GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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BCGEU/SD No. 59 (Peace River South)

Issue: Is the employer obligated to provide benefits to support staff who have reached the termination provisions in the benefit contracts?

Facts: School District No. 59 (Peace River South) previously had a mandatory retirement policy, which was consistently enforced.

During collective bargaining in 2006, the parties agreed to move the administration of benefits to the Public Education Benefits Trust (PEBT). The parties further agreed that the terms of coverage administered by PEBT would contain the same terms of coverage as contained in the previous benefits plan that had been administered by West Pro Benefits.

The benefit contracts provide for termination at age 65 or retirement. If retirement is at the end of the school year, coverage will cease on July 31. The grievor turned 65 on November 4, 2007. Her benefits continued to July 31, 2008, pursuant to the terms of the benefit contracts.

The grievor continued to work for the employer. Following the termination of her benefit coverage, the grievor did not purchase replacement coverage and also had not incurred any medical or other expenses that would have been covered under the terms of the insurance plan administered by PEBT.

Collective Agreement Language:

> **Article 22.1 Health Care Plans**
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> The Employer shall provide the health care benefits listed below for all employees working a minimum schedule of 15 hours per week.

Employer Argument: The employer has met its obligations under the Collective Agreement because the parties negotiated and agreed upon the terms of coverage in the insurance plan.

Union Argument: The employer is in breach of Article 22.1. This contractual right is not modified by the PEBT plan which states coverage will cease when employees "attain age 65 or [retire]."

Decision: Grievance dismissed**.**

Arbitrator Hall dismissed the grievance and upheld the terms of coverage the parties agreed to. He stated:

> "The parties' mutual intention was to provide benefit coverage pursuant to the negotiated insurance plan envisaged by Article 22.1 of the Collective Agreement. The agreed-upon plan

> includes age restrictions and accordingly, the Union's claim on behalf of the Grievor for continued benefits must be dismissed."

Significance: Collective agreement language regarding benefit provisions must be read and interpreted in conjunction with relevant health & welfare plan provisions.

BCPSEA Reference No.: A-43-2009

BCTF/BCPSEA/ SD No. 61 (Greater Victoria): Arbitral Jurisprudence

Issue: Does an arbitrator have the jurisdiction to hear the merits of a grievance and provide remedy for a health and safety grievance where the Workers' Compensation Board has already investigated, issued directive orders, and ensured compliance from the employer?

Facts: The incident at issue occurred in the fall of 2007. There had been several angry outbursts by the child prior to this incident. These had occurred under the supervision of the assigned Education Assistant. Incident reports had been submitted. In the incident at issue, the student threw several books on the floor and stepped on them. The student then grabbed the teacher's lanyard which was hanging around her neck and kicked the teacher.

The union sent a letter to WorkSafeBC [the Workers' Compensation Board (WCB)]. In response, the WCB conducted an investigation and issued a directive order. The WCB wrote a follow up report to the directive order, noting the employer had brought itself into compliance with the order. The next day, the union referred the grievance to arbitration.

Collective Agreement Language:

> **ARTICLE D.11 HEALTH AND SAFETY**
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> D.11.3 Other specific health and safety problems shall be reported to the principal. If the situation is not rectified, the concern shall be processed through the grievance procedure as outlined in Article A.6.

Employer Argument: The WCB orders have been complied with. The WCB has exclusive jurisdiction over the real substance of the matters in dispute and the jurisdiction to provide the remedy lies with the WCB and not with an arbitrator.

Union Argument: The Board of Education failed to take adequate steps to address the violent behaviour of the student, culminating in an assault on the individual grievor. While some concerns were resolved through the WCB investigation process, some health and safety issues have not been rectified and an arbitrator has jurisdiction to hear the merits of these issues.

Decision: Grievance dismissed.

