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Human Resources Newsletter

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Supreme Court rules that B.C. legislation restricting the right to collective bargaining infringes freedom of association

In *British Columbia Teachers' Federation v. British Columbia*, (2016 SCJ No. 49) the Supreme Court of Canada (SCC) considered an appeal fourteen years in the making.

In 2002 British Columbia passed two statutes which dealt with collective agreements for public-sector workers in the field of education. The Acts in question were the *Education Flexibility and Choice Act*, (SBC 2002 c. 3) and the *Education Services Collective Agreement Amendment Act*, (2004, SBC 2004, c. 16). The pieces of legislation removed terms from the collective agreements between the British Columbia Teachers' Federation (BCTF), the labour union that represents public school teachers in British Columbia, and the British Columbia Public School Employers' Association (BCPSEA), an employer bargaining agent for the Province. The terms removed related to, among others, class size, resources for special needs students, student-teacher ratios and similar workload provisions. The legislation also restricted future collective bargaining on those and other issues.

In 2011, the Supreme Court of British Columbia found that the legislation was unconstitutional because the removal of clauses in the collective agreements and restriction on future bargaining infringed freedom of association under the *Charter of Rights and Freedoms* (*Charter*), and that the infringement was not justified. The Supreme Court of British Columbia suspended the order of unconstitutionality for 12 months to grant the Province time to address the Decision.

Following the Supreme Court of British Columbia Decision, consultations between the Province and BCTF, as well as collective bargaining between BCTF and BCPSEA, occurred simultaneously. In both cases the parties were not able to reach an agreement and negotiations stalled. When the Supreme Court of British Columbia's 12-month grace period expired, the Province enacted a new statute, *The Education Improvement Act*, (SBC 2012, c. 3). However, *The Education Improvement Act* included provisions which were very similar to those found in the previous legislation. BCTF challenged the constitutionality of *The Education Improvement Act* based on the fact that it was virtually identical to the previous legislation which had been declared unconstitutional by the British Columbia Supreme Court.

The Trial Judge found that the Province had failed to establish a basis to distinguish *The Education Improvement Act* from the previous legislation. The Judge struck *The Education Improvement Act* down, reinstating the previous contractual terms which had been removed from the collective agreements as well as removing the restrictions on future bargaining. The Trial Judge's decision was appealed and the British Columbia Court of Appeal allowed the appeal, finding that *The Education Improvement Act* was valid because the Province had engaged in consultations prior to its enactment which were undertaken in good faith and which provided meaningful input for the teachers' union.

The Court of Appeal Decision was then appealed to the SCC. The majority of the SCC allowed the appeal. In a rare oral ruling, the SCC provided very brief reasons for its decision stating that the majority of the SCC agreed with the reasoning of Justice Donald of the Court of Appeal, who had dissented from the Court of Appeal majority decision. Justice Donald held that the Province had failed to consult with the teachers in good faith and that the legislation infringed freedom of association and was not justified under the *Charter*. Justice Donald argued that the 2012 legislation infringed on teachers' freedom of association, which includes the right to associate in pursuit of workplace goals and to a meaningful process to achieve those goals. He concluded that the Province's actions had substantially interfered with the employees' right to collectively bargain for over 13 years. While the disputed legislation arguably had a reasonable objective, the provincial government did not take proper steps to minimize interference with freedom of association. Further, Justice Donald held that the consultations prior to the legislation being enacted had not been in good faith, as the provincial government had failed to meet the minimum standard of good faith negotiation. The Province was at a minimum required to engage in meaningful dialogue, explain their position, read, listen to, and consider the position of the other party. Because the Province did not consult in good faith, it did not retain a meaningful process that protected the teachers' right to collectively bargain. Since the consultations had not provided a meaningful process, the Province could not rely on the consultations as justification for the unilateral deletion of terms from the collective agreements which had previously been bargained for. Justice Donald therefore held that the enactment of *The Education Improvement Act* was a substantial interference with the teachers' right to freedom of association which could not be justified. The SCC ruling essentially affirmed the decision of the Trial Judge and reinstated the terms which had been deleted from the collective agreements and removed the restrictions on collective bargaining.

