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Human Resources Newsletter

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Supreme Court rules termination due to violation of drug policy is not discrimination on the ground of drug-dependency

In *Stewart v. Elk Valley Coal Corp.* (2017 SCC 30), the Supreme Court of Canada (SCC) delivered a ruling regarding the capacity of employers to terminate drug-dependent employees due to violation of employment policies.

The employee had worked as a driver of a loader in a mine.

Due to the inherent danger associated with mine operations, maintenance of a safe worksite was of great importance, requiring strict policies. Consequently, the employer implemented a "no free accident" rule under its Alcohol, Illegal Drugs and Medication Policy. This required employees to disclose any dependence or addiction issues before drug-related incidents occurred in the workplace. If they did so, employees would be offered treatment. However, where an employee failed to disclose, and tested positive for a substance following an accident, they would be terminated. The employee attended a training session that explained and reviewed the Policy, where he subsequently signed a form acknowledging receipt and understanding.

However, the employee used cocaine on his days off, and failed to disclose such information. He was then subsequently involved in an accident operating his loader at the end of a 12-hour shift. Although no one was harmed, the employee tested positive for cocaine. In a subsequent meeting, he indicated to his employer that he thought he was addicted to cocaine, but was terminated nine days later in accordance with the "no free accident" rule. He was, however, provided with the opportunity to apply for a subsequent position after six months, upon the completion of a rehabilitation program.

The Alberta Human Rights Commission (the Tribunal) held that the employee was not terminated due to his addiction, but rather due to breach of the Policy. On appeal, the Alberta Court of Appeal upheld the decision. Leave was granted to the SCC, where the main issue was whether the employee had been terminated due to his addiction, which would raise a *prima facie* case of discrimination. The employee advanced two lines of argument. First, while the breach of policy was the dominant cause of termination, he contended his addiction was nevertheless a "factor" sufficient to establish a *prima facie* case. Second, addiction was a factor in his termination since denial — an aspect of addiction — had prevented him from providing prior disclosure.

The SCC applied a reasonableness standard, finding that the decision of the Tribunal had been reasonable in the circumstances. It was determined that the Tribunal had applied the correct two-part test for identifying discrimination.

First, a *prima facie* case of discrimination is found where a disability is protected under human rights legislation, there was adverse treatment with respect to employment, and disability was a factor in the adverse treatment.

Second, where a *prima facie* case is found, it must be determined if the employer provided accommodation to the point of undue hardship. Points of contention were whether the employee's disability was a factor in his termination and whether the employer had provided accommodation to the point of undue hardship.

The SCC majority ruled that there was sufficient evidence before the Tribunal to find that the termination of employment was due to breach of policy rather than addiction. Regardless of whether the employee was an addict or a casual user, he would have been terminated by failing to disclose his use

before the accident occurred. The employee possessed the capacity to comply with the terms of the Policy and, it was thus reasonable for the Tribunal to conclude that there was no *prima facie* discrimination.

Any prior denial of the employee's addiction was irrelevant to the analysis since he had the capacity to disclose, and it could not be assumed that he had a diminished capacity to comply with the terms of the Policy. While a *prima facie* case would have been found if it was demonstrated that the employer terminated the employee due to his addiction, there was no evidence to this effect. In the absence of a *prima facie* case, the SCC found it unnecessary to consider whether there had been reasonable accommodation by the employer.

The concurring judges agreed with the final ruling, but opposed the lack of finding of a *prima facie* case. They suggested that the Tribunal unreasonably focused on the employee's capacity to control his choices, and failed to consider the connection between drug dependency and the decision to terminate. However, they found the employer provided reasonable accommodation to the point of undue hardship since adherence to the "no free accident" rule was essential for deterrence. The dissenting judge argued that that there was a *prima facie* case and no accommodation to the point of undue hardship. It was stated that a policy that automatically terminates drug-dependent employees *prima facie* discriminates against individuals burdened by drug dependence and its associated stigmas. Furthermore, it was asserted that there was no reasonable accommodation since there was a lack of individualized analysis of the employee's needs and any accommodation was post-incident.

The case represents a significant step in allowing employers to rationalize termination of drug-dependent employees based on policy rather than the dependency itself. Moving forward, this may have a significant impact on employment policy design. ■

Teacher's refusal to work with student with behavioural issues partially supported by adjudicator

The decision in *Toronto Catholic District School Board* (2017 OOHSAD No. 10) (OLRB Case No.: 3442-14-HS) involved an appeal under section 61 of the *Occupational Health and Safety Act* (*OHSA*).

