School Board Update

School Board Client Update

Date: November 18, 2013

The following represents a few notable decisions made by the Ontario Labour Relations Board, the Human Rights Tribunal of Ontario and arbitrators in 2013 that are relevant to school boards in Ontario.

FACEBOOK POSTING BY TEACHER WARRANTS DISCIPLINE

In *Ontario Secondary School Teachers' Federation and Simcoe County District School Board*, 2013 CanLII 62014 (CanLII), the suspension of a teacher for posting comments on Facebook harming the reputation of his principal and school board was upheld.

AB is a gay teacher employed by the Simcoe County District School Board (the "Board") in a small community. It was AB's perception that he had been the object of discrimination by the principal at his school. The Board hired a third party investigator to investigate AB's claims, who determined that AB's claims were unfounded.

AB then posted a message on Facebook that spoke to the difficulties of being an openly gay high school teacher in a small community. The message went on to conclude, "To the homophobic Principal who told me that she didn't think a gay teacher should be part of the Gay Student Alliance – we need leaders, not sheep." The Board, represented by Hicks Morley's Lauri Reesor, was concerned about the reputational damage caused by the Facebook post, personally and professionally to the principal and professionally to the school and the Board. AB was suspended.

Arbitrator Jim Hayes found that the Board had a legitimate reason to impose discipline on AB. In Arbitrator Hayes' view, the nexus between AB's off-duty Facebook posting and his employment was clear. As a result, the Board's concern about reputational damage was not misplaced or exaggerated. AB was directed to write a letter of apology to his principal, following receipt of which his penalty would be reduced to a three day suspension with appropriate compensation.

AN EMPLOYEE'S REQUEST FOR BEREAVEMENT LEAVE MUST BE CONNECTED TO THE PURPOSE OF THE LEAVE

In *Durham District School Board and Canadian Union of Public Employees, Local 218 (Pereira)*, 2013 CanLII 67383 (Parmar), the grievor was an attendance secretary covered under the "make up time" provision of the collective agreement. Employees covered by the "make up time" provision are paid regular wages during regularly scheduled school shut-downs during Christmas break and March break, despite the fact that they are not required to work. Their work schedules during the remainder of the school year are arranged to make up for this paid period of no work. Under the collective agreement, employees cannot change the dates of their scheduled "make up time."

The grievor was off work from Monday, March 11 through Friday, March 15, 2013, as a result of March break. She was paid for these days as a result of the "make up time" provision. The grievor's mother passed away on March 8, 2013, and the funeral took place on March 13, 2013. On March 11, 2013, the grievor requested five days of bereavement leave to start on March 18th, the first day back after the March break. The collective agreement provided employees with a paid leave of absence for five successive working days "on the death of an employee's spouse, child, parent, sister or brother." The School Board denied the leave and CUPE grieved.

Arbitrator Parmar dismissed the grievance. She accepted the School Board's argument (successfully advanced by Hicks

Morley's Dolores Barbini) that by using the phrase "on the death of", the parties intended the bereavement leave to be taken as soon as a death occurs, not when an employee wishes the leave to be scheduled. Arbitrator Parmar held that the purpose of a bereavement leave is to allow an employee to bear his or her immediate grief privately, to deal with the immediate care of survivors and to deal with funeral activities. In this case, because the grievor had requested her bereavement leave to begin five days after the funeral had taken place, Arbitrator Parmar found that there was no connection between the grievor's request to commence her bereavement leave and the purpose of bereavement leave.

ONTARIO LABOUR RELATIONS BOARD CONFIRMS IT IS NOT THE "WATCHDOG OF INTERNAL UNION AFFAIRS"

In *Halton Elementary Unit of the Ontario English Catholic Teachers Association (O.E.C.T.A) v. Ontario English Catholic Teachers Association (O.E.C.T.A.)*, 2013 CanLII 9950, the Ontario Labour Relations Board (the "OLRB") dismissed four duty of fair representation complaints brought by groups of individual teachers and two district Presidents against OECTA, holding that they had failed to establish a *prima facie* case that there was a breach of the *Labour Relations Act, 1995*. The four complaints alleged that OECTA's Provincial Executive had violated several of the union's constitutional provisions and by-laws when it agreed to, and signed, the July 5, 2012 Memorandum of Understanding with the Provincial Government. The main allegation was that the Provincial Executive did not submit the Memorandum of Understanding to either the Council of Presidents or the general membership for ratification prior to signing the agreement.

