School Board Update

The Latest Updates for School Boards Before the Summer

Date: June 23, 2020

As the 2019 – 2020 school year draws to a close, it would be an understatement to say that the year did not go as expected. From the hurried transition to online learning to the ongoing adjustment to the "new normal" of synchronous learning, we know that our clients have successfully navigated unprecedented and difficult challenges – and that there will be more to come.

On June 19, 2020, the government issued a document entitled "Approach to reopening the schools for 2020-2021" which addresses the ways schools may be permitted to deliver the curriculum in the upcoming school year, school attendance, health and safety issues, and more. As the summer progresses, we will be monitoring any further developments that will impact the sector and will provide you with ongoing updates.

We know that many of the issues which our clients will encounter as you return to school – including the use of sick days and the accommodation of staff and students – will require rapid and constant decision-making based largely on pre-COVID-19 legislation and case law. Given this, we encourage you to reach out to your Hicks Morley lawyer for support and guidance as we navigate this new landscape.

In this *School Board Update* we look at practical issues relating to family status accommodation in these unusual times. We also include a recent decision of Arbitrator Stout addressing the issue of paid sick leave in the COVID-19 context, as well as decisions of Arbitrators Trachuk and Nyman about the use of special leaves and entitlements to Sick Leave Credit Gratuity.

We wish you and your families a safe and healthy summer.

Amanda and Dianne

Family Status Accommodation in Unusual Times

By: Amanda Lawrence-Patel

Requests for family status accommodation have become increasingly common in recent years. School boards frequently receive requests from, and provide accommodations to, employees on the basis of their childcare and eldercare needs. Not infrequently, these family status needs are the result of a medical condition or disability of the employee's parent or child. However, in the current climate of COVID 19, school boards may be seeing an increase in employee requests for family status accommodation which result from the impact of the pandemic, whether it be from the virus itself or the social distancing measures implemented to flatten the curve. What follows are some key considerations to keep in mind when engaging in the accommodation process during the pandemic.

The Nature of the Requests and the Accommodation Process

In light of COVID 19, school boards should anticipate that employees may request family status accommodation in the

following situations:

- for childcare issues which may arise due to the need to supervise their child during the day, as the child is no longer in school or daycare
- to provide eldercare to their parents, who might be residing with the employee at this time and/or who might require increased support during the pandemic (for example with groceries, meal preparation, or medical appointments)
- to care for children or parents who have contracted the virus, are particularly vulnerable to it, or who are otherwise in self-isolation (keeping in mind that family status under the *Human Rights Code* applies *only* to the parent and child relationship).

School boards should, as always, treat a request for accommodation seriously and thoughtfully, but also within the context of the current political, medical and social climate. It may mean that different considerations apply during the pandemic, and upon return to work. Accommodation requests that would once have been dismissed, may call for different considerations as a result of the current COVID-19 environment. Accordingly, we recommend that school boards first obtain as much information from the employee as they can about the employee's needs. For example:

- What is their relationship to the person they caring for?
- What does the care involve?
- How does it interfere with the normal workplace requirements?
- Is there a particular time of day that the care is required?
- Does the family member have a medical condition?
- Are other supports available to the employee?
- What are all reasonable options available to meet the needs of the employee?

In asking these questions, employers will need to be particularly mindful of the following.

The point of the exercise is to understand the needs of the employee with respect to providing eldercare or childcare, and the supports available to the employee both internally and externally to the workplace. The questions above are not exhaustive, and the focus is not on "self-accommodation" methods. As an employer, it is also important to be cognizant that the community or other supports which would ordinarily be available to an employee may no longer be available during the pandemic.

While it remains true that employees are not entitled to their perfect or preferred accommodation, school boards should clearly ask the employee what accommodation the employee is seeking. This is especially important in the current climate because not only may the school board not be able to provide the employee with the requested accommodation, but the employee may also have an entitlement under the *Employment Standards Act, 2000* to a job-protected leave of absence, the existence of which the employee may not be aware.

Finally, we encourage school boards to have honest discussions with employees about what reasonable accommodations they are able to provide, or are not able to provide, and why. This process of searching for a reasonable accommodation, perhaps more so now than ever before, will be as important as getting the ultimate answer on accommodation right. Documenting your process, considerations and any resulting accommodation strategies is critical.

