SHIBLEY RIGHTON LLP
Barristers and Solicitors

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A newsletter for educators

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British Columbia Court of Appeal and Freedom of Speech in the Classroom

Over the past several years, teachers' associations and school boards have debated the extent to which teachers' expression of political views and freedom of speech in the classroom is protected under s. 2(b) of the *Charter*. On May 21, 2013, the British Columbia Court of Appeal added another chapter to this debate when it released its decision in *British Columbia Teachers' Federation v. BC Public School Employers' Association / the Board of Education of School District No. 5*. In this decision the Court confirms teachers' rights to post political materials in the classroom; however, all three appellate judges also question the extent of this right suggesting that this decision will not be the last word on this issue.

To appreciate the Court of Appeal's most recent comments, reference must be had to a previous 2005 decision of the BC Court of Appeal titled *BCPSEA v. BCTF*, 2005 BCCA 393 ("*Munroe*"). In *Munroe*, the British Columbia Teachers' Federation ("BCTF") initiated a political campaign against class size and composition legislation by disseminating posters and flyers to its members with the intention that these materials be given to parents during parent-teacher interviews. An arbitrator held that the School Board's directive that the materials not be distributed and that teachers were not to discuss the BCTF's position on the legislation during parent-teacher interviews infringed the teachers' right to freedom of expression under s. 2(b) of the *Charter*. The arbitrator's findings were ultimately upheld by the British Columbia Court of Appeal; the Supreme Court of Canada refused leave to hear any further appeal.

Like *Munroe*, the most recent matter arose after teachers posted materials on school walls or wore buttons that criticized government education policies regarding school closures and special education. In response, the administration of School District No. 5 (the "School District") immediately forwarded a directive that political posters should not be displayed in school hallways or classrooms; some principals told teachers to stop wearing buttons.

The BCTF grieved the School District's directive; the matter was brought before an arbitrator who distinguished the case from the earlier *Munroe* decision. In dismissing the grievance, the arbitrator noted that whereas the political materials in the *Munroe* decision had been aimed directly at parents, the political message in this case directly involved children. The arbitrator held that, "insulating students from political messages in the classroom" was a pressing and substantial objective and that the effect of the directive on the intended audience, parents, was "at most modest."

The Court of Appeal disagreed with the arbitrator's conclusion. Writing the unanimous decision, Madam Justice Levine immediately recognized that the Court had not been asked to review *Munroe*; consequently, the Court was required to apply the principles in *Munroe* given that it was "indistinguishable on its facts." The Court held that the arbitrator erred in

finding that the goal of insulating students *generally* from such messages was a pressing and substantial objective. Although the Court did confirm that teachers do not enjoy an unlimited freedom of speech in schools, it stated that *Munroe* was clear that absent evidence of harm or potential harm to students caused by exposure to the political materials there is no *general* interest in protecting students from political messages. The Court set aside the order of the arbitrator and allowed the BCTF's grievance accordingly.

Despite the finding that the principles in *Munroe* were binding, all three judges in the 3-0 decision noted either that that the Court of Appeal had not been asked to reconsider *Munroe* or that the issue as to what limits should be placed on teachers' freedom of speech in the classroom must be reserved for another case. In our view, these comments are significant in that all three judges appear to suggest that the principles in *Munroe* are ripe for reconsideration and that, perhaps, the appropriate test is not harm or potential harm, but that students should be educated in a school system that is free from bias. Based on these comments, it would appear that the debate regarding freedom of speech in the classroom has yet to be concluded.

Human Rights Tribunal Orders Reinstatement of Employee and $420,000 in Lost Wages

All large employers, school boards included, encounter employees with disabilities who require accommodation. While some disabilities are manifested physically and are more easily identified and accommodated, other disabilities such as depression or stress-related disorders may be more difficult to diagnose and accommodate. However, a recent decision of the Ontario Human Rights Tribunal entitled *Fair v. Hamilton-Wentworth District School Board*, 2013 HRTO 440, drives home the need to ensure that employees with a disability are provided with opportunities to return to work where appropriate.

