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Human Resources Law Newsletter

June 2019

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Defamatory statements and the defence of qualified privilege

In *Kanak v. Riggin*, 2018 ONCA 345, the Ontario Court of Appeal emphasized that defamatory statements made by an employer are subject to the defence of qualified privilege and dismissed the appeal. As described in the trial decision, 2017 ONSC 2837 (*Kanak*), Ms. Kanak (plaintiff) was hired at Atomic Energy of Canada Limited (AECL) (defendant) in 2006 as a Senior Cost Control Analyst. She worked there until 2011. She received positive performance reviews and merit-based salary increases from her employer. She was laid off after AECL was sold off to another company. She received a conditional job offer on February 4, 2013 from Bruce Power. One of the

conditions for this offer was positive reference checks.

The plaintiff's manager from AECL provided a negative reference to Bruce Power, resulting in the company revoking its conditional offer of employment. Her former manager's comments included that she had workplace conflicts, failed to take directions well, did not effectively handle stress, and he would not re-hire her in a project controls position, but would hire her for an autonomous financial position. Ms. Kanak sued her former manager for defamation based on the statements that he had made about her to the prospective employer.

A plaintiff must prove three elements in a defamation action:

"(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

(2) that the words in fact referred to the plaintiff; and

(3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff" (*Kanak*, para. 10, citing *Grant v. Torstar Corp*, [2009] S.C.J. No. 61 at para. 28).

There was no dispute around the second and third factors. The trial judge found that the first factor was also satisfied because the words used to describe the plaintiff were undesirable characteristics that reasonably lowered her reputation.

The onus then shifted to the defendant to advance a defence to justify the defamation, such as "qualified privilege". This defence can apply for employment references. However, it can be defeated where the plaintiff establishes, with direct or extrinsic evidence that the defendant acted with malice.

The statements were made under circumstances where "qualified privilege" applied. The lower court described that an employer must have the ability to provide an honest description of an employee's strengths and weaknesses without fearing potential litigation. If this protection were not in place, employers would not provide any reference, or give limited ones that are unhelpful. Further, the defence was not defeated by the plaintiff because the evidence did not establish malice.

The Court of Appeal dismissed the appeal on liability. This case confirms that a past employer may candidly address the weakness(es) of a former employee and is unlikely to be held liable for defamation if their actions were not motivated by malice. ■

Court of Appeal holds there is no tort of harassment in Canada

In *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, the Ontario Court of Appeal held that the trial judge erred in establishing a new tort of harassment in Canada.

Mr. Merrifield (plaintiff) was a member of the Royal Canadian Mounted Police (RCMP) Threat Assessment Group (TAG), which was responsible for providing security services for federal politicians. His workplace difficulties began when he ran for nomination in a federal election without following the RCMP's regulations, such as the requirement to take a leave without pay while running. The employer determined that he was in a conflict of interest position and moved him to another group. In January 2006, the plaintiff began a sick leave after another transfer.

The employer conducted a formal investigation into the plaintiff's corporate credit card usage and found that he had violated a policy by failing to pay the balance due on it and had used it for minor unauthorized purchases.

The plaintiff brought an action seeking mental distress damages against the Crown, on behalf of the RCMP and RCMP management for the bullying and harassment that he alleged to have faced. The trial judge questioned several aspects of the employer's treatment of Mr. Merrifield, including its "flagrant and outrageous" failure to first ask him for an explanation regarding unauthorized uses on the employer's credit card (*Merrifield* ONCA at para. 18). The trial judge concluded that Mr. Merrifield suffered from depression and post-traumatic stress disorder due to his employer's actions. She also held that: the plaintiff had established the tort of intentional infliction of mental suffering; and that the tort of harassment applies in Canada and had been established in this case.

The Court of Appeal determined that the authorities that the trial judge relied on for the existence of the tort of harassment did not support its recognition. The Court of Appeal further held that

Mr. Merrifield's case did not cry out the need to establish a novel legal remedy. The tort of harassment as described by the trial judge was substantially similar to the tort of intentional infliction of mental suffering (IIMS). IIMS provided a remedy for Mr. Merrifield if he could establish that he faced conduct that was: "(1) flagrant and outrageous, (2) calculated to produce harm, and which (3) results in visible and provable illness" (*Merrifield* ONCA at para. 45, citing *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 at para. 48).

The trial judge in *Merrifield*, 2017 ONSC 1333, described the tort of harassment as involving four questions:

"(a) Was the conduct of the defendants toward Mr. Merrifield outrageous?

(b) Did the defendants intend to cause emotional stress or did they have a reckless disregard for causing Mr. Merrifield to suffer from emotional stress?

(c) Did Mr. Merrifield suffer from severe or extreme emotional distress?

(d) Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?" (*Merrifield,* ONSC, para. 719).

Put simply, the proposed tort of harassment was easier to establish because it had less onerous requirements than the tort of IIMS. First, it only required "outrageous" conduct, rather than "flagrant and outrageous" behaviour. Second, the proposed tort required either subjective intent or objectively-defined recklessness, as opposed to specifically requiring subjective intent. Third, the wrongdoer's conduct must be a "proximate cause of a visible and provable illness" to establish the tort of IIMS, rather than being the cause of severe or extreme emotional distress as would apply for the tort of harassment (*Merrifield* ONCA at para. 47).

The plaintiff failed to establish the tort of IIMS. The Court of Appeal held that the trial judge made "numerous and palpable overriding errors in her fact-finding" (para. 62). This included her failure to adequately consider that Mr. Merrifield did not comply with the governing regulations. Mr. Merrifield was aware of these regulations, yet failed to request leave without pay while running for nomination in the federal election. It also found that the employer did not act "outrageously" or in a manner that was not *bona fide* in transferring him out of the TAG. It based its reasoning on the fact that his superior had consulted and followed the advice of internal resources prior to determining that he was in a potential conflict of interest.

The trial judge erred in holding that any of the elements of the tort of IIMS were established. For example, the plaintiff had failed to establish that the defendant's conduct was intended to cause harm or that he knew that harm was substantially likely to follow. Further, the tort also requires more than emotional distress to satisfy step 3 and a causal link was not established.

The Court of Appeal re-emphasized that the common law allows for slow and incremental changes, but courts are generally reluctant to make far-reaching modifications to existing laws. This is, in part, because courts are not always in the best position to assess deficiencies in laws. The Legislature may be better situated to handle such problems.

