School Board Update

School Boards Take Note: Recent Developments of Interest

Date: February 5, 2019

With this unpredictable weather, we thought it would be helpful to provide some interesting (and educational) reading to be enjoyed comfortably indoors.

In this Update, we discuss a recent decision of Arbitrator Nyman with respect to what constitutes a collective agreement and which re-affirms the longstanding principle that the interpretation of a collective agreement is first to be based on the plain and ordinary meaning of the written words. We also discuss a topical case with respect to a grievor's obligation to produce arguably relevant medical documentation in the context of a grievance arbitration – notwithstanding the contractual restrictions that may exist.

We then consider the potential implications of the forthcoming "First Ever" *Parents' Bill of Rights,* which we are monitoring. Finally, we discuss the Information and Privacy Commissioner of Ontario's recently published *A Guide to Privacy and Access to Information in Ontario Schools.*

We hope you enjoy this edition and would like to thank Diana Holloway, Kate Shao and Matin Fazelpour for their help in preparing the articles. Please let us know if you have any topics of interest you would like to see discussed in our upcoming Updates.

Amanda Lawrence-Patel and Dianne Jozefacki

Arbitrator Confirms that PDT Process Not Collective Bargaining and Finds that PDT Agreement not Incorporated By Reference Into Collective Agreement

By: Dianne E. Jozefacki

The recent grievance considered in *Halton Catholic District School Board and OECTA – Halton Elementary Unit (Inclement Weather Supervision),* 2019 CarswellOnt 749 involved an interpretation of a school board's Collective Agreement and whether a letter of understanding (LOU) had been mistakenly entered into. Arbitrator Nyman provided an overview of the general principles relating to

incorporation by reference of external documents into a Collective Agreement and the doctrines of mistake and rectification. He also engaged in review of the complex collective bargaining structure in the Education sector and provided some helpful comments on the nature and sources of various obligations for local parties.

The Collective Bargaining Context

Beginning in 2004, the government of Ontario, through the Ministry of Education, initiated a process whereby discussions took place at a provincial level with various school board statutory bargaining agents, such as Ontario English Catholic Teachers Association (OECTA) and the provincial school board trustees' associations, including the Ontario Catholic Schools Trustees Association (OCSTA).

The intention of the government was that these discussions would result in framework agreements which would inform the content of actual Collective Agreements entered into between local bargaining agents and district school boards. This process was referred to as the Provincial Discussion Table (PDT).

The PDT process existed outside of the statutory framework of the *Education Act* or the *Labour Relations Act, 1995*. The individual district school boards were not participants in the PDT process – only the provincial school board trustees' associations.

The PDT agreement negotiated between the government, OCSTA and OECTA in 2008 set out a maximum number of supervision minutes for elementary teachers. OECTA understood that to be a hard cap.

In this case, the Halton Catholic District School Board (Board) was a member of OCSTA, but that membership was voluntary. As stated by the Arbitrator: "The PDT process also did not constitute collective bargaining nor did the PDT agreements constitute Collective Agreements. … Ultimately, the PDT Agreements did not replace or preclude, the process of local parties negotiating their own bilateral Collective Agreements, however, local parties could agree to incorporate the terms of the PDT Agreement into their Collective Agreements and thereby secure additional funding."

Issue – The Enforceability of the LOU

The Board and the Halton Elementary Unit of OECTA engaged in local bargaining during the summer of 2008 for the renewal 2008-2012 Collective Agreement. They agreed to include the language from the PDT Agreement into the Collective Agreement, as necessary to secure funding from the Government. This included the maximum supervision minutes for elementary teachers (Article 18.02). An accompanying LOU stated that "inclement weather days will not count towards the supervision minutes calculation" for the purpose of Article 18.02.

As a result of the language of the LOU, where there were inclement weather days the number of supervision hours per week which could be assigned to teachers exceeded the cap in the Collective Agreement. OECTA argued that in this regard the LOU was of no force and effect. Moreover, it was inconsistent with the PDT Agreement which was incorporated by reference into the Collective Agreement.

The Board argued that the LOU was unambiguous and binding on the parties. It also argued that the PDT Agreement was not incorporated into the Collective Agreement, and the Arbitrator did not have jurisdiction to consider the interpretation and application of the PDT Agreement.

