



Education Law eBulletin

A newsletter for educators

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Sick Leave Claim after Missed Flight Doesn't Get off the Ground

Sick pay and sick day entitlements provided to teachers and other public servant employees continues to be a magnet for public discussion. Indeed, news reports, media stories and radio call-in shows have devoted significant time and attention to the alleged abuse of sick time by public servants; this issue will only continue to gather steam in the press given the upcoming school board labour negotiations across Ontario. A recent labour arbitration decision titled *Trillium Lakelands District School Board v. Elementary Teachers' Federation of Ontario*, [2012] O.L.A.A. No. 250, may provide some fuel to employers' arguments regarding invalid claims to sick leave by employees.

In the *Trillium Lakelands* decision, a teacher for the Trillium Lakelands District School Board (the "Board") was scheduled to return from her vacation to Italy on August 31, 2011. September 1, 2011, the first day of the 2011-2012 school year, was a work day for the teacher. The teacher, who suffered from migraine headaches, allegedly experienced a migraine while driving her rental car back to the airport in Rome and was forced to pull off the road. Although the teacher did arrive at the airport seventy minutes prior to the departure of her flight, it was deemed insufficient time to allow her to board. The teacher missed her scheduled flight, was unable to make alternate flight arrangements, and was therefore absent from work on the first day of school.

The Board investigated her absence and was satisfied to treat the teacher's failure to report to work as a non-culpable vacation overstay; similar to a delay caused by weather or mechanical failure. No discipline was issued; however, the Board refused to credit her with a sick day on the basis that the purpose of sick leave is to provide an entitlement to teachers on the day of the illness causing absence, and not on some prior occasion. The teacher and her union grieved this decision on the basis that she only missed her flight due to illness.

In his decision, Arbitrator Randall agreed with the Board that sick leave should be properly applied only to the day of illness. Additionally, Arbitrator Randall dismissed the Union's argument that the teacher's absence was caused "by personal illness." In fact, the teacher was unable to attend work because she missed her flight, not because of the migraine; the arbitrator held that the teacher had not proven any causal link between the missed flight and her migraine. Indeed, Arbitrator Randall held that the teacher left her return from vacation too late and found it surprising that the teacher would "set out on her own, in a rented car in Rome, to make the last available flight," a situation which itself could have induced a migraine.

The *Trillium Lakelands* decision by Arbitrator Randall reinforces the principle that sick leave is to be taken by individuals who are not only ill on the day being claimed, but who can also substantiate or provide evidence of that illness. In *Trillium Lakelands*, Arbitrator Randall specifically noted that an employer will always be handicapped in assessing the bona fides of an employee's justification for overstaying a vacation. In our view, this is important given the reality that an employer will rarely be able to investigate and/or determine the validity of claims of an "upset stomach" or "headache" which subsequently

lead to flight or travel complications. Although Arbitrator Randall did note that there may be some circumstances in which sick leave is appropriate – for example, where the employee has been admitted to the hospital prior to the end of vacation – these types of circumstances will have obvious and definite proof on which the employer can rely in establishing the veracity of the claim of illness.

Human Error will not Constitute a *De Facto* Breach of Privacy

Not a week passes that we don't hear about someone's personal information being lost, mishandled or otherwise put at risk of being released to the wrong individuals. Be it patient information on a misplaced memory key or the inappropriate disposal of sensitive records; privacy, and the secure maintenance and disposal of records, continues to be a growing concern. That said, Order Number P2012-02 released by the Alberta Office of the Information Privacy Commissioner has held that human error on the part of the Alberta Teachers' Association did not automatically render the security measures taken by the Association as insufficient.

The Alberta Teachers' Association (the "Association") represents teachers across the Province of Alberta. The Teacher Qualification Service, on behalf of the Association, assesses teachers' educational experience to produce a Statement of Qualifications for the purposes of placing teachers on the salary grid set out in the collective agreement. On April 17, 2008, a teacher requested a reassessment of her educational experience. An assessment was made and the results of the assessment, which were not particularly favourable, were mistakenly sent to another teacher. When it was discovered that the assessment letter had been sent to the wrong teacher, the Teacher Qualification Service contacted the individual and requested that the letter, which had been opened, be returned. The letter was then sent to the correct recipient. When she became aware of the error, the teacher initiated a complaint with the Information Privacy Commissioner.

Although the Association admitted to improperly disclosing the complainant's personal information, it argued that the disclosure was an isolated incident and did not constitute a breach of the Province's privacy legislation. In the normal course, the Association ensures staff verify that addresses on envelopes match the letters being inserted therein; this is then verified by a supervisor prior to mailing. In short, the Association argued that the disclosure was due to rare and acceptable human error. The Adjudicator agreed with the Association on this point, finding that the Association's procedures constituted reasonable security arrangements. The Adjudicator also held that the information in question, the teacher's educational experience and the assessment thereof, was not particularly sensitive and that any fears of identity theft were overestimated by the complainant. Finally, the Adjudicator noted that the individual who actually received the misdirected assessment was a "complete stranger," and therefore had little motive or opportunity to harm the complainant's reputation.

In summary, this decision reiterates previous findings by the Office of the Information Privacy Commissioner that human error will not automatically impeach an organization's existing security measures. Instead, where human error has resulted in mistaken or otherwise inappropriate disclosure of private information, several factors will be considered when assessing whether a privacy breach has occurred, including: the nature and sensitivity of the information in question; the extent of the disclosure; the security measures in place; and the actual harm suffered by a complainant. In this case, the fact that the information in question was not particularly sensitive was a factor contributing to the finding that human error did not result in a breach of privacy. Simply because "mistakes happen" may not suffice in all circumstances of mistaken disclosure; we therefore encourage all employers and school boards to ensure that their security measures properly reflect the sensitivity of the information being handled.

At Shibley Righton, we have extensive experience with privacy-related matters; please contact us should you have any questions regarding your privacy policies and procedures.

For more information on sick leave claims or privacy law, please feel free to contact us at 1-877-422-7988.