GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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Teachers' Right to Change Return Date from Leave

School District No. 37 (Delta)/BCPSEA v. Delta Teachers' Association/BCTF

Issue

Can a teacher wishing to alter his/her return date from a parental leave be required to return only at a natural school break?

Significance

The short answer is yes. With a clear and carefully drafted published policy, a school district may require a teacher seeking to change his/her return to work from leave to coincide with a natural school break.

Facts

The school district had a published policy and leave request forms stating that:

- employees could make their requests for statutory pregnancy and parental leave separately (at least four weeks before the start of the leave)
- a teacher's request to return to work on a date earlier or later than originally confirmed would be approved only if it coincided with the start of a new school year, end of Winter or Spring Break, or the start of a semester at a semestered secondary school
- the district may make exceptions to this rule where it considers it appropriate and in the best interests of students.

The grievor was an elementary school teacher who made her requests for pregnancy and parental leaves at the same time. In her request, she confirmed her planned return to work date for parental leave at the start of the next school year (September), which was four weeks less than the 35 weeks' parental leave provided by the *Employment Standards Act* (ESA) and collective agreement. She decided to return earlier because she knew it would be easier for her and her students if she was in the classroom at the start of the school year.

Mid-way through her leave, the teacher had a change of heart and asked to take the full 35 weeks of parental leave and return to work at the beginning of October. The grievor did not have compelling circumstances requiring the change in her return date, other than the understandable desire to spend more time at home with her child. The district relied on its policy to deny her request and required her to return on the original date in September or the next school break following Winter Break.

Relevant Collective Agreement and Statutory Provisions

The collective agreement does not address changes to a teacher's return to work dates from a statutory pregnancy or parental leave. Article G.26 provides that the ESA provisions governing pregnancy and parental leaves are "guaranteed." The collective agreement also includes detailed provisions on leaving and returning to work from a parenthood leave beyond the statutory parental leave, including requiring a teacher to leave at a natural school break and return on September 1 (Article G.26.3).

Section 51 of the ESA sets out an employee's right to take parental leave as follows:

51. (1) An employee who requests parental leave under this section is entitled to,

(a) for a parent who takes leave under section 50 in relation to the birth of the child or children with respect to whom the parental leave is to be taken, up to 35 consecutive weeks of unpaid leave beginning immediately after the end of the leave taken under section 50 unless the employer and employee agree otherwise,

…

(3) A request for leave must

(a) be given in writing to the employer,

(b) if the request is for leave under subsection (1) (a), (b) or (c), be given to the employer at least 4 weeks before the employee proposes to begin leave…

Decision

Arbitrator Dorsey found that the district's policy was reasonable and consistent with the collective agreement and the ESA, and had been reasonably applied in the case of the grievor. The district's policy did not derogate from the teacher's rights under the ESA to take the full 35 weeks of parental leave with at least four weeks' notice, but instead obliged the teacher to reasonably inform herself about her rights before notifying the district of her planned leave dates. Once a teacher had given notice of her planned return date, it was reasonable for the district to require that an altered return date minimize disruption to the classroom.

In this case, the grievor, in full knowledge of her rights and obligations under the ESA and the district's policy, chose to take a shorter parental leave and confirm her planned return date from parental leave when she applied for pregnancy leave. The grievor and union did not provide a reason why her return date needed to be changed or occur other than at a natural school break. Arbitrator Dorsey concluded that the district fairly and adequately balanced the teacher's right to change her return date against its responsibility to act in the best interests of students and ensure classroom continuity.

BCPSEA Reference No. A-04-2018

Supreme Court of Canada Expands Scope of Liability for Workplace Discrimination

British Columbia Human Rights Tribunal v. Schrenk, 2017 SCC 62

Issue

Does the protection in the *Human Rights Code* (the Code) for employees against discrimination "regarding employment" include actions by third parties in the workplace?

Significance

The short answer is yes. The Supreme Court of Canada held that discriminatory actions are prohibited by the Code, regardless of who commits them, as long as there is a sufficient nexus to the employment context. The decision means that all parties to a workplace, including parents, students, contractors, and persons employed by other employers may be held accountable for discrimination connected to a person's employment.

Facts and Argument

Mr. Sheikhzadeh-Mashgoul worked as a civil engineer for an engineering firm supervising a road improvement project. The primary contractor hired to carry out the project employed a site foreman and superintendent, Mr. Schrenk. Mr. Schrenk repeatedly made racist and homophobic comments to Mr. Sheikhzadeh-Mashgoul at the worksite. Mr. Sheikhzadeh-Mashgoul reported the incidents to his

employer, which in turn reported the incidents to Mr. Schrenk's employer, and Mr. Schrenk was removed from the site. However, he continued to be involved in the project. When Mr. Schrenk continued to harass Mr. Sheikhzadeh-Mashgoul by email, Mr. Schrenk's employment was terminated by his employer.

