GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
SOLUTIONS AT WORK

2019-03 **June 14, 2019** **By E-mail: 12 Pages**

Labour Relations Board Denies Appeal of Chilliwack "Failure to Fill" Decision

In *Grievance and Arbitration Update No. 2018-04*, we previously reported on Arbitrator Glougie's arbitration decision that "failures to fill" in School District No. 33 (Chilliwack) violated the collective agreement. The Labour Relations Board recently denied the Employer's application to review and reconsider Arbitrator Glougie's decision.

With the appeal process now complete, BCPSEA will move forward to resolve the provincial "failure to fill" grievance as follows:

- The parties have concluded arbitration hearings regarding alleged failures to fill in districts with other collective agreement language related to coverage and replacement of absent teachers, such as language requiring replacement of absent teachers that is "subject to the availability of a TTOC" (School District No. 73 (Kamloops/Thompson)) and language requiring replacement in "normal circumstances" (School District No. 70 (Alberni)).
- The parties will determine the appropriate remedy for the violations of the collective agreement and, if necessary, Arbitrator Glougie will decide the issue.
- Once these decisions are rendered by Arbitrator Glougie, BCPSEA will work with the BCTF to apply the relevant decisions to resolve the remaining grievances and disputes under the provincial "failure to fill" grievance. Our aim in the process will be seeking to ensure that the collective agreement language does not interfere with districts' ability to provide high quality learning environments for students.

We will keep you updated as the matter proceeds. In the meantime, please contact Rosalie Cress and/or your BCPSEA labour relations liaison if you have any questions.

Out of District TTOC Experience Not Credited for Scale Placement

BCPSEA/SD No. 36 (Surrey) v. BCTF /Surrey Teachers' Association

Issues
Is a TTOC entitled to credit for out-of-district TTOC experience under the collective agreement? Did the teachers' union breach the collective agreement when it bypassed the dispute process for the Joint Salary Review Committee set out in the collective agreement and filed a policy grievance?

Significance
Out-of-district TTOC experience is not recognized under Article B.22 of the parties' collective agreement. It was not reasonable to interpret the term "relieving teacher" in that article as including TTOCs.

The parties must follow the dispute processes outlined in the collective agreement prior to filing a grievance at Step Three.

Relevant Collective Agreement Language

TTOC experience is not listed in Article B.22.1. The collective agreement provided for the recognition of within and out-of-district teaching experience as follows (emphasis added):

> B.22.1 CONDITIONS
> Providing the teacher held a valid teaching certificate, or its equivalent, at the time the experience was gained, teaching experience gained outside the district of Surrey shall be recognized as set out below:
> …
> c. Fractions of years taught outside the district will be accumulated and recognized where:
> i. Interrupted full-time teaching experience was of at least four (4) months' duration in a single continuous assignment, and/or
> ii. Part-time or relieving teaching experience was at a rate of 20% or more.
> …
> B.24.2 ACCUMULATION OF EXPERIENCE
> The following experience will be accumulated by the district Payroll Department, with calculations for increments made as of September and January:
> a. Full-time experience with this district and/or,
> b. Relieving or part-time experience with this district, and/or
> c. Experience as a Teacher Teaching On Call as specified in Article B.2.14, and/or
> …

The collective agreement also set out a Joint Salary Review Committee process:

> ARTICLE B.20 JOINT SALARY REVIEW COMMITTEE
> B.20.4 UNRESOLVED ITEMS
> If the matter remains unresolved after two (2) consecutive meetings of the Joint Salary Review Committee, the matter may be referred, in writing, as a grievance directly to Step Three of the grievance procedure.

Facts

Prior to 1990, substitute teaching (now TTOC) was not included as experience for the purposes of accumulating experience and calculating increments in the parties' collective agreements. In the 1990 collective agreement, substitute teaching experience within the district was included for the first time. A different article dealt with experience outside of the district — it was not amended to include substitute teaching experience and continued to reference only part-time or relieving teaching experience. This distinction still continues in the current collective agreement with Article B.22 (out-of-district) and B.24.2 (within district).

The district's evidence was that the term "relieving teachers" refers to teachers providing administrative relief on a part-time basis for teachers who have a partial load of administrative duties, and is synonymous with part-time teaching.

