College Update

College Update – Second Edition

Date: March 20, 2013

Dear Friends,

Spring is just around the corner and with the changing of the season, what better time for us to welcome our second edition of College Update! Hicks Morley's College Practice Group is pleased to periodically provide our College clients with specific information relevant to your particular interests.

In this edition we discuss labour relations issues as well as student accommodation challenges and new legislation affecting your facilities. We want to thank Alan Freedman and Leola Pon, whose efforts and contributions were integral to the publication of this edition.

As always we welcome your feedback on what you found useful, and what you might like to see in the future. Please feel free to contact the authors or your regular Hicks Morley lawyer should you wish further information about any of these topics.

Enjoy!

Wallace M. Kenny and Brenda J. Bowlby
Co-Editors

IN THIS ISSUE

- Court Overturns Arbitrator's Awards on 2006 Return to Work Grievances
- Academic Accommodation of Student Disabilities with Mental Health Issues
- Building an Accessible Campus: An Important AODA Update for Colleges
- When is a Union Grievance Appropriate?

COURT OVERTURNS ARBITRATOR'S AWARDS ON 2006 RETURN TO WORK GRIEVANCES

By: Alan S. Freedman

Alan Freedman regularly advises and represents employers in arbitration and labour board

proceedings, collective bargaining, human rights and occupational health and safety litigation, judicial review proceedings and employment-related litigation in the provincial and superior courts. Specifically with respect to the College Sector, Alan has represented Colleges in arbitrations both under the Academic and Support Staff Collective Agreements, which have included grievances on a range of issues including the Article 11 Workload Formula, job security and lay-offs, Article 2 Staffing, and discharges. Alan is also a regular speaker at the Colleges' Annual HR conference at Kempenfelt. Of note, Alan and his co-counsel Christopher Riggs were recently successful before the Divisional Court in reversing an arbitration decision on the 1200 return to work grievances, where the Court set aside the arbitrator's decision granting extra compensation to faculty members following their return from the 2006 academic strike.

The Ontario Divisional Court has set aside two awards of an arbitration board chaired by Owen Shime. The case stems from the 1200 grievances filed by faculty members following their return to work from the 2006 academic strike. Employees claimed they should be paid additional money because of the work they performed when they returned to work.

A majority of the Shime board found that the parties, in the Return to Work Protocol they signed to end the 2006 strike, gave the arbitration board an unfettered discretion to decide compensation payable to employees for the work they performed following the strike. The board decided it did not have to consider Article 11 of the collective agreement when deciding that issue.

The Divisional Court said this was unreasonable and agreed with the submissions made on behalf of the Colleges that Article 11 continued to govern all work in the post-strike period. The Court's decision will have significant ramifications for the grievances and for academic collective bargaining in the future.

HISTORY OF THE PROCEEDING

Staff covered by the academic collective agreement engaged in a lawful strike in March 2006 that lasted for approximately three weeks. The College Employers Council and OPSEU entered into a Return to Work Protocol at the conclusion of the strike. The Return to Work Protocol included the following paragraph:

The parties agree that a board of arbitration will be appointed to hear any faculty grievances arising out of or related to return to work. Faculty grievances related to workload arising from the return to work shall proceed directly to the board of arbitration who shall have the powers referenced in Article 32.

In the months following the return to work from the 2006 strike, approximately 1200 grievances were filed by faculty members seeking compensation for what they claimed was extra work they had to do to complete the winter 2006 semester. The board of arbitration chaired by Arbitrator Shime was appointed to hear all of the grievances. Given the number of cases filed, the parties

agreed that a few “test cases” would be used in the hopes of establishing principles that could assist the parties in dealing with the remaining grievances.

The Council argued that compensation could only be awarded in the period following the strike if the workload formula, in Article 11 (as modified by the Return to Work Protocol), generated additional hours that would merit extra pay. The Council argued that compensation could only be awarded in very limited circumstances.

Most of the hours claimed were for preparation and evaluation time. No increase in teaching contact hours occurred. Hours for preparation and feedback *under the formula* are not the same as actual hours *worked* by Faculty on preparation or evaluation. Under the formula these hours are hours attributed based on the teaching contact hours assigned. A teacher can personally work more or less hours than the formula actually generates in preparation and evaluation without impacting on the workload limits under Article 11. If the workload limits generated by the formula weren’t exceeded, then no additional compensation was warranted for work performed following the strike.

OPSEU argued that grievances related to workload arising from the return to work were not governed by Article 11 of the collective agreement at all. Rather, the grievances were governed by the Return to Work Protocol.