The applicant, a kindergarten teacher at the respondent's elementary school, appealed a decision of an inspector of the Ministry of Health and Safety to deny two of her 'refusal to work' claims under the *OHSA*. The basis of the teacher's 'refusal to work' claim and the inspector's decision to deny the claim were at issue in this case.

The applicant worked at the Toronto Catholic District School Board (TCDSB) for more than 11 years, teaching both junior and senior kindergarten students. In July of 2014, the applicant was informed that a student with a history of behavioural issues would be placed into her class for the upcoming school year. Immediately after discovering this, the

applicant approached the school principal expressing a number of concerns regarding the placement of the troubled student in her class. The principal advised the applicant that the student would be provided with additional support in the form of a full-time educational assistant (EA) and, like all other kindergarten classes, an early childhood educator would be present in the classroom at all times. The conversation that the applicant had with the principal allayed some of her concerns regarding the placement of the student in her class.

Despite the additional support, the student displayed a number of behavioural issues early in the school year, including several violent outbursts in which other students and support staff were struck by the student. In one such outburst, the student kicked and punched the applicant in the face, resulting in the applicant suffering a scratch to her eye that required medical attention.

As a result of the frequent violent outbursts, the applicant and the principal developed a safety plan in the event of future outbursts. As part of the safety plan, the applicant was to evacuate all of the students from the classroom if the student became violent, leaving the EA with the responsibility of monitoring the troubled student. This plan was intended to ensure the safety of the applicant and her students.

Subsequent to the development of the safety plan, the student had a violent outburst that led to the applicant's first work refusal. In the course of the outburst, a number of students and support staff were struck. As per the safety plan, the applicant removed all of the students from the classroom, leaving only the EA in the classroom with the student.

After evacuating the classroom, the applicant looked through the classroom door, and saw the student striking the EA. The applicant testified that the student became increasingly frustrated and attempted to force the classroom door open. As a result, the applicant informed the principal that she did not feel safe returning to the classroom and that she was exercising her right to refuse work under section 43 of the *OHSA*, which allows employees to refuse work whenever they believe that their continuing to work will endanger their safety.

The principal immediately convened a meeting with the applicant and other school officials. It was agreed that the student would be removed from the classroom and placed in the principal's office, and that the applicant would return to the classroom to continue her teaching duties.

The next day, after discovering that the student had been placed back into her class, the applicant called the principal to inquire about why the student had been placed into her class after they had agreed that the student would be removed from the class. The principal informed her that the student was only to be removed from her class for the remainder of the previous day and that it was never part of the agreement that the student would be permanently removed from the class. The applicant informed the principal that she still did not feel safe around the student and that, for a second time in two days, she would be exercising her right to refuse work under the *OHSA*.

An inspector from the Ministry of Health and Safety was called to assess the applicant's work refusal claims. The inspector determined that there was no reason for either of the applicant's work refusals under the *OHSA*. The applicant sought judicial review of the inspector's decision to reject her work refusal claims.

The applicant requested that the Board overturn the inspector's decision to reject her two work refusal claims. Specifically, the applicant argued that section 43 of the *OHSA* allowed her to refuse work as the student's presence in the classroom posed a clear safety risk to her and the other students.

The TCDSB, alternatively, argued that the applicant was not justified in refusing work under either circumstance. With respect to the applicant's first work refusal, the TCDSB argued that Regulation 857 under the *OHSA* — which provides that teachers are not to refuse work in circumstances where the life, health or safety of a pupil is in imminent danger — prevented the applicant from refusing to work, as there was a real possibility that the troubled student could have harmed himself in his agitated state. As for the second work refusal, the TCDSB argued that the applicant was not in any imminent danger, and that the mere chance that the student could harm the applicant was not sufficient to warrant a work refusal.

The adjudicator determined that the resolution of the first work refusal required an interpretation of Regulation 857 under the *OHSA*. The adjudicator relied on the *Hamilton-Wentworth Detention Centre*, [2012] OLRB Rep. November/December 1071 decision, a previous decision in which section 43 of the *OHSA* was at issue. In that decision, the Board held that because of the duty of care placed on teachers to keep students under their care safe, the right to refuse unsafe work is limited. On an examination of the evidence presented in this case, the adjudicator held that the health and safety of the troubled student was in imminent risk during the applicant's first work refusal. Accordingly, the Board dismissed the application with respect to the first work refusal and upheld the inspector's decision.

