

BCTF/ SD No. 39 (Vancouver): Eligibility for Early Retirement Incentive Plan (ERIP)

Issue: Was the employer's denial of the Early Retirement Incentive Plan (ERIP) to the grievors in violation of the *Human Rights Code* and/or the *Charter of Rights and Freedoms*?

Preliminary objection: Is the union estopped from raising this grievance, given that the issue before the arbitrator had already been addressed in a 1997 arbitration award between the parties?

Facts: The ERIP contains the following requirement:

"The employee must have been in active service for the previous four (4) years, during which there may be a maximum of one year of leave."

The four grievors were denied access to the ERIP as each of them did not meet the above requirement. The union argued that each of the grievors was absent from work due to health reasons. As each grievor suffered from a physical disability, the union asserted the employer's refusal to pay the ERIP was in violation of the *Human Rights Code* and/or the *Charter of Rights and Freedoms*.

The employer raised a preliminary objection, that the union is estopped from raising this grievance as the issue before the arbitrator had already been addressed in a 1997 arbitration award.

The 1997 arbitration award addressed a teacher who had been denied access to the ERIP as she did not meet the above requirement due to a medical leave. The arbitrator in that case dismissed the grievance, deciding that the term "leave" referred to all leaves under the collective agreement, not just personal leaves as argued by the union. The union did not argue discrimination.

Decision: Preliminary objection dismissed. Arbitration allowed to proceed on the merits of the issue.

Arbitrator John Kinzie noted that the union had previously agreed that the 1997 arbitration award would apply to other similar disputes. The union acted in accordance with that representation when it withdrew a similar grievance in 2004. Now it sought to resile from that agreement. Arbitrator Kinzie posed the following question: "Would permitting the union to proceed with this grievance give rise to an abuse of process?"

In answering the above question, Arbitrator Kinzie determined that:

"The *Human Rights Code* and the *Charter of Rights and Freedoms* are statutory and constitutional provisions that represent policies of "significant social importance" such that they must override any argument founded on the doctrines of equitable estoppel and abuse of process. In my view, to deny the grievors the opportunity to have it determined whether their human rights and Charter rights are being offended by the employer's administration of the ERIP would not be consistent with maintaining the integrity of the grievance-arbitration process,

nor with my obligations under Section 82(2) of the *Labour Relations Code*. Because they were not argued before her, Ms. Jackson did not make any determination on these issues.”

The hearing on the merits of the issue is scheduled for January 2008.

BCPSEA Reference A-31-2007.pdf

BCTF/SD No. 75 (Mission): Supreme Court – In-Dispute Declaration – Gallup Teacher Insight Questionnaire

Issue: The BCTF petitioned the BC Supreme Court for judicial review of the Labour Relations Board’s (the Board) Reconsideration Decision dismissing the application for reconsideration.

Facts: As reported in *Grievance & Arbitration Update No. 2005-09*, since October 2004 the employer has required all external applicants for teaching positions to complete the Gallup Teacher Insight screening questionnaire. On June 1, 2005, the BCTF placed the school district in-dispute over the use of the Questionnaire.

Vice-Chair Najeeb Hassan declared that, under s. 70 of the *Labour Relations Code* (the Code), the in-dispute declaration of the BCTF was void for all purposes and unenforceable.

The BCTF applied for reconsideration of the Vice-Chair’s decision. The reconsideration panel found that Section 70 is part of a balanced and comprehensive statutory scheme regarding labour relations. The Code even provides assistance to unions in their enforcement of in-dispute declarations. However, it also provides a discretionary fetter to ensure their effect is not disproportionate and they are not used in a way that is inconsistent with the scheme of the Code. In this case, the Board Declaration and order to communicate it are rationally connected to the purpose of the Code, and are not disproportionate to any such infringement.

The BCTF petitioned the BC Supreme Court for judicial review of the reconsideration decision.

Decision: Petition dismissed. On the four grounds upon which the BCTF bases its petition, the Court found:

Ground 1: The courts have repeatedly found that s. 70 confers upon the Board the power to make enforceable declarations. The phrase "declaratory opinion" is ambiguous. The Board's interpretation of these words is reasonable, and the Board is in the unique position to know whether the interpretation is consistent with the objects and purposes of the Code and the role of the Board in relations to it. To interpret the words to mean "mere opinion" would defeat the purpose of s. 70 of the Code.

Ground 2: There was ample evidence before the Board to reach the conclusion that the in-dispute declaration was substantially affecting the school district’s operations. In addition, it would have been wrong for the Board to consider, as a reasonable alternative open to the school district, the option of complying with the BCTF's demand of abandoning the Questionnaire. To recognize this as a legitimate alternative would be to permit the BCTF to achieve indirectly that which they are precluded from doing directly.

Ground 3: The Board's declaration that the BCTF's in-dispute declaration was void and unenforceable had no impact upon the right of the BCTF to express its view about the Questionnaire; it did not stifle it, limit its content, or alter the message in any way. Similarly, the communication order is limited to simply requiring the communication of the decision of the Board. It is not "forced expression."

Ground 4: In light of the reconsideration panel's finding that s. 2(b) was not infringed, it is somewhat puzzling that it went on to a s. 1 analysis. A court or tribunal should only undertake such an analysis with: (1) a clear recognition that the burden of proof has shifted to the party responsible for the infringement of the right, and (2) giving the parties the opportunity to tender evidence and make submissions. In this case, the analysis was an academic exercise; it is without consequence to the BCTF. Therefore, the s. 1 ruling should neither be reviewed here nor referred back to the Board.

BCPSEA Reference LB-02/2005

Questions

If you have any questions concerning these decisions, please contact your BCPSEA labour relations liaison. If you want a copy of the complete award, please contact **Nancy Hill at nancyhi@bcpsea.bc.ca** and identify the reference number found at the end of the summary.