Mr. Sheikhzadeh-Mashgoul brought a human rights complaint against Mr. Schrenk's employer and Mr. Schrenk as a personal respondent, alleging discrimination in employment on the basis of religion, place of origin, and sexual orientation. Mr. Schrenk applied to the Human Rights Tribunal to dismiss the complaint, arguing that he was not Mr. Sheikhzadeh-Mashgoul's employer or superior and therefore could not have engaged in discrimination "regarding [his] employment."

The Human Rights Tribunal disagreed and declined to dismiss the complaint, finding that a complaint of discrimination "regarding employment" could be made directly against a third party in the workplace.

Decision

The Supreme Court of Canada, in a majority decision, agreed with the Tribunal. The Court found that the British Columbia Code permits human rights complaints regarding employment to be made against third parties to the workplace as long as there is a sufficient nexus between the discrimination and the complainant's employment. To determine if there is a sufficient nexus, the Tribunal must conduct a contextual analysis considering all relevant circumstances, including:

1. Whether the respondent was integral to the complainant's workplace
2. Whether the alleged conduct occurred in the complainant's workplace, and
3. Whether the complainant's work performance or environment was negatively affected.

The Court reasoned that a person at work is a "captive audience" to those who may discriminate against him or her, which makes the employment context different from situations where discrimination which is not prohibited, such as "street harassment." For example, if the protection against discrimination was limited only to conduct by an employer or a superior in the workplace, a complainant could be left without a remedy for workplace harassment or discrimination that continued despite the employer taking all possible steps to stop it (as in this case), or which occurred without the employer's knowledge. The Court decided that a broader interpretation was more consistent with the express words of the Code — which prohibits discrimination regarding employment by any "person," not just by an "employer" — and the overall intent of the Code to protect persons from discrimination in various contexts of vulnerability, such as services to the public, tenancy and property, employment and union membership. While employers have the primary responsibility for ensuring a discrimination- and harassment-free workplace, they are not alone in that responsibility; anyone who discriminates against a person where there is a sufficient connection to employment may be held accountable for their conduct.

BCPSEA Reference No. CD-02-2017

Labour Relations Board Clarifies Employer's Role in Investigating a Harassment Complaint Between Union Officials

***University of the Fraser Valley v. University of the Fraser Valley Faculty and Staff Association,* BCLRB No. B24/2018**

Issue
Where is the line between an employer's legal obligation to address harassment in the workplace and the union's rights against employer interference with its internal affairs?

Significance
Employers may violate the *Labour Relations Code* if they reach too far into union affairs when investigating a harassment complaint. Employers will need to proceed carefully when faced with a harassment complaint that relates to dealings among union officials, and ensure they are striking the right balance between their legal obligations to address workplace harassment and the union's rights against interference with its internal affairs.

Facts and Argument
Five employees of the university were on full or partial leaves of absence in order to perform their duties as union executives (President, Vice President and Secretary Treasurer) and representatives (Contract Administrators). The University provided the two Contract Administrators with a designated office space on campus.

The university had a fairly standard Discrimination, Bullying and Harassment Prevention Policy (the Harassment Policy), which prohibited harassment in all interpersonal communications by all members of the University community engaged in university-related activities. The two Contract Administrators filed harassment complaints against the three union executives under the Harassment Policy. The allegations in the complaints related to the respondents' actions in their capacity as union officials and the alleged negative impacts of that conduct on the complainants' ability to perform their functions as union officials.

The university launched an investigation into the complaints, including seeking to review confidential and privileged communications among the union executives. The union alleged that the investigation interfered with its internal administration and was intimidating and threatening conduct contrary to the *Labour Relations Code* (the Code).

In addition, the two complainants both left work on sick leave. The union sought access to their office to access their union-related files and requested that the university provide release time to their replacements. The union alleged that the university's refusals to allow it to access the complainants' office space or authorize release time for their replacements also violated the Code.

Relevant Statutory Provisions
Section 6(1) of the Code prohibits an employer from "participating in or interfering with the administration of a trade union."

Section 115(1) of the *Workers Compensation Act* (the Act) requires an employer to take all reasonable steps to ensure the health and safety of its workers. WorkSafeBC Prevention Policy D3-115-2 discusses an employer's duties under the Act to address workplace bullying and harassment. The policy defines "bullying and harassment" broadly to include any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimidated, and requires employers to develop a policy and procedures for how they will deal with complaints of workplace bullying and harassment.

