



## Education Law eBulletin

A newsletter for educators

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### Part-Time Teacher Not Entitled to Full-Time Retirement Gratuity

In April 2009, Arbitrator Dana Randall issued her decision in *Trillium Lakelands District School Board and ETFO (Kelly Grievance)*, in which she considered whether a part-time teacher, who had previously been a full-time teacher with the Board, should receive a retirement gratuity based on her part-time earnings or the full-time grid salary.

In 1998, the Muskoka, Victoria County and Haliburton Boards of Education amalgamated to form the Trillium Lakelands District School Board. The Grievor was initially a full-time elementary teacher with the Muskoka Board. In 1985, the Grievor went part-time and continued in that capacity until her retirement. At the time of her retirement, the Grievor earned a salary of \$42,042.50, which was based on her part-time assignment; the Grievor had 212 sick leave credits, 200 of which were eligible for gratuity calculation.

The collective agreement in question calculates an individual's retirement gratuity based on the individual's annualized earnings. In this case, the issue in dispute was whether the Grievor's annualized salary was the part-time salary or the full-time equivalent as set out in the salary grid.

At the arbitration, the association argued that although the Grievor's annual earnings were \$42,042.50, this annual salary was calculated using the salary grid amount, being \$84,085. In short, the association argued that the Grievor's "annualized salary" was, in fact, the grid amount, which was then pro-rated to reflect her part-time status. The association also relied on s. 180 of the *Education Act*, which prohibits an employee from receiving a gratuity greater than one-half of her year's earnings unless the teacher has accepted a reduction from full-time to part-time status.

Notwithstanding the association's submissions, the arbitrator dismissed the grievance. In reviewing the formula set out in the collective agreement, the arbitrator noted that the language considered "annualized earnings" not "annualized salary." The arbitrator held this language to be significant, recognizing the difference between an annual salary and annual earnings. The arbitrator also held that "annualized earnings" did not refer to the full-time grid rate, as there was insufficient evidence to demonstrate that the parties intended the word "annualized" to transform a member's earnings, whatever they were, into the full-time salary grid amount. In addition, the arbitrator held that the reference to annualized earnings was included to help the parties determine the retirement gratuity in the event that a teacher's retirement did not coincide with the end of the school year.

Having regard to s. 180 of the *Education Act*, the arbitrator concluded that the provisions were included in the Act to reflect a legislative policy judgment that teachers should not be penalized for accepting part-time work at the end of their careers. That said, the arbitrator also found that s. 180 did not mandate entitlement to part-time teachers, and that it only allowed the workplace parties to negotiate contractual language that would allow part-time employees more than half of their actual salary and up to half of the full-time salary rate.

Finally, the arbitrator found that the decision to become part-time was a decision that the Grievor had made 23 years ago, and that this decision could not be characterized as an election in response to a Board offer.

Arbitrator Randall's decision illustrates that s. 180 of the *Education Act* provides a matrix within which school boards and teacher associations may bargain to ensure that full-time teachers who wish

to become part-time prior to retirement receive retirement gratuities based on their full-time service. However, it is salient that this cannot be assumed; that the parties must bargain for this benefit. In her award, Arbitrator Randall also noted that, if the Grievor had not elected to become part-time, this may have altered her decision regarding the Board's obligations to the Grievor. Thus, school boards should be mindful of their responsibilities regarding retirement gratuities which should be found in the appropriate collective agreement.

## Travel Time Not Included in Unpaid Lunch Break

In another recent arbitral decision, *Toronto District School Board v. CUPE Local 440 – Unit C*, Arbitrator Paula Knopf was asked to determine whether educational assistants who were required to travel between work assignments were truly in receipt of their contractual entitlement to a minimum 30 minute lunch break.

Educational assistants working for the Toronto District School Board work six hours per day. Many of these employees hold two positions that require them to attend at two different schools, working three hours in each location. These assignments result from a combination of available positions and the exercise of their seniority rights in the collective agreement. The issue that arose from this arrangement was the educational assistants' contractual entitlement to a "lunch period." The collective agreement in question provides that employees are entitled to one unpaid lunch period of not less than 30 minutes and not more than 60 minutes. Some educational assistants traveling from one location to another to perform their duties were not always able to avail themselves of a 30-minute uninterrupted lunch. The union therefore sought a declaration that educational assistants were entitled to a 30-minute uninterrupted lunch break, exclusive of travel time.

In reviewing the collective agreement, Arbitrator Knopf recognized that the parties had bargained for a minimum 30-minute unpaid lunch break for Educational Assistants. Arbitrator Knopf found that caselaw and arbitral jurisprudence indicate that the right to the uninterrupted or controlled lunch break is part of the collective bargaining process, and that individuals who have bargained for an unpaid lunch are free to do what they choose during that unpaid break. Where individuals are required to travel to fulfill their job functions, they continue to function under the control of the employer and are not given the time off. Therefore, the arbitrator declared that the reasonable time spent traveling between locations by Educational Assistants is not time that can be taken into account for purposes of determining if they have received their entitlement to a lunch period pursuant to the Collective Agreement.

Although the concept of an unpaid lunch is not new, school boards must take steps to ensure that staff are able to avail themselves of their contractual entitlements, especially in times when it is not uncommon to have personnel employed in itinerant positions.

### CASES

The Ontario Superior Court dismissed the Plaintiff's action for damages for alleged negligence of the campus police for false arrest, wrongful imprisonment, assault and battery, malicious prosecution and breach of Charter Rights, finding that the campus police had reasonable and probable grounds for arresting the Plaintiff and that the investigation and the arrest did not fall short of the required standard. *Small v. Stec*, [2009] O.J. No. 426 (S.C.J.).

The Saskatchewan Court of Appeal dismissed an appeal brought by the Saskatchewan Human Rights Commission and the parents of a child suffering from Williams Syndrome who sought review of the Saskatchewan Divisional Court's decision to dismiss their application for judicial review. *The Saskatchewan Human Rights Commission v. Prince Albert Roman Catholic School Division No. 6*, [2009] S.J. No. 96 (C.A.).

The British Columbia Supreme Court held that articles published in a student-run university newspaper were defamatory to a former member of the student union; the defence of qualified privilege or the defence of public interest responsible journalism were not available to the Defendants. *Hanson v. Tilley*, [2009] B.C.J. No. 517 (S.C.).

The Ontario Divisional Court dismissed an application for judicial review of the Minister of Labour's decision to rescind an Order authorizing the establishment of a Multi-Workplace Joint Health and Safety Committee for the Greater Essex County District School Board, finding that the Minister's decision was reasonable given the inability of the Multi-Workplace Committee to work together harmoniously, and the importance of protecting employees. *Elementary Teachers' Federation of Ontario v. Ontario (Minister of Labour)*, [2009] O.J. No. 719 (Div. Ct.).