



Education Law eBulletin

A newsletter for educators

November 2008

SHIBLEY RIGHTON LLP
Barristers & Solicitors
www.shibleyrighton.com

Toronto Office:
2510 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

Bryce Chandler
bryce.chander@shibleyrighton.com

Megan Marrie
megan.marrie@shibleyrighton.com

“Related Experience” Requirements in Collective Agreements

Many collective agreements require school boards to consider applicants' "related experience" when hiring in relation to job postings. Often, these clauses are present in collective agreements in order to ensure that employees with more seniority are considered for such positions instead of employers simply appointing an individual with direct experience. It is important, however, to determine at what point "related experience" must be considered. A recent labour arbitration between the Canadian Union of Public Employees, Local 4400 and the Toronto District School Board emphasizes this point.

In *CUPE, Local 4400 v. Toronto District School Board*, [2008] O.L.A.A. No. 488, the teachers' union launched a job posting grievance against the Board, alleging that the Board had violated the collective agreement by failing to recognize certain applicants' prior experience. Specifically, the collective agreement between the parties required that, if a vacancy was to be filled by interview, the Board must first interview qualified applicants based on their seniority. The collective agreement specifically required the Board, in reviewing the qualifications of an applicant, to consider an applicant's "related experience." When a position became available for a Literacy and Basic Skills instructor ("LBS position"), the Union took the position that experience teaching adults as an English as a Second Language ("ESL") instructor, or as a Language Instruction for Newcomers to Canada ("LINC") instructor, was "related experience" for the purpose of the job posting which required "successful teaching experience in an adult literacy program." The Union argued that ESL or LINC experience filled the requirement of "successful teaching experience in an adult literacy program." In this respect, the Union grieved the Board's failure to interview two senior applicants who had casual experience tutoring adult students regarding ESL and literacy issues, arguing that the Board had violated the collective agreement by not considering the applicants' related experience.

The Board, however, argued in favour of a strict interpretation of the collective agreement, and that the Union was attempting to erode its management rights to determine job qualifications. In this respect, the employer argued that only "qualified applicants" will be given an interview; there was no requirement in the collective agreement to consider "related experience" until applicants had been selected to be interviewed.

In reviewing the similarities and differences between the LBS, ESL and LINC instructor positions, the arbitrator found that although there were differences between the positions, work experience as an ESL or LINC instructor should qualify as "related experience." However, as argued by the Board, related experience did not factor into whether an applicant was qualified for the purposes of an interview. In short, although related experience must be considered, it need not form part of the decision to interview a candidate; it need only be considered at the interview stage. However, based on notes from interviewers, the arbitrator also noted that it appeared that the Board had narrowed its requirement in the job posting from "successful teaching experience in an adult literacy program" to "LBS experience." In this respect, the arbitrator noted that the Union's challenge may have been successful if any of the candidates who were not interviewed demonstrated experience in an adult literacy program other than LBS. None had, therefore the grievance was dismissed.

This decision underscores the import to be mindful and precise when negotiating collective agreements and when issuing job postings. In this case, the language of the collective agreement wholly supported the Board's arguments that related experience did not require the Board to give interviews to applicants it deemed to be otherwise unqualified for the position. However, as noted by the arbitrator, this right must be exercised reasonably and employers must ensure to attend to the language contained in the job postings themselves. In this case, the job posting required "successful teaching experience in an adult literacy program". If, for example, the employer had narrowed its criteria for qualification to LBS experience only, and if the applicants had demonstrated experience in the ESL or LINC programs, the arbitrator suggested that the Union may have had more success regarding the grievance based on the language in the job posting.

