GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2011-02 July 20, 2011 By E-mail: 11 Pages

Ex. The Board Of Education of SD #79 (Cowichan Valley) and CUPE, Local 606: Termination

ISSUES

Did the Employer have just and reasonable cause to terminate the grievor? Was the suspension of the employee appropriate during the investigation?

FACTS

The grievor, who worked in the administration office at a high school in Duncan, had duties that included running test results for teachers who utilized bubble answer sheets through a Scantron machine. The grievor's son attended the same high school. Teachers at the school testified to having conversations with the grievor where she expressed concern for her son over the academic stress that he was experiencing.

On April 13, 2010, the grievor's son completed a math test utilizing the bubble answer sheets. The grievor's son's Math teacher checked a few sheets after the completion of this test to gauge the level of difficulty before they were sent to be scanned. The grievor's son's test was on the top of the pile and the Math teacher estimated he scored around 16 or 17 out of 25. The tests were sent to the grievor to be scanned, and upon receiving the results back, the Math teacher noticed that the grievor's son had scored 20 out of 25. The Math teacher was concerned about this and consulted with the Science teacher. The teachers photocopied the grievor's son's next science test bubble sheet before handing in all of the sheets to the grievor to be processed thought the Scantron machine. Upon receipt of the scanned test results from the grievor, the Science teacher compared those results with the photocopied version of the grievor's son's Science test. The son's score had improved by 11.

After a meeting with the Principal, the Math, the Science, and the Social Studies teachers, the Social Studies teacher was directed to scan all of the bubble sheets at the conclusion of the next Social Studies test, which the grievor's son wrote. All of the tests were handed to the grievor to be scanned, and the results showed that one bubble sheet had been changed - the grievor's son's.

The Principal and the Secretary-Treasurer met and decided to send the grievor home with pay pending an investigation. An independent investigator was hired to review the evidence and concluded that "there is sufficient evidence for a normal person, of normal experience and intelligence to conclude that the balance of probabilities show that [the grievor] altered the test sheets to benefit her son". The grievor was terminated on May 25, 2010.

CA LANGUAGE

14. DISCHARGE, SUSPENSION AND DISCIPLINE

(a)
An employee to be discharged or suspended by the Superintendent or designate, or the Secretary-Treasurer, for just and reasonable cause, shall be given the reasons in the presence of the Union Steward and the reasons shall be confirmed in writing to the employee concerned and the Union.

(b)
Unless otherwise decided under the grievance procedure, suspension will mean loss of pay for the time or the duration of the suspension.

REMEDY REQUESTED

The grievor be reinstated with full back pay and seniority.

UNION ARGUMENT

The Employer was not focused on other potential employees that could have altered the tests. Instead, the Employer focused solely on the grievor. There are mitigating factors such as the fact that the Employer's policy on cheating is not consistently applied, there was no progressive discipline, the Employer has not terminated anyone before, and they did not look to other worksites where breach of trust may not be a concern. Finally, the grievor has a clean work record.

EMPLOYER ARGUMENT

Regarding the suspension grievance, the Employer is entitled under its management rights to send an employee home with pay pending investigation to ensure the integrity of the investigation. Furthermore, Article 14(b) of the Collective Agreement notes that suspension includes "loss of pay". The grievor suffered no such loss.

Regarding the termination grievance, the crux of the case is the credibility of the grievor. The grievor's actions were dishonest and the termination should be upheld as the grievor breached her position of trust.

DECISION

With respect to the suspension grievance, Arbitrator Brown agreed with the Employer that it was appropriate that the employee under investigation be away from the worksite while that investigation takes place. This absence from work does not constitute a suspension under the Collective Agreement, and even if it did, the only remedy would be a declaration as the grievor was paid during this absence.

With respect to the termination, Arbitrator Brown concluded,

"The grievor was in a position of trust. The integrity of the Employer's student records is very important to the education system. The acts were not a spur of the moment. They were calculated and repeated. Furthermore, to this day she denies any wrongdoing. If she had acknowledged the wrongdoing and shown some remorse my conclusion may have been different."

Accordingly, the arbitrator found the termination to not be excessive, and the grievances were dismissed.

SIGNIFICANCE

On a balance of probabilities, breach of a position of trust in a calculated and repeated manner may constitute just and reasonable cause for termination.

