School Board Update

Kindergarten Class Size Caps, Right to Remain Silent During a Board's Investigation and More…

Date: February 25, 2020

In our first *School Board Update* of 2020, we discuss recent decisions of interest which look at kindergarten class size caps, whether a grievor had the right to remain silent during a school board's investigation and whether a grievor was entitled to accommodation in respect of her commute to work. We also provide links to helpful materials we have prepared on the Coronavirus (recently renamed the COVID-19).

Complying with Regulatory Obligations for Kindergarten Class Size Caps

In Elementary Teachers' Federation of Ontario v Bluewater District School Board, Arbitrator Nyman considered what is required of a school board to ensure compliance with the kindergarten class size caps set out in Ontario Regulation 132/12: Class Size (Regulation) made under the *Education Act*. Significantly, the Arbitrator found that the 2017 amendments to the Regulation regarding the class size caps for kindergarten only needed to be met by the Bluewater District School Board (Board) on its determination date in September, and not for the duration of the school year.

Background

The Regulation requires a school board to select a date that is between September 1 and September 30 on which the Board will "determine" its class sizes (Determination Date).

In the 2017-2018 school year, the Board's kindergarten class sizes complied with the permitted Board-wide maxima on its Determination Date (average of 26 pupils and a maximum of 30). However, in early 2018 one of the Board's schools received an influx of students that resulted in the school's two kindergarten classes exceeding the class limits.

The grievance brought by the Federation related to the maximum number of students permitted in a kindergarten classroom. Of particular importance to the grievance were sections 3(1) and 3(4) of the Regulation:

- **3. (1)** Each board shall select for each school year a date not earlier than September 1 and not later than September 30 as the date as of which class sizes in elementary schools shall

be determined. …

- **(4)** For greater certainty, the purpose of the determination of the average size of a board's full day junior kindergarten and kindergarten classes under subsection (2) is to ensure that the requirement set out in section 2 is met.

The Award

Arbitrator Nyman considered whether the Board was obligated to comply with the kindergarten class size limits on its Determination Date only (as argued by the Board), or whether compliance was required throughout the school year (as argued by the Federation).

Arbitrator Nyman dismissed the grievance, finding:

- section 3(1) was not limited only to "average class sizes"
- the purpose of section 3(1) was to fix a date on which class sizes in all elementary classes are "determined" for compliance with both average class sizes and individual class size limits
- the purpose of section 3(4) was to ensure that school boards meet the maximum average class size of 26, and did not speak to the issue of individual class limits.

Takeaways

This decision affects all school boards. It clarifies that the limits to average kindergarten class sizes and individual classes need only be met by the Determination Date, and need not be met throughout the duration of the school year.

Argued by Hicks Morley's Michael Hines for the Board

Consequences of Failure to Co-operate in School Board's Investigation

A recent award provides guidance on a teacher's obligation to cooperate in an investigation related to allegations of misconduct in class and a school board's corresponding ability to discipline an employee for refusing to co-operate with its investigation.

In Ontario English Catholic Teachers' Association and Brant Haldimand Norfolk Catholic District School Board, Arbitrator Fishbein found that the Brant Haldimand Norfolk Catholic District School Board (Board) acted fairly and reasonably in maintaining the grievor's unpaid suspension until he co-operated with its investigation into allegations made against him. In so finding, the Arbitrator dismissed the individual and policy grievances that asserted the grievor had a right to remain silent

in investigations without any possible consequences resulting from that silence.

Background

The grievor was a male occasional teacher on a long-term assignment who was accused of inappropriate conduct towards two female students in his grade 5/6 class. Following the allegations, the Board immediately conducted an internal investigation and the grievor was promptly removed from his classroom responsibilities and placed on home assignment with pay while an investigation commenced.

When asked about each of the allegations, the grievor only provided “yes” or “no” responses. He admitted to two of the allegations and denied the rest. In order to conclude its investigation, the Board required more information and therefore asked the grievor a list of follow-up questions.

During the initial meeting, the grievor agreed to answer the questions. Shortly thereafter, the local police and Children’s Aid Society (CAS) commenced separate investigations. The grievor then changed his mind and refused to provide any further information based on the “pending investigations.” As a result of the grievor’s failure to cooperate, the Board decided to cease his pay while he remained on home duties on the basis the he was impeding the Board’s ability to conclude its investigation by not cooperating.