The tort of harassment does not exist in Ontario and this case did not justify establishing it. The Court of Appeal allowed the employer's appeal and reversed the trial judge's decision and held that even the tort of IIMS was not made out.

This decision serves as a reminder that claims for psychological suffering arising from the employment relationship should be based on the tort of IIMS. ■

Court awards 30-month notice period and full bonuses

In *Dawe v. Equitable Life Insurance Co of Canada*, 2018 ONSC 3130, the Ontario Superior Court of Justice held that the 62-year-old plaintiff was entitled to a 30-month notice period and full bonuses for that period when he was terminated without cause in October of 2015 from his senior vice president position with Equitable Life after 37 years of service. The trial judge noted that he "would have felt this case warranted a minimum 36-month notice period". The plaintiff had sought an assessment of an appropriate notice period and his bonus entitlement during that period on a motion for partial summary judgment.

The plaintiff's base salary was $249,000.00 in 2015, and his compensation package included a cash bonus (two bonus plans) and various other benefits. The terms of Equitable Life's incentive plans specified that all participants who were terminated without cause would receive "Terminal

Awards" that were pro-rated to their last day of employment, but only if each participant signed a "Full and Final Release" in the form required in his or her termination letter.

Prior to his termination, the plaintiff had been involved in a minor disagreement regarding the purchase of tickets for a sporting event. He was issued a verbal reprimand for the incident, which the trial judge noted was not warranted. The plaintiff had also brought complaints of harassment against the company's new president. These complaints were summarily dismissed by the management.

The plaintiff argued that he was entitled to 30 months of notice and full payment for his long-term and short-term incentive plans (LTIP and STIP, respectively) throughout this period. The employer asserted that 24 months of notice was reasonable and his entitlement to the incentive plans should be limited to the amount specified under the respective plans.

While only exceptional circumstances warrant a notice period longer than 24 months, the court found that the plaintiff was owed 30 months of notice. This assessment was based on the following factors set out in *Bardal v Globe and Mail Ltd*, [1960] O.J. No. 149: "(1) the age of the employee; (2) the character or nature of the employment; (3) the length of service to the employer; and (4) the availability of similar employment, having regard to the experience, training, and qualifications of the employee".

The plaintiff was 62 years old at the time of his dismissal, and in the position of senior vice-president. He had devoted his entire working career to the company, totalling 37 years. Similar employment opportunities were not available to him. The court specified that the plaintiff's age was a significant factor. He had made efforts to mitigate his loss of employment, which were unsuccessful. The court noted that "[w]hen there is no comparable employment available, termination without cause is tantamount to a forced retirement." The court found that the plaintiff had planned to work at Equitable Life until at least 65 years of age. Accordingly, the court held that he fell on the "extreme high end of each of the *Bardal* factors" (para. 36). The court further noted that 36 months of notice would be warranted.

The court followed the reasoning in *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619, which held that "damages in lieu of reasonable notice should place an employee in the same financial position that he or she would have been in had such notice been given and the employee had worked to the end of the period of reasonable notice" (para. 39, citing *Lin v. Ontario Teachers' Pension Plan*, 2016 ONCA 619 at para. 84). Where the bonus is an integral part of the employee's compensation package, damages for wrongful dismissal must generally include the amount an employee would have received in bonus, had he or she continued employment throughout the notice period.

It found that the plaintiff was entitled to full compensation throughout his notice period, including under the LTIP and STIP. If he were denied compensation under these plans, other employees would benefit from the work he had performed.

While an employer may limit an employee's bonus entitlements that fall above the statutory minimums by explicitly specifying so, the employer in this case made no effort to bring the bonus forfeiture provisions to the attention of the plaintiff. It should have communicated the terms of employment that it now sought to rely on. It was insufficient to simply provide the employee with a copy of the plan document.

The bonus at issue constituted a significant component of the plaintiff's total compensation. It was delivered yearly prior to his termination. The preceding factors indicate that the bonus was integral to his compensation. The court held that the language in the LTIP and STIP agreements was unclear and confusing. Thus, it did not unambiguously alter the plaintiff's common law entitlement. The employer's refusal to pay his bonus entitlement during the notice period also constituted a violation of sections 60 and 62 of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (*ESA*).

A partial summary judgment was granted in favour of the plaintiff for 30 months notice and an entitlement to full LTIP and STIP payments for that period.

This case confirms that an employer must clearly and unequivocally limit an employee's bonus entitlement in a written contract and bring this to the attention of any impacted employee in order to succeed in reducing its pay-out to an employee for termination without cause. It is also a reminder that

an employer wishing to contract out of common law reasonable notice must precisely define how much pay in lieu of notice an employee is entitled to upon termination. Recent case law has addressed many nuances around such contract language and legal advice should be sought in drafting termination clauses and/or imposing a termination. ■

Medical cannabis may not be accommodated in safety-sensitive job positions

International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48, is a judicial review of a labour arbitrator's holding that the duty to accommodate does not require that an employer accept risk resulting from possible impairment. The Supreme Court of Newfoundland the Labrador (court) held that the arbitrator was reasonable in the determination that an employer was not discriminatory in the decision not to hire someone because of their use of medical cannabis.

The grievor was a construction worker who suffered from chronic pain due to Crohn's disease and osteoarthritis. To treat his pain, he was prescribed medical cannabis.

Following a lay-off, the grievor was considered for a position conditional on a drug and alcohol / medical exam. The grievor informed the employer of his medical cannabis use and prescription, after which the employer refused to hire him. The grievance alleged that the employer's decision was discriminatory, which was contrary to the collective agreement and to the applicable legislation.

The arbitrator denied the grievance, holding that the grievor was not employed because his authorized use of medical cannabis created a risk of impairment on the job. The arbitrator added that the employer did not have access to technology and resources that could readily measure impairment from cannabis, and this inability to measure constituted undue hardship for the employer.

On review, the court held that the denial of employment did amount to a *prima facie* case of discrimination, as the grievor suffered from a disability within the meaning of the *Human Rights Act*, 2010, SNL 2010, c. H-13.1 (*Act*), and he was denied employment solely because he used cannabis to treat the pain from his disability. The respondent had two main assertions. First, the denial of employment was due to a good faith occupational qualification, which was the ability to work unimpaired. This fell within the meaning of the legislation. For this reason, they argued that discrimination was allowed. Second, they conceded that they had a duty to accommodate the grievor's disability, which would constitute undue hardship since the risk of impairment could not be alleviated by a reliable measure of impairment.

