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BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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BC Court of Appeal Remits Dispute Back to Arbitrator

In February 2010, Arbitrator Dorsey issued an award finding that a consultation between a principal and a teacher, during which the provision of resources is discussed, does not create an enforceable agreement between the teacher and the board of education that those additional resources will continue to be provided throughout the school year. He based his decision, in part, on the legislative requirement that the opinions of the principal and superintendent that a class organization is appropriate for student learning must be formed on the basis of facts and assumptions made as at September 30, not facts arising at a later time. The BC Court of Appeal (BCCA) in a decision released today, disagreed and has remitted the matter back to Arbitrator Dorsey.

Background Facts

- The grievor was a grade 5 teacher who, on September 30, 2008, had 29 students and four students with a ministry designated IEP.
- Under section 76 of the *School Act*, consultation was held with the teacher, and the principal/superintendent were of the opinion that the class was appropriate for student learning.
- During the consultation process, the grievor was informed that a support staff education assistant (Integration Support/Behaviour Assistant) was assigned to assist with her class and one other grade 5 class.
- District policy on replacement of education assistants when absent was to replace on the fourth day of absence.
- The education assistant was absent for five consecutive days in April, and due to a replacement not being available, the absence was not replaced on the fifth day.

BC Court of Appeal Decision

On appeal, the union argued that the arbitrator erred in finding that changed classroom conditions impacting the learning environment of a class during the school year cannot give rise to an arbitrable grievance. Further, the union sought a ruling that “agreements” made between an individual teacher and a board of education can be taken to arbitration. The court declined to address this latter issue and noted that neither party appealed the arbitrator’s finding of fact that there was insufficient evidence of an agreement between the board of education and the teacher regarding the provision of an Education Assistant (EA).

The appeal proceeded on the first question — whether the class size provisions of the *School Act* require an ongoing duty, past September 30, to ensure the class is appropriate for student learning.

The BCCA found that the requirement in section 27.1(2.3) of the *School Act* that the principal and superintendent be of the opinion that the class organization is appropriate for student learning is an ongoing one.

Commenting on Arbitrator Dorsey's reasoning at para. 26, Mr. Justice Groberman writes:

> The arbitrator appears to have concluded that because the consultation and reporting requirements had to be completed by late September or early October in each year, the requirement that the principal and superintendent be of the opinion that the class organization be appropriate for student learning was also to be completed in that time-frame. In the result, he found that compliance with s. 76.1(2.3) was to be determined at the end of September of the school year. He considered that subsequent events that might affect the appropriateness of the class for student learning were irrelevant to the question of whether the requirements of s. 76.1(2.3) were met.

In reaching a different conclusion, he then writes, at para. 30:

> While the consultation and reporting requirements in the class size provisions of the *School Act* are fulfilled by particular events that occur in September and October of each school year, I read the requirement that the principal and superintendent be of the opinion that the class organization is appropriate for student learning as an ongoing one. The ongoing nature of the obligation is underlined by s. 76.1(2.4), which provides that s. 76.1(2.3) applies *after* the date on which the superintendents' report is signed. *[emphasis in the original.]*

Finally, at paragraph 32, Mr. Justice Groberman concludes:

> As I interpret s. 76.1(2.3), the principal and superintendent were required, when the situation came to their attention, to consider whether the organization of Ms. Battand's class continued to be appropriate for student learning. If they were of the opinion that it did not continue to be so, the school board had a responsibility to make whatever changes were necessary to bring the class back into compliance with s. 76.1(2.3) — either by making accommodations to ensure that the organization of the class became appropriate, or by transferring a student with an IEP to another class.

In the result, the Court found that Arbitrator Dorsey had not determined whether Ms. Battand's class was organized in the opinions of the principal and superintendent in an appropriate manner when she raised the issue of prolonged absence of the EA. This matter was remitted back to Arbitrator Dorsey to consider.

We are reviewing the BCCA decision and will communicate further in the coming days. The decision can be accessed under "What's New" on our public website here.

Questions

If you have any questions on this matter, please contact your BCPSEA labour relations liaison.