SHIBLEY RIGHTON LLP
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Ontario Labour Arbitrator – 'Bureaucracy' Resulted in Harassment

The administration of human resources within a school board is a complex endeavor, managed by several different departments and supervising individuals located within central school board offices as well as individual school locations. In a recent decision titled *Ottawa-Carleton District School Board v. Elementary Teachers' Federation of Ontario (Bonnell Grievance)*, [2012] C.L.A.D. No. 88, an arbitrator held that the actions of a school board's 'bureaucracy' constituted harassment contrary to both the collective agreement and the Ontario *Human Rights Code*, resulting in a $20,000 award of damages for pain and suffering.

In *Bonnell*, the Grievor was a teacher with 35 years of teaching experience with the Ottawa-Carleton District School Board (the "Board") and had taught at Hopewell Avenue Public School ("Hopewell") for 30 of those years. The Grievor suffered from several physical ailments including allergies, a rare eye condition which required her to wear tinted lenses and a sciatic condition that frequently required her to conduct classes while sitting and restricted her mobility. The Board had accommodated these restrictions and there was never any suggestion that the Grievor's restrictions had any negative effect on her teaching ability. In fact, the Principal of Hopewell indicated that he did not need any further or ongoing need of the Grievor's medical certificate, which was not retained by the Board.

In 2008, Hopewell's Principal went on sick leave. During a staff meeting held by the new Principal at the end of the 2007-2008 school year, all teachers were told to check their mailboxes or email for classroom assignments. The Grievor, upset that she might lose her classroom, spoke to the Principal and promised to get a doctor's certificate.

Issues began to arise at the beginning of the 2008-2009 school year. At that time, the Grievor had not yet produced a medical certificate. On the first day of school, the Principal spoke to the Grievor and later delivered a letter to the Grievor discussing classroom cleanliness and safety, the Grievor's inability to produce her daybook, the Grievor's failure to follow the first day of school routine and finally, the Grievor's failure to produce a doctor's certificate. The letter did not set out any disciplinary action; however, during a subsequent meeting with the Grievor and her union representative, the union alleged that the Grievor was being targeted.

In January 2009, the Grievor suffered flu-like symptoms and went home ill, resulting in an extended absence from work. During this time, the Grievor contacted the Board's Wellness Officer to discuss her absence. At the hearing, the Grievor testified that she was upset by the Wellness Officer's "aggressive and unprofessional tone" when asking for medical documentation.

When the Grievor was prepared to return to work the Principal informed the Grievor that the medical certificate, provided by a chiropractor, was not acceptable and that the Grievor must provide a completed functional abilities form to justify any accommodation. This information was incorrect, a chiropractor's note was sufficient to allow a return to work. Based on this mistaken view and the Grievor's continued failure to provide a medical certificate regarding the Grievor's existing restrictions including the use of tinted glasses, the Grievor was not permitted to return to work at that time.

Subsequently, two separate complaints from parents were made against the Grievor; the parents told the Principal that they had also contacted the Children's Aid Society regarding the Grievor's behaviour. Armed with this information, the Board issued a letter to the Grievor outlining the allegations against her and indicating that due to the complaints and other "unusual behaviour" the Grievor was not to report to the school and that she would be contacted in due course. In fact, at the time that the Grievor was suspended, no complaints had in fact been made and the Principal had not made any attempt to verify the veracity of the parents' claims.

Following an investigation, a third letter was sent to the Grievor indicating that interviews with the students regarding the two incidents revealed that the Grievor caused "significant anxieties" to the children. The letter also stated the Board's expectations that the Grievor would consider the impact of her interaction with students and that she would create a safe, healthy, welcoming and valuably relevant learning experience for her students.

In June 2009, following the issuance of the third letter, the Elementary Teachers' Federation of Ontario (EFTO) initiated a grievance against the Board alleging that the Board had engaged in a deliberate and prolonged campaign to remove the Grievor from the teaching environment by "subjecting her to unrelenting discriminatory and mean-spirited treatment." With respect to the letters issued to the Grievor, the Board denied any discriminatory treatment and argued that the Grievor had not, in fact, been subjected to any discipline.