Decision

The Labour Relations Board (LRB) noted that the issue had not been decided before in British Columbia. However, consistent with past cases, the LRB's focus in applying section 6(1) is on the objective impact of the employer's conduct on the union, and does not depend on the employer having an anti-union motivation. Accordingly, the LRB approached the issue by balancing the competing interests of the employer's statutory obligations to address workplace bullying and harassment, and the union's legitimate interest in protecting its internal processes and affairs from disclosure to the employer, to find whether the employer's investigation amounted to interference with the union contrary to the Code.

Vice Chair Kandola found that, balancing those competing interests in this case, the employer had over-reached in investigating the harassment complaints and had violated the Code. The university did not provide any authority for the proposition that it was required, under pain of sanction, to immediately conduct a full and formal investigation into the complaints, including reviewing confidential and privileged internal union communications. The university's own policy similarly did not mandate a full investigation of every complaint, but provided the university with discretion on whether and how to investigate and resolve complaints. The need for a full investigation was also less evident because there was an internal union mediation process to attempt to resolve the issues raised by the complaints, which had not been concluded.

In addition, the LRB found there was not a "substantial risk of spillover effects" into the workplace of the alleged harassment. The complaints were about the effect of the respondents' conduct on their ability to perform their union roles, not as employees of the university. The complaints also did not involve any conduct or communications by the respondents outside of their union roles.

On balance, the employer's actions in immediately pursuing a full and formal investigation of the complaints, rather than taking other less intrusive measures such as confirming that the union will address the matter through its own internal processes, interfered with the union's internal affairs. Similarly, the employer's refusal to allow the union to access the Contract Administrators' office space and allow release time for their replacements negatively impacted the union's ability to represent and serve its members and there was no competing interest at play since the union was seeking to access only its own files and property.

However, Vice-Chair Kandola rejected the union's argument that the investigation of the complaints constituted "intimidation or threatening conduct." The university had a legitimate interest in investigating the complaints and, although its relationship with the union executives being investigated was contentious, there was no evidence that it was seeking to compel or induce the respondents to stop acting as union officials.

BCPSEA Reference No. LB-01-2018

What is the Difference Between a Letter of Expectation and a Letter of Discipline?

CUPE, Local 1623 v. Health Sciences North, 2017 CanLII 71477 (Wacyk)

Issue
When does a letter of expectation turn into a letter of discipline for which just and reasonable cause is required?

Significance
A letter of expectation may be appropriate to improve an employee's behaviour going forward, but must be crafted carefully to ensure that it reflects that purpose and does not slide into the realm of progressive discipline.

Facts and Argument
The employer had issued several "counselling notes" to employees regarding their conduct and behaviour. The collective agreement required the removal of letters of reprimand from an employee's record after a period of discipline-free behaviour, but there was no provision for the removal of counselling notes. The union brought a policy grievance against the employer's approach to issuing counselling notes, alleging that the notes were actually letters of reprimand.

Decision
Arbitrators have been clear: the character of a communication to an employee cannot be determined simply by the title given to it by the employer. It is the substance of the letter that determines whether it is a letter of expectation or discipline.

The purpose of a letter of expectation is, unsurprisingly, to clarify expectations and its tone and impact must reflect that intention. The arbitrator in this case provides a comprehensive list of considerations used in past cases to determine whether a letter or note is "counselling" or "disciplinary," including:

1. Whether the employer intended to impose discipline, punish or otherwise correct behaviour through imposition of a sanction
2. The impact upon the employee's career
3. The employer's stated intention as to whether the document would be relied upon to support disciplinary action in the future
4. Whether the alleged incident could amount to culpable behaviour
5. Whether the substance of the document is an expression of employer disapproval (non-disciplinary), or a punitive measure (disciplinary)
6. Whether the document sets out prospective standards for future behaviour (non-disciplinary) or has an immediate impact on the grievor (disciplinary)
7. The tone of the letter, including whether the language used is supportive and offers assistance to improve the behaviour (non-disciplinary), or is a rebuke and frames the conduct as blameworthy (disciplinary), and
8. Whether the letter forms part of an employee's record or personnel file.

The arbitrator considered that a counselling note that remains part of an employee's record unchallenged and indefinitely could very well negatively affect an employee's career in the future. Together with statements in the counselling notes like "any further incidents will result in more formal corrective action" and detailed recitations of the behaviour giving rise to the note, similar to a disciplinary letter, increased the likelihood that the notes were actually discipline.

