School Board Update

Leaves of Absence, Procedural Matters and More

Date: March 28, 2017

In this latest edition of our *School Board Update*, we are bringing you summaries of three recent cases which will be of interest. They deal with abuse of process at arbitration, entitlement of part-time and custodial employees to miscellaneous leaves, and the balancing of religious freedom with other statutory requirements. Happy reading!

Arbitrator Rules that the Failure of a Grievor to Cooperate with his Union Constitutes an Abuse of Process

In a helpful decision, Wellington Catholic District School Board v Canadian Union of Public Employees, Local 256.01, Arbitrator Sheehan concluded that the repeated failure of a grievor to cooperate with his union, or to make himself available for the arbitration hearing, resulted in an abuse of process and a dismissal of the grievance.

In this case, the grievor had been employed with the Wellington Catholic District School Board (Wellington CDSB) as a caretaker between July 2, 2013 and July 2, 2015. His employment was ultimately dismissed for possessing and consuming alcohol in the workplace, an offence for which he had previously been disciplined.

The Union's Attempts to Prepare for the Hearing

Shortly after the grievor's dismissal from employment, the Canadian Union of Public Employees, Local 256.01 (Union) filed a grievance. The matter was set for a hearing on March 31, 2016.

In advance of the hearing, the grievor's Union representative made diligent efforts to set up a preparation meeting with the grievor. In response, the grievor indicated that he could no longer attend the hearing date due to his employment obligations. He also indicated that he would only be available on Fridays in the future. On that basis, the hearing was rescheduled to a Friday, December 16, 2016.

Beginning in October of 2016, the grievor's union representative again made efforts to schedule a preparation meeting. The grievor responded that he required "proper representation" and that the delay in hearing his grievance was unreasonable. The Union representative reminded the grievor that the hearing had been postponed at his request and informed him that the Union would be proceeding with the grievance on December 16, 2016. Thereafter, the Union representative, and the Union president, made continued efforts to urge the grievor to attend a preparation meeting.

In response to these efforts, the grievor indicated that he would like to "sign off" on Union representation, as he believed that he was forced to be proactive on his own behalf. He also indicated that he was no longer seeking reinstatement, and that his anxiety and depression had increased exponentially.

This exchange was followed by a number of additional emails between the grievor and his Union representative, including the Union's offer to attempt to adjourn the hearing on the basis of the grievor's medical condition. The grievor refused this offer and refused to provide medical documentation to substantiate his disability. The grievor ultimately concluded that this matter would best be dealt with by a court.

Submissions at the Hearing

At the arbitration hearing on December 16, 2016, the Wellington CDSB took the position that the grievance should be dismissed on the basis that the grievor's conduct constituted an abuse of process and an attack on the integrity of the arbitration process. In that regard, the Wellington CDSB specifically emphasized the grievor's unwillingness to meet with his Union and his reluctance to reschedule his affairs to attend the hearing. The Wellington CDSB stated that these failures were clearly indicative of the fact that the grievor had no intention of participating in the process. This argument was further supported by the grievor's request to "sign off" on Union representation.

In response, the Union took the position that the hearing ought to be adjourned on the condition that the grievor produce medical documentation. The Union suggested that if the grievor failed to provide confirmatory medical, the grievance could then be dismissed.

The Grievance is Dismissed

Arbitrator Sheehan agreed with the Wellington CDSB and found that the grievor's actions constituted an abuse of process which warranted the dismissal of the grievance. In doing so, Arbitrator Sheehan was careful to note that the Union had made diligent efforts to represent the grievor's interests, including multiple attempts to meet with the grievor and to adjourn the hearing a second time to allow the grievor to produce medical documentation.

The Arbitrator then went on to consider the importance of the grievance arbitration process in labour relations in Ontario, which he noted serves as both the means by which parties to a collective agreement may resolve their disputes and the only mechanism by which an aggrieved employee may pursue a remedy. On that basis, he further noted that a termination grievance should only be dismissed as an abuse of process in the clearest of cases.

Arbitrator Sheehan found that this was such a case, as the grievor had displayed an outright refusal to cooperate or participate in the arbitration process. He had also indicated a clear desire to withdraw from the process. The Arbitrator further found that it was not appropriate to adjourn the hearing in order to give the grievor an opportunity to provide medical documentation, as the Union had clearly identified the consequences to the grievor should he fail to attend the hearing or provide medical documentation. The grievor chose to disregard this advice "at his own peril", and his actions confirmed that he did not accept or recognize the arbitration process. As a result, the grievance was dismissed.