Ex. BCPSEA/SD No. 68 (Nanaimo-Ladysmith) and BCTF/Nanaimo District Teachers' Association: Continuous Service

ISSUES

With respect to Article 12.5.1.9 of the Collective Agreement, must a teacher complete "nine (9) months of continuous service" in one school year in order to be granted a continuing contract of employment?

FACTS

On December 15th – 2008, the NDTA filed a grievance claiming that the Board was in violation of Article 12.5.1.9 of the Collective Agreement. The NDTA is claiming that Ms. Obersteiner has worked as temporary teacher on the basis of specific fixed-term temporary contract from February 4 to June 30th, 2008. Her temporary contract of employment for teaching was terminated as at June 30th 2008. At the end of the summer, the teacher resumed her employment with the District as a TTOC from September 1st to September 28th, 2008. On September 29th – 2008, she obtained a temporary assignment until February 1st, 2009. The NDTA is stating that there was no distinct break in the continuity of the teacher's employment over the summer months as Ms. Obersteiner worked the first day of school in September as a TTOC while obtaining a temporary assignment on September 29th, 2009.

On December 18th – 2008, the Board stated that, within the context of Article 12.5.1.9 of the Collective Agreement, "*continuous service*" means a period of unbroken employment with the District as an Employee. The board stated that a rational analysis of the provisions of Article 12.5.1.9 with regard to the completion of nine months of *continuous service* in light of its purpose, points to the conclusion that a teacher needs to be under a contract that is exercised in a continuous way over non-teaching periods such as summer months. In the case of Mrs. Obersteiner, there was a veritable break in the

continuity of the teacher's employment over the summer months. She was not under contract during the non-teaching period covering the summer months.

CA LANGUAGE

Article 12.5.1.9

A teacher on a temporary contract who has not received a "less than satisfactory report" shall be granted a continuing contract of employment after completion of nine (9) months of continuous service or fifteen (15) months of aggregate service in the employment of the Board.

Article 12.5.2.2

Temporary teachers may be evaluated at any time but in any event, upon the request of a temporary teacher, if the request is made in sufficient time to conduct and complete the evaluation, before the conclusion of either:

a.) the temporary teacher's ninth (9th) consecutive month of employment on a temporary appointment;
or
b.) the temporary teacher's fifteenth (15th) month of cumulative service on temporary appointments.

UNION ARGUMENT

A teacher who teaches, or is employed to teach all of the available teaching days during the period of time a teacher is providing a service should be deemed to have provided continuous service to the Board, notwithstanding the fact that the teacher was not under contract and technically unemployed during the summer months.

EMPLOYER ARGUMENT

"*Continuous service*" under Article 12.5.1.9 means a period of unbroken continuing employment with the District as a teacher. A teacher needs to be under a contract that is exercised in a continuous way within the same "school year" (i.e. the period commencing on 1 July in a year and ending on 30 June in the year following).

DECISION

Arbitrator Hall noted that the collective agreement and the extrinsic evidence may be examined together in order to determine whether there is any bona fide doubt or ambiguity about the proper meaning of the language in issue.

The Employer relied on what it characterizes as almost 20 years of consistent practice in applying Article 12.5.1.9. The Arbitrator agreed with the Union in that they were simply unaware of how the Employer was applying the conversion clause. He noted further:

> *There is no evidence before me to demonstrate that any responsible Union representative was ever aware of how Article 12.5.1.9 was being implemented by the Employer. In some cases, a practice may be so widespread or obvious that knowledge of acquiescence can be inferred. At the same time, there is no obligation on a trade union to investigate how an employer actually administers the collective agreement.*

According to the Arbitrator, the Employer's position implies that a teacher on a temporary contract must have completed "nine (9) months of continuous service *in a school year* or fifteen (15) months of aggregate service in the employment of the Board". The words "in a school year" are not found in Article 12.5.1.9. Furthermore, in the view of Arbitrator Hall, the Employer's position illicitly converts the concept of "continuous service" into one of "consecutive service" if the nine months must be completed in a single school year.