This case emphasizes the duty of good faith in labour negotiations and reinforces the

protections provided to employees through the right to collective bargaining under freedom of association.

A similar approach is reflected in *OPSEU v. Ontario*, reviewed in "Court finds Ontario in breach of Teachers' Charter Rights" (KC LLP Human Resources Newsletter, April 2016). ■

Human Rights Tribunal holds that there is only one test for discrimination

In *Misetich v Value Village Stores Inc.*, (2016 HRTO 1229) the Tribunal confirmed that an applicant claiming discrimination on the basis of family status must provide adequate information to substantiate his or her claim. In this human rights case, the employee was unsuccessful in claiming that she was discriminated against by her employer based on family status.

The applicant alleged that she could not work certain hours because she had to provide meals to her elderly mother, but failed to provide adequate evidence when asked on multiple occasions by her employer. In such cases, where an employee alleges that they are being discriminated against in respect of family status, they must provide sufficient documentation when requested by the employer, otherwise their claim will likely fail.

The applicant began working for the respondent as a part-time sales clerk in 2006, and later moved positions to a more physically demanding role in production, working straight days, Monday to Friday. The applicant developed a repetitive strain injury to her left hand and arm in 2013, and a report from her doctor indicated that she had a number of physical restrictions. In response, the store manager wrote to the applicant offering her temporary, modified duties, but with varied hours. The applicant rejected the offer, explaining that the varied hours would place a hardship on her because she prepared evening meals for her elderly mother. The applicant sent a note stating the following:

"I am available to work 7 30 - 4, 8 - 4 30 or the occasional 10 - 6 30 shift (cash) Mon. - Fri. I am unable to work evenings, weekend or on call shifts. To try and force me to work these shifts would completely change the terms of my employment. I care for an elderly (86 year old) parent & my 'family status' is such that I can only work the above mentioned shifts."

The store manager requested additional documentation from the applicant, including a physician's statement and medical evidence from the applicant regarding her eldercare responsibilities. The applicant initially refused, finding the employer's request insulting and offensive. The store manager sent another request for "bona fide evidence (medical or legal) to verify working evenings, weekends and/or 'on call' shifts would cause (the applicant) undue hardship due to these responsibilities". The applicant provided a short doctor's note that simply confirmed that the applicant could not work "outside her normal hours because she has to take care of her mother", which the store manager forwarded to the claims manager. The applicant returned to work on a temporary basis after she and the store manager agreed upon a shortened work schedule.

The claims manager did not accept the doctor's note regarding the applicant's care for her mother, and requested that the applicant provide medical evidence from the applicant's mother's doctor confirming that the applicant was required to care for her mother after 5 p.m. in order to prevent a serious compromise to her mother's health, and that there were no reasonable care alternatives beyond 5 p.m. Monday to Friday and the entire weekend. The claims manager advised the applicant that failure to do so could be viewed as insubordination and could put her employment at risk. Further communications were exchanged and further requests for this information were made, but not satisfied. The employer advised the applicant by letter that her failure to return to

work on modified duties and hours, and her continued failure to provide acceptable evidence to support her accommodation request in respect of her family responsibilities would result in the termination of her employment on the basis of job abandonment. The applicant subsequently did not work for a month's worth of scheduled shifts and was terminated because of job abandonment.

Every person has a right to equal treatment with respect to employment without discrimination because of family status, which includes the status of being in a parent and child relationship, under the *Human Rights Code,* RSO 1990, c. H.19. The Human Rights Tribunal of Ontario (HRTO) held that the test for family status discrimination is the same as that for other forms of discrimination

"[a]n applicant must establish that he or she is a member of a protected group, has experienced adverse treatment, and the ground of discrimination was a factor in the adverse treatment."

The HRTO found that, for a period of ten months, the employer made multiple requests for medical proof from the applicant in respect of her mother's care. In response, the applicant provided very little and/or insufficient information as she believed that the employer was not entitled to private information about her mother. The applicant claimed that the employer discriminated against her on the basis of family status by changing her hours, but she failed to provide adequate information to the employer about the nature of her eldercare responsibilities. The applicant claimed that she provided evening meals to her mother, but failed to show how the change in her hours would adversely affect her ability to do so. As such, the applicant failed to make out a claim of discrimination.