The arbitrator determined that both positions the grievor had been referred to were safety-sensitive positions, because they required physical dexterity and mental focus. To lack these qualities would create hazards for the grievor and other workers. The arbitrator held that once the question of potential impairment was raised, the employer could demand medical information that would show the grievor could perform his job safely. The court did not find that this approach was unreasonable. The court held that the evidence of potency and dosage level, along with the advice of the technician that the grievor would inevitably fail, was enough circumstantial evidence for the employer to ask for further evidence before making a hiring decision.

At this point, the only way that the grievor could have been employed was through accommodation. One possibility was that he could work in another position made available to him, but no other jobs were available that were not safety sensitive. Additionally, the arbitrator found that no other medical or therapy modalities were available. Conventional medications were ineffective and accommodation could not reasonably be found through changing the grievor's medication.

The court held that the arbitrator properly considered the expert evidenced offered by both the union and employer, from which he concluded that cannabis can impair a worker's ability to function safely in a safety-sensitive workplace. The court concluded as follows:

"I find that the Arbitrator accurately identified the issue before him in this case as a question of the Employer's duty to accommodate use of medical cannabis by a worker in a safety sensitive position. He found that the duty to accommodate did not extend to a requirement that the Employer accept a risk resulting from the possibility of impairment. He concluded that the evidence of possible impairment adduced by the Employer (and not contradicted by the Grievor's treating physician who conceded the

possibility of residual impairment beyond the initial four hours from use" met its onus to demonstrate undue hardship which displaced its acknowledged duty to accommodate…The Arbitrator based his findings on resolution of the evidence before him and his decision was within the range of reasonable outcomes." (para. 44 and 46).

This case confirms that employers may have a zero-tolerance policy in respect of impairing medications, including medical cannabis, for safety-sensitive position, particularly in circumstances in which impairment cannot be accurately measured. ■

Tribunal addressed the family status analysis and employee scheduling

In *Simpson v. Pranajen Group Ltd o/a Nimigon Retirement Home*, 2019 HRTO 10, the Human Rights Tribunal of Ontario (Tribunal) held that the employer failed to accommodate an employee's family status because it terminated her employment, at least in part, because of her needs arising from her family status.

The applicant worked as a personal support worker (PSW) and had a 2-year-old child and a 5-year-old child with autism. The eldest child's autism required her to be home when the school bus dropped him off. There were no other family members who could care for the child in the mid-afternoon.

The employer shared its plans to transfer the applicant to a 3 pm to 11 pm shift. On March 11, 2017, the applicant informed her employer that she was unable to attend the proposed shift because of her childcare obligations and her inability to find a flexible daycare.

While her manager initially agreed to allow her to work a night shift, instead of the evening shift, the employer later changed its position because of her sickness-related absence from work on April 23, 2017. Her manager advised her that she had breached a work policy requiring PSWs to obtain a replacement for herself and requested a doctor's note from her before her next shift. Ms. Simpson had only missed 3-4 shifts in the past. She maintained that she was not aware of any policy requiring her to find her own replacement when sick.

The employer terminated her employment on May 23, 2017 upon receiving confirmation that she would not be able to work the late afternoon shift. It issued the Applicant a vague termination letter, citing the following brief reasons for her termination: (1) "attendance"; (2) "failure to follow instructions"; (3) "conduct"; (4) "creating disturbance"; (5) "performance"; and (6) "work quality" (para. 16).

The applicant alleged discrimination and reprisal contrary to the *Human Rights Code*, R.S.O. 1990, c. H.19 (*Code*). The allegation of reprisal was later withdrawn. The applicant sought $15,000 for the loss of the right to be free from discrimination and $15,000 for injury to dignity, feelings, and self-respect. The employer did not file a response to the application.

The Tribunal found that the employer did not accommodate the applicant to the point of undue hardship. It found that at least one of the reasons for her dismissal was her inability to attend certain shifts due to her childcare responsibilities. The employer had arbitrarily, unreasonably, and unfairly withdrawn its offer to provide the applicant the midnight shift.

The Tribunal applied the family status discrimination tests from *Canada (Attorney General) v. Johnstone*, 2014 FCA 110 (*Johnstone*) and *Misetich v. Value Village Stores Inc.*, 2016 HRTO 1229 (*Misetich*). It justified its decision by reasoning that its conclusion under either test would be the same. While the *Misetich* test follows the general discrimination analysis, namely that the individual was a member of a protected group and his or her protected characteristic was a factor in adverse treatment that he or she faced, the family status analysis from *Johnstone* also requires the individual to take reasonable steps to self-accommodate the adverse impact caused by the workplace rule.

The four-part test for family status discrimination set out in *Johnstone* requires the Applicant to establish that:

"a. the child is under his or her care and supervision;

b. the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to personal choice;

c. the individual has made reasonable efforts to meet those childcare obligations through

reasonable alternative solutions, and that no such alternative solution is reasonably accessible; and

d. the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation" (para. 27, citing *Johnstone* at para. 93).

It first applied the *Misetich* analysis, finding that the applicant had established *prima facie* discrimination. The applicant was in a parent and child relationship. She was a member of a group characterized by family status. She suffered an adverse impact, namely dismissal from her job, at least in part because of her childcare responsibilities.

Even under the *Johnstone* analysis, family status discrimination was established. She had a legal responsibility to care for her children. There was evidence that the employee did try to self-accommodate. Ms. Simpson specifically maintained her name on daycare lists and obtained support from her parents-in-law when possible. The Tribunal determined that the applicant made reasonable efforts to find an alternative childcare option, but none were reasonably accessible to her. The employer's expectation that Ms. Simpson work the 3 pm to 11 pm shift interfered with her childcare obligations in a way that was "more than trivial or insubstantial" (para. 33).

Further, the employer failed to satisfy the procedural and substantive aspects of its duty to accommodate, short of undue hardship. It did not make sufficient inquiries into a reasonable accommodation option and did not provide evidence establishing that it had met the threshold of undue hardship.

The Tribunal awarded $30,000.00 in damages for injury to dignity, feelings, and self-respect for the serious adverse and discriminatory treatment that she faced. This decision confirms the tests applicable to employer and employee with respect to "family status" in Ontario. ■

Employee input critical in accommodation process

In *Skedden v. ArcelorMittal Dofasco,* 2019 HRTO 627, the Human Rights Tribunal disapproved of the overly narrow approach that an employer, the respondent, took in the assessment of their employee's abilities. As a result, the respondent employer failed to establish that the employee applicant, could not perform the essential duties of his job short of undue hardship.