Arbitrator Taylor found that the issue was under the jurisdiction of WorkSafeBC (WCB):

> "The WCB has already investigated the issue raised (and by this I mean the seven issues raised in the step two grievance letter and the WCB complaint letter, as well as the recommendations from the 2005 safety audit) and the WCB had decided the question. The decision of the WCB is final (in that another complaint about the compliance of the Employer in this fact situation cannot be raised again) and the parties to the WCB process are the same as to this process."

In declining jurisdiction to hear the grievance, Arbitrator Taylor concluded,

> "…no injustice results from my decision to decline jurisdiction to hear the grievance."

Significance: This decision reaffirms WorkSafeBC's jurisdiction over health and safety matters.

BCPSEA Reference No: A-44-2009

BCTF/BCPSEA/SD No. 61 (Greater Victoria): Maternity Benefit Top-Up During Summer Months

Issue: Is the employer obligated to pay Supplemental Unemployment Benefits (SUB) on Maternity Leave to teachers during the summer months if the teachers are on maternity leave under the *Employment Standards Act* (ESA) and are eligible to receive EI maternity benefits?

Alternatively, should SUB not be payable over the summer months, should a teacher's SUB resume after the summer months for the remainder of the 17 weeks of benefits after a teacher has transitioned to EI parental leave?

Additionally, what is the appropriate formula to be used when calculating weekly salary for the purposes of the SUB payments?

Facts: The employer calculates one week's salary as 1/40th of a teacher's annualized salary. One week's salary has been calculated in this manner since the SUB plan entered the Collective Agreement in 1988.

Since the introduction of the SUB plan, the employer has not paid SUB payments in the summer months (July and August). The union has been aware of this practice since 1988 and has not filed a grievance prior to this grievance being launched.

Collective Agreement Language:

G.2.2 Supplemental Unemployment Benefits on Maternity Leave

a) When a pregnant teacher takes a maternity leave to which she is entitled pursuant to the *Employment Standards Act*, the Board shall pay the teacher:

   i) 95% of her current salary for the first two weeks of the leave, and, where the teacher is eligible to receive EI maternity benefits,

   ii) the difference between 95% of her current salary and the amount of EI maternity benefits received by the teacher for a further 15 weeks.

b) The Board agrees to enter into the Supplementary Employment Benefit (SUB) Plan agreement required by the *Employment Insurance Act* in respect of such maternity payment.

Employer Argument: The parties' reference to the difference between 95% of the employee's "current salary" and EI maternity benefit levels creates a link between the time at which the teacher is receiving SUB plan benefits and the salary she would otherwise be receiving at that time. Acknowledging that the

parties did not expressly exclude the summer months in the language of Article G.2.2, such an exclusion should be implied because, under the Collective Agreement, teachers are not paid any salary during the summer months such that no "current salary" exists at that time to form the basis for the calculation of any SUB payments.

If the collective agreement language is not clear, any ambiguity is resolved by the parties' 20 years of consistent, unopposed practice. The extrinsic evidence of past practice under Article G.2.2 manifests the parties' intention that SUB payments are linked to the time when the teacher is on Employment Standards maternity leave, and would otherwise be receiving salary under the Collective Agreement.

Union Argument: Article G.2.2 clearly ties the employer's obligation to make SUB payments to a teacher's entitlement to ESA leave and eligibility for EI benefits. Thus, where a teacher satisfies these external statutory criteria, the employer must pay SUB even if the teacher's maternity leave extends over the summer months. In the absence of clear language imposing a restriction against SUB being paid during the summer months, an interpretation to that effect would amount to an amendment of the Collective Agreement. As the language in Article G.2.2 is clear, extrinsic evidence is not admissible as an aid to interpretation.

As to the proper divisor for calculating weekly salary for the purposes of SUB payments, a 1/40 formula should apply because that is the formula the parties have always agreed to use to calculate salary installments and the employer's practice has always been to use that formula when calculating SUB payments under Article G.2.2.

Alternatively, if SUB should not be paid during the summer months, the payments should be suspended in July and August, and should resume in the Fall if the teacher is still on leave at that time. For the purposes of EI, employees transition seamlessly from pregnancy to parental benefits. Acknowledging that Article G.2.2 of the Collective Agreement specifically refers to EI maternity benefits, allowing a teacher to resume receiving SUB in September even if she has transitioned to EI parental benefits, is consistent with the purpose of Article G.2.2.