The district's Joint Salary Review Committee has a broad mandate to deal with questions relating to salary, allowances, benefits, or indemnities under Article B.20.2. In this case, the Committee met and discussed credit for out-of-district TTOC experience in early 2017, in the context of finding ways to make the district more competitive in recruiting. The district's existing practice of not crediting out-of-district TTOC experience was not disputed. The district's practice was discussed by the Committee in June 2017 in relation to a specific teacher, however, the practice was not challenged and the matter was considered to be resolved. The issue was brought up again by the union again in an October 2017 email, but was not addressed at the next Committee meeting because the union had already filed a policy grievance at Step Three.

Analysis and Decision

Arbitrator Hall concluded that the parties intended to recognize TTOC experience under the collective agreement within the district but did not intend to recognize out-of-district substitute teaching experience. In reviewing prior collective agreements to 1973, Arbitrator Hall noted that

there is a lengthy history of part-time and relieving teachers always being referred to together, while also noting that substitute teachers (now TTOCs) were dealt with in separate articles.

Arbitrator Hall rejected the union's argument that "relieving teaching" included TTOCs and the premise that the term "relieving teacher" no longer has meaning and must now mean "TTOCs," accepting that it was synonymous for part-time relief teaching. He stated (at page 16):

> In any event, even if relieving teachers no longer exist as such in the district, this would not be the first time that "a vestage" from a prior period (to adopt the Union's description) continues unaltered in a collective agreement. And it does not mean that one must give the words new meaning — particularly where the meaning would be plainly inconsistent with other terms of the contract. As stated in Pacific Press, the rules of interpretation are not "rigidly binding."

Arbitrator Hall found great significance in the fact that the parties included substitute teaching experience within the district for purposes of accumulating experience in the 1990 collective agreement, but did not similarly amend Article 45, which dealt with out-of-district experience. Article 45 continued to refer only to part-time or relieving teaching experience, a distinction that has continued in the current collective agreement. He also found it significant that the collective agreements since 1990 were never amended to allow for recognition of out-of-district TTOC experience.

Arbitrator Hall agreed that the union breached the collective agreement by not following the process outlined in Article B.20.4. Where parties have designed an internal mechanism for resolving certain questions without resorting to a formal grievance, the procedure should be followed and respected. He concluded that the Committee is clearly constituted as a problem-solving forum, which includes an express pre-condition of addressing issues at two consecutive Committee meetings prior to referring the matter to a grievance at Step Three.

Conclusion
The district's interpretation of Article B.22.1 was affirmed: the collective agreement does not require out-of-district TTOC experience to be recognized and the words "relieving teacher" do not include TTOCs.

Where the parties agree to an internal mechanism for resolving disputes prior to filing a grievance, that procedure should be followed. A party who does not follow that process and instead files a grievance will be found to have contravened the collective agreement.

BCPSEA Reference No. A-12-2019; Arbitrator Hall, June 6, 2019.

Summer is not a "Lay Off" for 10-Month Workers

SD No. 79 (Cowichan Valley) v. USW Local 1-1937

Issue
Is the summer period for a 10-month employee a lay-off, entitling her to apply her seniority to bump a junior employee?

Significance
The short answer is no. The end of a 10-month position did not constitute a layoff as the reduction in the workforce was not an action of the district, but the nature of the position into which the grievor posted.

Facts
The grievor was a custodian with significant seniority whose day shift custodial position was going to be changed to an afternoon position. The grievor exercised her bumping rights under the collective agreement to bump into an itinerant custodian position. The posting for the new permanent position stated that it was "10 months in length only and will commence September 1 to June 30th each year." The grievor grieved the district's refusal to allow her to exercise her bumping rights on or before June 30th.

Relevant Collective Agreement Language
Article V Section 4 of the collective agreement stated:

> Although the Board does not desire to reduce the work force or hours of work, it is recognized that circumstances may require such action. In making such reductions, the Board and the Union will consult to ensure that such actions are orderly and taken so that seniority is applied.
>
> Prior to any lay-offs, or reduction in hours of work, of regular employees, the Board will consult with the Union through the Negotiation Committee…
>
> In the event of a reduction of the working force, providing other qualifications are equal, the last person hired shall be the first released….

Analysis and Decision
Arbitrator Jackson reiterated the principle that "[a]ll persons who are laid off are off work but not all persons who are off work have been laid off." What constitutes a "lay off" or reduction in the work force turns on the particular language, structure, and purpose of the collective agreement in question but, fundamentally, a layoff requires two elements:

1. There is a reduction of the work force as a result of which an employee is out of work; and
2. The reduction has been initiated by the employer.

