



Education Law eBulletin

A newsletter for educators

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Bad Backs Not Disabilities Pursuant to the *Code*

A decision by the Supreme Court of Newfoundland and Labrador Court of Appeal has held that an employee's bad back is not a disability pursuant to the Newfoundland *Human Rights Code*.

In September 2000, an employee filed a complaint with the Human Rights Commission alleging that she had been subjected to discrimination and harassment in the workplace by virtue of her "bad back" that had resulted in extended sick leave periods in 1991, 1994, 1997 and 2000. More specifically, the employer had accused the Complainant of excessive use of the sick leave policy. The Commission referred the complaint to a Board of Inquiry which not only awarded the Complainant damages, but also rendered inoperative the employer's Sick Leave Policy. The employer appealed the decision. The Trial Division overturned the Board of Inquiry's decision, finding that the Board of Inquiry had not properly determined whether a disability existed. The Court of Appeal upheld this decision finding that, in order to determine whether a disability exists, a proper legal test should have regard to the definition of disability provided in the *Human Rights Code*. Specifically, the Court of Appeal held that the test or parameter for determining the existence of a physical disability should include the following components:

- the disability should include infirmity, malformation or disfigurement of the body suffered by a person as a result of injury, illness or birth defect;
- the illness must be persistent and ongoing; and
- there should be some significant limitation on the person's ability to function normally.

With respect to the ongoing back problem, the trial judge noted that, although the *Code* should be read broadly, it should not be read so broadly such that injuries or illnesses which may be either transient or of short duration are included within the definition. Accordingly, the trial judge found it significant that, after taking more than two months' sick leave between January and March 2000, the Complainant returned to work without the need for accommodation. Moreover, the Complainant's bad back did not in any way interfere with the performance of her duties or limit her ability to work between April and July 2000 when she was requested to sign a medical release form. As such, the trial judge held that the Complainant had no underlying medical condition concerning her back which was ongoing or persistent. The Court of Appeal agreed with the trial judge's conclusions that the back problem had not manifested itself with a degree of permanence, nor had it impaired the Complainant's ability to carry on her work so as to constitute a "physical disability" within the meaning of s. 2(l) of the *Code*.

Although there are some subtle differences between the Newfoundland and Labrador *Human Rights Code* and the Ontario *Human Rights Code*, this decision coincides with Ontario case law which has held that not every injury or illness is included in the definition of disability and that some degree of permanence may be necessary. In the above case, sporadic and unpredictable "flare-ups" do not a disability make. Employers should be cautious and consult legal counsel before taking action against employees however, as some conditions such as seasonal allergies, although not persistent year-round, have been found to be disabilities pursuant to the *Code*.

Arbitrator Confirms ‘Students First’ in Disallowing Unpaid Leave Request

An employer’s exercise of its rights pursuant to a “management rights” clause in any collective agreement is constantly subject to minute scrutiny by unions and often results in grievances regarding alleged arbitrary or bad faith decisions. Recently, an Ontario Arbitrator reviewed a School Board’s decision refusing a full-time teaching assistant a four-day unpaid leave of absence on the occasion of her brother’s wedding in Mexico. The hearing was held, and the award was issued, before the date of the requested leave. Although the employer had denied the full amount of leave requested, it did initially consent to a two-day unpaid leave. The grievor appealed this decision as it was demonstrated that this would not be sufficient time to allow the grievor to attend the wedding.

The employer’s principal objection to allowing the grievor to go on leave in May 2007 was that it would inevitably have a negative impact on student success; more specifically the impact her absence would have on a particular student. The principal testified that in her opinion, any change in the routine, environment or staff had a negative effect on the students in question, particularly since they had a hard time focussing. These students will often “act out” and refuse to do their work when a substitute Teaching Assistant is introduced into the classroom. The union argued that, in withholding its permission for a four-day leave, the employer was acting unreasonably and thereby violated a provision of the collective agreement which incorporated a Policy Statement and the concept of “employee wellness”.

In dismissing the grievance, the Arbitrator made three observations about the nature of the balancing exercise called for by the Collective Agreement. First, the Arbitrator recognized that the employer’s interest is to be given paramountcy, as is the employer’s determination whether its interests would be adversely affected. Second, the Collective Agreement clearly stated that vacation could not be taken during the school year. Third, the Collective Agreement allowed for only two discretionary days per year; allowing 4 for the grievor would have required an exception to the Policy. Accordingly, the Arbitrator had to determine whether the employer acted unreasonably in denying an exception to the rule. The union was therefore required to demonstrate that the impact on student success or operational requirements of granting the exception would be minimal or negligible; and that the teaching assistant’s failure to support the request was a decision taken in an arbitrary or discriminatory manner. The evidence demonstrated that the grievor’s absence would be more than minimal or negligible. Finally, the Arbitrator held that there was no evidence that the decision was made in bad faith or for anything other than legitimate reasons.

In dismissing the grievance, the Arbitrator implicitly acknowledges that in making discretionary decisions, school board administrators are in the best position to determine students’ needs and to avoid courses of action that may impact negatively upon them.

CASES

The Supreme Court of Canada dismissed an appeal by four Alberta teachers who challenged the constitutional legitimacy of provincial legislation that would extend an existing prohibition on teachers acting as trustees in the jurisdiction in which they are employed. The Supreme Court of Canada held that the provisions of the *Alberta School Trustees Statutes Amendment Act* did not violate the teachers’ freedom of expression or equality rights under the *Charter* as section 2(b) generally imposes a negative obligation on government not to interfere with freedom of expression, rather than imposing a positive obligation on government to provide a platform for a particular statutory means of expression. *Baier v. Alberta*, [2007] S.C.C. No. 31.

The Alberta Court of Appeal dismissed a probationary teacher’s appeal that his employer acted unreasonably in allowing his probationary employment contract to end without terminating the contract. *Lust v. Foundations For the Future Charter Academy*, [2007] A.J. No. 579.

The New Brunswick Court of Queen’s Bench dismissed the Plaintiff business school instructor’s claim for wrongful dismissal, finding that the Plaintiff was employed on a fixed-term contract and that there was no implied term in the oral contract that the Defendant would employ the Plaintiff for the following academic year. *Carr v. Atlantic Business College Ltd.*, [2007] N.B.J. No. 49.

An Arbitrator accepted the Union’s argument that the meaning of “period” in the Collective Agreement as it related to Additional Professional Assignments was not intended to mean “instructional period” but rather meant a scheduled division during the instructional day. *Hamilton Wentworth District School Board v. Ontario Secondary School Teachers’ Federation (Supervision Duties Grievance)*, [2007] O.L.A.A. No. 136.

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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