The Takeaway

These are uncertain times – for employees and school boards. As such, we encourage all parties involved in the accommodation process to communicate clearly and with compassion for others involved. For employees, and unions, this means cooperating in the accommodation process through making the employee's needs clear and accepting reasonable accommodation offers. For school boards, this means receiving the information thoughtfully, considering all reasonably appropriate accommodations to meet the employee's family status needs, and advising the employee and the union of the accommodations the school board is able to provide in the context of these challenging times.

Arbitrator Finds that Nurses in Mandatory Self-Isolation are not Entitled to Paid Sick Leave Unless they are Actually Sick

By: Hicks Morley

In Participating Nursing Homes v Ontario Nurses' Association, Arbitrator Stout rejected an argument by the Ontario Nurses' Association (ONA) that all nurses who are required to be absent from work due to COVID-19 should be deemed sick and thus be compensated with sick pay.

The Arbitrator took note of the broader "public policy" considerations, but ultimately based his decision on a simple and well-established legal principle: "[E]mployees are not entitled to be paid if they do not attend work. Any payment for an absence must be found in legislation or the collective agreement." Given the absence of legislation in Ontario requiring employers to pay employees while they are off work self-isolating, the core issue in this case was whether such a requirement could be found in the following Collective Agreement language:

Income protection is payable when a full-time employee is absent from work due to legitimate personal illness or injury which is not compensable under the *Workplace Safety and Insurance Act*.

Arbitrator Stout focused on this "illness or injury" requirement and concluded, in turn, that "asymptomatic full-time employees who did not test positive or were not tested" would not be entitled to sick pay. This is because these employees were "not absent due to a legitimate illness, but rather they were absent because they could possibly be ill or might be unwell or unhealthy."

What Does This Decision Mean for School Boards?

This decision is about nurses in long-term care homes and it does not apply directly to school boards. That being said, the language that Arbitrator Stout considered in this case is similar to the language found in the school boards' centrally negotiated sick leave plan. Indeed, in both instances, sick leave eligibility is expressly tied to the existence of a "personal illness" or "personal injury."

In the coming months, as schools across Ontario begin to reopen their doors in the midst of a global pandemic, issues will inevitably arise regarding the entitlements of employees who are required to self-isolate. In addressing those issues, school boards should be aware of this decision and the underlying legal principles.

Hicks Morley's John Bruce was counsel for Participating Homes

Denial of Paid "Special Leave" for Attendance at Child's Dance Competition Upheld

By: Sean Reginio

In Ontario Secondary School Teachers' Federation – District 8 v Avon Maitland District School Board, Arbitrator Trachuk

considered requests by teachers to take “Special Leave” to attend their children’s dance competitions. Instead of being granted the “Special Leave,” the grievors had been told to take “Approved Unpaid Days” (AUDs).

Article 13.02 of the applicable collective agreement provides employees with paid Special Leave days each school year for “essential personal matters” or “personal reasons not including a person’s business” and lists a series of examples of suitable circumstances (e.g. family illness, religious holy days, legal proceedings). Article 13.12 provides employees with AUDs each school year. Employees are not permitted to take either leave for the purposes of extending a holiday period.

This case involved three denials of Special Leave to two grievors. In all three instances, the grievors responded to the denial with a request for an AUD, which was approved in each case. The only exception occurred in the context of an AUD requested for the day immediately preceding March Break. In that case, a partial AUD was approved under the precondition that the grievor return for the last period of school on that date.

The Ontario Secondary School Teachers’ Federation argued that the failure to grant Special Leave in these instances constituted a violation of the collective agreement. The grievors had described the demanding nature of attending dance competitions with their children. For example, a parent is expected to assist with on-site preparations for hair, makeup, and costume. Asking another parent to assist with these preparations for an additional child was described as not being feasible. The grievors were mothers and it was noted that fathers were not allowed in the change rooms during these specific competitions.

The Federation argued that attending dance competitions constituted “personal reasons not including a person’s business” pursuant to Article 13.02. The Federation further submitted that the grievor who requested an AUD for the day immediately preceding March Break should have been granted the full day off without being required to return for the final period of the day on the basis that the grievor was not using the day to leave early for a holiday.

The Avon Maitland District School Board argued that “it is not required to use public funds to pay parents who wish to attend the extracurricular activities in which they choose to register their children.” The Board focused on the use of the word “special” in the collective agreement language and that the Special Leave was reserved for circumstances “which are not usual or which are especially great or important.” The Board described a child’s extra-curricular activities as “routine attendances” that are the “very norm of childhood.” The Board further argued that the Principal’s decision to deny the initial AUD request for the day prior to March Break was directly compliant with the collective agreement language.

