GRIEVANCE & ARBITRATION UPDATE

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
SOLUTIONS AT WORK

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Special Education Designations Arbitration Award

BCPSEA v. BCTF

Issue

In the Memorandum of Agreement Re: LoU No. 17 (the "MoA") restoring class size and composition language, BCPSEA and the BCTF agreed to a process to determine how certain definitions of special education designations apply in the current context of educational service delivery. The process concluded with an arbitration decision by Arbitrator Jackson dated August 28, 2019.

Significance

We have previously provided information about Arbitrator Jackson's decision via *Teacher Collective Agreement Administration E-Update* No. 23 dated August 29, 2019 and No. 24 dated September 11, 2019. The award provides clarity on how to interpret restored class composition language that includes Ministry special education categories.

Of significance for districts with class composition language is that the arbitrator accepted the employer argument that Category G and Category J ought to be restored in a manner consistent with the Ministry designations before 2001, and that an expansion (or contraction) of those categories would be contrary to the arbitral principles of interpretation and the plain meaning of restoration.

BCPSEA Reference No. A-16-2019; Arbitrator Jackson, August 28, 2019

Second "Failure to Fill" Decision Finds No Violation of Collective Agreement

BCPSEA v. BCTF (SD No. 73 (Kamloops/Thompson) Decision)

Issue

Does a district's difficulty in filling TTOC assignments breach the collective agreement which includes different language than the first decision in Chilliwack?

Significance

The district did not violate the collective agreement when it reassigned non-enrolling (LART) teachers to cover teacher absences when TTOCs were unavailable throughout the 2017/18 school year. The decision clarifies that a district's liability for so-called "failures to fill" will depend on the specific collective agreement language and facts in each district.

Facts and Relevant Collective Agreement Language

Like Chilliwack, the Kamloops/Thompson collective agreement prohibited the district from reassigning teachers to cover absent classroom teachers except in emergency situations, and required classroom teachers who were absent for more than a half day to be covered by a TTOC.

However, unlike in Chilliwack, these prohibitions were "subject to availability of Teachers Teaching On Call":

> C. 14 Teachers teaching on call
>
> 1. General
>
> The Board shall maintain a list of approved Teachers Teaching on Call and shall forward a copy of said list to the Association annually. For the purposes of this article, a Teacher Teaching on Call is defined as a certificated teacher, and a substitute is an uncertificated replacement.
>
> 2. Availability
>
> Subject to availability of Teachers Teaching on Call:
>
> a. the Board shall employ Teachers Teaching on Call to replace classroom teachers who are absent due to illness or other authorized reasons for one half day or more;
> b. teachers will not be required to cover for a classroom teacher who is absent except in emergency situations;
> c. Librarians and Learning Assistance Teachers who are absent for two (2) or more days will be replaced by a qualified Teacher Teaching on Call on the third day…

In total, there were approximately 237 occasions on which the district was unable to provide TTOC coverage for absences for one half day or more. Learning Assistance and Resource Teachers (LARTs) were reassigned from their duties to provide coverage for some but not all of these absences.

Unlike in the Chilliwack decision, the union did not allege in this case that the reassignment of LART teachers resulted in a breach of the non-enrolling ratio. The district was approximately six FTE over the required combined teacher ratio for Learning Assistance, Resource and English Language Learner teachers.

Decision

The union argued that the district could only reassign teachers if there were no available teachers that the district could and should have hired to the TTOC list, and that Article C.14(1) obliged the district to hire uncertificated substitutes where certificated teachers are not available to be hired to the TTOC list before reassigning teachers to cover classes of absent teachers.

Arbitrator Glougie agreed with the district that the plain and ordinary meaning of "subject to availability" means subject to a TTOC being available on the day for which coverage is requested. If no TTOC is available to cover an absence on a particular day, the district can reassign a teacher to do so without breaching the collective agreement. Arbitrator Glougie also found that the parties' past expectations were consistent with this interpretation, including that the district had never staffed the TTOC list to provide coverage for every classroom teacher absence, and that teachers had been reassigned to cover classroom teacher absences in the past without grievance.

Arbitrator Glougie also acknowledged that the district had the management right to determine its hiring needs and determine the scope of its TTOC list. The district is not obligated to hire every available individual who might qualify for the TTOC list so that every absence is covered. The district is entitled under its management rights to balance the need to cover the majority of absences and provide enough work (and opportunities for continuing contracts with the district) so that TTOCs on the list can make a reasonable living.