According to OPSEU, the Return to Work Protocol was open-ended and allowed the Shime board to award compensation on an “equitable” basis.

AWARDS OF THE SHIME BOARD

In an interim award and a final award dealing with four test case grievances, a majority of the Shime board agreed with OPSEU. Arbitrator Shime developed his own set of principles outside of Article 11 and found that faculty members were to be “equitably compensated” for all hours worked in excess of 44 hours in each week at the rate of time and one-half.

DECISION OF THE DIVISIONAL COURT

The Divisional Court unanimously quashed Arbitrator Shime’s awards, finding that they were unreasonable. The Court decided that Article 11, as modified by the Return to Work Protocol, applied to the grievances. The Court referred the grievances back to a different arbitration board. In rendering its decision, the Court also made some helpful comments on the operation of the workload formula:

30. The result of the application of [Arbitrator Shime’s] principles is to compensate at time and a half for individual work and preparation when the workload exceeds 44 hours a week. That approach is inconsistent with the way the parties have dealt with the determination of workload

under the collective agreement, where hours are attributed for preparation and evaluation on a formula basis (unless there are atypical circumstances). That allocation is not based on a "time spent" model, where one would consider the work of a particular individual, who may spend more or less time than the attributed amount.

31. The parties here are sophisticated. Their collective agreement contains a detailed code for the determination of workload and compensation. Following the strike, they negotiated a detailed Protocol for the return to work that included numerous changes to the workload provision. Given the language of the collective agreement and the Protocol, it is not a reasonable conclusion that the parties intended to give an unlimited discretion to the arbitration board to develop a new workload and compensation scheme to apply to the return to work after the strike on a case by case basis and to have that system operate in conjunction with the rules in Article 11 applicable to the "normal workload."

OPSEU did not appeal the Divisional Court's decision. It has sent a letter out to the grievors asking them to reconsider their grievances in light of the Court's decision. For those grievances that OPSEU still wishes to pursue, a different arbitration board will have to be appointed.

CONCLUDING THOUGHTS

The 2006 strike lasted almost three weeks and many of the grievances seek compensation approaching or even exceeding three weeks of pay. Arbitrator Shime's workload "model" would have allowed many faculty members, in effect, to be paid for the period of the strike, thus presenting real challenges to collective bargaining in the future. The Court's decision is an important reminder that the rules governing compensation are to be found in the collective agreement and that any changes to these rules are to be negotiated directly at the bargaining table.

Chris Riggs and Alan Freedman argued the case on behalf of the Colleges in the Divisional Court.

ACADEMIC ACCOMMODATION OF STUDENT DISABILITIES WITH MENTAL HEALTH ISSUES

By: Brenda J. Bowlby

Accommodating students with disabilities involving mental health issues has become a growing challenge for Colleges. Increasingly, students with mental health issues are turning to the Human Rights Tribunal of Ontario to seek remedies when they do not pass courses or are not given accommodations which they feel they need. This is happening even though the accommodations provided to them may be more than reasonable.

In light of the increase in such applications to the Tribunal, it is important that Colleges ensure that

employees responsible for assisting students with mental health issues clearly understand the Colleges' obligations and the obligations of students in the accommodation process.

WHAT THE STUDENT SHOULD DO

First, it is important to remember that accommodation is a two-way street and that students also have responsibilities in the process. Human rights decisions from courts and tribunals have made clear that students must:

- identify that they require accommodation;
- produce evidence from a physician that he or she needs accommodation, if required – which should always be the case where a student seeks accommodation for mental health issues;
- provide a clear statement from his or her physician regarding the nature of the student's restrictions;
- provide confirmation from his or her physician as to whether the student is receiving ongoing treatment and monitoring to deal with the disability; and
- cooperate in the determination of the accommodation and in the provision of the accommodation.

In *Senadheera v. Ryerson University*, 2012 HRTO 1195 (CanLII), a Ph.D student's claim that he had been denied accommodations (for his Bi-Polar disorder) in the form of a flexible schedule was dismissed by the Tribunal. It found that the student had not made a request for such accommodation. Moreover, the student had been expected to regularly meet with his thesis adviser to ensure that progress was being made, but he failed to do so. Accordingly, his claim that the University failed to accommodate him academically was rejected.