Decision: Grievance dismissed.

Having considered both the language of Article G.2.2 and the extrinsic evidence, arbitrator Joan Gordon found the language of Article G.2.2 to be ambiguous as it relates to the issues in dispute. The language and structure of Article G.2.2 is capable of being interpreted as both parties contend.

Regarding the appropriate formula to calculate weekly SUB payments, Arbitrator Gordon found:

> "As noted already, the external statutes to which the SUB benefit and payments are linked under Article G.2.2 permit maternity leaves throughout the calendar year, and permit the receipt of EI pregnancy benefits by teachers in non-teaching periods, such as the summer months. Under the EIA and associated Regulations, "weekly insurable earnings" are calculated using a divisor of 52, again contemplating a 12-month regime. The parties' linkage of SUB payments to these statutory regimes provides support for the Union's claim to a 12-month entitlement to SUB benefits and the meaning the Union ascribes to the term "current salary". However, I find the Union's position is undermined by the second element of its claim -- i.e., the calculation of weekly salary for purposes of SUB payments should use a 1/40 formula, not a 1/52 formula. In my view, and as the Employer submits, this position must be viewed as an unreasonable interpretation, which creates an inconsistency between the statutory schemes the Union relies on to claim a 12-month entitlement to the SUB benefit and the benefit calculation formulas under those statutes and Article G.2.2. The unreasonableness of this interpretation was aptly characterized in the Employer's submission as the Union seeking to "have it both ways."

> Clearly, 95% of 1/40th of a teacher's current salary represents a significantly larger benefit than 95% of 1/52nd of a teacher's current salary. I find this inconsistent result undercuts the persuasiveness of the Union's position that the SUB payments should continue during July and August."

In conclusion, arbitrator Gordon found:

> "Here, there has been consistent past practice by the Employer over 20 years and since the inception of the SUB plan under the Collective Agreement, and the Union has knowingly acquiesced in the Employer's application of the disputed provision during that entire period. While the language of Article G.2.2 is capable, on several bases, of being interpreted as the Union asserts, I am persuaded that the mutual intent of the parties regarding the proper interpretation and administration of Article G.2.2 can be gleaned, with confidence, from the Employer's practice, which supports its position in this arbitration. I am satisfied the Employer's lengthy, consistent, unopposed application of Article G.2.2, both in terms of the non-payment of SUB over the summer months and the use of a 1/40 formula to calculate weekly salary, reflects the mutual intention of the parties."

Regarding the Union's alternative argument that SUB payments should be suspended over the summer months and resume in September if the teacher has transitioned to parental leave, Arbitrator Gordon found:

> "...eligibility to SUB payments turns on a teacher's entitlement to "maternity leave" under ESA. There is no basis in the language of Article G.2.2 to support a finding that the parties intended a teacher's transition to parental leave under ESA to be captured under this benefit provision...."

Significance: This decision reiterates that where the collective agreement language may contain ambiguity as to interpretation, a long standing unchallenged practice, of which the union was aware, can be interpreted to show the mutual intention of the parties. If SUB payments are calculated based on a 1/40 formula, SUB should not be paid over the summer months.

BCPSEA Reference No: A-02-2010

BCTF/BCPSEA/ SD No. 36 (Surrey): Duty to Accommodate — Medical Information

Issue: Was the employer entitled to additional medical information in order to assess the potential of a return to work and prior to considering a placement? Did the employer meet its duty to accommodate the grievor?

Facts: In the fall of 2006 the grievor sought, with medical support, a gradual return to work after seven years' medical absence. The grievor has both physical restrictions and a severe environmental and chemical allergy.

The employer received three notes from the grievor's general practitioner stating that the grievor was fit to return to work on a very graduated schedule.

The employer repeatedly requested specific information as to the agents that can cause an anaphylactic reaction in the employee. That information was not provided.