Next Steps
This second example decision in the provincial failure to fill grievance moves the sector one step further to resolving the provincial grievance. The parties are also still waiting for the arbitrator's decision related to the third category of example language in School District No. 70 (Alberni) on whether alleged "failures to fill" in that district violate collective agreement language requiring TTOCs to "normally replace" absent teachers, and on the appropriate remedy for the violations found in the Chilliwack case. Once these decisions are rendered, BCPSEA and the BCTF will work to resolve the outstanding issues in the provincial grievance.

BCPSEA Reference A-18-2019; Arbitrator Glougie, August 26, 2019

Consultation with School-based Teams Does Not Require Face-to-Face Meetings
BCPSEA/SD No. 23 (Central Okanagan) v. BCTF/COTA

Issue
Where a district must "consult" with school-based teams, must that consultation involve "face to face" meetings?

Significance
No. Consultation involves a bilateral interaction in which both parties have an active role in making their views known and considering the other party's views. Each should be informed of the other's views and each should have a meaningful opportunity to give and receive information. But this does not necessarily require face-to-face meetings so long as school-based teams are provided with enough information to provide meaningful input to the decision-maker.

Collective Agreement Language
Under the district's restored collective agreement language, identification of students with "exceptional educational needs" is necessary in order to apply class composition limits. The restored language states that "*no more than three students with exceptional educational needs shall be integrated at the same time into one regular classroom."* Article D.3 states that students with "exceptional educational needs" are those whom the Superintendent or designate identifies *after consultation with the School-Based Team in order to assess accurately the student's educational needs and requirements*.

Paragraphs 10.A and 10.B of the Memorandum of Agreement re LoU No. 17 (the "MoA") contain transitional language applicable to ancillary language relating to school-based and district-based processes. For the most part, school-based team language was required to be implemented by the start of the 2017/18 school year. However, the parties recognized that it may take longer for districts to implement district-based process language and, therefore, school-based process and ancillary language that makes reference to district-based processes did not have to be fully implemented until January 31, 2018.

Facts
In March 2017, the district and the local began a series of meetings to discuss a shared understanding of the restored language. The union's view was that all students with Ministry designations were students with "exceptional educational needs." The district's view was that students were only identified as having "exceptional educational needs" if they were identified by the Superintendent or designate after consultation with the school-based team. Most of the parties' meetings were focused on this disagreement. There was some discussion of the restored school-based team language, but nothing of substance concerning the process for the district's consultation with school-based teams for the purposes of identifying students with exceptional

educational needs. This was not surprising, given the union's view that all Ministry designated students were deemed to be "students with exceptional educational needs."

The district made attempts in the Fall of 2017 to draft a joint communication concerning school-based team processes, including the district's consultation with school-based teams in order to identify students with exceptional educational needs. However, at that time, the union remained of the view that all Ministry designated students were deemed to be students with exceptional educational needs and so no consensus on a joint communication was reached.

The district distributed its own description of the school-based team processes, including identification of students with exceptional educational needs in December 2017.

In January 2018, the district asked the union whether it would agree, on a without prejudice basis, that the district could identify a first group of students with exceptional educational needs without the need to consult with school-based teams. It was not until after the union abandoned its position (and separate grievance) concerning Ministry designations in mid-March 2018 that the union formally rejected the district's offer.

The district immediately provided a list of students it had pre-identified as having exceptional educational needs to school-based teams along with its criteria for determining "exceptional educational needs" and asked school-based teams to indicate whether they agreed or disagreed. School-based teams were also invited to propose other students for identification and were required to provide student file documentation to support their referrals. The Superintendent responded in writing to each referral, reiterating the criteria considered and giving a brief rationale of whether the referral was accepted or denied, as required by the restored collective agreement language. If denied, the letters also listed the type of information that ought to be included in order to support reconsideration.

Analysis

Arbitrator Fleming found that the consultation requirement was school-based language which made reference to a district level process and, therefore, under the MoA the district had until January 31, 2018 to implement the restored language.

The arbitrator found that "consultation" requires a bilateral interaction in which both parties have an active role in making their views known and considering the other party's views. Each party should be informed of the other's views and each should have a meaningful opportunity to give and receive information.

Arbitrator Fleming found that the district's communication to school-based teams in December 2017 did not meet the threshold of consultation because it did not indicate the criteria to be used in the identification process, the type of information necessary to support a referral, or the possibility of a reconsideration.

However, the district's process initiated in April 2018 did include this information and so it provided a meaningful opportunity for the school-based team to provide input and therefore meet the threshold for "consultation."