Arbitrator Trachuk dismissed the grievances on the basis that the Board had acted within its rights as described in the collective agreement. Special Leave clearly necessitated “special” circumstances, not just “personal” circumstances. The Principal was similarly compliant with the collective agreement when requiring the grievor to return to work for the last period immediately preceding the March Break. Based on this decision, school boards should keep the following in mind:

- If a leave is described as requiring “special” circumstances, an employer does not have to grant requests to use this leave for events that can be described as routine (e.g. routine requirements of parenting).
- Depending on the facts, an employer may deny a request for leave immediately preceding or following holiday periods even when the employee has demonstrated that they are not seeking to extend a holiday.

Hicks Morley’s Lisa Meyer was counsel for the Board

Arbitrator Considers Term “Full Years’ Service” in Context of Sick Leave Credit Gratuity

By: Hicks Morley

In Ontario Secondary Schools Teachers' Federation v Toronto District School Board. Arbitrator Nyman considered the interpretation of the term "full years' service" in the context of calculating an employee Sick Leave Credit Gratuity (SLCG).

The SLCG is a benefit paid to a teacher upon retirement, disability or death. The issue raised in the case, which involved a policy and individual grievance, was the appropriate method of calculating the SLCG.

The collective agreement provision regarding SLCG entitlement states:

4.5.21.2.0

The sick leave Credit gratuity to be paid shall be equal to 2% of the final Total Salary of the Teacher at the time of retirement, disability or death multiplied by the number of *full years' service* with the Board and any Predecessor Boards…

The Board had a specific practice for calculating an employee's service and entitlement to the SLCG. In particular, when calculating a "full year" it deemed a teacher to have started on the first day of a month if the teacher began work between the first and fifteenth day of that month; if the teacher started on the sixteenth day of the month or later, the Board deemed the teacher not to have started work until the first day of the following month. The same approach applied to the month in which the teacher stopped working.

The grievor in this case started working for a predecessor Board on October 22, 1990 and retired on June 30, 2010. In accordance with its practice when calculating SLCG entitlement, the Board credited the grievor with 19 full years of service since he was deemed to have started work on November 1, 1990 (i.e. he completed 19.8 years of service).

The OSSTF argued that the proper interpretation of "full years' service" was found in the provision addressing the calculation of Teaching Experience. That provision deemed a teacher who was hired before October 31 of the school year to have worked a complete year. This was compared to the Board's practice of basing service for the SLCG on a calendar or rolling year.

In contrast, the Board took the position that the OSSTF knew or ought to have known about the Board's method of calculating the SLCG entitlement based on its longstanding and consistent practice.

The Arbitrator's Decision

The Board introduced evidence that included 98 instances in which a teacher had the opportunity to bring the calculation issue to the attention of the OSSTF. However, there were 40 other instances where the practice was inconsistent due to calculation errors. As a result, Arbitrator Nyman found that this evidence did not help to resolve the dispute.

Arbitrator Nyman determined which interpretation of the collective agreement was most reasonable, rather than considering past practice. Ultimately, he found that where the parties had agreed to a cut-off point in time or where they agreed to deem a period of time to have passed, they expressly set out that language in the collective agreement.

For example, the language regarding "Teaching Experience" explicitly set out periods in which a teacher was deemed to have worked a complete school year. Similarly, other benefit provisions in the collective agreement, including earned benefits, expressly referred to Teaching Experience as relevant criteria for benefit calculation.

Because the parties did not refer to Teaching Experience (or other "deemed periods") with respect to calculating the SLCG benefit, Arbitrator Nyman found that provision was not determinative. Rather, he wrote that if the parties had intended SLCG to be calculated based on Teaching Experience, they would have explicitly said so in the collective agreement.

Arbitrator Nyman concluded that interpreting “full years’ service” to include calendar years, school years, and any other 12 month period (as was the Board’s practice) was the most reasonable interpretation.

Notably, Arbitrator Nyman stated “I accept the TDSB’s argument that the application of its deeming rules simplify the calculation of years of service and are a reasonable exercise of its management rights. Had the rules acted to deprive a teacher of a completed year of service in any circumstance, I may not have reached the same conclusion.”

Hicks Morley’s Dolores Barbini was counsel for the Board

If you require further information about the topics discussed above, please contact the author of the article or any member of our School Board practice group.