Arbitrator Weatherill did not centre out any one individual as the source of harassment, nor did he specifically state that any of the requests for medical information, other than the mistaken statement by the Principal that the chiropractor's note was inadequate, were improper or violated the collective agreement. However, Arbitrator Weatherill held that the the Board, in part through the school administration, but "principally through its bureaucracy," had in fact violated the collective agreement and discriminated against the Grievor on the basis of disability by engaging " in a course of vexatious comment or conduct which was known or ought reasonably to be known as unwelcome" based on the following:

- although the initial letter issued by the Principal was not disciplinary, it was "…quite unnecessarily negative in tone and had a very negative effect on the Grievor," and that the meeting to discuss that letter created an impression of animus against the Grievor;

- the Wellness Officer's behaviour was aggressive and unprofessional – ETFO alleged that the Wellness Officer had at one point asked why the Grievor "doesn't just retire" (the Wellness Officer was not called to give evidence);

- the second letter was, in fact, disciplinary based on the tone and the effect on the Grievor. Specifically, the second letter removed the Grievor from the school "…suddenly, in a situation in which, on the evidence, rumours abounded, was undoubtedly the infliction of a penalty, whether or not the employer thought that was the effect;"

- the third letter issued by the Board was also disciplinary in that it suggested that the Grievor caused anxieties in her students, based on an Investigation Summary that, in the Arbitrator's view, was "clearly unreliable" and "worthless" on the basis that the summary was "mostly an account of what the children said," and did not involve either ETFO or the Grievor; and

- both the tone and the content of the second and third letters provided further evidence of animus against the Grievor.

Further, it would appear that the arbitrator's findings regarding harassment were also based on the "tone" of letters and conversations with the Grievor. In concluding that the Grievor had been harassed, the arbitrator ordered that the Grievor be compensated for any loss of earnings or other benefits and lost sick days following her attempt to return to work in March. Arbitrator Weatherill further awarded the Grievor $20,000.00 for her "considerable pain and mental stress" resulting from the Board's violations of the collective agreement and s. 10(1) of the Ontario *Human Rights Code*.

In our view, Arbitrator Weatherill's decision that the Board's bureaucracy resulted in harassment justifying damages for pain and suffering should be confined to the specific facts of this case. Ultimately, a school board remains entitled to request doctor's certificates to support physical restrictions and updates as to its employees' medical status. That said, this decision outlines the pitfalls that may accompany poorly and/or hastily written correspondence and ill-considered requests or demands for additional or otherwise unnecessary medical documentation and suggests that school administrators may wish to inform themselves of the circumstances regarding individual employees when making certain requests. Finally, Arbitrator Weatherill's decision further demonstrates that, depending on the facts of the case, arbitrators may rely on legislation such as the *Human Rights Code* to award damages in respect of pain and suffering.

Rental of School Premises – Review of Contract Language Recommended

It has been a relatively common practice for school boards to rent out various premises for use by social groups or for other activities outside of normal school hours. The British Columbia Supreme Court's decision in *Shelton-Johnson v. Delta School District No. 37*, [2011] B.C.J. No. 2154, emphasizes the importance that school boards ensure that the rental of any space is properly documented and protects the board from any potential litigation.

In 2009, the Sons of Scotland Benevolent Association hosted Highland Games on the property of the South Delta Secondary School in Tsawwassen, British Columbia. The plaintiff, Shelton-Johnson, alleged that, during the games, she tripped on the sidewalk adjacent to the school's cafeteria. The plaintiff brought an action against both the Sons of Scotland and the Board of Education of School District No 37 (the "Board") for damages. The defendants submitted a joint statement of facts in which the Board and the Sons of Scotland agreed that the parties had contemplated that that patrons and volunteers would need to use the sidewalk to gain access to the interior of the school.

The Board subsequently brought an application seeking an order that an indemnity clause found in the rental agreement between the Board and the Sons of Scotland applied with respect to the plaintiff's claim. The Sons of Scotland disputed this, and argued that the clause did not apply on the basis that it referred only to those portions of the school which were expressly set out in the rental agreement, and to other external areas.

The British Columbia Supreme Court dismissed the Board's application on the basis that the language of the indemnity clause did not apply to the contract. In particular, the Court held that in order to make a party liable for negligence, the relevant indemnity clause must be unequivocally certain. The indemnity clause in the rental agreement used two terms - "premises" and "facilities" and was disjunctive. Although the indemnity clause provided that the Sons of Scotland agreed to accept the "premises" at its own risk, the clause further provided that the user would only indemnify the Board from any injury or damage to a person who used the school's "facilities". The rental agreement specifically defined the "school facilities" as the cafeteria, a classroom and adjacent washrooms and changing rooms; the sidewalks or schoolyards were not included. Because the indemnity clause shifted responsibility for negligence of the School Board to the Sons of Scotland for incidents regarding only "school facilities," the court dismissed the application finding that the sidewalk was not subject to the indemnity clause.

Rental of school facilities has been a common means by which school boards have supplemented their budgets, and will become increasingly important as a result of impending budgetary cutbacks. We strongly recommend that all school boards conduct a review of their rental agreements to ensure that they contain the precise language necessary to avoid potential liability arising during these types of extra-curricular activities.