The OLRB found that the complaints failed to establish a *prima facie* case, holding that even if the Provincial Executive had failed to follow the constitutional provisions and by-laws, the OLRB does not have the jurisdiction to be the "watchdog for internal union affairs." Further, the OLRB found that the Provincial Executive was not engaged in collective bargaining when it was engaged in the Provincial Discussion Table discussions with the Provincial Government. Therefore, the Provincial Executive was not under an obligation to communicate with the membership during these negotiations.

A similar conclusion was reached in *Ballantyne v. Ontario Secondary School Teachers' Federation*, 2013 CanLII 4156.

SIGNIFICANT REMEDY ORDERED BY THE HRTO FOR FAILURE TO ACCOMMODATE

In *Sharon Fair v. Hamilton-Wentworth District School Board*, 2012 HRTO 350 (and 2013 HRTO 440 [decision on remedy]), the Applicant was an employee of the Hamilton-Wentworth District School Board (the "Board"). The Applicant was employed by the Board from 1988 until 2004 when her employment was terminated because the school board did not have a position in which the Applicant could be accommodated as a result of her disability.

The Applicant's disability arose out of the Ministry of Labour's criticism of the asbestos removal projects that the Applicant was responsible for in her role as Supervisor, Regulated Substances, and the Ministry's decision to threaten the Applicant with a substantial personal fine. As a result of these events, the Applicant was diagnosed with an anxiety disorder, depression, and post-traumatic stress syndrome. The Applicant applied for and received long-term disability benefits and sick leave benefits until her employment was terminated.

The Applicant filed an Application with the Human Rights Tribunal in which she alleged that she had been discriminated against on the basis of disability. In agreeing with her argument, the Tribunal made the following findings:

- The School Board failed to actively, promptly and diligently canvass possible solutions to the Applicant's need for accommodation;
- The School Board failed to place the Applicant in one of the available work positions, either temporarily or permanently; and
- The School Board failed to consider alternate employment opportunities that would involve a lower risk of personal

liability that would have been acceptable to the Applicant.

In light of these findings, the Tribunal, in a subsequent decision, ordered that the Applicant be reinstated to a position that did not involve exposure to personal liability for health and safety, awarded over $400,000 (plus interest) in back pay to June 26, 2003, and awarded $30,000 as compensation for injury to dignity, feelings, and self-respect.

TEACHING EXPERIENCE FOR WAGE GRID PLACEMENT MEANS ACTUAL EXPERIENCE ACQUIRED DURING SCHOOL YEAR

At issue in *Limestone District School Board and ETFO (Gallant)*, (2013) 114 C.L.A.S. 114 (Albertyn) was the calculation of teaching experience for the purposes of placement on the wage grid in the collective agreement. Article 12.3.2 of the agreement provided that “Where the calculation of teaching experience results in partial years and for the purposes of grid placement, fractional years of .5 or greater shall be rounded up to the nearest year and fractional years of less than .5 shall be rounded down to the nearest year.”

The School Board’s practice was to round up or down yearly teaching experience amounts for the purposes of wage grid placement, but to keep a running total of the actual amount of teaching experience. The rounded up or down number was not a new “floor” for the purposes of calculating teaching experience. Rather, the placement in each year would be based upon the actual total, rounded up or down.

The grievance arose after the grievor was informed of her placement on the wage grid for the 2007-08 school year. For the previous 2006-07 school year, her 2.6 years of teaching experience had been rounded up to 3 for wage grid placement. During this school year, the grievor only accrued 0.83 years of teaching experience. For the 2007-08 school year, this 0.83 accrual was added to her 2.6 years of teaching experience for a total of 3.43. As was the Board’s practice, it rounded the grid placement to 3 years. ETFO grieved, and argued that her new teaching experience of 0.83 years ought to be added to 3 and then rounded up to step 4.