The applicant was a maintenance technician and long-term employee of the respondent. He had to have his left hip replaced and he went on medical leave. He was cleared to return to work some five months later on a graduated basis. His health care providers told him that he could work his regular 8-hour shift at his own pace, but that he was restricted from being "on-call," i.e. where he was required to make himself available to come in after-hours to complete urgent repairs.

The applicant met with the respondent's medical services department and had an appointment with the respondent's in-house physician, as per the request of the applicant's supervisor. The physician added a number of restrictions to the applicant's file. The applicant felt that he would be able to meet the physical demands of his job with these restrictions in place. The supervisor did not agree, and looked for an alternative position, which was not found. As a result, the applicant was off work for a period of five months.

After the restrictions were added, a meeting was set up to make a final decision with respect to accommodation. The applicant's supervisor testified that prior to the meeting, he had never spoken to the applicant about his restrictions, and at the meeting, no one asked the applicant for input.

The respondent had also raised a health and safety issue as the applicant was walking with a limp. However, this was not supported by any documentation and was based solely on the respondent's own observation. He never raised this with the applicant, which the Tribunal determined would have been the proper approach.

The Tribunal concluded that the respondent took a much narrower view than what was supported by the applicant's medical documentation.

In assessing the evidence, the Tribunal did not accept that the applicant ever conceded that he was unable to do his job. The respondent was the one who took the position that he could not do his job and the applicant challenged this throughout.

The Tribunal was confident that the applicant had a *prima facie* case of discrimination. He had a disability-related restriction and suffered the disadvantage of being removed from his job. They concluded that the respondent did not meet its

obligations under sections 5 and 17 of the *Human Rights Code*, R.S.O. 1990, c. H-19 (*Code*). They did not properly consider the medical evidence before them and reached conclusions through casual observations and selective and narrow interpretations of medical documents. They also did not consult the applicant in the process and did not seek clarification. As a result, the respondent did not establish that the applicant was unable to do the essential duties of his job short of undue hardship.

In assessing compensation for injury to dignity, feelings, and self-respect, the Tribunal considered the principles set out in *Arunachalam v. Best Buy Canada,* 2010 HRTO 1880: the objective seriousness of the conduct and the effect on the particular applicant who experienced discrimination. The applicant argued that the refusal to allow him to work and lack of dignity he was afforded during the accommodation process supported a claim of damages towards the higher end. The Tribunal disagreed, pointing out that he obtained short-term disability for the five months he was off work and was able to return to work following his second surgery. They determined that an appropriate amount would be $15,000.00.

The Tribunal also ordered pre- and post-judgment interest, $16,156.25 in lost wages, and that the respondent review and revise its current policies addressing disability accommodation. Finally, the Tribunal ordered that the respondent provide training on disability accommodation.

This case illustrates that Tribunals favour taking a well-rounded approach when assessing an employee's abilities. It also emphasizes the importance of asking an employee for input when making a determination regarding their abilities and accommodation. ■

Tribunal confirms applications may proceed if arbitration hasn't addressed discrimination allegations

In *Formosi v. Halton Catholic District School Board*, 2018 HRTO 1804, in an interim decision, the Human Rights Tribunal (Tribunal) illustrated how it determines when another proceeding (in this case a grievance) has appropriately dealt with the substance of the application before the Tribunal.

The applicant was a teacher who was diagnosed with post-concussion syndrome. While her school provided her with some accommodations, the respondent school board ultimately terminated her employment. The applicant then grieved through her union, Ontario English Catholic Teachers' Association (OECTA), which filed three grievances on her behalf.

Upon hearing the three grievances, the arbitrator found that the main reason the respondent terminated the applicant's employment was its determination that the applicant was absent without leave. This determination was made on the basis of the applicant's refusal to attend an Independent Medical Examination (IME). The grievance alleged that this requirement was a violation of the collective agreement and the *Human Rights Code,* R.S.O. 1990, c. H.19 (*Code*). They described it as "unnecessary, unreasonable, punitive, retaliatory and an invasion of the applicant's privacy".

The arbitrator found that this requirement was unreasonable in the context of the applicant's short-term absence. Additionally, there were other, less intrusive means by which the respondent could obtain additional medical information. As such, the arbitrator concluded that the respondent did not have just cause to terminate the applicant as the applicant was not insubordinate in refusing the IME. The arbitrator ordered damages to compensate the applicant for loss of earnings and benefits after appropriate deductions.

The applicant filed this application alleging reprisal and discrimination in employment because of disability contrary to the *Code*. The applicant alleged that the respondent discriminated against her when it treated her IME refusal as justification for the termination, and that it should have accepted what she had already provided as adequate medical documentation.

The Tribunal referred to section 45.1 of the *Code*, which states that the Tribunal may dismiss an application if it is of the opinion that another proceeding has appropriately dealt with the substance of the application. It stated that a labour arbitration consists of a proceeding within the meaning of this section. So, the question this Tribunal faced was whether the arbitrator appropriately dealt with the substance of the allegations in the application.

The Tribunal held that the arbitrator had the jurisdiction to apply the *Code*. However, the

Tribunal noted that just because an arbitrator finds just cause for a termination does not mean that they can be deemed to have dealt with whether the termination may have involved discriminatory factors. This is particularly true if a *Code* violation had not been raised by any party. In this case, however, the Tribunal found that the arbitrator had dealt with the *Code*.

The Tribunal reached this conclusion for a number of reasons. The first was that the grievance before the arbitrator specifically alleged a *Code* violation. The arbitrator "put her mind to the disability issues of discrimination or at least the elements that would constitute discrimination" and dealt with the evidence and issues that the Tribunal would have to consider in determining if the IME requirement and termination were discriminatory. As such, the adjudicator dismissed this allegation under section 45.1 of the *Code*. The Tribunal did not dismiss the allegations of denial of sick leave being in violation of the *Code*, noting that it did "not appear that the arbitrator appropriately dealt with the allegation that the denial of sick leave was discriminatory".

The applicant's final allegation was that the respondent terminated her employment because in 2011, she had filed a prior application against the respondent, which had been dismissed as having no reasonable prospect of success. As the awards resulting from the grievance proceedings did not address the earlier application or the argument of reprisal, the Tribunal found that the grievance process did not appropriately deal with the substance of the reprisal allegation.