During the hearing the applicant provided evidence regarding her mother and her eldercare responsibilities. The HRTO held that although this information could have substantiated her claims that the change in hours adversely impacted her on the basis of family status, this information was provided after the fact and any such arguments were thus theoretical. ■

False accusations can lead to a teacher's licence being revoked

In *Grogan v. Ontario College of Teachers*, (*2016 O.J. No. 5396*) the court examined the level and type of punishment appropriate for a teacher who has made false accusations about a colleague.

Angela Grogan appealed a decision of the Discipline Committee of the Ontario College of Teachers where it was found that she had made two false accusations about another teacher. The accusations were in regard to suspected inappropriate behaviour with a non-verbal, developmentally-delayed female student. The Discipline Committee felt that accusations of such a nature which were determined to be false were such a great offence that they warranted the revocation of Ms. Grogan's teaching license. Ms. Grogan appealed not only the penalty but also the finding that her accusations were false.

The events leading up to this appeal included complaints made by Ms. Grogan to the school board, the children's aid society and the police. The school board conducted an investigation and the College of Teachers also investigated, based on similar complaints made by the student's parents. Neither of the investigations turned up any improper conduct which warranted any action. When the investigations were completed the accused teacher, who is referred to as A.A., filed a complaint with the College of Teachers against Ms. Grogan accusing her of making a false complaint against him. The College investigated A.A's complaint and determined that it may have been valid and at least warranted some action. The complaint was sent to the Discipline Committee which held that Ms. Grogan's complaints had been false

and that such accusations required serious discipline, culminating in the revocation of her licence.

Ms. Grogan's appeal of the Discipline Committee's decision rested on three arguments: first, that the Discipline Committee ignored material evidence that concerned the credibility of A.A.; second, that the Discipline Committee had applied a higher standard of scrutiny in assessing her evidence than it did the evidence of A.A.; and third, that the Discipline Committee reversed the onus of proof in Ms. Grogan's case.

After hearing the evidence in her appeal, the Court did not find any of Ms. Grogan's arguments compelling. It was found that the Discipline Committee considered all of the evidence that it heard and that it made its findings based on that evidence. Any evidence which may have been ignored was only discounted because it was not relevant to the allegations at hand. Further, the Court held that the Discipline Committee explained to Ms. Grogan why it preferred certain evidence over her own. These reasons included the evidence being corroborated by other witnesses or independent physical evidence. Also, in some instances, the Discipline Committee preferred the evidence they heard to the evidence of Ms. Grogan based on what was described as failings in her evidence. The explanations provided showed no unequal level of scrutiny of Ms. Grogan's evidence over that of A.A.'s, and no reversal of the onus of proof. The Court found no basis to interfere with the factual findings of the Discipline Committee, and held that the Committee's findings were reasonable ones for them to make based on the evidence.

The Court acknowledged how serious the penalty of losing her licence to teach was for Ms. Grogan. However, the Court found no reason to deviate from the decision of the Discipline Committee regardless of the impact. The Discipline Committee gave careful and thorough reasons for reaching its conclusion as to the appropriate penalty and considered all of the mitigating an aggravating factors. The Court found that the appellant made very serious allegations against a fellow teacher, allegations which were found to be false. While it was acknowledged that engaging in the alleged conduct would have been an extremely serious offence, the Court also acknowledged that falsely accusing another teacher of such conduct is also extremely serious. The repercussion of the false accusation had not only impacted the career of A.A., but had also negatively impacted the public's trust and confidence in the profession. Ms. Grogan argued that to punish her so harshly for the offence would have a chilling effect on the willingness of teachers to report other teachers' misconduct. However, the Court concurred with the decision of the Discipline Committee that there would not be a chilling effect as long as the teacher had a reasonably held suspicion of the improper conduct. The Court found that the decision of the Discipline Committee was reasonable and it was upheld.