The adjudicator then moved to the applicant's second work refusal, and made a determination as to whether the applicant had reason to believe that the troubled student posed a real risk to her safety. The adjudicator disagreed with the TCDSB's interpretation of the *OHSA,* holding that section 43 of the *OHSA* does not require that an employee's safety actually be placed in imminent jeopardy, but rather, it is enough that there is a reasonable anticipation of some future danger. The adjudicator held that the applicant was at risk of future harm due to the student's presence in her classroom. As such, the adjudicator overturned the inspector's decision and held that the applicant's second work refusal was justified.

Aside from declaring that the applicant's right to refuse work had been violated, the adjudicator did not make any other findings with respect to remedies, as it was not clear what remedies the applicant was seeking. The adjudicator did note, however, that the TCDSB needed to establish greater communication with teachers in circumstances similar to those in this case.

This case should serve to warn school boards that teachers have the right to refuse to work under the *OHSA*. However, teachers should also note that their right to refuse to work is not without limitations. ■

Tribunal holds that board did not discriminate when it sought to transfer educational assistant as a means of accommodation

In *Rae v. Near North District School Board* (2017 HRTO 902), the respondent school board sought to transfer the applicant educational assistant (EA) to a new location. Since 1986, the applicant had worked as an EA with Near North District School Board (NNDSB) at a single elementary school. The applicant suffered from an anxiety-related disability and had taken disability leave.

The applicant's doctor recommended that she be moved to a new location as a means of accommodating her disability. NNDSB initially transferred the applicant to a high school, however the applicant indicated that the transition from an elementary school to a high school would only exacerbate her disability-related stress and anxiety. NNDSB therefore offered to transfer her to a different elementary school called Nobel Public School (Nobel).

The Human Rights Tribunal of Ontario (Tribunal) held that NNDSB's decision to transfer the applicant to Nobel was based on the recommendations of the applicant's own doctor. The applicant disputed the transfer, stating that the increased drive would be "inconvenient" and "not a good financial fit" for her because her family did not have a second car. The applicant acknowledged however that Nobel was the nearest elementary school with an available position for an educational assistant.

Shortly after the recommendation to transfer the applicant to a new school, the applicant's doctor provided an updated opinion stating that the applicant's disability prevented her from working at any location. The Tribunal held that upon receiving this opinion from the applicant's doctor, NNDSB's obligation to accommodate the applicant's disability-related needs was suspended until she could be cleared to return to work.

The applicant's allegation that NNDSB failed in its duty to accommodate or that it discriminated against her on the basis of her disability was therefore dismissed.

The applicant also alleged that she experienced reprisal by NNDSB when it denied her entitlement to certain sick days. The Tribunal rejected this argument as well, finding that the evidence suggested that the applicant did in fact receive payment for accrued sick days once she provided the required medical documentation. The evidence also suggested that NNDSB provided all documents required to complete its portion of the applicant's claim for long-term disability benefits.

The applicant provided no evidence suggesting that NNDSB failed in its duty to accommodate or that it engaged in any actions or threats that could be seen as having the intent to retaliate against her for

attempting to enforce her rights under the *Human Rights Code*. The Application was therefore dismissed. ■

Court confirms that duty to accommodate did not require employer to allow excessive employee absenteeism

In *Ontario Public Service Employees Union v. Ontario (Children and Youth Services)* (2016 ONSC 5732), the Divisional Court confirmed that an employer did not breach its duty to accommodate when it chose to dismiss an employee whose disability prevented him from working.

The applicant in this case was a youth services worker who suffered from a chronic degenerative back condition that would flare up unpredictably and prevent him from working. The employer proposed numerous accommodations, all of which the applicant rejected, because his inability to work stemmed from the unpredictable nature of his disability rather than any barriers in the workplace. The employer subsequently terminated the applicant's employment for innocent absenteeism.

The Grievance Settlement Board determined that the applicant's rate of absenteeism was 35%. His condition was highly unpredictable, chronic, and there was no suggestion that it would improve in the future. The Board found that this absenteeism was excessive and the employer's actions were justified, because the applicant was unable to perform the basic obligations associated with his position and would not be able to do so for the foreseeable future.