While the Tribunal did not dismiss the reprisal allegation, they did note that proving reprisal would require the applicant to demonstrate there was intent to retaliate due to the previous application. The Tribunal was concerned about whether the applicant would be able to prove this. As such, the Tribunal ordered that the applicant file submissions indicating what evidence she intended to rely on to establish this claim.

This case demonstrates that the Tribunal may be willing to hear cases involving subject matter that has been raised in a prior proceeding. The question comes down to whether the substance of the application has been dealt with appropriately before. In this case, the Tribunal found that not all of the applicant's allegations had been properly dealt with, and was willing to hear those outstanding allegations. ■

'Last Chance' Agreement doesn't excuse discriminatory conduct

In *Redpath Sugar Ltd. v. Unifor, Local 2003* (Mojsoski Grievance), 2019 OLAA No. 32, the grievor was an employee with approximately 28 years of service as an operator at the employer's sugar refining and packaging plant. The grievor was subject to the terms of a last chance agreement when he was terminated as a result of unsatisfactory job performance. Specifically, he allegedly conducted quality control weight checks improperly.

On the day of the incident, the grievor was filling bags of sugar with a machine he did not usually use. The grievor was required to perform periodic checks to ensure that the scales and fillers were working and the bags were being filled to the correct weight. He was supposed to be using two scales during his shift, but one of the scales was not operating for much of his shift. Despite this, the grievor had completed paperwork recording weight entries for the defective scale. The grievor explained that the paperwork was incorrect because he had been confused at the time he filled it out as his shift supervisor was shouting at him. This included the use of ethnic slurs. The employer terminated him on the grounds that he did not fill out the weight check documentation to the standard required.

The union argued that the grievor's termination was due to "arbitrary, discriminatory, and bad faith reasons, including on the basis of his ethnic origin and place of origin contrary to the Ontario *Human Rights Code*" *(Code*) (para. 2). The employer argued that there was no *Code*-based discrimination or harassment and no causal connection between such harassment and the grievor's dismissal. The employer also argued that, due to the last chance agreement, the grievor's termination could not be subject to further arbitral review, including on the "arbitrary, discriminatory or bad faith" standard (para 55).

The grievor's comprehension of English was limited. He spoke and understood the language with difficulty. However, it was clear that the grievor understood his duties in completing the checks. The grievor testified that his shift supervisor had been targeting him for quite some time, and called him names such as "refugee", "gypsy", and "idiot". He told him that because he

"doesn't even speak English" that he did not deserve to work for the company (para. 23).

The union called a number of employees to testify about their experiences at the company and how the grievor's shift supervisor treated him. One long-term employee stated that he had made similar mistakes in the past and was not berated the way that the grievor was. He was always given the opportunity to fix the mistake. He also said that the way the grievor was picked on was an ongoing joke amongst employees.

The arbitrator reviewed the arbitral approach to last chance agreements, citing *Re O-Pee-Chee Co. and Glass Molders, Pottery, Plastics and Allied Workers International Union, Loc. 49 (McDonald)*, in which the arbitrator stated that the general approach "is to require strong and compelling reasons in order to vary the result which flows from a breach of the agreement" (para. 64). However, even the strictest last chance agreement cannot prevent an arbitrator from scrutinizing the employer's actions and imposing appropriate remedies. The parties cannot contract out of the protections under the *Code*.

The arbitrator held that whether any discriminatory treatment actually played a role in the grievor's termination was an important consideration. A finding of discriminatory treatment would give rise to a remedy, but reinstatement was only possible if the discrimination was a factor in the termination.

The arbitrator held that the grievor was terminated on the basis of three issues. The first was an error that was caused partially by the discriminatory and abusive conduct to which he was subjected. The second was the way in which he sought to correct the error, which he did incorrectly due to his shift supervisor's interference. The shift supervisor initially refused to give him the documentation back so that the grievor could fix it, and instead told him it was his last day and used discriminatory language. The third reason the grievor was terminated was due to a deliberately false allegation that the grievor had asked for a prohibited substance, to which the grievor had no opportunity to respond. The grievor's shift supervisor accused the grievor of asking for white-out to fix his mistake. He found this extremely problematic, as white-out is not even allowed on-site. The arbitrator did not find that the grievor made this request – rather, the shift supervisor included this allegation to ensure that the grievor would be terminated.

Having regard to the evidence as a whole, the arbitrator found that the union met its onus in establishing that the grievor's ethnic and place of origin was a factor in his termination, thus the employer was found to have breached the *Code*. Further, the arbitrator held that the employer acted in a manner that was arbitrary, discriminatory and in bad faith. The arbitrator ordered that the grievor be reinstated to employment and that the employer compensate him for losses arising from his unlawful termination. ■

Arbitrator upholds management rights; distinguishes policy rules from collective agreement rights

Toronto District School Board v. Canadian Union of Public Employees Local 4400 (Blackburn Grievance), 2019 OLAA No. 103, concerned two grievances brought by a caretaker of the school board, regarding two disciplinary actions. The first incident involved a written warning after a breach of the school board's call-in policy and insubordination during a workplace incident. The grievor refused to perform work on a two-week rotation system that was implemented by the employer. The arbitrator determined that the refusal to perform work was *prima facie* insubordination, as he refused the order to work to the point that he left the workplace. The employer had the right to modify and assign work under the management rights clause of the collective agreement. The direction was not "inconsistent with the enterprise" but rather the assignment "was entirely consistent with the grievor performing the caretaker work for which he was hired and for which he was being compensated". The employer's modification of the rotation system did not violate the collective agreement and the related legislation. Thus, it had just cause to discipline the caretaker and a written warning was a reasonable penalty. The arbitrator, however, ordered the removal of the reference to the call-in procedure, since this allegation was not proven. The grievor's assertion that he tried to call in was not implausible, and the employer should have followed up on this explanation.