Sharon Fair ("Fair") was an employee of the Hamilton-Wentworth District School Board (the "School Board") for approximately 16 years between 1988-2004. In 2001, Fair was employed by the School Board as Supervisor, Regulated Substances, Asbestos. The Tribunal heard evidence that the position was rife with stress; as the supervisor in charge of removal of asbestos from School Board buildings, Fair believed that she could be held personally liable under health and safety legislation for any mistakes that occurred with respect to asbestos removal. Fair testified that she lived in constant fear of the possible repercussions of her position. As a result of the stress, Fair developed a generalized anxiety disorder and was ultimately diagnosed with post-traumatic stress disorder.

Fair was subsequently deemed medically unfit to work and received long-term disability until April 2003 at which time she was cleared to return to work in a position that did not involve health and safety responsibilities. The School Board ultimately refused to re-employ Fair, taking the position that since all supervisors are responsible for health and safety, it was unable to accommodate her. Fair initiated a human rights complaint in which she sought reinstatement as a remedy. Notably, as a result of changes to the human rights complaint process in 2004, complex matters could be stayed until after changes to the process had been completed. Fair re-filed her application with the Tribunal in 2009, following the completion of revisions to the human rights complaint process.

At the hearing of the matter in 2012, the Tribunal heard and accepted evidence that despite the School Board's claims that health and safety was a component of all supervisory positions, there were several supervisory positions that would have been suitable for Fair and for which she would have been qualified. Consequently,

the Tribunal concluded that the School Board did discriminate against Fair on the basis of disability insofar as it failed to accommodate her medical condition and provide her with an available and suitable position. The Tribunal concluded the 2012 hearing without making an order as to remedy, leaving it to the parties to attempt to resolve the matter. No resolution was reached however, as Fair was seeking reinstatement that the School Board was unwilling to consider.

When the parties returned to the Tribunal in March 2013 to present arguments as to the appropriate remedy, the School Board argued that reinstatement following a 9-year absence was prejudicial. The Tribunal rejected this argument noting that the delay was not unreasonable given the complexity of the issues and that the delay could not be attributed to Fair herself. The Tribunal further recognized that the most appropriate remedy for a human rights violation will make the applicant "whole." This includes reinstatement, where possible. In this case, the Tribunal heard evidence that although Fair felt humiliated and degraded by the School Board, she did not harbor any ill-will. The Tribunal held that reinstatement was appropriate in this case given that Fair could have returned to active employment in 2004 as an Area Supervisor or Staff Development Supervisor if the School Board had properly accommodated her. The Tribunal therefore ordered the School Board to reinstated Fair to a suitable position and further awarded Fair damages in the amount of $419,284, plus interest for lost wages and $30,000 in general damages for loss of dignity and self-respect.

Despite the fact that this decision will almost certainly be appealed by the School Board, given the extraordinary circumstances of this case and the reasons for the 9-year delay, the value of this decision is not in the amount of lost wages that were awarded. In our view, this decision is more remarkable for the following reasons: first, school administrators must recognize that it is not only arbitrators who have the authority to reinstate terminated employees; the Human Rights Tribunal has always had this authority although it is not always exercised to the same extent. Second, school board administrators should ensure that efforts are always taken to accommodate an employee with a disability who is deemed fit to return to work. Particular attention should be paid to the bona fide occupational requirements of available positions and, importantly, whether the returning employee is able to perform the core duties of the position in question. If an employee can perform the core functions, the employer will likely have difficulty defending a decision not to offer that position to the returning employee. Finally, delay is seldom an employer's ally where damages are at issue. Although the delay present in this case is unlikely to be repeated in the future, regardless of whether an issue is proceeding to labour arbitration or in the human rights forum, delay can be very costly.