Decision

Arbitrator Nyman dismissed OECTA's grievance, making the following findings:

- OECTA agreed to the LOU and the language in s. 18.02 of the Collective Agreement on the same bargaining day and therefore it was "not plausible that the impact of the LOU on the supervision maxima was not contemplated or understood given the timing of the agreement on the language and the clear meaning of the word s in the LOU."
- OCSTA did not have authority to bind the Board during the PDT process.
- The PDT Agreement was not incorporated by reference into the Collective Agreement because there was no clear and unequivocal language indicating the parties' intention to do so.
- As the PDT Agreement was not incorporated into the Collective Agreement, the Arbitrator had no authority to enforce it or to declare the LOU invalid for not complying with the PDT Agreement.
- The general approach of "context as a general interpretative concept" cannot be relied upon to find that language means something substantially different than what the words convey.
- OECTA's request that he apply the doctrine of mutual mistake to declare the LOU null and void was rejected: the parties clearly intended to enter into the LOU which carved out inclement weather, and there was no "common error as to some fundamental fact."
- As the parties meant what they said, this was not a case where it was appropriate to exercise discretion to apply the remedy of rectification:

There is no argument that the LOU was not what was agreed upon. … This therefore not a case where the written agreement must be rectified so that it accurately matches what was agreed upon. It is really a case where the parties' agreement has unintended consequences or conflicting consequences. It is therefore not a case in which the doctrine of rectification should be applied. If the LOU is declared void, it would not be rectifying the Collective Agreement so that it matched the parties' intentions, but rather would be akin to rewriting it and preferring one intention over another. The determination of which intention should be preferred is an issue best left to the parties.

Take-Away

This decision, which was successfully argued on behalf of the Board by Hicks Morley's John Paul Alexandrowicz, is helpful as it re-affirms that the interpretation of a Collective Agreement is first to be based on the plain and ordinary meaning of the written words negotiated by the parties themselves. Sometimes, it is as simple as what is written on the page.

Grievor Ordered to Produce Sensitive Medical Information in Case about Denial of Disability Benefits

By: Diana P. Holloway

Arbitrator Christopher White recently released *Greater Essex County District School Board and Canadian Union of Public Employees, Local 27*, 2018 CarswellOnt 22187, a lengthy interim arbitration award granting the request of a School Board (Board) for an order that the grievor's sensitive medical information be produced.

By way of background, the grievor had applied for sick leave / short term disability benefits and had submitted certificates from his physician stating that he was unable to attend at work due to a medical condition. However, none of these certificates provided any information about the nature or cause(s) of the grievor's condition. The Board denied the grievor's claim for benefits on the basis that he had not provided sufficient medical information to support it.

The grievor never returned to work, and his union filed a grievance alleging that the Board was in violation of the Collective Agreement between the parties. The language of the Collective Agreement spoke to the medical information that the Board could require in response for an outstanding request for sick leave, restricting the Board to:

…medical confirmation of illness or injury and any restrictions or limitations any Employee may have, confirming the dates of absence and the reason thereof (omitting a diagnosis).

In advance of the hearing on the merits of this grievance, the Board requested an order for the production of **"any and all medical documents of any kind" pertaining to the grievor from the time just prior to when the grievor went off work until the date of the grievance**. The Union asserted primarily that the Collective Agreement language at issue had been negotiated by sophisticated parties and set out exactly what information an employee might be required to provide. It argued that the Board had made its decision based on certain information and could not seek at arbitration to justify its decision based on information it had not initially relied upon.

In response, the Board argued that the onus ultimately lay with the Union to prove its assertion of disability rather than on the Board to prove the contrary, and that the production rules that applied at arbitration (i.e., for all documents arguably relevant to the issues) could go beyond whatever the Board might have been entitled to had arbitration not been resorted to.

The Arbitrator began his analysis by rejecting the Union's primary position, finding that a production order was appropriate because at least some of the requested medical information was arguably relevant to the issue of whether the grievor had failed to provide sufficient medical information to support his claim.

The Arbitrator then turned to the task of determining what the scope of the production order should be. He found that the Board's proposed temporal parameters were reasonable, and held that the production order should only apply to arguably relevant medical information from the proposed time period.

Finally, the Arbitrator considered what process for production would be most appropriate. He rejected the assertion that he was required to review the grievor's medical information to assess its relevance prior to making a production order, conceding that proceeding in that manner may be necessary in cases where the information to be produced includes sensitive medical information, but only if there is objective evidence that the impact of disclosure on the griever would be disproportionately severe. He then concluded that since there was no such evidence in the case before him, there was no need to deviate from the "normal" production process.

