GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2010-03 **July 14, 2010** **By E-mail: 4 Pages**

Pausch/SD No. 34 (Abbotsford): Discrimination

Issue: Is there a case of discrimination based on disability and/or age? Has the school district established that their refusal to allow the grievor, Mr. Pausch, to continue in the competition for the position was based on a bona fide occupational requirement? Has the district met their duty to accommodate?

Facts: To fill the Apprentice HVAC Mechanic position ("the Position"), the district designed a testing process that involved a written and physical component. Although Mr. Pausch was currently on long term disability from his mechanic position, which included accommodated duties due to his physical limitations, Mr. Pausch applied for the position. During the staffing process, the district sought information as to whether Mr. Pausch's medical condition or restrictions had changed. Mr. Pausch provided no such update.

Although the grievor passed the written component of the test, as the physical testing component involved carrying 60 lb. freon gas tanks to the roof of a school and securing lengths of pipe underneath a portable, the grievor was not permitted to perform the physical testing component of the staffing competition.

With respect to the job itself, the employer considered possible accommodations (including the installation of a rope and pulley system, use of a handcart, etc.). However, in the end, the employer determined that these accommodations would not be cost effective or practical (such systems would have to be installed in every building) and would create an undue hardship.

Employer Argument: The physical test was representative of the duties involved in the position. For example, lifting tanks of Freon to the roof was a common and frequent duty of HVAC mechanics. As a result, the grievor could not be accommodated in this position based on the current medical information.

Union Argument: The physical test was not representative of the duties involved in the position. The employer did not meet its duty to accommodate up to the point of undue hardship.

Decision: Grievance dismissed. There was no evidence to suggest that the test was structured to purposely exclude Mr. Pausch from taking it. There was no evidence to suggest that the respondents designed the physical test for anything other than a purpose rationally connected to the job, or that there was an absence of good faith.

There was a prima facie case of discrimination based on physical disability but none based on age. There was no link between Pausch's age and the adverse treatment alleged. The decision states:

> "[163] … the respondents have reasonably accommodated Mr. Pausch over time, and continue to do so. Mr. Pausch has been employed by the District throughout, and worked in his automotive mechanic position, with accommodations negotiated by his Union on his behalf, when he was able to do so. Further, the respondents did not take the approach that, having been accommodated in his current position, Mr. Pausch cannot apply for any other position. Rather, when Mr. Pausch applied for the Position, the respondents permitted him to engage in the competition process. When that process came to physical testing, the respondents considered whether they could accommodate Mr. Pausch with respect to the physical demands of both the testing and the Position as a whole. They came to the conclusion that they could not. For the reasons outlined above, I find that their conclusion was correct".

The employer met its duty to accommodate. Failure to meet with Mr. Pausch directly did not amount to a breach of the procedural component of the duty to accommodate.

Significance: This case shows that the employer has a duty to accommodate up to the point of undue hardship. To meet the duty to accommodate and be in a position to assess whether the employee can be accommodated, the employer must first seek updated medical information regarding the condition and limitations of the employee, as well as an updated resume to assess the employee's capability. It is important to note that the employer did not automatically discount the grievor from participating in the application process for the position, but instead went through the required accommodation process of assessing whether the employee could be accommodated to the point of undue hardship. Having involved the union and having exhausted all reasonable solutions short of undue hardship, a ruling of no discrimination was found.

BCPSEA Reference No.: HR-01-2010

United Brotherhood of Carpenters and Joiners, Local 1995/SD No. 39 (Vancouver): Discipline/Discharge

Issue: Did the employer have just cause for dismissal?

Facts: Mr. Aubery Hawco (the grievor), a carpenter for the employer for 12.5 years, admitted to distributing pornographic material, including explicit hardcore pornographic videos, through his school district email address for a period of two years. The grievor had stored this material on the employer's computer and admitted to repeatedly looking at it. The grievor further admitted knowing his actions were wrong and breached the employer's trust, and that he held a position of significant trust.

