



## Education Law eBulletin

A newsletter for educators

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### Courts direct individuals to file claims in the appropriate forums

In several recent decisions, courts have affirmed that potential plaintiffs should have regard for the specific nature of their claim prior to initiating court actions. Notably, the courts are deferring some issues that may be within their jurisdiction to human rights and labour relations board and tribunals.

In *Jaffer v. York University*, a student with Down Syndrome had discussed accommodation measures with the university, but no agreement had ever been reached. After being granted an opportunity to redo a paper, the paper was examined and the student was subsequently informed that he could not continue his studies because he had not achieved at least a D+ average. The student initiated a claim against the university seeking damages, arguing that there had been a breach of contract and asserted claims in breach of duty of good faith and negligence. The university brought a motion requesting that the claim be dismissed because the matter was essentially academic and ought to be dealt with internally, and also because the student had also initiated a human rights claim, which fell within the exclusive jurisdiction of the Ontario Human Rights Commission.

In granting the motion, the Ontario Superior Court Judge reviewed the plaintiff's claim, noting that the major allegation against the university was that it had failed to accommodate him, and it was the failure to accommodate that led to his unjust expulsion from the academic program. The judge found that the failure to accommodate should be dealt with by the Ontario Human Rights Commission given its guidelines concerning accessible education. Accordingly, although the court recognized that there might be some contractual or tortious issues within the broader claim, the pith and substance of the impugned conduct was academic in nature and should not, therefore, be continued in the courts.

The Alberta Court of Queen's Bench also recently struck a teacher's defamation claim against his former principal and school board administrators on the basis that the issue arose out of the employment relationship and therefore properly belonged in the labour relations forum. In *Abrams v. Johnson*, a former teacher with the Calgary Board of Education had, several years prior, been exonerated of inappropriately touching female students. After requesting a transfer and being advised it had been approved, it was subsequently revoked. The teacher then initiated complaints of unprofessional conduct to the Alberta Teachers' Association against two teachers which resulted in a finding of unprofessional conduct against the individuals who were responsible for revoking the transfer. In the action before the court, the plaintiff claimed that the defendants had defamed him by making statements to the Alberta Teachers' Association, colleagues and parents.

The defendants brought an application to summarily dismiss the plaintiff's claims for defamation. In allowing the application, the court confirmed that the essential character of the claim was not defamation and harassment; it arose from an employment dispute. As such, the plaintiff had appropriate remedies for the problems he faced under the collective agreement, which were properly the jurisdiction of the labour relations regime. The court held that the teacher's allegations regarding defamatory statements to colleagues and parents,

although not clearly related to a workplace problem, did not contain sufficient particularity to proceed. Notably, the court did not provide an opportunity to provide additional particulars or amend the statement of claim and granted the summary dismissal of the claim with costs.

The above-mentioned cases are similar in several respects. The courts in both matters recognized that the respective claims, human rights in *Jaffer* and defamation in *Abrams*, did raise issues that could be addressed by the courts. However, in reviewing the associated legislation and examining the true nature of the claims, the courts declined to deal with either of the matters, including those portions of the claims that the courts arguably had the jurisdiction to hear. It is trite to say that the courts are well versed to address human rights issues. However, in *Jaffer*, the court opted instead to allow the issues raised by the plaintiff to be heard in the human rights forum. Additionally, although defamation is also properly within the jurisdiction of the courts, the Alberta Court of Queen's Bench found that the unionized employee was required to proceed within the labour relations regime and did not appear to consider the possibility that the statement of claim could be amended to sufficiently particularize the defamation allegations concerning communications with parents and students.

In our September 2009 eBulletin, and others, we have discussed that courts will pay deference to principals and school boards when school boards are making administrative decisions within their expertise. That is, courts appear unwilling to interfere with educational matters that are best left to school administrators. The above-mentioned decisions further demonstrate the trend by the courts to encourage the use of alternative forums to deal with matters, and that these decisions may not be simply due to exclusive jurisdiction, but because in the court's view, the matter is more appropriately dealt with by that alternative process.

In our view, school boards should remember to review any potential claims with legal counsel to determine whether another, more appropriate forum should be used to deal with a complaint. By addressing the proper forum in which any given matter is heard, school boards can avoid having to defend a multiplicity of proceedings, thereby providing the board with a greater measure of certainty in the outcome while, at the same time, potentially reducing overall legal costs.

#### CASES

The British Columbia Court of Appeal dismissed a university student's appeal finding that the *Canadian Charter of Rights and Freedoms* does not apply to universities, which are not governmental actors and the trial judge did not err in failing to consider the *Charter*. *Maughan v. University of British Columbia*, [2009] B.C.J. No. 2062.

The Saskatchewan Court of Queen's Bench declined to interfere with a dental student's appeals that were proceeding pursuant to the *University of Saskatchewan Act*, but issued an Order requiring the appeals to proceed prior to the beginning of the new school year. *Bikey v. University of Saskatchewan*, [2009] S.J. No. 553.

In a judicial review hearing, the British Columbia Supreme Court set aside a decision by the British Columbia Information and Privacy Commissioner requiring Simon Fraser University to disclose records related to a subsidiary company on the basis that the subsidiary was not a public sector entity and therefore not subject to disclosure under the *Freedom of Information and Protection of Privacy Act*. *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, [2009] B.C.J. No. 2145.

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