Significantly, the Arbitrator proposed that the following factors should be considered when establishing a production process for sensitive medical information:

a. the nature of the medical information sought, because certain classes of information invite greater privacy concerns than others
b. whether the medical condition at issue is the product of, or related to, the workplace, because a stronger link to the workplace will likely heighten a grievor's privacy interest
c. whether disclosure of the medical information will create the potential for future adverse impacts on the employment relationship, because such impacts should be minimized
d. to what extent, and for what purpose, the medical information is to be shared, and the nature of the grievor's relationship(s) with the potential recipient(s) of the information, because the circumstances of disclosure can heighten a grievor's privacy interest
e. whether safeguards can be implemented to ensure that the disclosed information is used only for the limited purpose(s) for which it has been produced; and
f. whether certain mechanisms for production will better accomplish the goal of establishing an expedient, efficient and effective disclosure process.

This is an important decision for school boards insofar as it confirms that, whatever contractual restrictions may exist as a request for sick benefits is unfolding, medical information is arguably

relevant and therefore producible in arbitration cases about the denial of disability benefits. Further, it sheds valuable insight into how arbitrators may approach the task of establishing a process for the production of sensitive medical information. Hicks Morley's Michael Hines successfully argued the case on behalf of the Board.

Provincial Government Consults Parents on the "First Ever" *Parents' Bill of Rights*

By: Kate K. Shao

In August 2018, the Ontario government announced a province-wide consultation into the Ontario school curriculum. With the goal of creating "an education system that respects parents while preparing [Ontario] students for success," the government led public consultations from September to December 2018. The consultations were conducted across three channels (online surveys, telephone town halls and submission packages) and focused on the "shortcomings" of the Ontario curriculum, including issues such as:

- how to improve student performance in the STEM disciplines of Science, Technology, Engineering and Math;
- how schools are preparing students with needed job skills, whether it be by exposing them to opportunities in the skilled trades or giving them the opportunity to improve their skills in increasingly important fields like coding;
- what more can be done to ensure students graduate with important life skills like financial literacy;
- how to build a new age-appropriate Health and Physical Education curriculum that includes subjects like mental health, sex-ed and legalization of cannabis;
- what measures can be taken to improve standardized testing; and
- what steps schools should take to ban cellphone use in the classroom.

Part of this consultation included canvassing parents on what they would want to see in the province's "first ever" *Parents' Bill of Rights.* By using the authority set out in the *Ontario College of Teachers Act, 1996*, the Minister of Education, Lisa Thompson, struck a Public Interest Committee to assist in informing the creation of the *Bill*. The Minister has advised that the Committee will "ensure curriculum-based misconduct issues are fairly dealt with at the college." The government plans to use the feedback from the Committee to draft legislation that ensures the "rights of parents are protected."

While the government has not revealed the findings of its consultation, the forthcoming *Parents'*

Bill of Rights will likely have implications on educational actors, such as school boards. Accordingly, when the *Bill* is released, school boards may need to review their policies and procedures to ensure they are in line with the anticipated legislation.

The IPC Publishes Guidance for School Boards on Their Obligations under MFIPPA

By: Matin Fazelpour

The Information and Privacy Commissioner of Ontario (IPC) has published *A Guide to Privacy and Access to Information in Ontario Schools* (Guide). The Guide provides a succinct overview of a school board's responsibilities under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the Act). The Act obliges school boards to protect individual privacy and maintain the freedom of information for records in their custody or control. The Guide provides direction to school boards on complying with their responsibilities under the Act, using particularized examples from IPC decisions concerning school boards.

School boards can consult this document for guidance on their obligations to protect individual privacy and to provide access to information rights. The Guide also covers special circumstances, such as disclosure to law enforcement or children's' aid societies.

1) Protection of individual privacy

The Guide provides a summary of a school board's duty under Part II of MFIPPA to limit the collection, retention, use and disclosure of personal information. It includes a detailed analysis of a school board's duty to collect students' personal information only with consent or where necessary to comply with obligations under the *Education Act*.

Generally, a school board may collect information for the purposes of educating students. Therefore, a collection of students' personal information that is necessary for the purpose of educating them will usually be lawful even if consent is not obtained. The collection of personal information for any other purpose might breach students' privacy protections and the school board's obligations under the Act.

Moreover, the Guide notes that students, or their parents, must generally be notified when students' personal information is collected on grounds of its necessity for an *Education Act* purpose. School boards are generally required to provide notice of the legal authority for collecting personal information without consent, of the purposes for which the information is intended to be

used and of a contact person who can answer questions about the collection.

This document includes a handy review of the types of personal information that school boards generally collect, such as a breakdown of Ontario Student Record (OSR) information and other commonly collected information (e.g. permission slips, class lists, and records of marks, among others).

Subsequent sections of the Guide set out the school board's obligation to limit the use and disclosure of personal information. It examines the rule that personal information can be used or disclosed for a purpose consistent with the reason for which the information was collected, stating that "a consistent purpose is one which the parent or student would reasonably expect, such as using the information for the improvement of instruction of the student." However, the Guide makes it clear that there are a number of scenarios in which personal information may not be disclosed. School boards should note that they have wider discretion to use personal information than to disclose it.

