GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

2017-03 **December 7, 2017** **By E-mail: Five Pages**

School District No. 36 (Surrey) v. Canadian Union of Public Employees (CUPE) Local 728 (Jaworski Grievance)

2017 CanLII 61766

Issue

Was the School District entitled to consider an employee's absenteeism in a selection decision?

Facts and Argument

The School District denied the grievor's application for the specialized position of Trades Helper on the Filter Crew due to his high rate of absenteeism. CUPE Local 728 (the Union) alleged that the School District's decision was a violation of the collective agreement because he was the most senior qualified applicant.

The School District took the position that regular attendance was a legitimate requirement of the position. The successful applicant needed to be available for their regularly scheduled shifts both to ensure indoor air quality for staff and students, and safe and efficient working conditions for the crew. Using casuals to fill in for one member of the Filter Crew was not feasible given the specialized experience and training necessary to do the work safely. The grievor's attendance level of just under 70% — most of which were related to his duties as a Second Vice President of the Union — meant he was not a viable candidate for the job.

Decision

Arbitrator Glass ruled that the School District did not violate the collective agreement when it did not award the position to the grievor. Depending on the nature of the position, employers may consider a reasonable level of attendance as a qualification in a selection decision.

The arbitrator accepted that the Filter Crew position required a consistently reasonable level of attendance that the Grievor was simply unable to provide at the time of his application, and that he was unlikely to meet going forward. Before making its selection decision, the School District had confirmed with the grievor that he would likely continue to have the same level of absenteeism. The grievor candidly stated that he would not reduce his number of absences as a union official and was in fact intending to run as a candidate for the Secretary Treasurer position in the upcoming election. Notably, the grievor was indeed elected to the Secretary Treasurer position shortly before the arbitration hearing and his attendance subsequently dropped to 50% — a fact relied on by the arbitrator in his decision.

Significance

Regular attendance may be a legitimate job requirement and considered by districts in selection decisions, subject to any obligations under human rights law. To justify a decision, the rate of absenteeism must be compelling and regular attendance must be a bona fide requirement of the job.

BCPSEA Reference No. A-11-2017

Nagra v. Board of Education of School District No. 39 (Vancouver)

2017 BCHRT 252

Issue

Was an employee discriminated against on the basis of a disability when he was involved in an attendance support program?

Facts and Argument

A Settlement Worker made a human rights complaint that he had been, in part, discriminated against on the basis of a disability when his supervisor met with him to discuss his attendance as part of the district's attendance support program. The employee alleged that he had a disability which caused his frequent absences to receive medical treatment.

The School District applied to the Human Rights Tribunal to preliminarily dismiss the complaint. The School District argued that the grievor's involvement in the attendance support program did not entail any adverse treatment. The attendance support meetings were informative and not disciplinary.

Decision

The Tribunal agreed with the School District and dismissed the complaint as having no reasonable prospect of success. In line with past decisions, the Tribunal confirmed that it is not adverse treatment to alert an employee that their absenteeism is a concern and advise of potential consequences if their attendance does not improve. The School District's attendance support program involved providing information to the employee about his absences and offering resources to support him achieve better attendance. There was no discipline. The Tribunal found that although involvement in an attendance support program may cause stress to an employee, that does not mean it is adverse treatment or otherwise discriminatory.

Significance

Similar to the *Jaworski* decision above, the Tribunal's decision confirms how a well-functioning attendance support program can withstand legal challenge. The School District succeeded in dismissing the human rights complaint with evidence that it had a clear, legally defensible attendance support program and the supervisor's meetings with the employee were consistent with the program.

BCPSEA Reference No. HR-01-2017

School District No. 47 (Powell River) and Powell River Educational Services Society v. Canadian Union of Public Employees (CUPE) Local 476

Labour Relations Board B74/2017

Issue

Is the School District a "common employer" under the *Labour Relations Code* (the Code) of a society operating summer and after school programs for its students?

Facts and Argument

The Society operates, among other programs, a summer recreation and reading program for elementary school-aged children and an after school program for youth. The School District rented office space and shared senior management personnel and an accountant in common with the Society. The Society hired several teachers and bargaining unit members of CUPE Local 476 (the Union) as its employees. The funding for the Society from a Ministry grant was paid to the Society through the School District.

The Union argued that the School District and the Society should be declared a “common employer” under section 38 of the Code. A common employer declaration would mean that the employees of the Society are included in the Union’s bargaining unit and subject to the terms of the collective agreement with the School District.

Relevant Statutory Language

Section 38 of the Code states:

> If in the board’s opinion associated or related activities or businesses are carried on by or through more than one corporation, individual, firm, syndicate or association, or a combination of them under common control or direction, the board may treat them as constituting one employer for the purposes of this Code and grant such relief, by way of declaration or otherwise, as the board considers appropriate.