It will be critical, where a student requests accommodation for a mental health issue, to require that the student provide not only a medical report confirming that the student has a disability, but also to require a clear statement from the medical practitioner of the student's restrictions/limitations and whether the student is undergoing treatment or monitoring. Since mental health issues can be treated, it will be an expectation that students will cooperate with any treatment (whether therapy or medications) which may alleviate the restrictions arising from their disabilities. It will also be important to ask for a prognosis regarding whether the restrictions are permanent or temporary.

It should be noted that medical practitioners cannot dictate accommodations. They can make recommendations regarding possible options. In the end, it is the College's right and responsibility to decide if an accommodation is appropriate or possible without undue hardship.

WHAT THE COLLEGE SHOULD DO

The requirements of a College in providing accommodation were effectively described in *Fisher v.*

York University, 2011 HRTO 1229 (CanLII) as follows:

The duty to accommodate includes both procedural and substantive components. The procedural component requires that the respondent undertake a reasonable investigation to understand the applicant's learning disability and needs for accommodation. The substantive component requires that the respondent provide reasonable accommodation or demonstrate that it is impossible to accommodate the applicant without undue hardship. The respondent is not obliged to provide perfect accommodation. The onus is on the respondent to demonstrate that, procedurally and substantively, it did what was reasonable in the circumstances to accommodate the applicant up to the point of undue hardship.

While the *Fisher* case involved a student with a learning disability, the foregoing applies equally to students with mental health issues.

The procedural requirements will become a critical issue in cases where the College takes the position that no accommodation is possible without undue hardship. Of course, it is sensible to ensure, as a matter of practice, that appropriate procedural steps are taken in every case to ensure that the right information is available should the employee later challenge the accommodation provided.

To demonstrate the procedural component of accommodation has occurred a College should ensure in every case that:

- Sufficient medical information is obtained from the student to allow the College to understand the nature of the restrictions/limitations/needs that arise because of the student's disability.
- A process is in place to determine whether a reasonable accommodation which will provide the student with the opportunity to meet the requisite academic standards is available. While some Colleges have taken the position that accommodations are "negotiated" with the student, this is not an appropriate approach. Students who require accommodations are entitled to reasonable accommodations. They should not be expected to "negotiate" those matters. It is the College's responsibility to determine what those accommodations will be and to ensure that they are delivered.
- Where accommodation includes the provision of assistive technology or scribes, such accommodations are put into place in a timely manner.
- The student is advised to contact a designated person should any problems arise. A follow-up by Disability Services needs to occur to ensure that the accommodations have been put into place so that any problems which arise can be addressed in a timely manner. This may be achieved by designating a disability consultant to maintain regular contact with the student through e-mail, voice mail or periodic meetings.
- Since managing stress is normally an issue for most students with mental health issues, accommodation should include consideration of steps which can be taken to reduce a

student's stress in dealing with the College's bureaucracy. This includes Disability Services – if a student has more than one disability that requires accommodation, it is best that the student not be assigned different disability consultants for each disability, but one consultant should deal with all disabilities. Even if the consultant has to consult with another disability consultant, this will reduce a student's stress and better ensure that nothing falls between the cracks.

- Where it is determined that no accommodation is available, it will be important to avoid making this determination until all possibilities have been considered. This includes ensuring that the student and relevant College personnel (*e.g.* professors, program coordinator, Chair/Dean, disabilities consultant) have been consulted.

In the *Fisher* case, the Tribunal determined that the University satisfied its accommodation obligations. The following assessment by the Tribunal of the steps taken by the University is worth reviewing:

The respondent's process for determining accommodation was not perfect but the human rights standard is not one of perfection. In this case both parties contributed to the problems which arose. However, the respondent put into place mechanisms whereby such problems could be identified and resolved. These mechanisms required that the applicant participate in reasonable ways by advising the appropriate persons of any problems and working with the respondent to find appropriate solutions. For these reasons, I conclude that the respondent did not violate its duty to accommodate the applicant. On the contrary, the respondent made all reasonable efforts to accommodate the applicant as is required by section 11 of the Code.

It should be noted that a reasonable accommodation will not guarantee that a student will pass a course. In *Worthington v. Algonquin College of Applied Arts and Technology*, 2012 HRTO 715 (CanLII), the Tribunal stated:

The obligation of a service provider like the College is not to provide the perfect accommodation, but only reasonable ones. The measure of whether or not reasonable accommodation was provided cannot be the applicant's success or failure in the program, as that would be to suggest that an educational institution must not just take reasonable steps to establish a level playing field for students with disabilities, in order to ensure their access to educational opportunities, but to ensure their ultimate success. That is too high a standard, and would ignore the other factors which contribute to, and detract from, student success.

