



## Education Law eBulletin

A newsletter for educators

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### Ontario Human Rights Tribunal Imposes Interim Publication Ban

Human Rights complaints are often emotionally charged. Hurt and angry feelings can continue to fester as the complaint proceeds. In most cases the parties involved are able to deal with these issues in a professional manner. However, this is not always possible, and parties may be left to wonder what, if any, action they may take in response to unfounded or vexatious complaints being spread throughout the community and/or online.

Such an issue was recently considered in an interim decision by the Human Rights Tribunal of Ontario regarding a complaint against the Toronto Catholic District School Board and other respondents involving allegations of sexual harassment and sexual solicitation by an instructor of the Board. The Board and respondents had already requested that a complaint be dismissed on the grounds that it was vexatious, abusive and made in bad faith. This position was supported by a Court Order finding the applicant to be a vexatious litigant pursuant to the *Courts of Justice Act*. However, in the time after the complaint had been filed and prior to the hearing, the complainant engaged in abusive and defamatory online commentary against the Toronto Catholic District School Board and other personal respondents (collectively, "the Respondents") to the complaint. On August 20, 2009, the Respondents requested the following orders from the Tribunal: an order that the complainant be prohibited from posting and otherwise disseminating information related to these proceedings, and an order requiring the applicant to remove all posted materials from the internet or other media forthwith and to refrain from making such postings in the future. The Respondents alleged that the online postings went well beyond the boundaries of what is acceptable in the proceeding and described them as inflammatory, argumentative, scandalous, frivolous and vexatious. The Respondents further submitted that the postings included serious personal and professional attacks on the Respondents and their counsel and that the complainant's conduct was both defamatory and harassing in nature and was intended to intimidate counsel and the Respondents. The complainant did not respond to the Respondents' requests for orders, and so an oral hearing was held on September 18, 2009, to deal with the issue.

At the hearing, the Tribunal issued a publication ban pending the outcome of the application to have the complaint dismissed. The Tribunal noted that the complaint and reply contained many bald assertions of behaviour and psychology that, if they continued to be broadcast online, could have negative consequences, both personally and professionally, for the Respondents. The Tribunal found that, based on the baseless online commentary and the conduct of the complainant, a publication ban pending the hearing was necessary to ensure the integrity of the Tribunal's processes. See *Nourhaghghi v. Toronto Catholic District School Board*, 2009 HRTO 1519.

This type of interim remedial order is a useful tool that school board administrators should remember when involved in contentious Human Rights litigation. Where defamatory comments are made against school board administrators, they may wish to commence a civil action for defamation personally; but such lawsuits are usually costly and often best thought of as an option of last resort, especially where the maker of the defamatory comments is a parent. Moreover, even if the defamed educators are successful in court, there may be difficulties in enforcing the court's judgment or collecting an award of damages against an individual. In any event, in practical terms and regardless of a court's findings, it may be difficult to reverse the real damage done to one's reputation by defamatory comments. Where possible, a more proactive approach that attempts to contain the misinformation and its undesirable impact will always be the more effective solution. Thus, educators will find some welcome relief in the Tribunal's decision in *Nourhaghghi*.



## Court Upholds Arbitration Decision Allowing Principals and Vice-Principals to be Assigned to Teaching Positions

School Boards across Ontario are facing declining enrolment, diminishing populations, shrinking budgets and the challenges associated therewith. A recent decision by the Ontario Divisional Court may help school boards cut costs where there is a reduced requirement for teaching staff.

As a result of diminishing school population, the Superior-Greenstone District School Board (the "Board") decided in April 2007 to alter the work assignments of the principals and vice-principals in six of its ten schools. The work assignments of the principals in three of the schools were changed to half-time principal and half-time teaching. In two of the schools, the work assignment of the vice-principal was changed to half-time vice-principal and half-time teaching and, in the sixth school, the vice-principal's assignment was changed from half-time vice-principal and half-time teaching to one-quarter vice-principal and three-quarters teaching. The assumption of teaching responsibilities by principals and vice-principals, being excluded from the bargaining unit, resulted in one teacher in each of the six schools being declared partially redundant. The union grieved, arguing that the reassignment of work resulting in the layoff of teachers violated the collective agreement. At arbitration, the grievance was dismissed. The union subsequently applied for judicial review of this decision.

The Ontario Divisional Court held that the arbitrator had correctly identified that s. 287.1(1) of the *Education Act* expressly provided that principal or a vice-principal may perform the duties of a teacher despite any provision in a collective agreement. The Court agreed that this section is permissive and has paramountcy over any provision in the collective agreement. In the event of a conflict with a regulation made under the Act, it would have paramountcy over the regulation as well. In addition, the Court held that O. Reg 90/98 would apply only if a principal or vice-principal position had been declared redundant, which was not the case, as there were no teachers at any of the schools who had been appointed by the Board to perform the duties of a principal pursuant to the *Education Act*.

In our opinion, the above-mentioned findings are significant, especially as they may help cash-strapped school boards avoid otherwise unnecessary staffing costs. As long principals and vice-principals are not declared redundant where teachers are taking over those duties, it would appear that school boards may use principals to fill out any teaching staff requirements.

### CASES

The Prince Edward Island Supreme Court allowed an application for judicial review of the P.E.I. Information and Privacy Commissioner who had found that a school board had violated the Act by attempting to collect information about a bus driver who was becoming unfit to perform his duties. *Eastern School District v. Prince Edward Island (Information and Privacy Commissioner)*, 2009 PESC 27.

The Ontario Superior Court of Justice awarded damages to a teacher who had been employed under a fixed-term contract and did not receive notice as required by the contract. *Fletcher v. Chippewas of Kettle & Stony Point First Nation*, [2009] O.J. No. 3299.

The Ontario Court of Appeal upheld a trial judge's finding that an agreement between school boards regarding the payment of teacher retirement gratuities was valid. *Conseil Scolaire de District du Nord-Est de L'Ontario v. Near North District School Board*, [2009] O.J. No. 3290.

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