Employer Argument: Employers have both a duty and a right to ensure that an employee, returning to an accommodated position or otherwise, is medically fit prior to the return. There is a right to have specific objective medical information to determine the nature of the condition, the limitations, their severity, and the impact on her ability to do the job.

Specific information was requested at several meetings and through correspondence with the union and the employee. Specifically, a comprehensive list of the precise environmental and chemical agents was requested. By the grievor failing to provide the medical information, the employer was discharged of the duty to accommodate.

Union Argument: The employer failed the duty to accommodate by not placing the employee and no further medical information was required.

Decision: Grievance dismissed.

Arbitrator Korbin stated that it is well settled that the employer is entitled to ensure that there is sufficient and adequate objective medical information to support an individual's safe return to work and accommodation. Without the specific medical evidence regarding the limitation or the exact nature of the disability, the employer has no way of determining whether or not it is safe to accommodate or return that person to work.

Consistent with arbitral jurisprudence, Arbitrator Korbin found:

> "I am satisfied that clear and unequivocal medical evidence was necessary in order for the Employer to safely return Ms. Willis to work. In this instance the medical notes provided by Dr. Cordoni to support her request to return to work were incomplete on the nature and extent of her disability as well as the environmental and chemical triggers that set off her allergies.
>
> I am supported in this conclusion by the evidence of Dr. Chang who, it will be recalled, is a medical specialist in allergy and clinical immunology. Dr. Chang based his opinion on objective testing of the grievor's chemical sensitivities and her reaction to those. He stated in reaction to tests he applied himself Ms. Willis "developed dyspnea, dysphasia, and a clonic-tonic reaction." And further that she "continued to have flares of the multiple allergy/multiple chemical sensitivity symptoms." As noted above, in his report Dr. Chang then concluded, based on the symptoms he observed, including an anaphylactic reaction to a chemical patch test in the hospital, that it is impossible for her to work outside her home and confirmed in testimony that remained his opinion as of this hearing. In fact when Dr. Chang was asked what his response would have been had he been aware the Union and grievor were attempting a return to work at a school, he stated, 'I would not think that a good idea.'"

Further, the arbitrator accepted that the accommodation process sometimes takes a significant amount of time, especially where an employee's safety or risk of re-injury is at stake.

Arbitrator Korbin concluded:

> "In summary, having reviewed all of the evidence, documents and authorities I find there has been no violation of the collective agreement in the particular circumstances of this case. Given the extent of Ms. Willis' allergies, the seriousness and potentially harmful consequences of an anaphylactic reaction, the Employer did not and does not have the necessary medical assurances required for her to safely return to work. The enormity of the potential and uncertain risk of returning Ms. Willis to work would constitute undue hardship for the Employer."

Significance: This case confirms the right and responsibility of the employer to receive specific objective medical information. When considering a return to work and/or an accommodation, the grievor had an obligation to provide convincing evidence to the employer she could be returned to work safely. She did not satisfy that onus. The employer does not have to explore other options, such as working from home as there was no basis of evidence that existed before the arbitrator.

The safety of the employee is a serious factor and without a reasonable level of assuredness the safety issues can be addressed, the potential and uncertain risk in a return to work constituted undue hardship for the employer.

BCPSEA Reference No: A-03-2010

BCTF/BCPSEA/SD No. 34 (Abbotsford): *Charter of Rights and Freedoms*

Issue: Can a teacher, who is also a staff representative, place a sign outside her classroom that says "Staff Representative"?

Facts: Early in September 2006, the grievor received a sign from the Union that said "Staff Representative." The sign measured about two by eight inches and wasmade of thin plastic, mainly dark blue with white lettering and white border. The grievor placed the sign on the wall outside her classroom, beside the door. The grievor did this for two purposes: (1) to provide information to people in the school about where she was located, for example, new teachers would be able to see where she was located and (2) she liked being the staff representative for the Union.