Colleges can take comfort in knowing that the Human Rights Tribunal has made clear that there is no requirement that academic standards be reduced or ignored in order to provide accommodation (see both *Fisher* and *Worthington*). Rather, the aim of accommodation is to provide students with an opportunity to meet legitimate academic standards.

The process of accommodation is never easy and there is little doubt that accommodating mental

health issues can be challenging.

Please do not hesitate to contact your Hicks Morley lawyer if any questions arise regarding the accommodation of students with disabilities.

BUILDING AN ACCESSIBLE CAMPUS: AN IMPORTANT AODA UPDATE FOR COLLEGES

By: Leola W. Pon

Leola Pon represents employers with a particular focus on human rights, workplace safety and insurance, health and safety, labour relations, and employment. She advises Colleges and Universities on faculty and staff performance management, accommodation and return to work issues under the Human Rights Code, and compliance with the Accessibility for Ontarians with Disabilities Act, 2005. Leola is a member of the Ontario Bar Association's Workers' Compensation Section Executive and its Court Accessibility Working Group. Her legal practice is supplemented by years of prior practical work experience in the human resources and labour relations field as an advisor and as in-house legal counsel for a post-secondary educational institution.

In the last few months, we have witnessed a flurry of new legislative activity related to the *Accessibility for Ontarians with Disabilities Act*, 2005 ("AODA"). In late 2012, the Ontario government began to roll-out its long-awaited and highly anticipated standards for accessible built environments. In this article, we will look at the new and proposed built environment standards.

ACCESSIBLE PUBLIC SPACES ON CAMPUS – NEW STANDARDS IN EFFECT

The first set of built environment standards relate to the design of public spaces. These technical standards came into effect January 1, 2013, and apply to certain types of newly-constructed or redeveloped public spaces, such as:

- outdoor public use eating areas;
- exterior paths of travel, including those with ramps, stairs, curb ramps, depressed curbs, accessible pedestrian signals, and rest areas;
- accessible parking spaces; and
- service counters, fixed queuing guides, and waiting areas.

For Colleges, the new built environment standards will apply to the public spaces that are newly constructed or redeveloped on and after January 1, 2016. The Integrated Accessibility Standards ("IAS") regulation creates a narrow exception to this effective date where a College has entered into a contract before January 1, 2013 to construct or redevelop a public space to which the IAS would otherwise apply.

The potential impact of these changes are significant and need to be incorporated into campus planning and development activities now. These standards are set out at Part IV.1 of the IAS: http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_110191_e.htm

ACCESSIBLE BUILDINGS ON CAMPUS – PROPOSED CHANGES TO BUILDING CODE

The Ontario government is also planning to implement a different set of built environment standards by making changes to Ontario's Building Code. The government recently released a consultation paper ("Consultation Paper") setting out a large number of proposed technical changes to the barrier-free design requirements of the Building Code. The consultation process focuses on certain key accessibility requirements, including:

- renovations;
- barrier-free path of travel (common access and circulation);
- vertical access (elevators);
- visitable suites in multi-unit residential buildings;
- adaptable design and construction;
- visual fire alarms;
- washrooms; and
- use of educational materials and resources

Comments on the Consultation Paper were due March 1, 2013.

COMPLIANCE AND ENFORCEMENT

The compliance reporting schedule has been amended. Starting December 31, 2013, Colleges will need to file accessibility reports in relation to the IAS regulation every two years. This new reporting schedule will also apply, with "necessary modifications", to the accessibility reports required under the Accessibility Standards for Customer Service regulation.

The penalties for non-compliance or an offence under the AODA are noteworthy: up to $100,000 per day or part-day for a corporation, and $50,000 per day or part day for an individual. Directors and officers of a corporation, including College Board of Governors, have a specific duty to "take all reasonable care" to prevent the corporation from committing an offence, failing which each director or officer could be subject to a penalty of up to $50,000 per day or part day.

PREPARING FOR THE BUILT ENVIRONMENT STANDARDS

There is no doubt that Colleges will be impacted by the new public spaces standards, as well as the proposed technical changes under the Building Code, once finalized. In fact, the government acknowledges in its Consultation Paper that the proposed changes to the Building Code will result

in additional construction costs.

These developments will be of interest to those Colleges planning or undergoing significant construction and redevelopment on their public spaces and buildings. Colleges, as well as contractors and professionals retained by Colleges, are well advised to prepare for the new IAS public spaces standards.

WHEN IS A UNION GRIEVANCE APPROPRIATE?

