



## Education Law eBulletin

A newsletter for educators

April 2009

SHIBLEY RIGHTON LLP  
Barristers & Solicitors  
www.shibleyrighton.com

Toronto Office:  
250 University Avenue  
Suite 700  
Toronto, ON M5H 3E5  
Tel.: (416) 214-5200  
Toll free: 1-877-214-5200

Windsor Office:  
2510 Ouellette Avenue  
Suite 301  
Windsor, ON N8X 1L4  
Tel.: (519) 969-9844  
Toll free: 1-866-422-7988

### Education and Public Law Group

John P. Bell  
john.bell@shibleyrighton.com

Brian P. Nolan  
brian.nolan@shibleyrighton.com

Diane M. Abbey  
diane.abbey@shibleyrighton.com

Sheila M. MacKinnon  
sheila.mackinnon@shibleyrighton.com

J. Paul R. Howard  
paul.howard@shibleyrighton.com

Thomas McRae  
thomas.mcrae@shibleyrighton.com

Gaynor J. Roger  
gaynor.roger@shibleyrighton.com

Bryce Chandler  
bryce.chandler@shibleyrighton.com

Megan Marrie  
megan.marrie@shibleyrighton.com

### Labour Notes: Court finds that arbitration may not be exclusive mechanism to resolve employment-related disputes

A recent decision by the Newfoundland & Labrador Supreme Court, Trial Division, has held that the Newfoundland and Labrador *Labour Relations Act* does not mandate collective agreement arbitration as the sole and exclusive mechanism for resolving employment-related disputes.

In *Budgen v. City of St. John's* (2009), 301 D.L.R. (4th) 166, a firefighter initiated a statement of claim against both the City of St. John's (the "City") and his union, the International Association of Firefighters, Local 1075 (the "Union"), alleging that he had been assaulted by a co-worker, causing the plaintiff to fear for his life and take an extended leave. The plaintiff alleged that the assault forced him to take an extended leave due to psychological reasons. After a psychological assessment, a City-appointed psychiatrist diagnosed the plaintiff as suffering from post-traumatic stress disorder and recommended that he return to work so long as the City and the Union ensured that he was not required to interact with the harassing co-worker. Ultimately, the plaintiff alleged that the harassment continued and therefore initiated a claim for special, general, aggravated and punitive damages from the co-defendants for negligence, negligent misrepresentation, deceit and intentional or reckless infliction of mental suffering.

The defendant City and Union subsequently applied to strike out the plaintiff's statement of claim. The City argued that the court had no jurisdiction because the essential character of the dispute between the City and the plaintiff was governed by a collective agreement that conferred exclusive jurisdiction on an arbitration board, and that s. 86 of the *Labour Relations Act* specifically required the final settlement of all disputes in such a manner. Similarly, the Union argued that the court's jurisdiction regarding the common law duty of fair representation was ousted by s. 130 of the *Act*, which mandated that such matters be dealt with by the Labour Relations Board.

In dismissing the applications to set aside the statement of claim, the court held that not all employment-related disputes are foreclosed to the courts, but only those that, in their essential character arise, either expressly or inferentially, from the interpretation, application, administration or violation of the collective agreement and provide for a dispute resolution mechanism other than recourse to the courts. Section 86 of the *Act*, the court held, requires a collective agreement to contain a provision for the settlement of disputes but does not mandate collective agreement arbitration as the sole mechanism for dispute resolution. The court held that although there was no question that the plaintiff's claim was employment-related, the legislation required for the final settlement of differences "by arbitration or otherwise;" binding arbitration was only required in the event that the collective agreement did not provide for the final resolution of an employment-related disagreement.

In *Budgen*, Article 4.03 of the collective agreement between the City and the Union specifically addressed the issue of harassment, providing that any grievance in that respect shall be filed at step 3 of the process and that "[a]n individual is free to file a complaint in any forum and may do so, however an individual who wishes to file and process a grievance on any allegation of harassment must do so before actively proceeding with a complaint in any other forum."

Based on the language of the collective agreement, the court held that the parties had agreed that an employee complaining of harassment could use the grievance process up to and including final and binding arbitration and/or process a complaint in "any forum." Thus, the court found that the parties had agreed that a complainant could have access to multiple forums regarding harassment in the workplace, and that this agreement should stand notwithstanding that it resulted in overlapping jurisdictions.