Key Takeaways from this Decision

While it is relatively rare that a grievor will refuse to participate in the arbitration process to the extent demonstrated in this case, this decision serves as a helpful reminder that the arbitration process is a key element of labour relations in Ontario, and therefore must be respected by the parties involved.

More particularly, this decision may be helpful to keep on hand when either a grievor or a union seeks to undermine the arbitration process through delay or a failure to participate in the process. It may also be helpful for any case in which an employer is seeking to emphasize the importance of the arbitration process and the inherent integrity that must be preserved.

Of course, this decision will also certainly be relevant if you are faced with a grievor who refuses to cooperate in the process outright, either with the union or in the course of the arbitration.

Arbitrator Rules that Part-Time Clerical and Custodial Employees Not Entitled to Miscellaneous Leaves of Absences

In *Canadian Union of Public Employees, Local 4400 and Toronto District School Board* (30 November 2016, Howe), Arbitrator Howe concluded that part-time clerical and custodial employees at the Toronto District School Board (TDSB), represented by the Canadian Union of Public Employees, Local 440 (CUPE), were not entitled to miscellaneous leaves which

could be deducted from sick leave credits.

In reaching this decision, Arbitrator Howe considered the interpretation and interplay of the 2008-2012 and 2012-2014 collective agreements between the TDSB and CUPE, the 2012 and 2013 CUPE Memoranda of Understanding (MOUs) and the now expired *Education Act* Regulation 1/13 *Sick Leave Credits and Sick Leave Credit Gratuities*.

Background

This proceeding consisted of a policy grievance and three individual grievances with respect to certain part-time employees under the collective agreements for the clerical unit and the custodial unit.

Under the 2008-2012 collective agreements, sick leave credits were granted to full-time employees and to part-time employees working a minimum number of hours per week (15 hours for clerical employees and 24 hours for custodial employees). Those employees who were granted sick leave credits were also granted up to five leave days for miscellaneous leaves (for example, to move into a new place of residence) without loss of salary but with deductions from accumulated sick leave credits.

The 2012 CUPE MOU set out the following with respect to sick leave days (among other things):

D. Sick Leave / Short Term Leave and Disability Plan / Short Term Leave and Disability Plan Top-Up / Long Term Disability Plan […]

(i) Sick Leave Days

1. Each school year, an employee shall be paid 100% of regular salary for up to eleven (11) days of absence due to personal illness. Personal illness shall be defined as per the 2008-2012 local collective agreement. A less than full-time employee shall be paid 100% of the employee's regular salary (as per the employee's full-time equivalent status) for up to eleven (11) days of absence due to personal illness…
2. […]
3. […]
4. Any leave of absence, in the 2008-2012 Collective Agreement, that utilizes deduction from sick leave for reasons other than personal illness shall be granted without loss of salary or deduction from sick leave, to a maximum of five (5) days per school year. These days shall not be used for the purpose of personal sick leave nor shall they be accumulated from year-to-year.

Education Act Regulation 1/13, *Sick Leave Credits and Sick Leave Credit Gratuities*[1], was enacted on January 2, 2013. In its first version, it granted sick leave credits only to employees who were in a class of employees that, on August 31, 2012 or after, were eligible to accumulate sick leave credits. Practically, this excluded the part-time employees in question because they were not entitled to sick leave.

The May 13, 2013 CUPE MOU, amended paragraph D. i) 1 of the 2012 CUPE MOU by clarifying that "employee" included any employee other than a casual employee. The parties also agreed that employees were not entitled to sick leave unless they were previously entitled to it.

However, the landscape with respect to entitlement to sick leave credits changed when Regulation 1/13 was subsequently amended in June, 2013 to revoke the limit on classes of employees eligible for sick leave credits, as set out above. It substituted this limit with the broader requirement that the employee just be a permanent employee to be eligible for sick leave credits. Practically, this granted sick leave credits to the part-time employees in Unit C and Unit D who were previously denied such entitlements. This interpretation was also confirmed in a Memorandum from the Ministry of Education.