Arbitrator Albertyn dismissed the grievance, distinguishing between wage grid placement and teaching experience, finding that ETFO’s interpretation would result in artificially inflated teaching experience. He accepted the Board’s argument (advanced by Hicks Morley’s Vince Panetta) that the reference to teaching experience in Article 12.3.2 was simply to allow the parties to know how to address a fraction in the calculation of a teacher’s actual teaching experience at any point when calculating grid placement.

ATHEISM FOUND TO BE PROTECTED CREED UNDER THE *CODE*

In *R.C. v. District School Board of Niagara*, 2013 HRTO 1382, the School Board had a policy of allowing religious literature to be handed out to children if the child’s parents had consented. R.C., the father of a grade five student, challenged the policy on the basis that it did not comply with the *Human Rights Code*. R.C. had earlier requested permission to distribute the book “Just Pretend: A Freethought Book for Children” to the students and was denied on the basis that atheism was not a religion. R.C. filed an Application with the Human Rights Tribunal, seeking a declaration that no religious literature ought to be distributed at school.

In the course of the proceedings, the Tribunal was required to determine two issues: first, whether atheism is in fact a protected “creed”; and, second, whether the School Board’s policy on the distribution of religious literature violated the *Human Rights Code*.

With respect to the first issue, the Tribunal readily concluded that protection against discrimination on the basis of religion must include protection of the belief that there is no deity. The Tribunal stated that such a principle is a “profoundly personal belief about the lack of existence of a divine or higher order of being that governs [the holder’s] perception of themselves, humankind and the world.” The Tribunal further noted that in its seminal freedom of religion decision in *R. v. Big M. Drug Mart*

Ltd., the Supreme Court of Canada found that freedom of religion and conscience under the *Charter* includes both belief and non-belief.

The Tribunal then went on to find that the School Board's new policy violated the norm of substantive equality. The Tribunal further held that in order to comply with the *Human Right Code*, the School Board had a responsibility to make efforts to encourage a diversity of literature and awareness of the policy under which the materials could be distributed. This included ensuring that a clear statement was given to parents indicating that all creeds are permitted to distribute materials with parental consent.

GOVERNMENT IMMUNE FROM APPLICATION OF *LABOUR RELATIONS ACT, 1995*

In R v. Ontario Secondary School Teachers' Federation, 2012 CanLII 80016, OSSTF alleged that the Government (including the Premier of Ontario, the Minister of Education and the Minister of Finance) violated sections 17, 72, 73 and 76 of the *Labour Relations Act*, 1995 (the "LRA") by making public statements with respect to its 2012 Provincial Discussion Table ("PDT") positions. ETFO and CUPE intervened in support of OSSTF, while OPSBA and OCSTA also intervened and participated.

The Government made preliminary objections to the jurisdiction of the OLRB to hear the application. In particular, it argued that (i) the Crown is immune from the application of the LRA and, (ii) OSSTF did not make out *prima facie* violations of the LRA.

The Government argued that past OLRB case law made it clear that Ministers, as servants of the Crown, are immune from the application of the LRA. It referenced as support section 71 of the *Legislation Act, 2006* which provides "No Act or regulation binds Her Majesty or affects Her Majesty's rights or prerogatives unless it expressly states an intention to do so" and section 4(2) of the LRA which provides "Except as provided in subsection (1), this Act does not bind the Crown".

In the alternative, the Government argued that political, legislative or governmental action is not justiciable under the LRA, which is intended to only govern the collective bargaining relationship between employers, employees and their representative bargaining agents. Furthermore, it argued that the allegations did not disclose *prima facie* violations of the LRA, as the Government was not an employer, it was not acting on behalf of employers and the PDT Discussions were not a form of collective bargaining and so fell outside of the LRA.

In response, OSSTF sought to distinguish the previous OLRB jurisprudence. It argued that the Government was essentially stepping into the shoes of the school boards as employers and attempting to dictate the process and contents of school board collective bargaining. It further argued that it was possible for the Government to lose its immunity because of its actions.

The OLRB did not accept OSSTF's arguments, and dismissed the application based on the Government's preliminary arguments. In doing so, it emphasized that the PDT process was purely voluntary and so operated outside of both the LRA and the *Education Act*.

Should you have any questions regarding these cases, please contact your regular Hicks Morley lawyer.

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