Student Discipline and claims of Humiliation and Mental Suffering

With recent re-workings of the *Safe Schools Act* and the increasing intervention of disgruntled parents, student discipline is quickly becoming a touchy area for school boards. In fact, it has almost become routine that, whether or not a formal claim is launched, parents rely on humiliation and mental suffering that their child has experienced to support any claim for damages or other remediation. However, school administrators must remember that the onus remains with the parents to establish that such mental suffering or humiliation in fact occurred. This issue was recently considered by the Ontario Superior Court in *Moore v. Hatch House Montessori School*, [2008] O.J. No. 3654. In October 2007, a 3 1/2 old student was engaging in disruptive behaviour including tripping other students and placing wood blocks in his socks. Upon observing his behaviour, the student's teacher brought him to the toddler room. The parents argued that the teacher made comments to the effect that if he wished to act like a baby then he would be treated like a baby, and that sometimes a little damage does a lot of good. The teacher denied making either of these statements, instead indicating that she brought the student to the toddler room to wait to speak to the Principal who had been busy at the time. The student was returned to his classroom several minutes later without incident and without having spoken to the Principal.

The parents subsequently spoke to the teacher about the situation and attempted to speak to the principal. Contact with the principal was never made, and the parents decided to give 30 days' notice that they intended to withdraw both their sons from the school. However, the school waived its rights to the 30 day notice period and required immediate removal of both students from the school. The parents subsequently brought an action for damages to recover: the cost of the school uniform they could not sell, \$500.00; the return of prepaid deposits for the children, \$600.00 (which deposits were described in the hand book as non refundable "or applied to any applicant withdrawing from Hatch House before the month of June"); as well as \$3,000.00 for emotional damage suffered by the two children and Mrs. Moore, based upon a claim of \$1,000.00 each.

In reviewing the facts, the Court made several salient findings, including that there was absolutely no evidence that either student suffered any emotional trauma. Further, there was no evidence that the disciplined student ever indicated that he was upset about being placed in the toddler room, that he felt humiliated or belittled, or that he considered this brief placement as a punishment or an embarrassment. Accordingly, the court held that there was absolutely no evidence to support any claim of emotional damages sought in the Claim. The Court further held that, with respect to the damages claimed by negligence, although the school did owe a duty of care to the students, that duty of care was not breached. The Court recognized that psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset, and that there was no medical evidence of psychiatric illness or any significant impact on the life of the children or the Plaintiffs, as parents. Accordingly, the Court held that the Plaintiffs failed to establish that they or the children sustained damage.

Finally, the Court further held that there was no breach of contract. In this respect, the Court found that the 30 day notice period set out in the contract was inserted into the agreement solely for the benefit of the School; it could be waived by that party. Accordingly, the claim was dismissed with a modest costs order awarded in favour of the school.

This was a small claims court decision, seemingly a claim brought "on principle" by the parents, as it claimed only the modest sum of \$4,100.00. However, the decision reinforces the idea that, in order to claim damages for humiliation or mental suffering, these claims must be supported by evidence, preferably coming from a licenced medical practitioner. This decision also reinforces that, in respect of claims in negligence, a claim must demonstrate a breach of a duty of care. In the case before it, the Court found that removing the disruptive student and placing him in a toddler class was not such a breach.

Readers should take caution, however, that the school exercised its right to remove the students without 30 days' notice only after the parents had provided notice that they were taking their children out of the school. School administrators should be wary of requiring the removal of students from a school without following proper procedures.

CASES

The Federal Court of Appeal set aside the decision of the tax court, restoring the Minister's decision to disallow a taxpayer's claimed medical expense of \$12,900 for the cost of tuition fees paid on behalf of her son to attend a private school. *Scott v. Canada*, [2008] F.C.J. No. 1356.

The Newfoundland and Labrador Provincial Court convicted a student of threatening to cause bodily harm to a teacher (the student threatened to punch the teacher in the face.) *R. v. N.G.H.*, [2008] N.J. No. 261.

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

Legal Disclaimer: The information contained in this publication is not intended to be legal advice. It is general information only. You should take appropriate professional advice on your particular circumstances. Shibley Righton LLP disclaims all responsibility for all consequences of any person acting on, or refraining from acting in reliance on, information contained herein.