



Education Law eBulletin

A newsletter for educators

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Employer Implementation of Workplace Policies



An employer's exercise of its management rights pursuant to a collective agreement can, at times, be needlessly contentious should the union opt to object to the employer's actions. This is especially so when an employer attempts to unilaterally introduce reasonable policies or guidelines into the workplace. Arbitrator Beattie recently dealt with such a situation in *Transalta Energy Corporation v. Communications, Energy and Paperworkers Union, Local 707*, [2006] A.G.A.A. No. 72.

In 2002, *Transalta*, the employer, announced the introduction of a Code of Conduct (the "Code") containing guidelines for the professional and ethical standards of all of its employees, the purpose of which was to maintaining the company's reputation for integrity and honesty. Included in the Code were guidelines respecting topics ranging from ethical business conduct, health and safety, accounting and auditing procedures to social responsibility. At the beginning of 2005, the employer sought to have all employees sign a form acknowledging that they had read and understood the Code. On the same form, the employer asked employees to identify any issues which may need to be reviewed in light of the contents of the Code. The Union took the position that its members would not sign any such acknowledgement on the basis that "there was too much in the Code to understand," and advised its members not to sign the acknowledgement. When the deadline passed with only one member signing the form, the employer grieved the Union's position and its instructions to members that they not sign the acknowledgement.

In finding for the employer, Arbitrator Beattie held that the Code was reasonable and did not conflict with the provisions of the collective agreement. The Arbitrator rejected the union's arguments that a member may overlook something for which he or she could be disciplined at a later time. In short, Arbitrator Beattie agreed with a previous award insofar as it held that a detailed policy did not mean that members could not understand it. The Code was reasonable on its face and did not contradict any of the terms of the collective agreement. Moreover, the Arbitrator held that it was within the employer's purview, pursuant to its management rights, to unilaterally implement the Code of Conduct and require that its employees sign off on the Code. In addition, the Arbitrator found that the acknowledgement and potential disclosure of any issues which may have required review did not convert the unilateral policy into an agreement between the employer and employee.

In his decision, Arbitrator Beattie made additional comments including that the Code was a "commendable initiative" and that it was in everyone's interest to "safeguard the company's reputation for integrity and honesty."

The Arbitrator's comments regarding the importance of an employer's integrity and honesty are especially relevant when discussing the integrity and public confidence in a public school system. In addressing this issue, courts have upheld disciplinary action taken against teachers whose off-duty actions are harmful to a school system *per se*, insofar as such action may potentially harm students or the reputation of a school system (*Kempling v. British Columbia College of Teachers*, 2005 BCCA 327.) The *Transalta* decision seems to suggest that school boards, as employers, may generate and implement reasonable workplace policies to address issues, such as employee blogging or employee use of technology, which may arise unexpectedly and/or that are not discussed in the collective agreement.

Prior to the unilateral implementation of such policies, legal counsel should be consulted to ensure that the policy or guidelines, as drafted, are reasonable and non-contentious to avoid unnecessary grievance procedures.

Assignment of Bargaining Unit Work to Non-Bargaining Unit Employees

Employers must always be cautious when assigning what may be bargaining unit work to non-union employees, even in temporary situations or when the work being assigned is new to the employer. In such situations, before assigning work, an employer should review the collective agreement, including those provisions regarding management rights and those which define or describe work to be done by bargaining unit members. Although a collective agreement may not place specific restrictions on an employer's right to assign bargaining unit work, there exists an implied restriction on such rights. This implied restriction on management rights has been applied by arbitrators to ensure management rights are not used by an employer to circumvent the collective agreement, thereby rendering job classification, seniority, bumping and other similar provisions in the collective agreement meaningless. It must be noted, however, that the protection of bargaining unit work does not include the protection of specific positions or jobs unless the collective agreement dictates otherwise. In this respect, arbitrators and courts have routinely held that jobs are not "water-tight compartments" and neither an employee nor the union has any proprietary interest in a specific position.

Arbitrators have held that tasks normally performed by bargaining unit members and tasks which are integral (as opposed to incidental) to the bargaining unit position will be considered bargaining unit work. Given the scope of bargaining unit positions, the range of importance of tasks performed by bargaining unit members in those positions and the frequency that such tasks are performed, issues regarding the reassignment of work is determined on a case-by-case basis. In most cases, the overarching question to be determined is whether the assignment of work outside of the bargaining unit has effectively undermined the integrity of either the bargaining unit or the collective agreement.

This question can often become difficult where there are overlapping duties as between bargaining unit members and management employees. For example, a bargaining unit computer technician and his or her information technology supervisor may, at times, perform the same tasks to ensure the integrity and maintenance of a school board's network. In this case, in addition to the consideration that the task must be integral to the bargaining unit position, some arbitrators have held that there must be evidence that such duties have been completely "abandoned" to the bargaining unit.

Using the same example, other issues may arise when new software or new performance protocols are introduced, leading to possible disputes arising regarding performance of such protocols. Again, regard must be had to the collective agreement. If the new protocols are like any other bargaining unit functions, the new work may be held to be bargaining unit work. However, if the protocols are entirely new, or mirror other overlapping duties, it is possible that the work could legitimately be allocated to management employees.

Again, the assessment of whether the work in question is actually bargaining unit work is done on a case-by-case basis. To avoid needless grievance and arbitration proceedings, it may be wise to consult legal counsel prior to assigning or reassigning what may appear to be bargaining unit work to non-union employees.

Case Summaries

The British Columbia Court of Appeal overturned an order awarding special costs to the family of an autistic child on the basis that the action was driven primarily by the family's circumstances and not by its public importance. *Barclay (Guardian ad litem of) v. British Columbia*, [2006] B.C.J. No. 2194.

A mother's complaint against a School District on behalf of her special-needs son was dismissed by the Human Rights Tribunal for failure to make out a prima facie case of discrimination in the provision of educational services contrary to s. 8 of the Human Rights Code. *G. v. Fraser-Cascade School District No. 78*, [2006] B.C.H.R.T.D. No. 474.

The British Columbia Supreme Court struck wording from the School Board Fees Order 125/90, finding that the provincial legislation which allowed school boards to charge fees for certain goods and services required for learning outcomes or assessment requirements were contrary to the enabling legislation, the *School Act*. *Young v. British Columbia (Minister of Education)*, [2006] B.C.J. No. 2188.

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

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