Arbitrator Hall found that the Union's submissions distinguishing Articles 12.51.9 and 12.5.2.2 were more persuasive. In his view, the differences were readily apparent:

> *The pre-existing language distinguished between "employment" and "service", with the former being tied to "consecutive month(s)… on temporary appointments". This reinforces the Union's position that service is not the same as employment status, and connotes actual work performed under one or more temporary appointments.*

The Arbitrator concluded by rejecting the Employer's contention that the words "consecutive month[s] of employment" should be treated synonymously with "months of continuous service" as it is well accepted that parties are presumed to have mutually intended different meaning when they use different words to record the terms of their agreement. As upholding the Union's interpretation of Article 12.5.1.9 does not impair its underlying purpose, Arbitrator Hall answered the general interpretive question in favour of the Union.

SIGNIFICANCE

Under this collective agreement, the non-teaching months of summer do not constitute a break in continuous service.

Ex. BCTF/Kamloops Thompson Teachers' Association and BCPSEA/SD No. 73 (Kamloops/Thompson): Freedom of Expression

ISSUES

Did the Employer violate the collective agreement and teachers' right of free expression, by directing the removal of black armbands signifying protest against FSA, and if so, is it justified as a reasonable limit under Section 1 of the Charter?

FACTS

In this case, an elementary school teacher wore a black armband on the day her class was scheduled to write the Foundation Skills Assessment (FSA) test. She also made additional armbands and provided them to other teachers the following day. Students asked the teacher why she was wearing the arm band and she said it was to protest the FSA. Some students cheered. The school principal directed all the teachers to remove their black arm bands and refrain from discussing with students the black armbands and the protest against the FSA. The teacher was upset by the direction and conveyed her sentiments to the class. She told the class, "Apparently the Charter of Rights and Freedoms does not exist". There was no issue in this case that the district's direction infringed teachers' expression. The question was whether or not the employer could justify a restriction of the teachers' freedom of speech as a reasonable limit under Section 1 of the Charter.

CA LANGUAGE

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

REMEDY REQUESTED

The union is seeking remedies including a declaration of the violation, an order to make all affected teachers and the union whole, and an order for future compliance.

UNION ARGUMENT

By directing the removal of the armbands, the Employer violated teachers' right of freedom of expression, which is protected in the school setting under the Charter.

EMPLOYER ARGUMENT

The direction by the Employer to remove the armbands signifying protest against FSA is a reasonable limit under Section 1 of the Charter. Freedom of expression is not absolute, and the limits imposed by the Employer were proportional and a balanced limitation upon the teachers' freedom of expression within the duty of fidelity and within the requirements of the Oakes test.

DECISION

In determining whether or not the Employer's direction was a reasonable limitation of the teachers' right to freedom of expression, Arbitrator Burke applied the Oakes test, from R. v. Oakes, [1986] 1 S.C.R. 103.:

> *"Under s. 1, the onus is on the [employer] to show that the limit is directed at a pressing and substational objective, impairing the right of freedom of expression in a reasonably minimal way, and having an effect in terms of curtailment of the right that is proportionate to the benefit sought."*

Arbitrator Burke accepted that the district's direction was rationally connected to three pressing and substantial objectives:

1. Insulating students while in attendance at school from political messages that impact directly on their mandated educational program.

2. District's duty to ensure that statuatory mandated FSA is effectively delivered in a manner that does not undermine the effectiveness of the assessments.

3. Ensuring the results of the FSA are reliable and can be used both provincially and in the district in making important educational decisions to students.

Arbitrator Burke summarized the first part of the Section 1 analysis as follows:

> *"In my view there was a rational connection between this direction and the three substantial and pressing objectives outlined above. It was a rational attempt to preclude political activity that impacted directly on an educational program that affected a vulnerable group and potentially undermined the results and usefulness of the mandated FSAs."*

With respect to the "minimal impairment" and "proportionality" aspects of the Section 1 analysis, Arbitrator Burke accepted that it is not necessary to show that the district's direction was the least restrictive means of achieving its objectives. She accepted that it was appropriate to consider whether the direction imposed by the employer impaired the teachers' freedom of expression in a "reasonably minimal way".

The Arbitrator found that the district was not seeking to prohibit the teachers' ability to have and express views concerning the FSA. Rather, it was seeking to limit the expression of those views in schools and classrooms with students who must write the FSA (a mandatory district requirement). She then concluded that the limits of free speech imposed by the district met the "minimal impairment" test as the limits imposed were only in relation to students with other forums available for free speech.