The issue raised by the grievances, therefore, was whether part-time employees who had not been granted miscellaneous

leaves under the 2008-2012 collective agreements (because they were not eligible for sick leave credits under those collective agreements) became entitled to miscellaneous leave under the 2012-2014 collective agreements.

Submissions at the Hearing

At the hearing, CUPE took the position that had the parties to the 2012 MOU wanted to put a restriction on entitlement to miscellaneous leave, the parties would have specifically done so (as was evidenced in other parts of the 2012 CUPE MOU). Given that paragraph D. i) 1 granted sick leave days to a broad group employees, that same broad group of employees should also be granted miscellaneous leaves.

The TDSB took the position that clear and unequivocal language was required to establish an entitlement to a monetary benefit and CUPE failed to meet that onus.

The TDSB also relied upon the chronology of amendments to Regulation 1/13 and the two MOUs to support its interpretation. In so doing, the TDSB was able to demonstrate that the purpose of paragraph D. i) 4 of the 2012 MOU was not to confer *new* entitlements to miscellaneous leaves, but rather just to preserve what entitlements were already existing.

In reply, the Union took the position that there was no regulatory restriction to the scope of paragraph D. i) 4 of the 2012 MOU and therefore, in light of the fact that the part-time employees at issue had been granted sick leave, they should be entitled to the miscellaneous leaves, which were “any leave of absence, in the 2008-2012 Collective Agreement, that utilizes deduction from sick leave”.

The Grievance is Dismissed

Arbitrator Howe agreed with the TDSB and found that the part-time employees in question were not entitled to miscellaneous leaves, despite the fact that they had subsequently become entitled to sick leave credits. He came to this conclusion on the basis that paragraph D. i) 1 of the 2012 MOU differentiated between types of employees (i.e. “employee” or “less than full-time employee”) whereas paragraph D. i) 4 did not. This distinction supported the TDSB’s interpretation that *other paid* leaves in the 2008-2012 collective agreement only extended to the class of employees who were previously entitled to them..

Arbitrator Howe also endorsed the well-established principle that where a monetary benefit is asserted, the onus is on the party asserting the benefit to show in clear, specific and unequivocal terms that the monetary benefit is part of the employee’s compensation package, and that such intent is not normally imposed by inference or implication. He found that there was nothing in the 2012-2014 collective agreements for Units C and D that clearly or specifically expressed an intention to extend miscellaneous leave eligibility to the affected part-time employees.

Key Takeaways from this Decision

This decision helpfully demonstrates that the particular language of a collective agreement and regulation must be carefully considered when interpreting entitlements under a collective agreement. This exercise may involve an analysis of the evolution of such documents and it is important to consider that context.

This decision is also helpful in reinforcing the principle that monetary benefits must be explicitly conferred upon employees, and cannot be inferred or implied. Employers may rely upon this decision to resist arguments where employees are seeking entitlements through ambiguous language.

Father’s Request to Withdraw his Children from School Programs Involving “False Teachings” denied by Ontario Superior Court

In E.T. v Hamilton-Wentworth District School Board, the Ontario Superior Court recently dismissed a request from an applicant, a father who is a member of the Greek Orthodox Church, for an order which would effectively allow his children to be withdrawn from any lessons or activities that exposed them to “false teachings” at their public elementary school. It found that the Hamilton-Wentworth School Board (Board) properly engaged in a balancing of its statutory requirements with the values under the *Canadian Charter of Rights and Freedoms* (*Charter*) in concluding that it could not accommodate this request.

One of the tenets of the applicant’s religious belief was that he must protect his children from “false teachings” (including issues relating to moral relativism and human sexuality). He sought accommodation from the Board which would effectively prevent his children from being present for such teachings. The Board denied the accommodation request and the applicant brought this action, arguing that failure to provide accommodation violated his right to freedom of religion under section 2(a) of the *Charter*. He also argued discrimination on the basis of creed under the Ontario *Human Rights Code* (Code).

The Board, with the Elementary Teachers’ Federation of Ontario (ETFO) and the Ontario Ministry of the Attorney General (AG) intervening in support, took the position that such accommodation was not possible.