The Labour Relations Board (LRB) requires four elements to be met in order to make a common employer declaration:

- More than one entity carrying on a business or activity
- The entities are under common control or direction
- The entities are engaged in associated or related activities or businesses, and
- There is a labour relations purpose for making a common employer.

Decision

The LRB denied the Union’s application to declare the School District and the Society a common employer with respect to the summer and after school programs. The LRB found that the School District and the Society met the first three elements of the “common employer" test. They were two entities under common control and direction given their significantly integrated operations, funding, leadership, office space, and accountant. Second, while the summer and after school programs are outside the School District’s statutory mandate to provide K-12 education, the summer and after school programs were related activities to the School District, since they served the same students and the Society was staffed largely by the School District’s employees.

The real issue was whether there was a labour relations purpose to declaring the School District and Society a common employer. There will be such a labour relations purpose when there is a threat to the union’s bargaining rights or collective agreement arising from the common control and direction. The LRB recognizes that, in addition to direct threats to job security or collective agreement rights, a “real threat” may come from the erosion of collective rights when an increase in work which would have expanded the bargaining unit is, instead, diverted to the second non-union entity.

In this case, the Board found there was no labour relations purpose to declaring the School District and Society a common employer. There was no evidence that the work of the summer and after school programs would have been performed by the Union if it had not been done by the Society. The Union had not historically represented employees who worked in the summer or after school programs. In fact, several of the employees working in the programs were teachers, who are expressly excluded from the Union’s bargaining unit. There was also no evidence that the School District would have operated the programs if the Society did not do so. Finally, the LRB was persuaded by the fact that the programs had been operated by the Society for a significant period of time (1-6 years) without complaint by the Union.

Significance

Districts should be aware of the potential to be declared a “common employer” under the Code with a separate but connected entity. While each case will depend on its unique facts, third parties that operate related activities, such as summer or before/after school programs, on a district’s premises (or

which are otherwise closely integrated with the district's financial or other operations) may be declared a common employer with the district and subject to a collective agreement, unless there is clearly no threat to the collective rights of the union. To determine the risk of a third party and district being declared a common employer, districts may wish to consider:

- How closely connected is the district with the third party? Does it share premises or space, finances, leadership, employees or other assets?
- Has the work done by the third party been historically done by the district's employees?
- Would the district perform the work directly if it were not contracted or operated through the third party or is it outside the district's mandate?
- Is the union aware of the third party's activities?

BCPSEA Reference No. LB-01-2017

Telecommunications Workers' Union v. Telus Communications Inc. 2017

CanLII 57754 (SCC), Refusing leave to appeal 2017 BCCA 100

Issue

Does the union have rights to notice, information, and consultation in all requests for accommodation?

Decision

An earlier arbitration decision had ruled that the Telecommunications Workers' Union (TWU) had the right to be involved — including receiving notice and information and being consulted — in **all** accommodation requests made by bargaining unit employees. The British Columbia Court of Appeal quashed that decision earlier this year as being unreasonable, and the Supreme Court of Canada recently dismissed the TWU's application for leave to appeal. The Court's decision therefore stands as the final word on the issue.

The arbitrator had ruled that the TWU had rights to notice, information, and consultation in all accommodation requests by its members arising from its statutory authority as exclusive bargaining agent. The collective agreement did not expressly provide the TWU with rights to notice, information or consultation in all accommodation cases, and contained only relatively unremarkable provisions recognizing the union's exclusive bargaining agency and Telus's management rights, and prohibiting discrimination.

The British Columbia Court of Appeal disagreed with the arbitrator's reasoning and confirmed that the primary obligation to avoid and cure discrimination rests with the employer. While unions are required to assist in the search for appropriate accommodation, the union's exclusive authority as bargaining agent does not extend that duty (and liability) beyond circumstances where the union's participation is required to modify the terms of the collective agreement or otherwise facilitate an accommodation. For example, Telus receives approximately 1,000 accommodation requests per year, including requests for ergonomic chairs and lighting adjustments, which do not require any adjustment to negotiated terms of employment. The union's status as bargaining agent is simply not engaged by these cases. The Court also noted that the logical extension of the arbitrator's reasoning would be that a union would have the right to be involved, against an employee's wishes, in all requests for accommodation of any human rights ground, including religion and family status.

Significance

Without an express collective agreement provision stating otherwise, the union is not entitled to notice, information and consultation in all accommodation cases. The union is entitled to participate in the accommodation process where:

- The union has participated in creating a discriminatory provision, policy or rule
- The union's agreement is necessary to facilitate a reasonable accommodation, or
- The employee requests union representation.

Any questions about this decision and its impact for your district should be directed to your BCPSEA labour relations liaison.

BCPSEA Reference No. CD-01-2017

Questions

If you would like a copy of any of the decisions cited above, please contact Nancy Hill (604 730 4517; nancyh@bcpsea.bc.ca) and quote the BCPSEA Reference No. found at the end of each case summary.