Employer Argument: The employer relied on the undisputed facts, including the admissions of the grievor and the evidence of the pornographic content. The employer pointed out that the grievor admitted he had not been honest at the January 13, 2010 meeting. Further, the grievor never provided a sincere apology despite repeatedly having the opportunity to do so.

Also argued was the issue of time theft. As the distribution and viewing activities took place during working hours, the grievor dishonestly charged the employer for these activities.

Union Argument: Under the circumstances, discharge was an excessive response to the grievor's conduct. The grievor was honest and forthright in his comments before the arbitration board. In the Union's opinion, the grievor's subsequent apology was sincere and showed genuine remorse in that the grievor committed to never repeat his actions.

The dismissal of the grievor was disproportionate to the employer's disciplinary response to other employees in the same worksite. Further, the employer failed to properly weigh the grievor's length of service, clean disciplinary record and competent work performance.
Decision: Grievance dismissed. In his decision, Arbitrator Ready stated:

> "In summary, common sense should have prevented the grievor from engaging in such deplorable activities. In my view, there is no reasonable excuse for the grievor's actions in using the Employer's computer to download, view, store and distribute such offensive pornographic material. The evidence before me clearly demonstrates that the grievor's voluminous pornographic email activity represents a patent breach of the Employer's trust in circumstances where it was self-evident that the objective of the Employer in ensuring the care and education of children could be compromised."

The grievor, for this reason, ought to have known better.

Significance: This decision confirms that when an employee breaches a fundamental level of trust with the employer such that it poisons the employment relationship, there may be just cause for dismissal. These activities are especially inappropriate given the nature of the workplace, as there is a high level of responsibility placed on employees in a public school setting.

BCPSEA Reference No.: A-32-2010

Greater Victoria Teachers' Association/SD No. 61 (Greater Victoria): Committee Membership

Issue: When the employer establishes "working groups" on various educational matters, does this constitute a committee under Article A.15 and the corresponding requirement for the union to choose the teacher representative?

Collective Agreement Language:

> **A.15 Committee Membership**
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> A.15.1 Local representatives on committees specifically established by this Collective Agreement shall be appointed by the Local.
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> A.15.2 In addition, if the employer wishes to establish a committee which includes bargaining unit members, it shall notify the Local about the mandate of the committee, and the Local shall appoint the representatives.

Employer Argument: Bringing teachers and administrators together does not constitute a committee as contemplated in the collective agreement under article A.15.

The district was prepared to meet with the GVTA to attempt to identify those committees or working groups that might be covered under A.15.2, but would not accept that just because a group is created and funded by the district and has GVTA members, it is de facto a committee as contemplated by A.15.2.

Union Argument: The GVTA contended that the district created short-term, task-specific groups, some or all of which were made up of GVTA members, yet did not notify the union of the creation of

the group, did not communicate its mandate, or formally request the GVTA to appoint representatives. The use of "working groups" was intended to circumvent the requirements of A.15.2.
Decision: Grievance settled on a without prejudice and precedence basis to the position of any other district or local in the province. The settlement terms are as follows:

1. The district will inform the GTVA of the formation of any committee it wishes to establish which includes bargaining unit members and the GVTA will appoint those members.

2. The district will inform the GTVA annually of initial committee meeting dates. Agendas and minutes will be provided to the GVTA members on district committees whenever they are available.

3. Where the district wants to establish a "working group" that is open to all teachers or all teachers in a specific area, the following conditions shall apply:

    a. The district will inform the GVTA of the proposed working group and its mandate.
    b. The invitation to teachers will be a joint invitation from both the district and the GVTA
    c. Notwithstanding the teaching area specified, any GVTA Executive member(s) may attend these working group meetings.

Significance: Although the settlement is without precedent and prejudice to other districts, this settlement demonstrates that there is a distinction between a "working group" and a "committee" as defined in article A.15. This distinction will be based on the specific facts of each group or committee.

BCPSEA Reference No.: A-26-2010

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.