The facts of this case were particularly important to the outcome. The allegations made against the grievor did not, on their face, demonstrate misconduct, although they occurred during the school day. The complainant students were very credible; however, there were concerns about the extent to which they may have influenced each other (even innocently) or misperceived the situation. In the circumstances, the Board required further information and context, which the grievor refused to provide. That left the Board in a position where it could not decide whether the grievor had engaged in any misconduct. The Board felt that it could not complete its investigation without more explanation from the grievor. Accordingly, it was determined that he could not return to the class and the Board decided not to pay him during the period of his failure to cooperate in its investigation. The Board did not set out to discipline the grievor in the traditional sense, as a penalty.

On the very first day of the unpaid leave, the police closed their investigation and advised the grievor of same. By the end of the school year, the local CAS advised the Board in writing that they were closing their file and their investigation was inconclusive due to the grievor’s failure to cooperate in their investigation. Accordingly, there appeared to be no reasoned basis for the grievor not to have answered the Board’s follow up questions during the interim period. The grievor did not testify.

During the summer, the grievor wanted to apply for permanent positions and was advised by the Board that in order to be eligible, the investigation first had to be completed. Within a short period,

the grievor provided a lengthy, written response to the Board's follow up questions. His explanations were acceptable to the Board and he was allowed to apply for permanent positions and was ultimately successful.

The grievor ended up being unpaid for approximately 6 weeks.

The Award

Arbitrator Fishbein ultimately found that the "unpaid leave" was in fact a disciplinary suspension despite the Board's characterization to the contrary. The Arbitrator concluded that the Board could discipline the grievor for failing to co-operate with its investigation by not answering its relevant questions which were necessary to complete its investigation. This is an important ruling because, to this point, the law in Ontario was not clear about whether an employee's refusal to answer questions and participate in an employer investigation formed an independent and free-standing basis for discipline.

Also of importance, the Arbitrator rejected the Association's argument that employees have an absolute right to remain silent in an investigation. He upheld the suspension without pay, concluding:

- there is a distinction between the criminal justice system and the employment relationship: individuals have a right to protect themselves from self-incrimination during a criminal investigation; however, the employment relationship is of an ongoing nature and requires continued trust, respect and good faith
- the facts of the present case, where a male teacher had been accused of inappropriate conduct towards young female students, were such that explanations were required
- the Board's interest in receiving answers to its questions clearly outweighed the grievor's right to remain silent as the allegations against the grievor arose out of the performance of his duties which involved working directly with students
- the Board would not have been faulted for imposing discipline on the grievor if he had not provided an explanation for the allegations up until the hearing date.

Takeaways

The award promotes a contextual approach to determining whether or not an employee is obligated to cooperate in an employer investigation and the school board's corresponding right to impose discipline for failure to do so. The Arbitrator rejected that an employee has an absolute right to silence.

Some of the factors to be considered are:

- the impact of the refusal to answer on the continuation of the employment relationship

- the specific nature of the business or workplace and the employer's interests
- the factual circumstances surrounding the misconduct.

As stated by the Arbitrator, "the prevailing circumstances here were such that the Grievor had an obligation to answer the questions the School Board fairly and reasonably put to him or otherwise be suspended without pay."

Argued by Hicks Morley's Dolores Barbini for the Board

Quick Hit

Arbitrator Renders Helpful Decision for School Boards Dealing with Commute to Work Accommodation Requests

In Ontario Secondary School Teachers' Federation and Toronto District School Board, Grievance # 13-50 (Accommodation), Arbitrator Nyman held that the refusal of the Toronto District School Board to transfer the grievor, a secondary school teacher who suffered from chronic pain and fatigue, to a school located within 15 kilometers of her home to ease her commute did not amount to *prima facie* discrimination, finding that the situation involved her "preferences" rather than her medical "needs." Even if *prima facie* discrimination had been established, he would have found no failure to accommodate. This decision is helpful for school boards with multiple sites and which receive commute to work accommodation requests from employees to work at a different site.

For more information on this award, see our Case in Point blog post of February 20, 2020.

Argued by Hicks Morley's Michael Hines for the Board

The Coronavirus (COVID-19) – What Every Employer Should Know

Health officials in Canada are stating that the risk of contracting coronavirus (COVID-19) in Canada remains extremely low. That said, employers should be aware of their obligations in the unlikely event there is an outbreak.

Our *FTR Now* of January 27, 2020 Coronavirus Update: What Employers Need to Know Right Now looks at workplace issues such as sick leave benefits, statutory leaves of absences, work refusals, privacy and human rights considerations, and more. This *FTR Now* is accompanied by a companion publication entitled Coronavirus: Questions and Answers for Employers, which may address your immediate questions.

Please contact your regular Hicks Morley lawyer should you have further questions about the Coronavirus.