Arbitrator Jackson rejected the union's argument that the creation of the 10-month position was an employer-initiated action which reduced the work force. Jackson concluded that the plain meaning of the collective agreement provision at issue is that a reduction in the work force is an "action" taken by the district due to circumstances that require it. She found it would be unreasonable to conclude that the creation of a new position that increases the work force is an "action" that reduces the work force.

Further, although the district issued Records of Employment to 10-month bus drivers that stated a suspension of employment due to "shortage of work/end of contract or season," these were government forms required to allow the employees access to Employment Insurance benefits and were not evidence that these positions were "laid off" in the summer months.

Conclusion

Under the specific collective agreement language and facts of this case, the end of the 10-month itinerant dustodian position in the summer months did not constitute a "lay off" entitling the grievor to exercise her bumping rights.

BCPSEA Reference No. A-02-2019; Arbitrator Jackson January 10, 2019.

Use of Interviews in Selection Decisions

BCPSEA/SD No. 61 (Greater Victoria) v. /BCTF/Greater Victoria Teachers Union

Issue
To what extent can an employer rely on interviews when making selection decisions?

Significance
Interviews are a valid part of the assessment process when districts make hiring decisions, but can form only part of the overall assessment. Interviews allow the employer to assess certain skills and intangible qualities not apparent through written applications alone, but should be only part of a holistic approach to selecting a candidate conducted with regard to the relevant collective agreement language.

Facts
The grievor was unsuccessful in his applications for two teaching positions at two secondary schools, Reynolds High and Esquimalt Secondary. Both were Music Teacher positions and both had significant responsibility outside the normal timetable, including developing and conducting stage shows for each school. The successful candidates were significantly junior to the grievor but were selected because they performed markedly better on the scoring criteria used in the interviews. The grievor claimed the seniority provision in the collective agreement applied and he should have been selected as the senior applicant.

Collective Agreement
The collective agreement contained a clause which allowed the school to hire a junior candidate with "demonstrably higher" ability, provided under Article E.20.6:

> . . . the applicant with the greatest seniority as defined in Article C.2 shall be given preference, provided that (s)he possesses the qualifications as set out in Article C.21 of this Agreement. ***Where a junior teacher is selected, her/his ability to perform the teaching position shall be demonstrably higher than more senior candidates.*** [emphasis added]

Analysis and Decision
Arbitrator Sullivan dismissed one grievance but upheld the other. Regarding the position for Reynolds High School, the Arbitrator held that the decision to forgo the grievor in favour of a junior employee was justified. The evidence presented at arbitration confirmed that the junior candidate for the position at Reynolds had demonstrably higher ability and experience for the teaching position than the grievor. Conversely, for Esquimalt, Arbitrator Sullivan found that there was no good reason to select the more junior employee over the grievor; the successful candidate did not have demonstrably higher ability for the job. He stated "there is little to differentiate [the successful candidate's abilities] with those of the grievor — certainly not a "demonstrable" difference as required under the relevant Collective Agreement language." As such, the Arbitrator held that the grievor should have been chosen for the Esquimalt position.

Although the successful candidate for the Esquimalt position performed better at the interview, the Arbitrator held that this was not enough to reasonably determine superior ability. The Arbitrator made a point of explaining that the interview is only a part of the overall assessment. While noting that applicants do have an obligation to prepare for and perform well in interviews, Arbitrator Sullivan also stated that the ability to perform well in an interview and "sell yourself" is not always determinative of ability. Moreover, in this case the Arbitrator found that many factors (such as actual work experience) were also important indicators that were overlooked in the Esquimalt selection decision.

Ultimately, each of the candidates, including the grievor, had an extensive resume relevant to the position. The Arbitrator stated that greater weight should have been given to the resumes of each applicant when making the selection decision (at page 22):

> Management is certainly entitled to a high degree of deference in exercising its discretion to select teachers, however it cannot do so in a manner that is arbitrary, discriminatory, in bad faith or otherwise unreasonable. In the present case using interviews may well have been a helpful tool in determining the abilities of the respective applicants, but it was unreasonable for such to effectively comprise the sole means for doing so.