This case serves as a warning to any who may wish to abuse the regulatory system to harm another, and as a precedent for teachers that their reputations cannot be unduly dragged through the mud by other teachers. ■

Professionals can face discipline for posts on Facebook

Facebook and other social media networks are not as private as some may think. Regulated professionals should be cautious about what they post online as they could face discipline for off-duty conduct if the conduct is connected to them in their professional capacity, as was the case in *Investigation Committee of the Saskatchewan Registered Nurses Association v Carolyn M. Strom* (Decision of the Discipline Committee of the SRNA, unreported, October 2016).

Carolyn Strom (Ms. Strom) was a nurse registered with the Saskatchewan Registered Nurses Association (SRNA). Her grandfather

died after spending time in palliative care in a health facility in Saskatchewan. Ms. Strom was unhappy with the care that he received, and made a Facebook post criticizing and complimenting the efforts made by the staff at the health facility. In her post, Ms. Strom identified the health facility and the fact that she was a registered nurse (albeit, at a different health facility). Ms. Strom also tweeted her Facebook post which caused the post to become fully public.

The Facebook post was copied and circulated among the staff at the health facility, and ultimately reported to the SRNA. The report disclosed that staff at the health facility found Ms. Strom's conduct unprofessional and upsetting, and believed that there were better means of addressing the problem that Ms. Strom should have utilized. Ms. Strom was charged with professional misconduct contrary to the following sections of *The Registered Nurses Act, 1988*:

"26(1) For the purpose of this Act, professional misconduct is a question of fact but any matter, conduct or thing, whether or not disgraceful or dishonourable, that is contrary to the best interests of the public or nurses or tends to harm the standing of the profession of nursing is professional misconduct within the meaning of this Act.

(2) Without restricting the generality of subsection (1), the discipline committee may find a nurse guilty of professional misconduct if the nurse has:

(c) inappropriately used the nurse's professional status for personal gain;

(h) failed to exercise discretion with respect to the disclosure of confidential information about a client;

(l) failed to comply with the code of ethics of the association."

The allegations under section 26(2)(c) and (h) were dismissed, but the Discipline Committee found that Ms. Strom failed to comply with the Canadian Nurses Association's *Code of Ethics for Registered Nurses, 2008* (*Code*). The *Code* requires nurses to, among other things, treat colleagues and other health-care workers in a respectful manner, to refrain from judging and humiliating them, and to practice according to the values and responsibilities of the *Code* and in keeping with the professional standards. Ms. Strom argued that the provisions of the *Code* and the professional standards did not apply to her in this case as she did not write the Facebook post or tweet it as a registered nurse. However, case law holds that regulated professionals' off-duty conduct can give rise to discipline for professional misconduct where there is evidence of, or where it can be inferred that there is direct impairment of an individual's ability to function in a professional capacity or in a wider sense. Ms. Strom identified herself as a registered nurse to give credibility to her comments which thus linked her views of the care provided at the health facility to her position as a registered nurse. The Discipline Committee found that Ms. Strom's comments harmed the reputation of the staff at the health facility and undermined the public's confidence in it.

Ms. Strom argued that her right to freedom of expression under section 2(b) of the *Charter* would be violated if she was found guilty of professional misconduct. While the Discipline Committee found that her section 2(b) right was infringed, it was justified under section 1.

The Discipline Committee acknowledged that Ms. Strom's post may have been motivated by grief and anger, and accepted that it was not driven by malice, but stressed that Ms. Strom was "a professional bound to act with integrity and in accordance with the *Code of Ethics*."

This case demonstrates that professionals should think twice before venting their frustrations on social media, as they may be disciplined for doing so and may be liable in damages. ■

Insurance plan's denial of coverage for medical marijuana found to be discriminatory

In *Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*, (2017 CanLII 3240 NSHRC) (Skinner) the Nova Scotia Human Rights Commission Board of Inquiry (the Board) ruled that an insurance provider's denial of coverage for medical marijuana was discriminatory and ordered that coverage for medical marijuana be provided.