BCPSEA Reference No. A-13-2017

Discipline of School Employee for their Conduct as a Parent

CUPE, Local 5047 v. Halifax Regional School Board, 2017 Carswell NS 904 (Richardson)

Issue
To what extent can a school district discipline for an employee for their conduct as a parent?

Significance
Because of the nature of a school district's operations, it may discipline an employee for off-duty conduct that may damage the district's reputation as a safe and effective learning environment, including an employee's conduct as a parent.

Facts and Argument
The grievor was an Educational Program Assistant with the school board. She was recognized by the employer as being very good at her job. Her son was a student at another school in the school district and had special needs.

During her three years' service, the grievor had been disciplined for her conduct dealing with others as a parent. She received a written warning for a verbal confrontation she had with another parent during a field trip with her son's class. She also received a one day suspension and a six month prohibition from attending her son's school for two incidents in which she yelled at the vice-principal of the school, including ripping up her son's suspension notice and throwing it on the vice-principal's desk.

The grievor's employment was terminated by the school board after a further incident in which she, acting on a mistaken belief that her son had been placed against her wishes in a "time out" room, loudly and aggressively confronted her son's teacher and other employees at the school. During the confrontation, which occurred in front of her son, she told the teacher that she "felt like busting [her] up" and she "felt like [she] would lose it."

Decision
The arbitrator found there was just and reasonable cause to discipline the grievor for her conduct as a parent. While accepting the general rule that an employer cannot discipline an employee for off-duty misconduct unless there is a real and material impact on the employer's reputation and workplace, the arbitrator considered that school operations are different from other employers. A school board's operations are based on social relationships and accordingly, there is a heightened emphasis on the responsibility of employees, especially teachers and education assistants, to act as role models for students in their dealings with others. The arbitrator considered that the need to foster and maintain a school board's reputation as a safe and effective learning environment gave it a legitimate interest in addressing an employee's off-duty conduct that may damage that reputation. Further, in this case, while the grievor's conduct did not take place at the school where she worked, it did occur at another of her employer's workplaces and affected the work of a fellow employee (her son's teacher). The arbitrator found that the grievor's actions went further than was necessary as a parent advocating for her child and disrespected a fellow employee in front of her son. The grievor knew from past discipline that this type of aggressive behaviour as a parent was not appropriate.

However, the arbitrator did not find there was just and reasonable cause for termination of her employment. While the grievor had demonstrated an inability to control her emotions and deal appropriately with fellow employees involving in her son's education, despite previous discipline, the arbitrator did not find the employment relationship was beyond repair. The grievor had not acted maliciously but was under the mistaken belief that the teacher had ignored or breached an agreement about the use of the "time out" room for her son. Her conduct as a parent did not directly affect her work as an employee and she was consistently regarded as "very good" at her job. The arbitrator also found that the grievor's conduct was not as serious as making actual threats, but was rather strong

expressions about her emotions in the situation. Finally, the arbitrator decided that the school board's progression from a one day suspension to termination for very similar conduct was not justified. Instead of termination, the arbitrator substituted a two year suspension without pay (to the date of the award) and reinstatement, on the condition that the grievor would never be assigned to the same school as the affected teacher.

BCPSEA Reference No. A-14-2017

BCPSEA Update: BCTF Section 88 Application on Failures to Fill Teacher Vacancies

Nature of Application

On December 15, 2017, the BC Teachers' Federation (BCTF) applied under section 88 of the *Labour Relations Code* requesting that the Labour Relations Board (LRB) inquire into and make recommendations about failures to fill teaching vacancies in the province. They alleged that it is causing widespread labour unrest and disruption of service to students in the province.

Outcome

BCPSEA and the BCTF held a preliminary meeting at the LRB on January 23 to discuss the application. BCPSEA argued that the appropriate process to resolve these issues during the term of the collective agreement includes the grievance–arbitration process and the other initiatives already underway, such as the Labour Market Partnership Project and the Ministry of Education's Expert Panel.

The parties agreed, on a without-prejudice basis, to mediate whether there are common areas of dispute in existing grievances and prioritize issues to be resolved expeditiously by arbitration. The BCTF and BCPSEA have exchanged particulars about the grievances in the province which have been identified as related to failures to fill and TTOC shortages. Each district's BCPSEA labour relations liaisons will have contacted districts if any grievances from a district were identified in the BCTF's particulars.

Next Steps

Chair Jacquie de Aguayo will mediate the without prejudice process between the parties on March 6 and 7, 2018. There is no obligation on either party to consolidate or forward any particular grievance to arbitration. We will provide a further update about the outcome of the mediation after March 7.

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.