GRIEVANCE & ARBITRATION UPDATE

British Columbia Public School Employers' Association

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BCTF/School District No. 61 (Greater Victoria): Qualifications/Management Rights/Duty to Accommodate

Staffing levels in the Continuing Education Program were reduced for the upcoming school year. The Employer held 2.34 FTE in reserve as a contingency to meet needs when the enrolment was known. The Grievor had an incurable and degenerative condition limiting his mobility, which he had managed while working in the Learning Centre assisting students in self-paced programs. His seniority was not such to maintain a 1.0 FTE in the Centre within the reduced FTE, and he requested accommodation so that he could remain in the Centre. He was offered but rejected a .5 FTE in the Centre with the possibility of an increase in FTE should enrolment increase, which it ultimately did. The Grievor was denied a Math 12 assignment in the Centre. He was offered and accepted an English, Social Studies, Principles of Math 9 and enriched Math 10 assignment in a secondary school. In mid-September, the Grievor went on sick leave. Arbitrator Jim Dorsey, QC, addressed three questions:

1. Was the Grievor qualified to teach Math 12? No. The Grievor had a B.A. (History Honours) 1970, had taken one math course in first year, worked as a math student marker in his second year, and had taught Math 10 and 11 in the classroom and the Learning Centre. However, there are significant qualitative differences between those courses and Math 12 such that the Grievor did not have the necessary qualifications to teach Math 12.

2. Did the Employer exercise its management rights consistent with the collective agreement in establishing the Learning Centre assignments? Yes. The Arbitrator recognized that because of its nature, it is more difficult to project enrolment in Continuing Education than for most elementary and secondary schools. "It was within the employer's authority under the collective agreement and the *School Act* to decide the resources to be allocated to the Continuing Education Program and to determine the ratio and the level of staffing within the Program…I find it was not unreasonable, unfair or contrary to the collective agreement for the employer to reserve some of the allocated FTE to respond to the uncertainties of September enrolment."

3. Did the Employer fulfill its duty to accommodate? Yes. The Grievor's new assignment was within his subject area and in a room that had been used by a teacher who was accommodated for mobility limitations. "Accommodation for a disabled individual is an individualized process that must consider and respond to both the individual and the context. Mistakes will be made… Accommodation is an ongoing shared process. An attempted arrangement must be monitored and adjusted or, if necessary, replaced. It is not a single event or single effort."

BCPSEA Reference No. A-03-2005

BCTF/School District No. 73 (Kamloops/Thompson): Duty to Accommodate

The Grievor did not disclose her disability, depression and social anxiety to the Employer or the Union. Rather, she and the Union argued she should be accommodated because she perceived her drama assignment, which included a number of different courses with different grade levels, to be an intolerable working environment. Arbitrator Emily Burke dismissed the grievance, saying that "an Employer cannot accommodate that which it is unaware of…the Union and/or the Grievor must be prepared to do their part to provide information sufficient to initiate" the assessment of a claim for accommodation." An employer is entitled to "notice of the disability involved or behaviour such that causes a prudent employer to inquire into the situation to become an informed employer…While the Grievor and/or the Union may be entitled to invoke privacy rights, lack of disclosure which in turn leads to lack of knowledge, may ultimately impact on whether the Employer has fulfilled its duty to accommodate to the point of undue hardship. Without sufficient information, an Employer may not be able to accommodate to the extent expected by the Grievor."

The arbitrator also commented on the necessity for an employee to be qualified for the accommodation: "…an employer is not required to accommodate an employee into a position for which he/she is not qualified. In this case, while unqualified TOCs were occasionally called out, the Employer sought to avoid that situation if it could for appropriate pedagogical reasons."

BCPSEA Reference No. A-04-2005

School District No. 82 (Coast Mountains): Human Rights Tribunal — Discrimination

The complainant, a teacher who was educated and had taught in the Philippines, filed a second Human Rights complaint alleging that BCPSEA, her employer, and her union had discriminated against her on the basis of her place of origin, contrary to the *Human Rights Code*. The teacher was assigned to Category 3 by TQS.

In her first complaint, which was filed against TQS, the employer and the union, she alleged that:

1. It was discriminatory to pay teachers differently because of their education attainments

2. The manner in which TQS evaluated her educational credentials was discriminatory; and

3. The discrimination was post 1991 when TQS created regulations which treat foreign-trained teachers less favourably than Canadian-trained teachers.

The Human Resource Tribunal dismissed the first complaint in 2000.

The second complaint did not include TQS, and was expressed slightly differently. The teacher alleged that:

1. It is discriminatory to create and maintain a system for paying teachers which does not provide equal pay for work of equal value but sets wages on the basis of education and teaching experience and both criteria are affected by place of origin.

2. Her teaching experience and education in the Philippines was undervalued as she was only given 3.5 years of credit for her seven years of teaching and she was not given full credit for her years of post-secondary education.

3. It is discriminatory to create and maintain a system for paying teachers in which the rate of pay depends on an amount of education, rather than competency, effectiveness, degree of responsibility or workload.

The respondents argued that the second complaint is res judicata, having been previously dismissed by the Tribunal. The complainant submitted that the matter is not res judicata as there are new legal issues. In the alternative, the Tribunal should exercise its discretion and refuse to apply the res judicata doctrine for a number of reasons: the complaint is in an emerging area of law; the original proceeding was unfair because she was badly represented; there is no danger of inconsistent results; and it would be unjust to not allow the complaint to proceed. Moreover, as the complaint is one of a continuing cause of action, cause of action estoppel should not apply.

The Tribunal dismissed the complaint as all the elements for cause of action estoppel were present:

1. A final decision in the first complaint was pronounced by a court of competent jurisdiction over the parties and the subject matter;

2. That decision involved a determination of the same cause of action as that advanced in the present litigation;

3. The parties in both proceedings are the same even though TQS is not included in the second complaint.

The message in this decision is that any dissatisfaction with the outcome of a Human Rights Complaint should be dealt with through the appropriate appeal mechanisms and not with another application to the Tribunal.

BCPSEA Reference No. HR-01-2005 (Second Complaint)
BCPSEA Reference No. HR-01-2000 (First Complaint)

School District No. 82 (Coast Mountains): BC Supreme Court — Local School Calendar

The petitioner, a parent, sought an order quashing the school board's decision to adopt a four day week for the 2004-05 school year. The Court dismissed the petition. The issues were categorized and answered as follows:

1. Did the school board comply with the *School Act* and the *School Calendar Regulation* in adopting the local school calendar? Yes, the requirements were fully complied with.

2. Did the school board consult with parents and employee representatives prior to adopting the local school calendar? Yes:

    - Consultation was full, fair, and meaningful. Response to the parent inquiry was full and frank.
    - Financial disclosure was adequate, fair and timely. Estimates and projections were appropriate and factually based.
    - The process and procedure for consultation conformed to natural justice and provided procedural fairness.

BCPSEA Reference No. CD-02-2005.pdf

Questions

If you have any questions concerning these decisions, please contact your BCPSEA liaison. If you want a copy of the complete award, please contact Lynda Kuit at lyndak@bcpsea.bc.ca and identify the reference number found at the end of each summary.