The complainant, Mr. Skinner, was injured in a motor vehicle accident while working for ThyssenKrupp Elevator Canada. The accident resulted in mental and physical disabilities permanently impairing Mr. Skinner's ability to work. He suffered chronic pain and required high doses of medication. Conventional pain medication proved unsuccessful and Mr. Skinner was prescribed medical marijuana which significantly improved his symptoms. The employer's vehicle insurance originally covered the cost of the medical marijuana. When that coverage ran out, Mr. Skinner requested that coverage be provided by the Canadian Elevator Industry Welfare Trust Plan (the Plan) which provides health and related benefits for employees of the Canadian elevator industry. The Plan administrator denied coverage because medical marijuana was not an accepted drug under the Plan as it had not been approved by Health Canada and did not have a drug identification number. After multiple requests, which were all refused, Mr. Skinner filed a human rights complaint alleging discrimination in the provision of services based on physical and mental disability.

The Board held that determining whether a benefits plan is discriminatory requires a determination of the purpose of the plan and a comparison of how the benefits are allocated to beneficiaries under the plan. The purpose of the Plan was to maximize the benefits provided while remaining sustainable. When comparing how benefits had been allocated, the Board determined that other beneficiaries had received coverage for their specially-requested and medically-necessary prescription drugs. However, unlike those beneficiaries Mr. Skinner's request was rejected. The Board determined that the denial of the request for coverage was based on the complainant's disability. Further, the lack of coverage negatively impacted Mr. Skinner and his family, which the Board held amounted to a disadvantage.

The plan administrator argued that medical marijuana was not medically necessary for Mr. Skinner and that medical necessity was a perquisite to coverage under the Plan. The Board found that the Plan did not define what 'medically necessary' meant and that in any case in the Board's view medical marijuana was medically necessary for Mr. Skinner. Further, the insurance plan did not specifically require a drug identification number and the plan covered both drugs and medicines. The Board held that medical marijuana could be characterized as a medicine. The Board found that the respondent discriminated against Mr. Skinner by denying coverage for medical marijuana. The exclusion of coverage was inconsistent with the purpose of the Plan, and had an adverse effect on the complainant depriving him of a medically necessary drug despite coverage of other specially requested medications for other beneficiaries. Further, the denial had profoundly negative effects on the complainant and his family. The administrator's justification was wholly inadequate, providing no evidence to establish that coverage of medical marijuana amounted to undue hardship.

The Board noted that its decision did not indicate that all employee benefits plans will be required to cover medical marijuana. The finding of discrimination in this case was dependent on the unique circumstances of Mr. Skinner and the Plan. The Board also noted that the capacity of the coverage provider to accommodate the employee will impact the analysis and that plans with less resources may not be required to make

medical marijuana available. The Board held that, in general, there may be justifications for a discriminatory policy regarding a benefits plan. However, a plan administrator must ensure that their justification is supported with sufficient evidence to establish that undue hardship would result without the policy. The Board explained that where an employee with a disability requests coverage that is consistent with the purpose of a plan and comparable to coverage provided to other beneficiaries, more is required from a plan administrator than simply an assertion that its hands are tied by its policy and forms. ■

Teacher's illegal involvement in an international cheese-smuggling ring did not warrant termination as a penalty

In *Grand Erie District School Board v. Ontario Secondary School Teachers' Federations, District 23* (2016 CanLII 72391 ONLA) a labour arbitrator considered the impact of a teacher's off-duty involvement in a cheese smuggling ring on the employee's termination.

Alex Zurby was a teacher for the Grand Erie District School Board (the Board). He was originally hired as an elementary teacher and a part time teacher at the Brantford jail. In 2008, he began working full-time at the jail until he was transferred to teach at a youth facility in 2011. In 2015, the Board was advised that Mr. Zurby was a witness in a criminal trial relating to a cheese smuggling ring. Further information eventually revealed that Mr. Zurby had been a participant in the smuggling ring. He was suspended and a meeting was arranged between the Board and Mr. Zurby as well as his union representation. At the meeting, Mr. Zurby refused to answer questions regarding his involvement in the smuggling ring, and the Board decided to terminate his employment with cause.