Conclusion
Considering all the relevant factors, Arbitrator Sullivan concluded that neither candidate for the Esquimalt position was "demonstrably" better than the other and, therefore, the grievor's seniority must prevail pursuant to the collective agreement language.

BCPSEA Reference A-31-2018; Arbitrator Sullivan, December 21, 2018.

Secondment Leave Limited to Terms of Collective Agreement.

BCPSEA/SD No. 39 (Vancouver) v. BCTF/Vancouver Teachers' Federation

Issue
When approving secondment leave requests for less than a full school year, may the employer impose a condition that the teacher must take unpaid personal leave for the remainder of the school year?

Significance
Although the employer has the management right to approve secondment leaves, under the collective agreement the employer cannot require a teacher returning from a secondment lasting less than a full school year to take unpaid personal leave for the remainder of the term.

Relevant Collective Agreement Language
Article G.21.29 of the district's Collective Agreement states:

> 29. Secondment
> Leave of absence due to approved secondment for any reason shall guarantee the employee a return to the same or comparable position and priority shall be given for placement.

Facts
When a teacher in the Vancouver School District is seconded to Simon Fraser University, the term of the secondment covers September 1 to April 30, leaving two months remaining in the school year.

When deciding whether to approve requests for secondment leave lasting less than a full school year, the district's practice has been to require the teacher to take unpaid personal leave for the duration of the school year or else to be placed on the regular TTOC list. This has been the practice since 1991.

Analysis and Decision
Arbitrator Hall found that the employer must exercise its discretion on a case-by-case basis, and that the practice of requiring all teachers requesting secondment leave to take unpaid personal leave or else be placed on the regular TTOC list for the balance of the school year for which the teacher is seconded is not reasonable, but that the employer may develop general guidelines that allow each case to be honestly assessed in a manner consistent with the collective agreement.

Hall emphasized the point that the Employer may unilaterally make decisions on matters not covered in the collective agreement, but may not act when the collective agreement "occupies the field," as he found it does in this case. Specifically, the collective agreement does not allow the Employer to put employees on personal leave without pay that they have not requested. In addition, the collective agreement defines the periods for which unpaid personal leave may be taken, and May 1 – June 30 (the period considered in this arbitration) is not included.

While the union argued that appointment to a permanent TTOC assignment for two months would satisfy an employee's right to return to the same or comparable position following the secondment, Arbitrator Hall disagreed with the union's assertion that a permanent TTOC position is comparable to a continuing classroom assignment.

Conclusion
At the end of an approved secondment leave lasting less than a full school year, the Employer must return a teacher to a position that is the same as or comparable to their continuing position.

BCPSEA Reference No. A-11-2019; Arbitrator Hall, June 3, 2019.

Health Authority Substance Use Disorder Policy Ordered to be Partially Amended

Interior Health Authority and Hospital Employees' Union

Issue
What constitutes a reasonable and non-discriminatory substance use policy?

Significance
While the substance order policy in this case arose in the health care context and included detailed actions to be taken for employees with suspected substance use disorders, the reasoning is helpful for employers in safety-sensitive sectors, including school districts, to consider in reviewing their policies and practices around substance use in the workplace.

Facts
The employer is a health authority that provides a wide range of health care services throughout the interior of the province. In consultation with a physician consultant, the employer developed and implemented a Substance Use Disorder policy. The union advanced a wide-ranging policy grievance challenging the health authority's substance use disorder policy, which included requirements such as medical assessment and implementation of individualized treatment recommendations for employees with substance use disorders working in safety-sensitive positions. The union argued that the policy systematically discriminated against employees with substance use disorders and was an unreasonable and arbitrary exercise of the employer's management rights.

Analysis and Decision
Arbitrator John Hall concluded that the core of the policy aligned substantially with the currently accepted arbitral approach to drug and alcohol policies governing safety sensitive sectors, but that specific mandatory elements of the policy did not permit a sufficiently individualized approach to withstand scrutiny under human rights law.

The Arbitrator did not accept the union's primary challenge to the rationale and purpose of the policy. The union was seeking to change the accepted arbitral approach to employee substance use in safety-sensitive positions. The union put forward various experts to support a medical "harm reduction" model in the workplace, suggesting that employees in safety-sensitive positions with a diagnosed substance use disorder should not be subject to requirements such as abstinence or medical testing. This approach was not accepted by the Arbitrator. However, Arbitrator Hall did find

that certain aspects of the policy were discriminatory under human rights law and an unreasonable exercise of management rights.