Arbitrator Fleming also found that, although the district had developed referral forms, it was not necessary for it to do so to meet its obligation to consult. Further, he found that it is to be expected that school-based teams would need to invest significant time in making a referral. With respect to the response letters, Arbitrator Fleming found that while the district could have included a more fulsome rationale, the letters and information the district provided was sufficient to meet the

requirement of consultation and a face-to-face meeting (which the union argued was necessary) to explain the rationale was not required.

The arbitrator issued a declaration as a remedy and refused to award the significant monetary remedy sought by the union due to the district's collaborative approach to implementing the restored language. Specifically, Arbitrator Fleming said:

> *However, the Employer's obligation to consult with SBTs under Article D.3.1.1 was essentially a new requirement. The Employer acted in good faith throughout this process and made substantive efforts to implement the language of Article D. 3.1.1. In that exercise, it adopted a collaborative, co-operative labour relations approach to the implementation. That approach is laudable, particularly given the labour relations impact of the removal of that language from the Collective Agreement by legislation.*
>
> *As well, given the consultation is a Collective Agreement obligation, it is understandable why the Employer sought to work co-operatively with COTA on the implementation of Article D.3 and in particular Article D.3.1.1.*
>
> *The imposition of a consultative process under Article D.3.1.1, while within the Employer's rights, would not likely have assisted in repairing or improving the parties' relationship.*
>
> *I also note the approach adopted by the Employer is consistent with Section 2 (d) of the B.C. Labour Relations Code (the "Code") which encourages co-operative labour relations approaches.*

Conclusion

While the union's grievance was granted in part, the arbitrator clearly found that the district met its duty to consult through a paper-based consultation process, which provided school-based teams with guidance on the criteria it would apply, the type of information they should attach to support their referral, and a description of the additional information that would be required to support a reconsideration of the decision in the event of an initial denial.

BCPSEA Reference A-20-2019; Arbitrator Fleming, September 12, 2019

Approving Partial Day Leave to Attend Graduation Ceremony

SD No. 43 (Coquitlam) v. Canadian Union of Public Employees, Local 561

Issue

Was the employer entitled to approve only a partial day of leave to attend a graduation ceremony leave under the collective agreement?

Significance

The collective agreement permitted the district to approve only a partial day of leave, but the district is estopped from changing its longstanding practice of interpreting the collective agreement more generously until the agreement expires.

Relevant Collective Agreement Language

Article 6.3 D of the collective agreement states:

1. An employee, with benefits, shall be entitled to leave of absence with pay for up to one (1) day per year for the following:
   a) To attend an employee's own graduation or a graduation ceremony of an employee's child at high school or a recognized post-secondary educational institute. This leave shall be provided when the ceremony is held during the employee's regular hours of work. …

Facts
The grievor requested leave to attend her daughter's university graduation ceremony. After she took the leave, the human resources department asked the grievor the time and duration of the ceremony and approved pay for only a partial day, giving the grievor 2.5 hours of unpaid leave for the remainder of the day.

Historically, the district had typically granted a full day of leave if requested by an employee.

When the clause was originally negotiated, the union proposed one day of leave for attending graduation ceremonies. The district counter-proposed "up to" one day of leave and the amended proposal was accepted. The district's bargaining notes indicate that the amendment was made to ensure the leave was used only for necessary activities relating to attending the graduation ceremony.

Analysis and Decision
Arbitrator Somjen found that the district's interpretation of the language was correct; the district may only be required to pay for part of a day to attend a graduation ceremony if that is all that is required to attend the graduation ceremony and related necessary activities.

However, Arbitrator Somjen found that, because of the district's longstanding practice of normally interpreting the clause to provide a full day of leave when requested by the employee, the district was estopped from changing its practice until the union had an opportunity to negotiate changes to the language.

Conclusion
The district must maintain the previous practice of approving full days of leave to attend graduation ceremonies as requested by employees until the expiry of the collective agreement.

BCPSEA Reference A-09-2019; Arbitrator Somjen, May 22, 2019

Grievor Not Entitled to Pay During Accommodation Process
SD No. 45 (West Vancouver) v. WVMEA

Issue
Should an employee receive full wages during period of time the employer and union work through the accommodation process?

Significance
The answer is no. Both the district and union in this case acted promptly to accommodate the grievor and there was no breach of the duty to accommodate — either in the process or the accommodation itself. The grievor was not entitled to any damages including back pay for the time she was not working during the search for an appropriate accommodation.

Facts
The grievor was an Education Assistant (EA) who sustained serious injuries in an automobile accident and was unable to work for over one year. Her physician confirmed that the grievor had significant, indefinite medical restrictions upon her return to work, including no heavy duties, student transfers, running, jumping or stressful activities, and she required mini breaks regularly. The district had been previously able to accommodate the grievor temporarily in a position with students which matched her medical restrictions.