Evidence was presented as to signage in other places at the school and in other schools. In other schools, "Staff Representative" signs were also posted. Some principals directed the teachers to remove the signs while other principals allowed the signs to remain posted.

Employer Argument: The removal of the sign was justified. Under the *School Act,* the principal has overall authority over a school's property including the right to make decisions about what should be on the walls of a school. With regard to the Collective Agreement, there is a negotiated provision that gives the Union the right to post notices regarding activities of the Union and other information on a bulletin board in the staffroom of each school. This does not, however, give the Union the right to post material anywhere else in the school and it does not confer on the Union any additional rights to those in the Collective Agreement.

With regard to the *Charter of Rights and Freedoms,* there is no basis for finding a violation of the grievor's freedom of expression. The *Charter* does not guarantee right of access to a particular platform for expression, or a particular means or form of expression. Further, the inside walls of a school are not an appropriate place where third parties can engage in expression involving the affairs of the Union.

In the alternative, if there has been a violation of freedom of expression, it is justified under section 1 of the *Charter.*

Union Argument: The Collective Agreement between the parties, as well as the *Charter,* supports the position that a teacher may put a sign outside her classroom that says "Staff Representative." The sign is a legitimate and constitutionally protected form of expression under the *Charter* and is consistent with the Collective Agreement.

With regard to the Collective Agreement, the sign is innocuous, it provides information to people in the school and it reflects the pride of people who are staff representatives for their Union. While the

Collective Agreement permits the Union to have a bulletin board in each school it does not say that a sign, such as in this case, cannot be posted elsewhere. The sign in question is a legitimate one in the workplace because it does not impinge on the Employer's authority and it is not damaging to the Employer's reputation.

Decision: Grievance regarding the *Charter* upheld. Grievance regarding the Collective Agreement dismissed.

Arbitrator John Steeves found as follows:

> "The "Staff Representative" sign, placed outside the grievor's classroom, was small and unobtrusive. It reflected her responsibilities to represent her members and the Union in various dealings with the Employer. The Union is a significant part of bringing democratic decision-making processes to the workplace, as recognized by previous decisions of the Supreme Court of Canada. The sign represented the pride the grievor and other staff representatives felt in being elected to that position and in representing the Union and its members. Therefore, it has expressive content.
>
> The principal removed the sign consistent with her authority to manage the operations of the school. That was a valid purpose. However, the effect of the removal was to create a perception that the Staff Representative and the Union were excluded from the school. This perception is not consistent with the fact that teachers in the school are members of the Union and that the Union (and the Employer) obtain their legal status through legislation. The effect is to make the sign a symbol for the existence of the Union itself. In light of the expressive content of the sign and this effect, there is a violation of section 2(b) of the *Charter.*
>
> With regards to section 1 of the *Charter,* the broad objective of the Employer when the "Staff Representative" sign was removed was to manage the school property. This is a valid objective. However, the sign does not interfere in any apparent way with the operation of the school or the education of students. Also, only the sign in dispute was removed and not any other material on the school wall so it cannot be said that there was a neutral decision to remove the sign. There is no policy or procedure in place that would assist in assessing the proportionality of the Employer's decision. Overall, the Employer has not justified that the removal of the sign was reasonably and demonstrably justified.
>
> With regards to the issues in this grievance under the *Canadian Charter of Rights and Freedoms,* the grievance is allowed.
>
> Finally, the Union submits that the removal of the "Staff Representative" sign was contrary to the collective agreement and other cases of union expression pursuant to section 4(1) of the *Labour Relations Code.* However, the provisions in the collective agreement relied on by the Union do not support the posting of the sign outside the grievor's classroom. As well, as a matter under the collective agreement, the Employer is entitled to maintain the integrity of school property.
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> With regards to the issues in this grievance under the collective agreement, the grievance is denied."

Significance: Although the arbitrator found no violation of the Collective Agreement, the arbitrator ruled the removal of the union sign was a violation of the *Charter*. It is important to note that each case will revolve around the specific facts of the case.

BCPSEA Reference No: A-04-2010

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.