The court also dismissed the Union's application for similar reasons, indicating that s. 130 of the *Act* requires fair representation cases to be brought before the Labour Relations Board only where there has been a "failure to provide ready access to the grievance process"; all other matters relating to the duty of fair representation are left to the courts.

This case is relevant to those provincial jurisdictions with statutory language mandating final settlement of an issue by "arbitration or otherwise," which includes most jurisdictions except Ontario. Section 48 of the Ontario *Labour Relations Act* is very specific, requiring "final and binding settlement by arbitration." Accordingly, it would be

unlikely that parties to a collective agreement in Ontario would be able to contract out of the legislative requirement for binding arbitration in the same manner as above.

### Filling long-term occasional positions: does hiring new teachers discriminate against retired teachers?

In the current economy, school board administrators are forced to use a variety of methods to reduce costs. Recently, one school board attempted to cut costs by directing that preference be given to hiring new teachers to fill long-term occasional (LTO) positions instead of looking to an established pool of retired teachers. According to the applicable collective agreement, salaries of teachers were determined by both credentials and years of experience; the employer therefore believed that by hiring new teachers it could save significant expense.

Upon learning of the direction, the Ontario English Catholic Teachers' Association (the "Association") commenced a grievance alleging the employer was discriminating against retired teachers on the basis of age, thereby violating the collective agreement and the *Human Rights Code*. At the beginning of the arbitration hearing, a preliminary objection was raised by the school board to determine exactly what the Association needed to prove in order to shift the burden of proof to the employer. The Association claimed it needed to show only that the employer practiced differential treatment on the prohibited ground of age. The school board, however, argued that the Association was also required to demonstrate that the decision to hire new teachers imposed a burden on, or withheld a benefit from, older teachers in a way that violated their dignity.

The arbitrator accepted the school board's arguments, finding that the Association must demonstrate not just differential treatment but also an affront to dignity to the retired teachers or that they have been subjected to a disadvantage as a result of the school board's actions. Only after both elements were demonstrated did the burden of proof shift to the employer to justify its actions.

This decision is consistent line with Supreme Court of Canada jurisprudence; employers must remember that any grievance alleging a violation of human rights must demonstrate not only differential treatment but also that the differential treatment results in an affront to an individual's dignity.

*Dufferin-Peel Catholic District School Board and Ontario English Catholic Teachers' Association Elementary and Secondary Occasional Teachers' Unit*, [2008] O.L.A.A. No. 508.

#### CASES

The Ontario Superior Court of Justice found that, by voting and influencing discussions that affected the employment of his children, a school board trustee acted in a conflict of interest contrary to s. 5 of the *Municipal Conflict of Interest Act*. *Baillargeon v. Carroll*, [2009] O.J. No. 502 (S.C.J.).

The Ontario Superior Court allowed an application for judicial review of an arbitrator's declaration finding that the arbitrator's decision, regarding the monitoring of students by Special Education Resource Teachers, did not address the issue brought to grievance and resulted in a declaration that was not sought by either party and was not a reasonable construction of the collective agreement. *Halton Catholic District School Board v. Ontario English Catholic Teachers' Assn.*, [2009] O.J. No. 718 (S.C.J.).

The Alberta Court of Appeal allowed an appeal by an assistant principal where a Board of Reference, using evidence not before it, concluded that it lacked jurisdiction to hear her complaint that her employment had been terminated instead of ending by virtue of a contract agreement. *Cuff v. Edmonton School District No. 7*, [2009] A.J. No. 5 (C.A.).

The Court of Appeal allowed the University of Saskatchewan's appeal from the dismissal of its application for judicial review of an arbitration decision. At issue was whether the academic probation in this matter triggered the grievance procedure. *University of Saskatchewan v. Wilde*, [2008] S.J. No. 814 (C.A.).

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We welcome your comments and questions. Send them, and any updated contact information, to [bryce.chandler@shibleyrighton.com](mailto:bryce.chandler@shibleyrighton.com). If you wish to unsubscribe to this eBulletin, please send a blank e-mail to [unsubscribe@shibleyrighton.com](mailto:unsubscribe@shibleyrighton.com).

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