The grievor informed the district in the last week of August that she intended to return to work that school year. Although it was a busy time for organizing schools and classes, the district very quickly met with the union representative and the grievor to attempt to search for work that matched the grievor's restrictions.

For approximately two months, in regular consultation and communication with the union, the district explored clerical work and education assistant roles and analyzed the grievor's restrictions and qualifications against 56 different jobs in the district:

- There were not many EA positions available in the district which readily matched the grievor's medical restrictions, given that the work is often physical and/or stressful. One of the available positions that matched the grievor's restrictions was rejected by the grievor on the basis that the school was a stressful environment; however, no evidence was provided to support the assertion.
- The district explored and eventually concluded after testing that the grievor was not able to perform administrative or clerical work.
- The district raised with the union the option of creating an EA position through LIF funding for the grievor, but the union was opposed since the funding would have to be renewed every year and the union's membership had voted to use LIF funding to increase existing EA hours, not create additional part-time positions.

The grievor was eventually accommodated as an EA casual with guaranteed call-out two days a week and at a part-time EA position at a secondary school two days a week.

Relevant Collective Agreement Provisions

Articles 400 and 401 of the collective agreement require that all vacancies be posted and filled in accordance with posting and hiring procedures, which precluded the district from unilaterally awarding the grievor a position without union agreement.

Article 406.1 of the collective agreement also prohibited "innovations, alterations or changes in work descriptions" without consultation between the union and employer.

Decision

Arbitrator Larson concluded that the district had met its duty to accommodate the grievor, both in the accommodation process and in fact. While the employer must actively seek to accommodate an employee's disability short of undue hardship, the search for accommodation does not fall only on the employer. Collective agreement limitations may need to give way to facilitate a reasonable accommodation and the union shares a joint responsibility with the employer to seek to accommodate a disabled employee. The employee also has a duty to search for and facilitate a reasonable accommodation.

The district needed the union's agreement to waive the posting provisions of the collective agreement in order to move the grievor into a position that met her restrictions, as no other positions were available for which she was qualified. While the arbitrator suggested that the accommodation process could have been improved through implementation of a formal accommodation policy, he found that both the district and the union "acted with considerable dispatch through the process and that the time that it took was not unreasonable." While the grievor suffered financial hardship arising from the two months without gainful work, Arbitrator Larson specifically found that all parties — the employer, union and grievor — bore some responsibility for the time taken to find and implement the accommodation. There was no breach of the duty to accommodate by the employer and, accordingly, no basis for damages or back pay.

BCPSEA Reference A-19-2019; Arbitrator Larson, July 2, 2019

Employer Required to Disclose Certain Retirees' Contact Info to Union

SD No. 43 (Coquitlam) v. Canadian Union of Public Employees, Local 561

Issue

Was the district's refusal to provide the names, addresses and telephone numbers of former employees and their surviving spouses a violation of the *Labour Relations Code* (the "Code") (section 6(1))?

Significance

It was a violation of section 6(1) of the Code for the district to refuse to provide to the union the contact information of retirees who had opted into the post-retirement benefits agreement, since the information was required for the union to represent those individuals under the collective agreement, could be easily supplied, and was not inconsistent with privacy laws. In contrast, it was not a violation of the Code to refuse to provide to the union the contact information for all retirees or for surviving spouses.

Facts

Since 1955, the district administered its own pension plan for non-teaching employees, including bargaining unit employees represented by the union, called the Non-Teaching Pension Plan (NTPP). The district and union entered into an agreement to transition the district's active non-teaching employees from the NTPP to the Municipal Pension Plan. In consideration of that agreement, the district and union also agreed to provide enhanced post-retirement benefits for NTPP members who opted in. The parties expressly agreed that the post-retirement benefits agreement forms part of the collective agreement.

The union requested that the district provide it with contact information for retirees and surviving spouses in order to "fulfill its representational role" related to the NTPP and post-retirement benefits agreement. The distirct refused to provide the contact information on the basis that the retirees and surviving spouses were not employees represented by the union. The union argued that the district's refusal to provide the contact information interfered with the administration of the union.

Relevant Collective Agreement Provision

Section 6(1) of the Code states that:

> Except as otherwise providing in section 8 [communications], an employer or person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

Decision

Vice-Chair Chesman reiterated that an employer's refusal to provide employee contact information to a union may interfere with the administration of a union in contravention of section 6(1) of the Code. The test for whether an employer's refusal to provide contact information violates the Code is:

1. Does the employer have a sound business reason for its refusal to provide the information?
2. Can the information be easily supplied?
3. Does the union need the information in order to fulfill its statutory obligations to represent the employees in the bargaining unit?