The grievor also received a one-day suspension due to his conduct during a work meeting, including aggressive and violent threats that he made to two team leaders. The grievor had filed a human rights complaint regarding the manager of plant operations prior to receiving the suspension. The

union argued that the involvement of this manager in discussions pertaining to his suspension violated the employer's human rights policy because these rules required separation of the parties after a complaint had been made. It maintained that the one-day suspension should be removed from his record on this basis. The arbitrator noted that an employer policy "does not have the status of a right under the collective agreement that might lead to the vitiation of discipline if breached". The issue was whether a possible policy breach was also a breach of the grievor's collective agreement rights, or was caused by "any improper motive, such as retribution or prejudice against the grievor on a prohibited ground". The arbitrator also noted that the policy did not require automatic separation of the parties, but mandated an analysis to determine if this was necessary. The arbitrator concluded that there was no evidence that the employer had an improper motive or that it had violated the collective agreement. Further, the employer appropriately followed a progressive discipline model by imposing the one-day suspension to rehabilitate the worker. The arbitrator commented that threats at the workplace are serious and could have warranted a heavier sanction. ■

Arbitrator awards damages in lieu of reinstatement – amount reduced to reflect poor work performance

In *Toronto Catholic District School Board v. Ontario English Catholic Teachers' Assn. (De Santis Grievance)*, 2019 OLAA No. 102, the award determined the appropriate compensation for an occasional teacher who had been unjustly dismissed and whose employment relationship had been irreparably damaged. The arbitrator had previously ordered compensation in lieu of reinstatement, and the parties were unable to agree on the amount. This amount was assessed using the approach set out in *Hay River Health & Social Services Authority v. P.S.A.C.* (2010), 201 L.A.C. (4th) 345 (*Hay River*). Under this approach, the first two steps involve a calculation of the grievor's maximum potential loss, including loss of income and benefits. The third step deducts for contingencies based on the likelihood that the individual would have been able to maintain a working relationship with the school board. The fourth step reduces the amount assessed for mitigation.

Applying this analysis, the arbitrator awarded the grievor $65,485.39 plus interest in lieu of reinstatement. First, it was determined that the grievor's maximum income loss was $865,833.84 based on her expected retirement age of 65 (24 earning years) and her average annual earnings ($36,076.41) prior to termination (24 years × $36,076.41). Second, the arbitrator added 15% as a reasonable estimate of her lost benefits, which, together with the maximum income loss, totalled $995,708.92. Third, the arbitrator was unconvinced that the grievor would have been able to obtain a permanent position with the school board if she had been reinstated because she had a record of poor work performance, was unwilling to accept direction, was aggressive with others, including supervisors, and would not recognize her shortcomings or accept responsibility for her actions. Based on the circumstances, and the expectation that it was reasonable to conclude that such behaviour would continue, the arbitrator set the contingency reduction at 90%. Finally, he looked at comparable work the teacher was able to obtain in the past that was outside of the Toronto Catholic District School Board and determined that the extent of such outside available work reduces her claim by 49%.

This BC decision clarifies that the scope of representation rights of unions may include retirees in circumstances where the issue is related to the collective agreement. ■

Arbitrator upholds termination of teacher for inappropriate relationship with students

In *Sudbury Catholic District School Board v. Ontario English Catholic Teachers' Assn. (Termination Grievance)*, 2019 OLAA No. 81, a union grieved a high school teacher's dismissal, which was based on an inappropriate relationship that he had with two female students. The teacher's inappropriate interactions with the students included a discussion with one about her having a sexually transmitted disease, assisting a student to obtain a tattoo, a loan that he provided to a student, and the exchange of personal text messages with a student. The principal and vice-principal had also warned the teacher about his inappropriate relationships with the same two students prior to his termination.

The employer focused its decision to dismiss the teacher on: (1) the risk he had placed on the well-

being of two vulnerable children; (2) his repeated "depraved judgment" in communicating with these students; and (3) his dishonesty during the employer's investigation. The union argued that the penalty imposed was excessive.

The arbitrator dismissed the grievance, holding that the grievor's serious misconduct constituted just cause for his termination. The grievor provided "unacceptable or vague rationales" for his behavior. Among other things, the grievor communicated with his students regarding intimate matters and clearly failed to maintain an appropriate relationship with them. His dishonest and evasiveness during the investigation was also problematic. The employer was reasonably concerned that the teacher had vitiated the trust placed in teachers by failing to maintain his professional boundaries with the students. The arbitrator noted the teacher was employed for less than four years, and was a successful teacher, and was well-liked by staff and students. It was also noted that the teacher had "revitalized the automotive technology program in the school and that this finding would likely mean it unlikely for him to continue his teaching career. Ultimately weighting all of the factors, it was concluded that the reasons for termination outweighed other considerations. ■

B.C. Labour Board addresses union representation of retirees

In *Board of School Trustees of School District No. 43 (Coquitlam) v. Canadian Union of Public Employees, Local 561,* 2019 CanLII 40323 (BCLRB), the British Columbia Labour Relations Board analyzed the scope of a union's representation of retirees.

The union asserted that the employer's refusal to provide the names, addresses, and telephone numbers (contact information) of former employees who were union members (retirees) or their surviving spouses contravened section 6(1) of the *Labour Relations Code* (*Code*), which prescribes that an employer must not interfere with the administration of a trade union.

The employer and union entered into an agreement for the transition of the employer's active, non-teaching employees from the Non-Teaching Pension Plan (NTPP), the employer's own pension plan, to the Municipal Pension Plan. There was also an option for NTPP members to opt for enhanced post-retirement group benefits (PRGB). The PRGB Agreement expressly provided that it would form part of the parties' Collective Agreement.

The union asked the employer to provide the contact information for the retirees and the surviving spouses, saying it was required to "fulfill its representational role". The employer refused on the basis that the retirees were not employees, and to do so would be inconsistent with privacy principles. The employer further argued that the refusal did not contravene the *Code* since the union did not have a statutory or contractual right to represent the retirees.

In the past, the Labour Relations Board has found that an employer's refusal to provide employee contact information to a trade union may constitute an interference with the administration of a trade union in contravention of section 6(1) of the *Code*. In this case, the Labour Relations Board found that, while a retiree is not an "employee" as defined by the *Code*, trade unions may still collectively bargain on their behalf.

The issue was whether the union's right to represent the retirees under the collective agreement's grievance and arbitration provision was a mere contractual right, as asserted by the employer, or a statutory right protected by section 6(1) of the *Code*.

The Labour Relations Board found that there was a substantive distinction between the scope of the union's representation of the retirees who opted for the PRGB, and of all the retirees in respect of the NTPP.