The following topics are covered in the Guide:

Guidance on the collection of personal information by a school board:

- How does the Act limit a school board's ability to collect personal information?
- What personal information is to be included in an OSR?
- When can a school board collect personal information directly?
- When is the duty to provide notice when collecting personal information engaged?

Guidance on a the use and disclosure of personal information by a school board:

- When can a school board use a student's personal information?
- When can a school board disclose a student's personal information?
- When is the disclosure of a student's personal information mandatory? This section covers:
    - disclosure to medical officers of health
    - notifying parents of potential harm to students
    - disclosure to eligibility review officers
    - duty to report a child in need of protection
    - occupational health and safety
- What information should be disclosed in an emergency?
- What information should be disclosed in compassionate circumstances?

Guidance on consent to collect, use and disclose personal information:

- At what age can a student provide valid consent?

- Must consent be in writing?

Guidance on safeguarding and retaining information:

- How long are school boards required to keep student records?
- When can records be destroyed or removed from the OSR?
- What happens to the OSR when a student changes schools?
- How do school boards safeguard records?

2) Access to Information

The Guide summarizes a school board's duty under Part I of MFIPPA to provide access to information in its custody or control if requested. School boards can consult the Guide to review the nuances of their obligation to provide access to information to students, parents, and the general public.

Interestingly, there is a parallel right of access under the *Education Act*, which gives every student the right to examine their OSR. Until a student turns 18, parents or guardians also have a right to examine the students' OSR. The Guide details the mechanics of how a request to view the OSR under the *Education Act* can be made.

An access request under MFIPPA requires a formal request to which the school board must respond in 30 days. In certain circumstances, which are canvassed in the Guide, a school board may charge fees for access to the information requested. A school board is required to issue a fee estimate if the costs are expected to be over $25. The mechanics of an access to information request differ slightly where the requester is seeking information about themselves, rather than general information or information about another individual.

Under MFIPPA, and to a lesser extent under the *Education Act*, students or their parents have a right to request a correction of the student's record if they believe it is inaccurate. School boards must take reasonable steps to ensure the personal information in their records is not used unless it is accurate and up-to-date. Only matters of fact, not opinion, may be corrected. A requester who seeks and is refused a correction may nevertheless be entitled to have a statement of disagreement attached to the information in the record in question.

The following topics are covered:

How do students and parents access personal information?

- Personal information can be requested either under the *Education Act*, which engages the Part II Protection of Individual Privacy provisions of MFIPPA, or under the Freedom of Information provisions in Part I of the Act.

Do individuals have a right to access general records from a school board?

- Do students need to reach a certain age before they can exercise their access rights?
- How does a child's age affect the parent's right of access to personal information?
- Do non-custodial parents have a right to access a child's school records?

How must a school board process correction requests?

- What steps must a school board take to reasonably ensure that student information is accurate?
- What reasonable measures is a school boards required to ensure that records are accurate?
- Can students and parents request correction of inaccurate records?
- What is the process for requesting a correction?

3) Special topics

The Guide also examines the procedure for processing access to information request with particular circumstances in the school board context. For example, the treatment of school photographs is explored both with respect to one's right of access to information and the board's protection of privacy obligations. The application of MFIPPA actually differs if the school hires a professional photographer. The Act's application to photographs taken by parents is also reviewed. Individuals not employed by school boards may not be subject to MFIPPA but schools are responsible for the safety and security of their students and the security and confidentiality of the students' personal information which includes their image.

School boards are also given guidance on the circumstances wherein disclosures to a Children's Aid Society (CAS) is lawful and even required. Any person, including a teacher or principal, is required to contact CAS if they have reasonable grounds to suspect that a child under the age of 16 is in need of protection. This duty supersedes the non-disclosure provisions in both MFIPPA and the *Education Act*.

Finally, the Guide canvasses the circumstances wherein a school board may disclose personal information to law enforcement. Generally, school boards should only disclose personal information to law enforcement when required by law, such as in response to a court order. However, school boards have limited discretion to disclose personal information (1) to aid in a law enforcement investigation or (2) for health or safety reasons.

Conclusion

School boards should periodically review their policies and practices to ensure they comply with their obligations under MFIPPA. Hicks Morley regularly helps its school board clients with this

process. If you would like our assistance to ensure statutory compliance, please contact a member of our Information, Data Security and Privacy Practice Group.

(Note: A condensed version of this article was published on the Hicks Morley website on January 15, 2019)