While the retirees are not "employees" under the Code, Vice-Chair Chesman acknowledged that retirees are not strangers to union representation and related rights under the collective agreement. Union representation may follow bargaining unit employees into their retirement because of

collective agreement rights to post-retirement benefits, such as pensions. In this case the district and union agreed that the post-retirement benefits agreement formed part of their collective agreement, and the union therefore had both a contractual right under the collective agreement and a statutory right under the Code to represent retirees who opted into the post-retirement benefits agreement. Surviving spouses, however, have not accepted union representation and had no right to union representation under the Code.

Applying the test under section 6(1), Vice-Chair Chesman noted that the post-retirement benefits agreement was agreed by the parties to form part of the collective agreement. The NTPP did not form part of the collective agreement. Accordingly, the union's right to contact information in order to enforce the terms of the collective agreement was limited to those retirees who had opted into the post-retirement benefits agreement, not all retirees who may have rights under the pension plan. There was no evidence that the retirees' contact information could not be easily supplied to the union. Further, privacy was not accepted as a sound business reason for refusing to provide the information. The *Freedom of Information and Protection of Privacy Act* (FIPPA) allows disclosure of personal information in accordance with another enactment of British Columbia. Because the Code is such an "enactment," disclosure of the contact information required under section 6(1) is permitted under FIPPA.

Accordingly, it was a violation of section 6(1) of the Code for the district to refuse to provide to the union the contact information of retirees who had opted into the post-retirement benefits agreement. It was not a violation of the Code for the district to refuse to provide the contact information for all retirees, or for surviving spouses.

BCPSEA Reference LB-04-2019; Arbitrator Chesman, May 1, 2019

Grievor Loses Right to Payment due to Breach of Settlement Agreement

Acadia University and AUFA (Mehta)

Issue

Can a grievor lose the right to a settlement payment if they breach the settlement agreement?

Significance

Yes. An arbitrator ordered that the remedy for a grievor's breach of the confidentiality provisions in a settlement agreement was that the grievor forfeited his right to the payment owed under the same agreement. The decision confirms the importance of crafting settlement agreements carefully, particularly in cases where it is in the district's interests to limit public disclosure of the fact and terms of a settlement, and reiterates that such terms can be enforced by an employer.

Facts

The grievor was a tenured professor terminated by the employer for just cause. His union grieved the termination. A settlement agreement was reached at a mediation involving the arbitrator as mediator, union counsel, employer counsel and the grievor's personal lawyer. The settlement agreement was voluntarily signed by the grievor and provided the following terms:

- The grievances were resolved without any admission of liability by any of the parties
- The parties agreed to keep the settlement strictly confidential except as required by law or to receive legal or financial advice
- The parties agreed that, if asked, they would limit discussion of the settlement to stating that the matters in dispute were resolved
- It was an "absolute condition" of the settlement that no term of the settlement would be publicly disclosed
- The employer would provide a monetary payment to the grievor

Almost immediately, the grievor tweeted out information about the settlement, including the following:

- "Vindicated professor! Advocate for free speech and institutional transparency in universities."
    - When one of the grievor's Twitter followers tweeted "congrats Rick! Hope you got a nice sum of monz", the grievor responded on Twitter: "All I will say is that I left with a big grin on my face."
- "Because I got the vindication I was seeking. In other words, I have left the university on my term, as opposed to the administration's or union's terms. The NDA that I was required to sign by law is not for my protection."

The grievor was advised by his union and later ordered by the arbitrator to delete the tweets, but refused to do so. Instead, he posted further tweets referring to his "severance pay".

Decision

The arbitrator found that the grievor had clearly breached the settlement. The arbitrator concluded that it was appropriate to order that the grievor was no longer entitled to the settlement payment under the agreement as a consequence of his repeated breaches of its confidentiality provisions. The arbitrator noted that the settlement terms were carefully drafted and understood by the grievor to restrict as much as possible what the parties could say publicly about the settlement. His academic freedom remained otherwise "virtually unfettered", as he could freely speak and write about all other aspects of his experience with his employer. The arbitrator concluded (at para. 12):

> *Settlements in labour law are sacrosanct and given the repeated and continuing breaches, together with the absence of any mitigating circumstance or explanation, I find that the University is no longer required to honour the payment provision.*

Conclusion

There are consequences to breaching a settlement agreement, even by a grievor.

BCPSEA Reference A-17-2019; Member Kaplan, May 24, 2019