Arbitrator Burke concluded her award with the following summary of her findings:

> *"The teachers are not prevented from voicing their objection in the many other forums that are available to them, including parent/teacher interviews, media outlets, school board and PAC meetings. Whether or not one agrees with FSA or its use, the objectives from insulating young students from political messages that directly impact on their mandated educational program as in this case, and ensuring the statutorily mandated FSA is delivered in a manner that does not undermine its effectiveness and reliability, outweighs any negative effects produced by the direction. I find therefore that this direction is a justified infringement upon the freedom of expression of the teachers and a reasonable limit under Section 1 of the Charter."*

Based on the above considerations, the grievance was dismissed.

SIGNIFICANCE

This decision is significant for school districts which must continue to balance impact on students with teacher's right to free speech.

See @issue 2011-06

Ex. BCPSEA/SD No. 61 (Greater Victoria) and BCTF – Parental Leave Top-Up for Birth Mothers

ISSUES

Are birth mothers entitled to SEB top up for 10 weeks during parental leave as they are already in receipt of maternity leave?

FACTS

After the Winnipeg and Surrey rulings which determined that it was discriminatory not to allow birth fathers parental leave sub top up where it was provided for adoptive parents, the school district, in accordance with those rulings started providing birth fathers, who were employees of the school district, the 10 weeks with top-up if they were on parental leave and in receipt of EI benefits.

The employer has never provided birth mothers with top up for parental leave in addition to the top up of 17 weeks for maternity leave.

CA LANGUAGE

G.2.5 Supplemental Unemployment Benefits on Parental Leave

a) When a teacher takes the parental leave for adoption to which (s)he is entitled pursuant to the *Employment Standards Act* and this Collective Agreement, the Board shall pay the teacher:

i) 95% of the current salary of the teacher for the first two weeks of such leave, except where the teacher is in receipt of EI benefits for that period, and
ii) where the teacher is entitled to receive EI parental benefits, the difference between 95% of her/his current salary and the amount of EI parental benefits received by the teacher, for the period of time the teacher is entitled to receive those benefits, up to a maximum of ten (10) weeks,
iii) The Board agrees to enter into the Supplemental Unemployment Benefits (SUB) Plan agreement required by the Employment Insurance Act in respect of such parental benefits payment.
iv) This clause will only become effective when the plan is registered with Human Resources Development Canada.

REMEDY REQUESTED

That all birth mothers be granted SUB benefits while on parental leave. That any birth mother currently on parental leave and entitled to receive EI benefits to receive SUB benefits as per article G.2.5.ii. That any birth mother currently on maternity leave who is scheduled to take parental leave and is entitled to EI benefits to be granted parental SUB benefits when their parental leave begins.

UNION ARGUMENT

Although birth mothers receive 17 weeks of top up under the maternity leave provision, they are being discriminated against by not also receiving 10 weeks of top up for parental leave. This is because the purpose of parental leave (caring for a child) is different from maternity leave (recovering from birth).

DECISION

Arbitrator Kinzie agreed with the Union that the exclusion of birth mothers from parental top-up is unjustifiably discriminatory. However, regarding remedy Kinzie preferred the approach and reasoning of the Supreme Court of Canada in *Schachter supra* and Mr. Picher in *Ontario Power Generation Inc. (2000), 92 L.A.C. (4th) 240 (M.G. Picher):*

Firstly, the Employer is not legally obliged, absent agreement, to provide SUB benefits to any of its employees taking pregnancy or parental leave and receiving benefits under those circumstances under the Employment Standards Act.

Second, only 10 adoptive parents applied for and received SUB benefits under Article G.2.5 between September 1999 and September 2009. Moreover, since a 2007 grievance, the Employer agreed to extend SUB benefits under this article to birth fathers and only eight birth fathers have applied and received said benefits.

Third, Arbitrator Kinzie characterized this case as one of underinclusion, as Article G.2.5 violates Section 15(1) of the Charter and Section 13(1) of the Human Rights Code because it includes all parents except birth mothers in providing for 10 weeks SUB benefits while the parent is on parental leave.

Fourth, one way of correcting the discrimination found in Article G.2.5 would be to make the provision for birth mothers to be covered by it. However, the number of birth mothers receiving benefits under the article could exceed the number of teachers who had received benefits under that provision in the preceding 10 years (i.e., 30 versus 18).

Fifth, the increased cost of $200,000 to the Employer is significant, but not significant to justify discrimination under Section 1 of the Charter or Section 12 (4) of the Human Rights Code. However, it was significant enough for the Arbitrator to believe that the Employer may not have agreed to the article in its present form with the discrimination removed.