After the meeting, the Board received a copy of the transcript from the criminal trial in which Mr. Zurby was a witness. The transcript revealed he had become involved with two police officers in a scheme to buy and smuggle cheese into Canada from the United States and sell it illegally in Ontario. The transcript showed that Mr. Zurby had mainly been involved in the selling of the cheese and had only participated in actual smuggling once.

Mr. Zurby's union grieved his dismissal. The Board took the position that the conduct was sufficiently serious to warrant termination for cause. The Board argued that, given the seriousness of the conduct which needed to be considered relative to his role as a teacher, and the manner in which his conduct impacted the trust relationship with the Board, Mr. Zurby's involvement in the criminal enterprise amounted to cause. Further, the Board argued that there was a lack of mitigating factors weighing in favour of a lesser penalty. Mr. Zurby's union took the position that the Board failed to establish that the termination was justified on the basis of Mr. Zurby's off-duty conduct, and that at most, the conduct was an error in judgment, which did not warrant dismissal.

The union argued that Mr. Zurby's off-duty conduct did not have a close enough connection to his employment to warrant disciplinary action by the Board, and that if the arbitrator felt that some form of discipline was appropriate, termination was too harsh of a penalty. The union also argued that the Board's handling of Mr. Zurby's case was not consistent with its handling of misconduct by other employees. The union argued that the Board's regular practice regarding off-duty misconduct did not involve termination, and that the decision to terminate was inconsistent with both the Board's practice and the law. Lastly, the union argued that Mr. Zurby was remorseful and cooperative despite the potentially negative consequences which should factor in his favour.

The arbitrator explained that the main issue to be determined in this case was whether

Mr. Zurby's off-duty conduct impacted the legitimate interests of the Board. The arbitrator considered that teaching is an occupation held to a higher ethical standard than most others, and concluded that although Mr. Zurby had not been charged with a criminal offence, his conduct nonetheless breached the standards expected of teachers. The nature of the conduct, considered in light of the high standard expected of teachers, was held to be a close enough connection to engage the Board's interests thus providing it authority to discipline the employee.

Despite concluding that there was such a connection, the arbitrator was still required to assess the appropriateness of the Board's response to the conduct. After consideration of the arguments advanced, the arbitrator concluded that a disciplinary response was reasonable and justified. With respect to the union's argument that the Board's response was inconsistent with its practices and was discriminatory, the arbitrator distinguished Mr. Zurby's conduct from that of other employees, and concluded that the Board's response did not constitute discriminatory discipline. The arbitrator considered whether Mr. Zurby's conduct would reflect negatively on the Board, and found that the actual impact had been minimal, but that there was the potential for the Board's reputation to be tarnished by association, However, this factor was not determinative. The Board further argued that, as a teacher in a youth facility, Mr. Zurby was required to be a role model for the students, which was a duty he could no longer fulfill.

The arbitrator concluded that the off-duty conduct did not render Mr. Zurby unable to be a role model at the Board, inside or outside the classroom, and that his expressed remorse was genuine. While discipline may have been appropriate termination was not. Mr. Zurby was ordered reinstated without loss of seniority subject to a 9-month unpaid suspension. The arbitrator noted that the reinstatement represented an opportunity to demonstrate that Mr. Zurby could conduct himself in accordance with the high ethical expectations for teachers. ■

Ontario Court of Appeal holds that specific and unambiguous language is required in order for a termination clause in an employment contract to be enforceable

In *Wood v. Fred Deeley Imports Ltd.*, (2017 O.J. No. 899) the Ontario Court of Appeal clarified that specific and unambiguous wording is required for a termination clause in an employment contract to be enforceable.

The Court of Appeal ruled that the termination clause in Julia Wood's employment contract was unenforceable because part of the termination clause was ambiguous. The ambiguity related to the level of compensation she would receive during her working notice period. Under the Ontario *Employment Standards Act* 2000, (SO 2000, c. 41) (ESA) employees have a statutory right to receive the same level of total compensation during their notice period as they did while working. As a result, payments for benefits must be made during the notice period or paid in lieu of notice. In Ms. Wood's contract, she was entitled to two weeks' notice or pay in lieu of notice for every year that she was employed.