The applicant then brought an application for judicial review of the Board's decision to the Divisional Court, arguing that the employer should have accommodated him by allowing him to work when he was able and not work when he was unable.

The Court applied *Dunsmuir v. New Brunswick* (2008 SCC 9) to determine that the appropriate standard of review was reasonableness, as this was a question of mixed fact and law.

The Court rejected the applicant's argument that the duty to accommodate includes a duty to allow an employee not to work. The purpose of the duty to accommodate is to help an employee to fulfill his or her job responsibilities. The Court cited *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec* (2008 SCC 43) for the principle that the duty to accommodate does not require an employer to alter the fundamental essence of the employment contract, namely the employee's duty to work in exchange for payment.

The Court dismissed the application for judicial review, upholding the termination because the employee had an excessive record of absenteeism, was incapable of regular attendance in the future, and had been provided with accommodation to the point of undue hardship.

This case confirms that there may be situations when an employee can be dismissed for innocent absenteeism,

provided of course that the employer has satisfied the duty to accommodate to the point of undue hardship. ■

Arbitrator holds that employer failed to protect employees from discriminatory and harassing public comments on company Twitter account

In *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission* (2016 OLAA No. 267), an arbitrator held that a company's Twitter account constituted part of the workplace, and that the duty to provide a safe work environment free from harassment and discrimination therefore included taking all reasonable and practical measures to protect employees from abusive and threatening comments made by members of the public on social media.

In this case, the Toronto Transit Commission (TTC) created a Twitter account called @TTChelps to respond to customer comments and questions. The union alleged that the Twitter account quickly devolved into a platform for members of the public to make offensive comments and threats against TTC employees. The union filed a grievance seeking, among other remedies, a declaration that the TTC breached the collective agreement, the Ontario *Human Rights Code* (the *Code*), and the *Occupational Health and Safety Act* (*OHSA*), and an order that the TTC permanently shut down its @TTChelps Twitter account.

The TTC argued that it would be impossible for employers to prevent all public comments that may amount to discrimination or harassment. While the TTC acknowledged that it was required to take reasonable precautions to prevent this kind of treatment, there were very real limits on an employer's ability to anticipate and control third-party behaviour on social media.

The arbitrator held that while it is certainly difficult for employers to regulate public comments on social media, this difficulty did not relieve the TTC of its duty to provide a safe work environment free from discrimination and harassment. The arbitrator held that the TTC failed to take all reasonable and practical measures to protect employees from discrimination and harassment by members of the public.

The arbitrator cited *Clarendon Foundation v. Ontario Public Service Employees Union, Local 593 (Mitchell Grievance),* (2000 OLAA No. 175) for the principle that because the employer has the greatest control over workplace conditions, it is the employer's duty to intervene when customers harass employees. The arbitrator found that this duty to intervene extends to cases where members of the public harass employees through social media platforms. While the arbitrator recognized that employers cannot control everything that third parties say on social media, employers can control some of it by taking reasonable steps to prevent harassment or discrimination by members of the public. Employers who fail to do so may be liable for breaching the *Code*, the *OHSA*, and any collective agreement or employer policies that apply in the circumstances.

The arbitrator considered the TTC's responses to offensive tweets as an example of its failure to take reasonable steps to prevent third party harassment and discrimination. The TTC sometimes replied to offensive comments by ignoring the inappropriate language used, apologizing for the customer's negative experience, and providing information on how to make a formal complaint. In other instances, the TTC would indicate that it does not condone harassment or threats against its employees, but it would not take any further action to deter similar comments. The arbitrator stated that taking reasonable steps to prevent third party discrimination and harassment requires additional actions, such as asking commenters to delete their offensive tweets and blocking them if they refuse to do so. Reasonable steps may also include contacting Twitter directly for assistance in having offensive tweets removed.

The arbitrator also recognized that it was an inappropriate invasion of privacy for members of the public to post photos or videos of TTC employees on the @TTChelps Twitter account, particularly when paired with offensive or threatening comments. The arbitrator recommended that employers adopt the same approach as that described above in relation to offensive comments by asking commenters to delete the photos or videos and blocking commenters or seeking Twitter's assistance if they refuse.

In relation to the union's concern that the TTC's responses to abusive tweets were inadequate, the arbitrator recommended that the TTC implement guidelines and template responses that are agreeable to both the employer and the union.