Sixth, Arbitrator Kinzie agreed with Mr. Picher in that to simply read in birth mothers would result in a "disproportionate windfall gain". If the Employer knew this interpretation could have been the end result, it may not have agreed to provide any SUB benefits to parents on parental leave.

Seventh, the preferred process for settling terms and conditions of employment for employees who are represented by a trade union is the free collective bargaining process.

For all these reasons, Arbitrator Kinzie found that the most appropriate remedy was to refer the matter back to the parties to renegotiate Articles G.2.2 and G.2.5 in light of this Award and the finding of discrimination and inequality of treatment contained in it.

SIGNIFICANCE

Collective Agreement language that is found to be discriminatory may need to be renegotiated.

Ex. BCPSEA and BCTF: Provincial Policy Grievance – Codes of Conduct, Ministerial Order 276/07

ISSUES

Does the arbitrator have jurisdiction to arbitrate merits of the Union's grievance alleging a failure by school boards to comply with Ministerial Order 267/07 regarding student codes of conduct?

FACTS

The BCTF filed a grievance with respect to whether codes of conduct for students had been developed and implemented across British Columbia schools in compliance with Ministerial Order 276/07. In particular, the union was concerned about an alleged failure of school districts to comply with s. 6(a) of the Ministerial Order which provides, in part, that boards of education must ensure their codes of conduct include "one or more statements that address the prohibited grounds of discrimination set out in the BC *Human Rights Code.*" At this stage of the arbitration, BCPSEA took no position on the interpretation of Ministerial Order 276/07, but first raised the preliminary matter of whether this grievance was arbitrable or not.

UNION ARGUMENT

The matter is arbitrable, as the essential nature of the dispute is the extent to which school boards are exercising their management rights reasonably and satisfying their obligation to provide teachers with a workplace that is free from harassment and discrimination under the *Human Rights Code*. Further, creating a safe environment for students results in a safe and orderly environment for teachers.

EMPLOYER ARGUMENT

The "code of conduct" legislation is with respect to the application of codes of conduct for students in schools, not teachers. As such, this legislation is not an employment-related statute for which an arbitrator has jurisdiction. The matter is not grievable or arbitrable, as the grievance does not arise out of the interpretation, application, operation, or alleged violation of the collective agreement nor does it create a substantive right and obligation for teachers or form a significant part of their employment relationship.

DECISION

Arbitrator Hall sustained the Employer's preliminary objection. He concluded that he did not have jurisdiction to arbitrate the merits of the Union's grievance alleging a failure by school boards to comply with the Ministerial order, and explained:

> *The Ministerial Order was promulgated pursuant to a statutory provision allowing the Minister to "establish a code of conduct for students". As explained in the Legislature by Minister Bond, one-third of British Columbia schools did not have codes of conduct that met provincial standards. The Ministerial Order was intended to remedy that situation "so that schools will be safer places for students to learn*

> *and grow." Further, student codes of conduct per se have never been negotiated at either the local level or provincial level. All of these considerations demonstrate that the Ministerial Order is not "employment related" legislation (Parry Sound), and is not "a significant part of the employment relationship" between teachers and their school boards (BCTF v. BCPSEA). It necessarily follows that the essential nature of the Union's grievance does not arise expressly or inferentially from the ambit of the collective agreement.*

Arbitrator Hall went on to Ministerial Order did not have the necessary express or implicit connection to the collective agreement for grievance to be arbitrable:

> *In my view, Section 27(1) ostensibly makes the Ministerial Order a term or condition of teachers' contract of employment. I also acknowledge that one of the duties of teachers under Section 4(l)(c) of the School Regulations is "ensuring that students understand and comply with codes of conduct governing their behaviour." However, Section 27(1) does not make the Ministerial Order a term or condition of the "teachers' collective agreement" referred to in Section 27(1)(b); nor, for reasons expressed in this award, does the Ministerial Order have the necessary express or implicit connection to the collective agreement for grievance arbitrators to have exclusive jurisdiction. Finally, as made clear by the awards of Arbitrator Gordon and Diebolt, not all provisions of the School Act can be arbitrated, despite their inclusion under Section 27(1)(a) in the teachers' contract of employment.*

Accordingly, the Arbitrator sustained the Employer's preliminary objection of arbitrability.