The Labour Relations Board ultimately concluded that the retirees who opted for the PRGB had a right to benefits under the collective agreement, as the PRGB was part of the collective agreement, whereas the NTPP was not. Therefore, they held that "the Union must be able to communicate with the Retirees who opted for the PRGB so as to monitor the Employer's compliance with the PRGB Agreement as part of the Collective Agreement" (para. 51). As a result, the Labour Relations Board decided that the employer's refusal to provide the contact information for the retirees who opted for the PRGB to the Union interfered with the administration of a trade union contrary to s. 6(1) of the *Code*. ■

Arbitrator considers role of volunteers in light of collective agreement

In *Canadian Union of Public Employees, Local 4400, Unit C v. Toronto District School Board (Union Work Grievance), [2019] OLAA No 104*, the wording of a collective agreement was analyzed to determine the level of responsibility that volunteers could be afforded without violating the collective agreement. The union sought the most restrictive interpretation of the employer's right to use volunteers, while the employer argued that its use of volunteers was in accordance with the collective agreement which contemplates parents' and community members' meaningful participation.

The union filed six grievances that were brought to arbitration involving six different schools. The grievances alleged that the employer had violated the collective agreement by using volunteers to perform the work of the bargaining unit.

The union alleged that in the 2012-2013 school year, the employer terminated a number of support staff positions and, in response, hired unpaid volunteers to do the work. The employer denied all but one of the accusations. The union argued that the collective agreement did not allow the employer to use volunteers outside of two narrowly-defined circumstances: "First, the work done by volunteers must relate to either enriching programs or providing other services. Second, the use of volunteers cannot adversely affect the bargaining unit in any of the ways specified in the Article." The union argued that the second condition meant that the employer must create bargaining unit positions to do these duties, as opposed to assigning them to a volunteer. The employer, on the other hand, argued that the use of volunteers was legitimate and aligned with the collective agreement. The employer contended that the agreement permits meaningful participation of volunteers, and also argued that the test for the proper use of volunteers involved striking a balance between the enrichment of school programs and adverse effect on a bargaining unit member.

The arbitrator held that volunteers were not strictly prohibited from taking on duties that form part of the job descriptions of the bargaining unit positions. As such, the question to be considered was at what point the volunteer duties constituted an impermissible encroachment on the bargaining unit. The arbitrator considered the evidence that both the union and employer presented regarding the volunteers who worked at each of the six schools. In each case, the two parties disagreed over the extent to which the volunteer roles overlapped with the work of laid-off staff.

The arbitrator found that there were three instances of volunteer work that violated the collective agreement. Firstly, a volunteer was completing the core duties of an eliminated 'office assistant' position. The employer acknowledged that this was a breach of the collective agreement. The second situation involved a volunteer who was completing many of the tasks of a recently laid off office assistant. The arbitrator held that, since this occurred following the lay-off of an office assistant, it amounted to the replacement of a bargaining unit position. The third contravention of the collective agreement involved a woman who volunteered in a classroom without an educational assistant or special needs assistant for 73 days from 9:00 am to 3:00 pm. The employer acknowledged that they could have hired an employee to complete this work instead of the volunteer. The arbitrator found that the volunteer was doing a sufficient portion of an education assistant's job to breach the collective agreement. Further it was not necessary to provide a connection between the volunteer's work and the elimination of the education assistant's position that year.

This case demonstrates that, while the duties of volunteers and bargaining units do not need to be completely separate, one must assess whether an employee can be hired to complete the work instead and whether an appropriate balance has been struck regarding the enrichment of school programs and adverse effect on a bargaining unit member. ■

Arbitrator upholds clear language in LOU exempting inclement weather supervision from provincial supervision cap

The award in *Halton Catholic District School Board v. Ontario English Catholic Teachers' Assn., Halton Elementary Unit (Inclement Weather Supervision Grievance)*, 2019 OLAA No 22, illustrated how Provincial Discussion Table (PDT) Agreements inter-relate with local collective agreements.

The issue in this case was in respect of the rules regarding supervision responsibilities set out in the collective agreement and letter of understanding

(LOU). The collective agreement provided that elementary teachers shall carry out supervision duty, and set out a maximum of supervision minutes over the term of the collective agreement. The LOU held that "inclement weather days [would] not count towards the supervision minutes calculation". While the Halton Catholic District School Board (HCDSB) argued that the LOU was clear and binding on the parties, the defendant (OECTA) argued that it was of no force and effect. Based on the language of the PDT Agreement, OECTA understood the maximum to be hard caps that could not be exceeded, despite the inclement weather provision in the LOU.

OECTA argued that the parties agreed to implement the PDT Agreement terms as a "paramount obligation", and therefore incorporated the terms into the Collective Agreement by reference. The LOU, it argued, was invalid as it was inconsistent with the PDT Agreement. They also argued that this was an appropriate case to apply the doctrines of common mistake and rectification, and that it was inappropriate and inequitable for the HCDSB to be enriched by this.

HCDSB argued that the PDT Agreement was not incorporated into the collective agreement, as the PDT Agreement negotiations occurred outside of the collective bargaining regime. The collective agreement was clear that supervision for inclement weather may exceed the caps.

The arbitrator determined it was clear that the LOU exempted supervision assigned for inclement weather from the supervision maximum and that OECTA understood that the LOU would have this effect when they agreed to it. The language was clear and they agreed to the LOU and the PDT's maximum provision on the same day in bargaining.

The arbitrator rejected the request to apply the doctrines of mistake or rectification and found that the parties clearly intended to create an agreement which allowed for exceptions to the supervision maximum, and that the LOU accurately reflected the parties' agreement to exempt inclement weather supervision from the supervision maxima.

The arbitrator dismissed the grievance.

This case demonstrates the inter-relationship of terms agreed to in central bargaining and terms agreed to in local bargaining. ■

Arbitrator reviews sick-leave top-up policy under collective agreement

In *District School Board Ontario North East v. Elementary Teachers' Federation of Ontario (Mahon Grievance)*, [2019] OLAA No 38, the arbitrator confirmed that the sick-leave provisions in a collective agreement were not discriminatory to employees who returned from pregnancy and parental leaves.

The grievor was a full-time teacher who took a pregnancy and parental leave from work, extending from August 17, 2015 until August 17, 2016. The collective agreement specified that each full-time teacher was allocated 11 sick days every September, which was to be paid out at 100% of the worker's salary. The teachers also had access to a "Short-Term Leave and Disability Plan" (STLDP) that provided each member with 120 sick days per academic year, paid out at 90% of their salary. If a teacher had any full-pay sick days left over from the most recent year that he or she had worked, those days would carry over to the next academic year and could be used to top-up his or her pay under the STLDP.

In September of 2016, the Grievor was allocated 11 sick days for the 2016-17 academic year (2016-17). She used up more than 11 sick days in that year and requested on March 1, 2017 to obtain compensation under the STLDP. She requested to apply her unused sick days from the 2015-16 academic year to top-up her pay under the STLDP to 100% of her salary. The employer denied her request due to the sick leave provisions of the collective agreement.