The Arbitrator accepted the following aspects of the policy:

- An abstinence model for the treatment/return to work requirements for employees in safety sensitive positions is consistent with prevailing case law.
- The definition of "safety sensitive positions" within the policy was reasonable, even though it differed from previous arbitration decisions in industrial contexts. The policy's definition of a "safety sensitive position" included consideration of potential harm to health, safety or property, as well as the employer's reputational interests. Arbitrator Hall stated that there is not a "definitive formula" for what constitutes a safety sensitive position, and will depend on the context of the workplace.
- Employees in safety sensitive positions may be reasonably required to self-disclose current addiction (i.e., serious substance use disorder) and prior addiction within the past six years, based on the increased risk of relapse and potential for harm.
- Employees in safety sensitive positions with suspected substance use disorders may be removed from the workplace pending medical assessment provided the decision to do so is based upon an individual assessment of the circumstances.

However, the Arbitrator concluded that other aspects of the policy could not be sustained:

- While an independent medical evaluation (IME) by an addiction specialist is the most desirable option with regard to diagnosis and treatment recommendations, Arbitrator Hall concluded the employer should first obtain medical information from the employee's physician before conducting an IME, and it is desirable that an addiction specialist be mutually agreed upon (for example, through a roster of mutually accepted addiction specialists).
- The policy should not automatically require an employee to undergo a second IME prior to clearing the employee for return to work, particularly if the addiction specialist performing the initial IME did not recommend a second IME before the employee's return to work.
- Sensitive personal information should not be required to be shared more broadly than necessary under the policy; for example:
    - Employees with current alcohol or drug dependency problems should not be required to disclose their dependency to their supervisor, while those with past dependency problems were required to disclose directly to the Employer's Disability Management department, which allowed for greater confidentiality. Sharing of medical information (including an IME report) to the employer's Disability Management department on a confidential basis was found to be appropriate.
    - IME specialists should also be directed not to include sensitive background information that is unnecessary as part of the IME report.
    - In addition, given the very personal and sensitive information which may be included in an IME, stringent steps needed to be in place to ensure details are appropriately confined with the Employer's Disability Management team. The nature of the information shared with the employee's supervisor/manager should be restricted to information regarding the safe completion of duties and does not include the details of the medical treatment plan.
    - The part of the policy that authorized searches of employees' personal effects if there is reasonable cause to believe they have violated the policy was unreasonable. As drafted, the searches could be triggered for "any violation of the policy," and it would not be reasonable for a minor violation of the policy to warrant an intrusive search of an employee's personal belongings.

Arbitrator Hall also made findings about the implementation of the policy, including return to work/last chance agreements for employees returning to work following treatment for substance use disorder, as follows:

- The union should be involved from the time there is a potential substance use disorder issue identified and the employee is removed from the workplace.
- An employee should not be automatically subject to a "last chance" agreement (as opposed to a return-to-work agreement). The decision to require a last chance agreement, and the specific terms of those agreements, must be based on an individual assessment, with the union having the opportunity to participate.
- The policy's automatic requirement for the employee to "check in" at specified times with Disability Management and with frontline managers as part of return-to-work and last chance agreements resulted in duplication in the circumstances. These check-ins were in addition to check-ins with medical professionals mandated by the terms of the employee's medical monitoring/treatment plan. The Arbitrator noted that both Disability Management and the employee's supervisor/manager had a role in checking in with employees, but that specified check-ins requirements should not result in duplication for the employee and should be tailored to an individual employee's circumstances.
- When an employee is subject to medical monitoring as part of an accommodation, the specific treatment plan they are required to follow must be based on a qualified professional's recommendations tailored to the individual employee's circumstances.
- Employers are not automatically required to pay the cost of assessment or monitoring. Arbitrator Hall indicated that a question of whether there was a basis for the employer to bear any of the cost in any case would need to be based on an individualized assessment.

Conclusion
In short, any substance use policy in the workplace must be highly adaptable to each employee's individual circumstances in order to pass legal muster. Arbitrator Hall reserved jurisdiction and directed that the application of the policy for the union's members be suspended, pending consultation by the parties to update the policy in accordance with the directions in the Award. There has not yet been any subsequent award dealing with terms of an updated policy.