SIGNIFICANCE

This award does not mean that districts do not have an obligation to comply with Ministerial Order 276/07; instead, it establishes that arbitration is the wrong forum for such a dispute/interpretation.

See @issue 2011-07. This decision is being appealed by the Union.

Ex. SD No. 71 (Comox Valley) and CUPE Local 439 – Termination Grievance

ISSUES

Did the Employer have just cause to terminate the grievor's employment?

FACTS

The grievor was working alone at the Tsolum North Island Distance Education School (NIDES) during the late afternoon/early evening on Thursday August 27, 2009. The grievor did not comply with the Employer's established policy that evening, which required a telephone call to the alarm monitoring company to inform them that he would be in the NIDES building. As a result of the grievor's failure to call the monitoring company, a security guard was dispatched to NIDES.

According to the security guard, he found the grievor in the computer lab of the NIDES building apparently masturbating while looking at a computer screen. The security guard testified that when the grievor saw him, the grievor "covered himself and turned away and started doing up his pants." When the grievor asked why the security guard was present, the security guard told him he was there to arm the building or find out why no one has checked in. The security guard also told the grievor, "That was not a good thing to use computers for".

The grievor denied these allegations, testifying that at the relevant time he was taking his lunch break and was viewing Sports Illustrated articles and Craigslist advertisements. The grievor explained that his fly was broken, and upon realization that it was open, made the necessary adjustments. He claimed that two support staff workers as well as a teacher could confirm this, as he had spoken to them regarding the broken fly earlier on the day in question. Only the two support staff workers were identified, and both denied having discussed the matter with the grievor.

The Employer ordered a forensic examination of the computer the grievor was using on the day in question. The results of the investigation yielded no inappropriate content on the computer.

CA LANGUAGE

ARTICLE C.21: DISMISSAL AND DISCIPLINE FOR MISCONDUCT

1. The Board shall not dismiss or discipline an employee bound by this Agreement except for just and reasonable cause.

REMEDY REQUESTED

The Union requests that the grievor be reinstated.

UNION ARGUMENT

The Employer has not met its burden of proof that the grievor committed a serious wrongdoing warranting termination from employment. At no time did the security guard did not see any part of the grievor's private parts and drew his conclusions as to what the grievor was doing based on his wrongful or at least unproven assumption that the grievor was looking at illicit material on the computer.

EMPLOYER ARGUMENT

The evidence of the disinterested security guard should be preferred over the grievor, who had a vested interest in the outcome of the proceedings. The misconduct witnessed by the security guard is serious and warrants discharge, particularly in light of the context of the employment relationship. The grievor has been dishonest, and his failure to admit any wrongdoing has caused irreparable harm to the required trust relationship.

DECISION

On a balance of probabilities, the Arbitrator preferred the evidence of the grievor to that of the security guard. He explained that the account of the grievor covering his self, and having an apparent protrusion, is consistent with the grievor's fly being broken. With regard to the fact the security guard is a disinterested witness to the proceedings the Arbitrator considered it in assessing credibility, but it is not in itself determinative of the matter.

Arbitrator Sullivan applied the Wm. Scott test and found that the first question of whether the grievor's conduct gave rise to just cause for some form of discipline must be answered in the negative. However, the grievor failed to take adequate mitigating steps, as the Arbitrator concludes:

> *For the entirety of the time since the grievor's discharge from employment in September 2009 he has seemed content to receive either Employment Insurance or temporary on-and-off work with a particular contractor he sought work from, and amounts received from these sources constitute a significant portion of his lost wages to date.*

Accordingly, the arbitrator ordered that the grievor be reinstated without back pay.

SIGNIFICANCE

In cases of conflicting evidence, testimony of a disinterested witness is not in itself determinative of the matter, but may be used to assess the credibility of the testimony.

Ex. BCPSEA/SD No. 61 and BCTF: Appeal WCB Jurisdiction Decision

ISSUES

Did the Arbitrator fail to make a genuine effort to interpret the Collective Agreement? Did the Arbitrator fail to provide a reasoned analysis for his interpretation of the Collective Agreement?

FACTS

On October 25, 2007, a teacher was injured by a special needs student. The Union filed a grievance (the "Grievance") and made a complaint (the "WCB Complaint") to WorkSafeBC (the "WCB"). In both the Grievance and the WCB Complaint, the Union identified the same seven safety concerns. Some of the concerns raised by the Union were particular to the incident of October 25, 2007; some were more general, such as the lack of a local health and safety committee.

