



## Education Law eBulletin

A newsletter for educators

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**HAVE A WONDERFUL 2007!**

### B.C. ARBITRATOR PLACES LIMITS ON “DISABILITY DEFENCE”

It is becoming more common that upon termination of the employment relationship for cause, an employee and/or his or her bargaining unit will assert that a disability contributed to the reason for the termination. By asserting this “disability defence,” the employee is essentially taking the position that the employer should accommodate the employee’s disability rather than terminate his or her employment. A recent decision by the British Columbia Labour Relations Board limits the effectiveness of such a defence, by placing a positive onus on employees and their bargaining representative(s) to establish that alleged but unproven disabilities contribute to culpable behaviour.

In *United Steelworkers of America, Local 1-424 v. Canadian Forest Products Ltd.*, [2006] B.C.L.R.B.D. No. 238 (QL), an employee who performed janitorial duties in a mill was dismissed after raging on a co-worker. The temper tantrum was not a stand-alone incident; it had been preceded by 12 similar incidents of “intemperate and unjustified displays of temper and aggression” during the course of six years, all of which had been the subject of disciplinary action.

Although the employee had suffered a head injury in 2002, this did not affect the frequency or severity of the outbursts. Accordingly, the employer treated the behaviour as culpable, and terminated the employment relationship. The union grieved, arguing that the employer acted too hastily and should have inquired into the possibility of a disability prior to termination. At arbitration, however, it was found that the union had the burden of proving that the alleged disability contributed to the misconduct. As the union had not proven the existence of a disability that caused the misconduct and the employer had not acknowledged the existence of a disability, the grievance was dismissed.

The union then appealed to the British Columbia Labour Relations Board (the “Board”). The Board held that there was no authority for the position that an employer has a pre-arbitration obligation to determine whether an employee had a disability if the employer does not concede that the grievor ever was disabled and the union does not establish that was the case.

Moreover, the Board made findings with respect to employers’ duties to accommodate. Human rights tribunals have held that employers are not absolved of their duties of accommodation regardless of a request by an employee if the employer was aware, or ought to have been aware, of a disability. In this case, however, the Board held that in the absence of such evidence, employers do not have any obligation to accommodate alleged but unproven disabilities.

Accordingly, in the case before it the Board held that if a union wished to put forward a “disability defence” insofar as the disability caused or contributed to the misconduct, the union had the burden of establishing that connection, and there was no positive requirement that the employer investigate an unproven disability. Moreover, the Board held that simply establishing a disability is not enough; the union must demonstrate that the disability contributed to the culpable misconduct.

This decision acts to protect employers from frivolous claims of disability arising after an employee is terminated or disciplined. In short, the decision places a positive onus on employees and their bargaining representatives to demonstrate a *bona fide* disability, and a connection between the disability and the conduct when raising the “disability defence” in a termination case.

It is important to reiterate that this decision in no way diminishes an employer’s duty to accommodate its employees where employees’ disabilities are apparent or acknowledged. The facts of this case are instructive - the intemperate outbursts existed prior to the grievor’s head trauma, and there had been no change in frequency or severity of the outbursts. Accordingly, employers must be cautious not to rely on this case to shirk their responsibilities to identify and accommodate disabilities.

## LEGISLATION UPDATE

### *Bill 107: Human Rights Code Amendment Act, 2006*

On December 5, 2006, the Ontario Legislature passed Bill 107, the *Human Rights Code Amendment Act, 2006*. Bill 107 received Royal Assent on December 20, 2006.

As was indicated in an earlier e-Bulletin, Bill 107 will have a dramatic effect on litigants by changing how human rights claims are litigated in Ontario.

The function of the Ontario Human Rights Commission has been changed dramatically. The Commission will no longer have any role with respect to complaints. Previously, the Commission acted as the “gatekeeper” by investigating complaints and then determining which complaints would be referred to the Human Rights Tribunal of Ontario.

Bill 107 will permit all complainants to apply directly to the Tribunal for a remedy. The Commission will continue to exist, and will have the power to conduct inquiries, intervene in Tribunal proceedings and initiate applications to the Tribunal when it is in the public interest to do so.

The Tribunal will have enhanced powers. For example, the Tribunal will be permitted to make rules governing its practice and procedures which will be liberally construed to permit the Tribunal to adopt alternative dispute resolutions. The Tribunal may also ask the Commission to appoint a person to conduct an inquiry and report back to the Tribunal.

The limitation period for filing a complaint has been extended from six months to one year. Decisions of the Tribunal are final and not subject to appeal. However, any party may now request the Tribunal to reconsider its decision.

The Bill establishes the Human Rights Legal Support Centre. The purpose of the Centre is to provide advice and assistance, legal and otherwise respecting the infringement of rights under the Code and the enforcement of those rights.

The repeal and replacement of the sections of the Code concerning the Commission and the Tribunal will come into force on a day to be named by proclamation of the Lieutenant Governor.

The new regime of complainants applying directly to the Tribunal is not yet in effect. However, there are transitional provisions which are in effect as of the date of Royal Assent and permit the Tribunal to deal with complaints referred to it under the old regime by applying any new rules they create, exercising the new powers they have been given under the Bill and disposing of complaints in accordance with the new regime.

It remains to be seen how the Tribunal intends to control the volume of complaints that are expected to be commenced under the direct access model. It is anticipated that there will be strict timelines for responding to complaints which will be difficult for school boards to meet particularly during the summer months.

#### **Mandatory Retirement**

In addition to the above changes to the Ontario *Human Rights Code*, on December 12, 2006, the *Code* was amended to change the definition of “age” such that the statute now effectively provides that employers cannot discriminate against employees on the basis of “age”, meaning “18 years or more”, effectively ending mandatory retirement.

#### **case law**

The British Columbia Court of Appeal upheld a finding that statutory provisions incorporated into a contract regarding notice and severance pay could not be ignored in favour of common law principles. *University of British Columbia v. Wong*, [2006] B.C.J. No. 2846.

The British Columbia Supreme Court held that a School District breached its statutory duty to consult with the parents of an autistic student in providing the student with access to education. *Hewko v. B.C.*, 2006 BCSC 1638.

The Newfoundland and Labrador Supreme Court (Trial Division) dismissed a parent’s appeal of an adjudicator’s decision to dismiss disciplinary charges against a police officer arising out of a sniff search conducted by a police dog at the junior high school attended by the daughter. *Fowler v. Adams*, [2006] N.J. No.295.

The Nova Scotia Board of Inquiry Under the Human Rights Act dismissed a human rights complaint made by a teacher’s assistant who suffered from vision impairment, finding that the School Board reasonably accommodated the teacher’s assistant’s disability. *Snow v. Cape Breton-Victoria Region School Board*, [2006] N.S.H.R.B.I.D. No. 5.

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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