board could not realistically consider making any accommodative changes that might have been necessary. The accommodation process foundered due to the applicant's refusal to provide medical documentation and not because of any proven medical need for the Board to exempt her from the TPA or change her teaching assignment.

The Tribunal also rejected the applicant's claim that the Board should have accommodated her by letting her remain off work instead of terminating her employment. The Tribunal stated that the duty to accommodate does not require employers to tolerate an employee's ongoing unsubstantiated absence.

The *Baber* case is unusual in that most employees seeking accommodation are more forthcoming with the medical information necessary to support their requests. Nevertheless, the case reinforces management's abilities to control the accommodation process by requiring employees (and their doctors) to focus on the medical aspects of the case while leaving the employer in charge of determining any resulting accommodations.

THE IMPORTANCE OF EARLY COLLECTION OF RELEVANT DOCUMENTS IN AN ELECTRONIC AGE

As soon as an employer learns that an issue has arisen that could be proceeding to a hearing – whether an arbitration, a human rights hearing, a court proceeding or litigation in any other forum – it is critical that steps be taken to secure not only the hard copies of all documents that in any way relate to the issue but also any electronic documents. The destruction/negligent loss of documents is called "spoliation," a legal term which has been described as follows:

“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” [*Cheung v. Toyota Canada Inc.*, 2003 CanLII 9439 (ON SC)]

In arbitration, it is now common for the union to seek disclosure of documents. In human rights applications and court litigation, procedural rules require disclosure of all arguably relevant documents and also require that the parties identify any documents which existed but no longer exist. Where a party to litigation makes a claim of prejudice because of by spoliation of evidence by the other party (“the spoliator”), the adjudicator may impose a presumption that the destruction or loss of the evidence in question would not assist the “spoliator.” This presumption may be rebutted in appropriate circumstances – e.g., by proving that the evidence would not assist the spoliator – but if the spoliator is unable to rebut the presumption, the results can lead to the spoliator losing the case.

In one arbitration, the grievance was allowed because of the destruction of notes and other background records used to repair a very sensitive report, despite the employer’s position that the records were destroyed pursuant to a routine practice. However, the circumstances of the situation strongly suggested that the employer reasonably should have foreseen that the destroyed records would become relevant to a legal dispute and taken steps to preserve the records. The arbitrator found that irreparable prejudice arose in the determination of the case because of the unavailability of the destroyed documents.

The lesson from this case is that all reasonable steps should be taken to secure all documents which may be relevant to an issue as soon as it becomes apparent that the issue is likely to become the subject of litigation. This includes electronic documents, which are often routinely destroyed as a matter of course.

In the case of electronic documents, special care should be taken to ensure that not just that hard copies are created but that the electronic documents themselves are preserved. Electronic data and information take many forms. The more obvious types include electronic drafts (“MS Word documents”), PDF images, voicemail messages, emails and personal devices (e.g., BlackBerry) calendar entries, messages including email correspondence and text messages. These forms of electronic data are all stored with metadata. (“Metadata” is information about a particular data set or document which describes how, when and by whom that data or document was collected, created, accessed, modified and formatted. This data can be essential to establishing key facts about the timing of when certain electronic documents were created and who had access to those documents, yet even the creator of the documents will often be unaware that this metadata even exists let alone how to access it.)

Where electronic data may be relevant to an issue that appears to be heading to litigation and any question arises about securing the data, we urge you to contact your Hicks Morley lawyer. We can assist you in communicating to your IT staff what is needed and how to best secure the documents.

CONCLUSION

If you have any questions about the issues discussed in College Update, or would like more information, please contact a member of the Hicks Morley Colleges Practice Group, and we would be pleased to assist you.