The arbitrator found that there were also many advantages to employers operating public social media accounts, such as allowing organizations to engage in a dialogue directly with their customers. The arbitrator therefore refused to grant an order that the TTC shut down its Twitter account. The issue of remedies was deferred to a later date, with the arbitrator encouraging the parties to negotiate an agreement in light of this award and to provide additional submissions and evidence.

As employers expand their online presence through the use of social media, they will need to be mindful of the duty to provide a safe work environment that is free from discrimination and harassment. This case demonstrates that the duty extends to taking reasonable and practical measures to protect employees from online discrimination and harassment by members of the public. This may include taking steps to remove offensive comments and employee photos or videos posted on social media by third parties. The case also demonstrates that employers should consider adopting policies or guidelines on the use of social media and how the employer will respond to abusive or threatening third party behaviour online. ■

Court upholds dismissal for refusal to undertake IME

In *Bottiglia v Ottawa Catholic School Board* (2017 ONSC 2517), the court upheld the decision of the Human Rights Tribunal of

Ontario (HRTO) to dismiss an application claiming discrimination. The Ottawa Catholic School Board (OCSB) had required an employee to participate in an independent medical examination (IME) following a medical absence. It was ruled as reasonable for an employer to require an employee to undergo an IME as part of the accommodation process.

The applicant employee was a superintendent for the OCSB who went on sick leave following a diagnosis of unipolar depressive disorder with anxiety features. A psychiatrist advised the OCSB that the employee required medical leave until further notice due to a prolonged recovery period. The OCSB concluded that an IME was required as circumstances surrounding both the leave of absence, and the adequacy of the prior medical opinion, were questionable. The employee argued that the OCSB had no authority to request a second opinion, and he refused to attend the IME. He resigned and later filed an application to the HRTO alleging discrimination on the ground of disability and raising the issues of failure to accommodate and reprisal on the part of his employer. The application was dismissed by the HRTO.

The employee argued that the HRTO's decision to dismiss his application was unreasonable. First, it was alleged that the HRTO had misapprehended the evidence by declining to consider events that occurred after the employee's application had been filed. Second, he argued that he should not have been required to participate in the IME. Third, he also argued that he should not have been considered to have discontinued the accommodation process by refusing to participate, alleging that the OCSB attempted to influence the examiner.

The standard of review applied by the Superior Court was reasonableness. The HRTO decision against the employee's claim was deemed reasonable, and the application for judicial review was dismissed.

First, the court ruled that the HRTO had not misapprehended the evidence by declining to consider post-application events. Much of the application concerned an alleged lack of accommodation before the application was filed, meaning that it would be procedurally unfair to rely on post-application evidence. Additionally, there was a lack of evidence to suggest that, if the post-application evidence was considered, the HRTO would have ruled differently. Thus, the HRTO's decision was both reasonable and necessary to ensure procedural fairness.

Second, the court upheld the HRTO's decision finding that the OCSB was justified in requesting an IME, given the legitimate concerns around adequacy and reliability of the assessment by the employee's physician. The court disagreed with the submission that, in the absence of contractual authority, an employer may only request an IME when expressly authorized by statute. The OCSB was considered to have had a reasonable and bona fide reason to question the adequacy and reliability of the medical information provided by the employee. In circumstances such as these, an employer will be considered justified in requesting that an employee attend an IME as part of the employer's duty to accommodate.

Third, the court found that the HRTO's finding that the employee was responsible for ending the accommodation process was within the range of acceptable, defensible outcomes. It was noted that, where an employer has provided information to an examiner which might reasonably be expected to impair the examiner's objectivity, an employee is justified in refusing to attend. The court disagreed with the HRTO's finding that the OCSB's expressed concerns to the examiner — claiming that the employee was influenced by money rather than health — were neither improper nor beyond reasonable expression. However, the HRTO's finding fell within the range of acceptable, defensible outcomes and thus was not overturned.

The court's decision to dismiss the appeal confirms that employers can require an employee to participate in an IME, in select circumstances where there is a bona fide reason to question the reliability of the medical information provided to justify a leave of absence. However, an employee may still be found to be justified in refusing to attend where the information provided by the employer to an examiner may reasonably be expected to impair its objectivity. ■

Court upholds dismissal of employee who secretly recorded meetings with senior management

In *Hart v. Parrish & Heimbecker, Limited* (2017 MBQB 68), the Manitoba Court of Queen's Bench upheld the defendant employer's decision to dismiss the plaintiff, a merchandising manager with 15 years of service.