The Arbitrator declined jurisdiction to hear the Grievance because he found the remedy sought by the Union related to the 2005 WCB Audit rather than the Collective Agreement. In his view, the matters raised in the Grievance were within the core mandate of the WCB and were not suitable for grievance arbitration. In the alternative, the Arbitrator held that the matters raised by the Union had been adjudicated through the WCB process.

The Union is applying under Section 99 of the *Labour Relations Code* (the "Code") for review of the award.

CA LANGUAGE

Labour Relations Code

99(1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that

(a) a party to the arbitration has been or is likely to be denied a fair hearing, or

(b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.

REMEDY REQUESTED

The Union requests the Award be set aside and the grievance be referred back to the Arbitrator for a hearing on the merits. The Union further requests the Board issue a declaration stating the Arbitrator has jurisdiction under the Collective Agreement to address the subject matter of the grievance.

UNION ARGUMENT

The Arbitrator erred in assuming the WCB investigated the seven issues raised by the Union and made a decision on them. The WCB only adjudicated the specific matters set out in the order and there was no adjudication or determination by the WCB of the Union's broader safety concerns. On the language of Article D.11.3, any health and safety concern which is not "rectified" is arbitrable. The Arbitrator did not engage in any genuine attempt to interpret Article D.11.3 or assess the requested remedy in the context of labour relations.

EMPLOYER ARGUMENT

The Arbitrator's factual finding that the matters raised by the Union in the Grievance have been adjudicated through the WCB investigation and reporting process is not subject to challenge under Section 99. To require the Employer to go through the arbitration process to deal with the same issues would be contrary to Section 2(e) of the Code—it would not promote conditions favourable to the orderly, constructive and expeditious settlement of disputes.

DECISION

Vice-Chair Bruce R. Wilkins was not persuaded that the Arbitrator failed to make a genuine effort to interpret the Collective Agreement language. He found that the Arbitrator provided a reasoned analysis for not accepting the Union's position. He notes:

> *The Arbitrator did not find that because matters might fall under WCB legislation, they are not suitable for grievance arbitration. To the contrary, he specifically acknowledged that the language of the Collective Agreement permits grievances regarding health and safety concerns (Award, para. 34). However, he found on the specific facts of the Grievance, the issues raised were not suitable to grievance arbitration because the remedies sought related to compliance with the 2005 WCB Audit. He found that the issue of whether the Employer complied with the 2005 WCB Audit was within the WCB's core jurisdiction (Award, para. 35).*

The Vice-Chair was also not persuaded that the Arbitrator erred in finding the appropriate forum for addressing the Union's complaint was the WCB. He notes:

> *The Union's main complaint was that it was dissatisfied with the Employer's compliance (or lack thereof) with respect to the 2005 WCB Audit. To the extent the Union's complaint was not addressed or resolved to the satisfaction of the Union, it has the ability to continue to pursue its complaint through the WCB process. To require the Employer to continue to defend against the same complaints in multiple forums is not consistent with Section 2(e) of the Code. As such, I find no error with the Arbitrator's decision.*

With respect to the Union's argument that the Arbitrator erred in assuming the WCB investigated the issues raised by the Union, the Vice-Chair determined that this was a finding or inference the Arbitrator was entitled to make, and conclues:

> *I find this finding or inference was based on the facts before him. In particular, he noted the Union specifically raised the same issues in its WCB Complaint and the Union met with the WCB officer both during his initial investigation and during his investigation after the directive order had been issued to ensure compliance with the order. The Arbitrator found the issues in the Grievance related to the core safety and prevention duties under the WCA and the OHS Regulation. Given the Arbitrator's findings, the assumption the WCB officer investigated the issues in the Grievance was a reasonable one and not*

> *contrary to the principles expressed or implied in the Code. I find no error with the Arbitrator's assumption.*

For these reasons, Vice-Chair Bruce R. Wilkins found that the Award was not inconsistent with the principles expressed or implied in the Code and the Union was not denied a fair hearing. Accordingly, he dismissed the Union's application.

SIGNIFICANCE

Matters already decided by WCB are not subject to arbitration.

Questions

If you have any questions concerning this decision, 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**.