BCPSEA Reference No. A-33-2018; Substance Use Disorder Policy Grievance), [2018] B.C.C.A.A.A. No. 87 (Hall)

Workers' Compensation Claim for Mental Disorder Denied

Certain School District v. Certain Employee

Issue
Is a worker's mental disorder compensable under the *Workers Compensation Act* (the Act) if the predominant cause is the manner in which a manager dealt with the worker's complaints about a coworker?

Significance
While every case will depend on its facts, in this case, the answer is no. Based on WorkSafeBC's policy and the uncontested medical evidence, the Workers' Compensation Appeal Tribunal (WCAT) determined that the worker's mental disorder was predominantly caused by the employer's decisions about the worker's employment and was therefore not compensable under the Act.

Facts
An employee of the district filed a claim for workers' compensation, alleging that the employee's coworker had subjected the employee to ongoing bullying and harassment and the manager did not

address the situation. The coworker had behaved aggressively and with hostility to the employee in the workplace, such as throwing a radio in the trash after being asked by the employee to turn it down. A picture of the employee's face was defaced at a work event with push pins stuck into it. The worker was also frustrated by various delays in projects at work and the resulting complaints made by others in the workplace, which the employee alleged the manager did not resolve to the employee's satisfaction.

The employee was diagnosed with anxiety and adjustment disorders, and cannabis use disorder. WorkSafeBC referred the employee to a psychology assessment. During the assessment, the employee reported that, although it was irritating to be around the coworker, it was the manager's failure to discipline the coworker which affected the employee the most and that the coworker's behavior was "just a minor part of [the employee's] stress." On the basis of this report and applicable policy, WorkSafeBC initially concluded that the predominant cause of the employee's disorders was the stress related to the manager's responses to the employee's complaints about the coworker, and these amounted to decisions by the employer about the employee's working conditions. This was overturned on review, and the district appealed the review decision to WCAT.

Relevant Legislation and Policy

Section 5.1 provides for an employee's entitlement to compensation for a mental disorder as follows:

> (1)…a worker is entitled to compensation for a mental disorder that does not result from an injury for which the worker is otherwise entitled to compensation, only if the mental disorder
>
> (a) either
>
> (i) is a reaction to one or more traumatic events arising out of and in the course of the worker's employment, or
>
> (ii) is predominantly caused by a significant work-related stressor, including bullying or harassment, or a cumulative series of significant work-related stressors, arising out of or in the course of the worker's employment,
>
> (b) is diagnosed by a psychiatrist or psychologist as a mental or physical condition that is described in the most recent American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders [DSM] at the time of the diagnosis, and
>
> (c) is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or working conditions, to discipline the worker or to terminate the worker's employment.

Analysis and Decision

WCAT had no difficulty concluding that the employee had a DSM-diagnosed mental disorder, and that the employee had experienced identifiable work-related events and/or stressors. The Tribunal also found that the employee's interactions with the coworker met the definition of "significant" work-related stressors according to WorkSafeBC Policy #C3-13.00. To be "significant," the work-related stressor must be excessive in intensity and/or duration from what is experienced in the normal pressures and tensions of employment. Interpersonal conflicts are not generally "significant" stressors unless the behavior is abusive or threatening. In this case, the employee's coworker was aggressive and disrespectful, and the behaviour was not what would normally be experienced in employment.

However, in order for an employee to be entitled to compensation, the significant work-related stressor(s) must:

- have arisen out of and in the course of the employee's employment and must have been the "predominant cause" of the mental disorder; and

- not have been caused by a decision of the employer relating to the employee's employment, such as a decision to change the working conditions.

In this case, WCAT accepted the uncontested medical opinion that the predominant cause of the employee's mental disorders was the manager's lack of actions in prioritizing and scheduling work orders, and response to the employee's concerns about his coworker, not the actions of the coworker.

Further, the manager's actions were decisions about the employee's working conditions, which could not result in compensation under the Act. WCAT found that excluded employment decisions about "working conditions" may include terms of employment (such as rate of pay, benefits, timing of break, and productivity expectations), other circumstances under which work is performed (such as shift work, assignments to work particular individuals or locations, tools and equipment and scheduling), and the environment in which the work is performed (temperature, noise, presence of hazards and interactions with coworkers, managers and third parties).