The Court noted the following:

- The *Education Act* requires school boards to deliver effective and appropriate educational programs to its students. The *Policy Program Memorandum No. 119* (PPM 119) issued by the Ministry of Education in 2009 requires that school boards, among other things, develop and deliver an equity and inclusive education policy. PPM 119 was “designed to respond to a concern that racism, religious intolerance, homophobia and gender-based violence were still evident in school communities.”
- The Board then developed an Equity Policy which committed the Board to ensuring that “all policies, guidelines and operating practices actively demonstrate a respect for Aboriginal, racial, ethnocultural and religious differences” and, as well, are inclusive of all persons regardless of sexual orientation. The Equity Policy also contained a guideline regarding religious accommodation, which indicated the Board would take all reasonable steps to ensure freedom of religion and religious practice.
- Based on the PPM 119 and the Board’s Equity Policy, the applicant was concerned that his children would be exposed to “false teachings” contrary to his faith, in particular teachings related to sexual orientation.
- The applicant requested accommodation under the Board’s Equity Policy in the form of being advised prior to his children’s involvement in any programs or activities dealing with issues such as moral relativism, sex education, homosexual/bisexual/transgender conduct and relationships, birth control, abortion and so on.
- The Board denied such accommodation, stating that it was obliged to follow the mandated curriculum and that it could not provide the applicant with the specific material regarding the issues being taught. It did invite the applicant to excuse his children from the sex education part of the curriculum. No decision was made on withdrawing the children from activities where such material was taught.
- The Board submitted that while its decision infringed on the applicant’s religious freedoms, it engaged in a proportional balancing of the statutory objectives of the *Education Act* with the *Charter* and took into account “its statutory duty of neutrality in such matters, which is implied in the requirements for inclusivity and student well-being” in the *Education Act.* Withdrawing the children from classes found by the applicant to be “false teachings” “would be contrary to the value of inclusion and student well-being, and could lead to feelings of exclusion or marginalization by students, including the applicant’s children.”
- ETFO submitted that “the curriculum has so fully integrated the requirements for gender equity, antiracism, respect for people with disabilities and respect for people of all sexual orientations and gender identities that it would be impractical if not impossible to advise the applicant in advance when any of the positions that he considers objectionable were to be taught.”

On the guarantee of religious freedom under the *Charter*, the Court noted that the guarantee is not “free-standing” but must be analyzed within a particular framework.

First, there must be evidence of “a practice of belief, having a nexus with religion, that calls for a particular line of conduct.” Second, the applicant must be sincere in that belief. The applicant in this case satisfied both requirements.

The applicant also demonstrated an initial justification for the accommodation request and that the interference with his *Charter* rights was not “trivial or insubstantial” as “his religious tenets are significantly at odds with numerous aspects of the Board’s Equity Policy.”

However, the Court concluded that the Board’s statutory requirements were consistent with *Charter*-protected values. Moreover, the accommodation sought by the applicant would create undue hardship. The Court stated:

[95] The Board denied its ability to provide advance notice to the applicant as to the teaching of potentially objectionable information. It viewed accommodation, in accordance with the applicant’s request, as creating undue hardship, since the teacher would have to interpret what the applicant’s form (in which he listed objectionable topics) meant and then determine whether the curriculum may or may not engage those topic areas. As well, the Board focused on the potential discriminatory effect on the applicant’s children and others if the advance notice request was granted. The Board noted that the integrated curriculum had embedded within it equity and inclusiveness principles. In short, the Board considered it unreasonable to provide the requested advance notice accommodation.

The Court also noted that accommodation by “non-attendance” would isolate the applicant’s children and that “isolation is antithetical to the competing legislative mandate and *Charter* values favoring inclusivity, equality and multiculturalism.” The Board properly choose inclusion over isolation and it would be difficult to find accommodation that addressed the applicant’s concerns. The Court did state, however, that the applicant was free to seek out alternatives to the public school for his children, such as an independent faith-based school or home-schooling.

With respect to the allegation of discrimination under the Code, the Court found it was without jurisdiction to determine that issue as the claim was not brought as an adjunct to another cause of action, as required by the Code.

For more information on the decisions discussed in this *School Board Upda*te, please contact Dianne E. Jozefacki at 416.864. 7209, Amanda Lawrence-Patel at 416.864.7030 or Dolores Barbini at 416.864.7303. Ms. Barbini successfully represented both the Wellington CDSB and the TDSB at the arbitrations.

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[1] Made under the *Education Act* and in force between January 2, 2013 and Aug 30, 2014.