The major issue in the case revolved around the meaning of the word "pay" in the termination clause. Ms. Wood argued that the word "pay" did not clearly indicate whether benefits and severance pay would be included, and, as a result, the termination clause was void as an attempt to contract out of statutory minimums under the ESA. The employer argued that the contract was clear that benefits and severance pay would be included. The specific language used in the termination clause was of paramount importance because, if it was unenforceable, Ms. Wood would be entitled to a period of reasonable notice under the common law

which would exceed the payments she received per the termination clause.

Ms. Wood was hired by Fred Deeley Imports Ltd. (Deeley) in 2007. She was initially offered the job verbally, but eventually signed an employment contract which included a termination clause. In 2015, Deeley advised Ms. Wood that her employment would be terminated without cause and she would be provided 13 weeks' working notice. Ms. Wood had worked for Deeley for eight years and four months, and was 48 years old. Her annual compensation, including benefits, was approximately $100,000.00. During the 13 weeks of notice, the company continued to contribute to her benefit plans, and she was also provided a lump-sum payment equivalent to eight weeks' pay.

Despite the contributions and payments, Ms. Wood brought a claim for wrongful dismissal. She argued that the termination clause was unenforceable because it did not specifically address the employer's obligation to contribute to the employee's benefit plans during the notice period. The requirement to continue to pay benefits during the notice period is mandatory under the ESA and cannot be contracted out of. However, Ms. Wood's claim was denied when the Motions Judge found that the termination clause was enforceable. Ms. Wood then appealed the decision.

The Court of Appeal focused on whether Ms. Wood's employment agreement was unenforceable because she signed it after she started working, and if not, then whether the termination clause was unenforceable because the language in the clause did not refer to the continuation of benefits payments during the notice period. The Court of Appeal concluded that it was immaterial that the employment contract was signed after Ms. Wood began to work because she had seen a copy of the employment contract before commencing work and the contract she eventually signed did not differ in a material way from the contract shown to her.

However, the Court of Appeal found that the termination clause in the contract was unenforceable for two reasons.

First, the clause excluded Deeley's obligation to continue to contribute to the employee's benefit plans during the notice period. Ms. Wood's compensation included Deeley's contributions to two benefit plans. In this case, the Court of Appeal held that the wording of the termination clause had the effect of excluding, and therefore contracting out of the ESA requirement to continue the benefit payments because the termination clause gave Ms. Wood two weeks' notice of termination or pay in lieu thereof for every year or partial year of employment, but did not discuss benefits contributions. Further, the clause explicitly stated that the company would not make any payments other than the pay in lieu of notice and that the payments and notice provided for in the termination clause were inclusive of Ms. Wood's entitlement to notice, pay in lieu of notice and severance pay.

The employer argued that the wording of the termination clause was broad enough to include benefits, and that the word "pay" should be read as including contributions to Ms. Wood's health and dental plan and her RRSP. Essentially the employer argued that benefits contributions were meant to be included in the word "pay". In support of this position, the employer pointed to the fact that it had continued paying for Ms. Wood's health and dental plan and offered to contribute to her RRSP during the notice period. However, the Court of Appeal disagreed confirming that the enforceability of a termination clause is dependent only on the clause's wording and not on the employer's actions. As such, the actual payment of the benefits was not material to whether the termination clause was enforceable.

The Court of Appeal found that, on its plain wording, the clause was at least ambiguous. The Court of Appeal explained that, since there is a substantial power imbalance between an employee and employer when a contract is signed, any ambiguity in the

contract had to be resolved in favour of the employee. Applying this rule, the Court of Appeal found that the word "pay" in the termination clause referred only to salary or wages, and could not be found to include benefits contributions and thus the termination clause was in violation of the ESA and unenforceable.

The Court of Appeal distinguished this case from other cases where similarly worded clauses were enforced because this clause was not open-ended but rather was all-inclusive, limiting the defendant's obligation to the payments specified in the termination clause. The Court of Appeal also held that, based on the way the termination clause was worded, it could potentially be read as not providing severance pay and thus did not satisfy the statutory obligation to provide severance pay. Unlike statutory notice, which may be satisfied by having the employee work out the notice period, severance pay must be paid and the termination clause did not specify that severance pay would be paid if the employee worked during the notice period. The failure to address severance pay was another violation of the ESA.