WCAT also did not agree that there had to be a formal, communicated decision in order to be an employment decision excluded from compensation under the Act. Instead, the manager's "routine decision-making about the worker's working conditions," which did not involve bullying and harassment, abuse, or threatening behaviour, was not a significant work-related stressor and, in any event, the manager's actions in not responding to the employee's complaints about the coworker and the prioritizing and scheduling of work were employment decisions excluded from compensation under the Act. WCAT allowed the appeal and denied the employee's claim.

BCPSEA Reference No. WCB-01-2019; WCAT Decision, April 15, 2019.

Supreme Court of Canada Upholds Privacy Rights at School

***R. v. Jarvis*, 2019 SCC 10**

Issue
Do students have a reasonable expectation of privacy when observed or recorded in the common areas of their school?

Significance
Yes, they do. The decision may have an impact far beyond criminal law, as it confirms a person's "reasonable expectation of privacy" depends on many factors and cannot be determined based on a black-and-white distinction between public and private. The Court's definition of "reasonable expectation of privacy" may affect the scope for civil claims by students or employees for breach of privacy under the *Privacy Act*, grievance arbitrations about surveillance in the workplace, and other proceedings.

Facts
A high school English teacher was criminally charged with voyeurism for using a camera concealed in a pen to surreptitiously record female students' faces and bodies while they were engaged in ordinary school activities in common areas of the school such as hallways, cafeteria, classrooms, and school grounds. The students were not aware that they were being filmed by the teacher and did not consent. A school board policy in effect at the time also prohibited the teacher's conduct.

The teacher was twice acquitted by the lower courts. The trial judge acquitted the teacher because he was not satisfied the recordings were made for a sexual purpose, which is required for the offence of voyeurism. The Court of Appeal upheld the acquittal for a different reason — although the Court was satisfied that the teacher's purpose was sexual, it found that the students did not have a reasonable expectation of privacy in the circumstances since they were in the common areas of the school.

Analysis and Decision
The Supreme Court of Canada did not take such a narrow view of privacy under the *Criminal Code*. The Court allowed the appeal and convicted the teacher of voyeurism. The Court considered that "privacy" is not an "all or nothing" concept such that being in a public or common space negates all expectations of privacy. The Court stated that a person will have a reasonable expectation of privacy in circumstances in which a person would reasonably expect not to be subjected to the type of observation or recording that occurred. The Court outlined that the relevant considerations may include:

- the location the person was in when observed or recorded;
- the nature of the observation or recording (as recordings are more privacy intrusive than observations, due to the risk of modification and disclosure);
- awareness of or consent to the observation or recording;
- the manner in which the observation or recording (was it fleeting or sustained, aided by technology and, if so, what type);
- the subject matter or content of the observation or recording (was it targeting a specific person or group, what activity was the person engaged in and was the focus on an intimate or generally private part of the person's body);
- any rules, regulations or policies governing the observation or recording;
- the relationship between the person being observed or recorded and the person observing or recording (for example, it is reasonable to expect that a person in a relationship of trust or authority will not abuse the position by engaging in non-consensual or unauthorized recording or observation);
- the purpose of the observation or recording; and
- the personal attributes of the person who was observed or recorded (such as age or vulnerability).

Conclusion
In this case, the Court had no doubt that the students' circumstances gave risk to a reasonable expectation that they would not be recorded in the manner they were. They were students in a high school. They were specifically recorded by their teacher for a sexual purpose in breach of the relationship of trust that exists between teachers and students, as well as in contravention of the school board's policy. Most significantly, the focus of the recordings were the students' bodies and particularly their breasts, which the students had a reasonable expectation would not be observed or recorded by their teacher while they were at school.

BCPSEA Reference No. CD-01-2019.

Clarification: *Grievance & Arbitration Update* No. 2018-04

In Grievance and Arbitration Update No. 2018-04, we summarized a decision (*BCPSEA/Certain School District v. BCTF/Certain Teachers' Association*[1]) about the lengthy suspension imposed by Arbitrator Taylor on a teacher accused of crossing personal boundaries with a vulnerable student. That summary did not include additional context which may be helpful for other districts. In particular, one of the risks of any grievance arbitration is that the evidence of witnesses relied on in an investigation may change at the hearing. In this case, a significant factor in the arbitrator's decision was credibility, and the student's and her parents' credibility was negatively affected when their evidence changed from the time of the district's investigation to the hearing.

[1] *BCPSEA Reference No. A-19-2018*