By: Wallace M. Kenny

Recently Hicks Morley has seen an escalation in “union grievances” being filed that deal with issues involving individual employees. This often occurs when OPSEU raises general concerns affecting the sector as a whole, and recommends that the local unions press the issue throughout the system. It may also occur simply because the local union doesn’t like the approach a College is taking on a particular matter.

Dealing with these grievances can be frustrating since the individuals directly affected are often content with the situation and have chosen not to complain.

In two recent cases, arbitrators have reaffirmed that, except in very limited circumstances, the union is not entitled to file a grievance on any matter upon which an individual would be personally entitled to grieve.

THE COLLECTIVE AGREEMENT LANGUAGE

This issue is addressed in Article 32.09 of the academic agreement and in Article 18.3.3 of the support staff agreement. These articles define the proper scope of a union grievance. A union grievance:

…shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievances shall not be by-passed except where the union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this agreement and that adversely affects the rights of employees.

In a *Durham College* case decided in October 2012 by Arbitrator Paula Knopf, the academic union claimed that the position of Disability Advisor, which was a classification under the support staff unit, was properly classified as a counsellor in the academic unit and the incumbents should therefore be included in the academic bargaining unit. The individual employees had not filed a grievance. At arbitration the College objected to the matter proceeding as a union grievance. The majority of the Board agreed it had no jurisdiction to hear the matter and dismissed the grievance.

The Arbitrator confirmed that a union grievance cannot be brought forward on a matter that could be brought by an individual, unless:

1. The union establishes the employee has not grieved an unreasonable standard;
2. The standard is patently unreasonable;
3. The standard affects the rights of employees.

The case law accepts that all three of the criteria must be fulfilled. If any one of these three tests have not been met, the grievance is not arbitral as a union grievance.

WHAT IS A PATENT VIOLATION?

The employer argued that any violation of the collective agreement that requires presentation of detailed evidence in order to be established, cannot be characterized as a “patent violation”. The Arbitrator acknowledged that the determination of the case would involve an analysis of the core duties of the Disability Advisor job function in relation to the details of the class definition of Counsellor under the academic agreement.

The Arbitrator indicates that:

…the alleged violation is not “crystal clear, nor is it apparent on its face. Something that requires detailed evidence, involves differing situations, and demands the weighing of testimony, falls far short of meeting the high burden of establishing a patent violation.”

This comment is of assistance in considering the nature of a “patent violation” going forward. Most of the cases previously decided have discussed possible competing interpretations of a clause in the agreement, not the nature of the evidence needed to establish the breach.

THE RIGHTS OF EMPLOYEES

Arbitrator Knopf also comments on the third criteria. She agrees with an earlier comment by Arbitrator Howard Brown in a *Fanshawe College* case (October 30, 2009). To meet the test of affecting the rights of employees the matter must “impact broadly on members of the bargaining unit”. While the inclusion of a job in the bargaining unit does have some impact on bargaining unit members by way of union dues, she concludes the impact is only incidental to the greater right of the individuals to claim the position. The “essential” nature of the case is to assert reclassification of the individuals. It can be seen by this analysis that it is insufficient to identify a general bargaining union interest. The general bargaining unit interest, rather than the potential individual interests related to the claim, must define the dispute.

This criteria was also discussed recently in *Northern College* (December 4, 2012) (Parmar). The arbitration board was considering a union grievance alleging that the assignment of certain duties

to two professors warranted the payment of a coordinator's allowance under the academic agreement. The union conceded that the matter was something that an individual could have grieved, but did not.

In considering the interpretation of the phrase "adversely affects the rights of employees", the Arbitrator stated that it must be "consistent with the intention of the parties that the union's ability to file such grievances is to be the exception, and not the norm". This case involved mainly individual interests.

Arbitrator Parmar ruled that she had no jurisdiction to hear the matter.

NO WAIVER OF JURISDICTIONAL ISSUE

It is good practice to alert the union during the grievance meeting, and in writing in the grievance response, that the College is objecting to the matter being filed as a union grievance. However, arbitrators have said that the question goes directly to their jurisdiction to hear the grievance and cannot be waived by a College's failure to object during the grievance process.

CONCLUSION

If you are concerned that your local union is filing union grievances that are related to individual employee circumstances you might wish to consider objecting to the matter proceeding. You may assist the union in the future on focusing on matters that are proper subjects for a union grievance, and limit discussion to the review of more general topics.

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 College Practice Group, and we would be pleased to assist you.