Since the termination clause in Ms. Wood's employment contract did not meet the minimum standards under the ESA, it was unenforceable and she was entitled to reasonable notice at common law. As a result, the Court of Appeal struck out the termination clause in Ms. Wood's employment contract and provided her with nine months' reasonable notice. The decision in this case clarified the level of specificity required in a termination clause for it to be enforceable. This decision also reinforces that an employment agreement will not automatically be void because the employee signed it after their first day of work. ■

IPC upholds school board's denial of FOI request based on concerns regarding the disclosure of personal information

In *York Catholic District School Board*, (2016 CanLII 94006) the Information and Privacy Commissioner (IPC) partly upheld the York Catholic District School Board's (the Board) decision to deny a request for documents regarding complaints made against the requester to school staff during the 2014/2015 school year.

The requester was a parent who requested documents from the Board under the *Municipal Freedom of Information and Protection of Privacy Act*, (RSO 1990, c. M.56) (MFIPPA). The documents related to complaints to the Board which were made about the requester. The Board located the records in question but did not disclose them because they contained the personal information of other people besides the requester.

The requester appealed the Board's decision not to disclose the records.

The Board argued that since the records contained the personal information of the requester as well as other parties, the Board had the discretion to withhold disclosure of the requested records. The IPC partly upheld the decision, but also ordered that one record should be disclosed to the requester.

The IPC explained that the first step in the analysis was to determine if the records which had been requested contained personal information. This was necessary because, if the information was personal information, its disclosure could be an unjustified invasion of privacy by the Board.

The IPC explained that to qualify as personal information, the information needed to be about an individual in a personal capacity. As

a general rule, information associated with an individual in a professional, official or business capacity is not considered to be about the individual, and thus is not personal information under MFIPPA. However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual. Further, to qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.

The records in question were emails to staff at one of the Board's schools. The IPC held that all the records contained the personal information of identifiable individuals including information about family status, educational history, personal email addresses, personal telephone numbers, personal opinions or views, correspondence that was private or confidential, and names where disclosure would reveal other personal information about the individual. However, the IPC did find that one of the records at issue did not contain the personal information of any identifiable individuals in their personal capacity except for the requester and her child. The other identifiable individuals in this record were all Board employees in their professional capacity. As such, the information could not be considered to be about them in their personal capacity and was not personal information. The IPC ordered the disclosure of this record but also considered whether the Board's decision to deny access to the records which contained personal information was a reasonable decision.

Generally, a person is entitled to their own personal information held by an institution, however, there are exceptions to this rule, including if the record also contains personal information about another person, the disclosure of which would be an unjustified invasion of privacy.

The Board argued that the disclosure of the remaining records would be an unjustified invasion of privacy because the records were highly sensitive communications written in confidence. The Board submitted that if the records were disclosed parents would lose trust in the school and decrease the public confidence in the Board. It argued that even if the documents were redacted, it was reasonable to expect that individuals could be identified, because the records contained classroom and student information. The requester argued that she had a right to know what complaints were made against her.

The IPC held that to be considered highly sensitive there must be a reasonable expectation of significant personal distress if the information is disclosed. To be considered 'supplied in confidence', both the individual supplying the information and the recipient need to have a reasonable expectation that the information would be treated confidentially.

The IPC held that the information related to confidential complaints made to the Board about the appellant by other parents, the disclosure of which could cause significant personal distress. As a result, it was sensitive information which had been supplied and accepted in confidence. The IPC also held that disclosure of the personal information at issue would expose the parents who complained in the emails to unfair pecuniary or other harm. Regarding the requester's argument that it would be unfair to keep the information from her, the IPC ruled that the one record which would be disclosed summarized the other complaints and that the requester's ability to review that record was enough to satisfy any unfairness she faced because of the decision to withhold the other records. The IPC ordered one record disclosed but upheld the Board's decision to not disclose the rest of the records. ■

— KC —

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