The arbitrator focused the analysis on three grounds: (1) the collective agreement; (2) the *Employment Standards Act* (*ESA*); and (3) the *Human Rights Code* (*Code*).

The collective agreement included a local provision indicating that "sick leave credits ... shall continue to accumulate" during pregnancy and parental leaves (para. 70). This conflicted with a central provision, namely Article C7.00, which set out that teachers were only eligible to top-up their salary with any unused sick leave days from their most recent year worked. However, Article C1.2 made clear that where there was a conflict between a central and a local provision, the central term prevailed. Thus, a teacher seeking to top-up his or

her pay under the STLDP could only carry forward sick leave days left-over from the most recent year that he or she had worked. The arbitrator commented that the parties could have excluded "last year worked" from the relevant provision during bargaining if they had intended to do so.

Even if the grievor had been at work in the 2015-16 academic year, she would not have been able to "top-up" her 90% STLDP pay to 100% because she had used up all of her 2014-15 sick days. The language of the collective agreement clearly indicated that the school board had to base the sick-leave carry forward amount on her most recent year worked. The employer correctly determined that she had no left-over sick days from her most recent year worked, and did not top-up her compensation for 90% of her salary.

The arbitrator then looked at section 44 of the *ESA*, which prohibits differentiation based on the sex of an employee. The Arbitrator found that the board's policy was neutral and did not differentiate based on the type of leave that an employee received.

Similarly, the board's policy did not constitute discrimination based on her sex and pregnancy under the *Code*. Section 5(1) of the *Code* prohibits discrimination with respect to employment based on an individual's protected characteristic, such as sex and family status. Under section 10(2) of the *Code*, the right to be free from discrimination because of sex is specified to apply to a pregnant woman.

The arbitrator found that the top-up sick leave credit policies applied in the same manner for all workers, including pregnant women. There was no evidence that the grievor suffered an adverse impact because she was pregnant. The arbitrator emphasized that it is not discriminatory to distinguish between an employee who is providing services to an employer for pay and one who is not. The arbitrator found that the carry forward policy was a work-related benefit for working employees who had not used sick days in their most recent year worked.

The arbitrator concluded that the application of the sick leave top-up policy to women on pregnancy leave did not constitute discrimination on the basis of sex and pregnancy and dismissed the grievance.

This award confirms that a collective agreement may restrict certain work-related benefits, such as salary top-ups for short-term disability plans, for workers who are away from work for prolonged periods. ■

Arbitrator addresses board's right to appoint long-term occasional teachers for prolonged temporary absences

In *Ontario Secondary School Teachers' Federation, District 17 v. Simcoe County District School Board (Use of Occasional Teachers Grievance)*, [2018] OLAA No 364, the arbitrator held that the school board could use a long-term occasional teacher (LTO) for temporary absences exceeding two years, and was not required to post and hire for a permanent position.

The union argued that the board must hire an additional permanent teacher when the regular teacher has been absent from work for two or more academic years. The school board asserted that it could continue using LTOs for as long as the teacher's absence remained temporary. The board, however, acknowledged that a single LTO who had covered a particular teacher's absence for two consecutive academic years would need to be replaced by a different LTO.

The arbitrator addressed the issue after examining the *Education Act* and the collective agreement.

The current definition of "occasional teacher" under the *Education Act* specifies that a teacher's employment as a substitute for another's temporary absence must not extend past the end of the second academic year from the start of his or her absence. The time limitation for using a specific occasional teacher is measured from the moment that the substitute teacher begins to work. It is meant to limit the time period that a particular substitute teacher provides coverage, rather than the length of the regular teacher's absence (as was the focus in the previous definition before it was amended in 1998).

The arbitrator found that it was consistent with the *Education Act* and the collective agreement for a different occasional teacher to be used after the two-year limit. The statute required a fact-specific inquiry into whether the regular teacher's absence was still temporary. If it was no longer temporary, then it required the board to hire a permanent teacher for the position. The board was authorized to hire LTOs for lengthy temporary absences, rather than being obligated to create and fill

permanent teaching positions. Accordingly, the grievance was dismissed.

This award is a reminder that a school board can use LTOs as substitutes for regular teachers even in the third year of absence, as long as the absence is temporary. ■

Personal Privacy and Student Safety Plans

In *Toronto Catholic District School Board v. Ontario English Catholic Teachers Assn. (Student Safety Plan Grievance),* [2019] OLAA No 123, Arbitrator Parmar held that the school board may withhold identifying personal information from student safety/transition plans where the information is not necessary for it to comply with the *Occupation Health and Safety Act*, R.S.O. 1990, c. O.1 (*OHSA*). This included the name and education number of students in Ontario.

The dispute concerned whether a student's name, the school's name, and a student's grade and classroom were required for the Joint Health and Safety Committee (JHSC) to satisfy its statutory role. The school board argued that the student safety plans were privileged because they formed part of the pupil records under the *Education Act*, R.S.O. 1990, c. E.2. The union asserted that it did not. The arbitrator considered the extent of personal information that the school board could redact from the student safety/transition plans.

The board has an obligation to conduct an assessment around risks of workplace violence under sections 32.0.2 and 32.0.3 of the *OHSA*. This requires collecting information that includes the "*specific* risks that arises from the *specific* behaviours of a student at a *specific* school, along with the specific measures put in place to control that risk" (para. 14). The arbitrator concluded that it may only withhold identifying, personal information that is not required for it to satisfy its obligations under the *OHSA*. This is consistent with section 32 of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, which allows institutions to disclose personal information for the purpose of complying with any legislation.

The JHSC required some of the personal information in the student safety plans to properly assess workplace safety and carry out its statutory function. The arbitrator found that the name of the school, the grade of students, and classroom information must be included in the safety plan, whereas student names did not. The required information was relevant to determining whether the steps taken to control safety risks by a particular school were sufficient. In comparison, the name of an individual student did not add anything to the JHSC's assessment. The arbitrator commented that a preferred approach was to identify students using an anonymized identification system, so that any identified risks and patterns could be managed more effectively.

The arbitrator concluded that the board could redact a student's name, Ontario Education Number, photo, medical history, educational history, and curriculum programming from the student safety plans.

This award demonstrates that the health and safety obligations of school boards may place appropriate limits on student privacy. ■

Keel Cottrelle LLP
Education Law Newsletter

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