The defendant employer received numerous complaints about the plaintiff's inappropriate and unprofessional behaviour, including hostile and threatening outbursts towards other employees. The defendant responded by requiring the plaintiff to complete a career counselling course, but when complaints about the plaintiff's behaviour continued, the employer determined that it had just cause for dismissal. The plaintiff rejected the defendant's severance package, which was offered to terminate the employment, and brought a claim for wrongful dismissal and damages.

One unique feature of this case was that the plaintiff used his cell phone to surreptitiously record multiple meetings with senior management leading up to his dismissal. The plaintiff sought to have these recordings entered into evidence, and the defendant employer agreed that they could be used as evidence subject to submissions regarding weight and relevance.

While the plaintiff hoped that the recordings would support his position, the Court found that the plaintiff's actions only provided further reason for the defendant to dismiss him for cause. The court found that the plaintiff's decision to secretly record meetings with senior management was inappropriate and amounted to a breach of his confidentiality and privacy obligations to his employer.

The defendant argued that, had it known the plaintiff was recording their meetings, it would have dismissed the plaintiff for that

fact alone, as this was a breach of the company's confidentiality and privacy policies. The plaintiff himself admitted that he knew a breach of his confidentiality obligations could result in termination.

The court confirmed that conduct discovered after termination may be used as a basis for termination. While the court found that the plaintiff's actions were a breach of his privacy obligations, the court did not go so far as to state that this in itself was sufficient for dismissal with cause. Instead, the court stated that the plaintiff's act of secretly recording meetings with senior management was "a factor in determining whether the defendant had just cause for dismissal". Considering the evidence of surreptitious video recording along with the numerous complaints about the plaintiff's behaviour, the court concluded that the defendant had just cause for dismissal.

It is important to note that this case does not definitively state that employees are prohibited from secretly recording meetings or that these recordings can never be used as evidence to support the employee's case. The court did however view the plaintiff's actions in a negative light. The recordings served only to provide further support for the defendant's position that it had just cause for dismissal. While employees may be able to secretly record meetings in which they participate, this case demonstrates that doing so may be a breach of an employer's confidentiality or privacy policies. The court made it clear that rather than supporting the employee's claim, such conduct may contribute to a finding of just cause for dismissal. ■

Court holds that denial of board employee's long-term disability benefits within exclusive jurisdiction of arbitrator

In *Morriseau v. Sun Life Assurance Company of Canada* (2017 ONSC 686), a unionized school board employee brought an action in the Ontario Superior Court of Justice against the defendant insurer for denying her entitlement to long-term disability benefits. The insurer moved to have the action dismissed, arguing that the entitlement to long-term disability benefits was governed under the collective agreement, and that arbitration was the proper forum for adjudication of this matter.

The Court held that the language of the collective agreement supported a finding that the school board was required to pay benefits under that agreement, even though the Benefits Booklet detailing that obligation was not explicitly incorporated into the collective agreement. Decision-making power was delegated from the board to the insurer; however, the Court found that the insurer was merely acting as an agent of the board. The intention was for the plan laid out in the Benefits Booklet to form part of the collective agreement.

The Court relied on the case of *London Life Insurance Co. v. Dubreuil Brothers Employees Assn.* (2000 49 OR (3d)), which set out the following four categories for determining jurisdiction in a case where there had been a denial of long-term disability benefits to a unionized employee:

1. where the collective agreement does not set out the benefit sought to be enforced, the claim is inarbitrable;

2. where the collective agreement stipulates that the employer is obliged to provide certain medical or sick-pay benefits, but does not incorporate the plan into the agreement or make specific reference to it, the claim is arbitrable;

3. where the collective agreement only obliges the employer to pay the premiums associated with an insurance plan, the claim is inarbitrable.

4. where the insurance policy is incorporated into the collective agreement, the claim is arbitrable.

In this case, the collective agreement obliged the board to pay premiums, while the Benefits Booklet, a document not expressly incorporated into the collective agreement, detailed the board's obligations related to long-term disability benefits. The court held that this situation best fit scenario 2 above, because the board was obliged to pay benefits under a plan that, while not expressly incorporated into the collective agreement, was nevertheless intended to form part of the collective agreement. For this reason, the court concluded that essential character of the dispute arose from the interpretation, application, or administration of the collective agreement. This dispute on the employee's entitlement to long-term disability benefits was therefore within the exclusive jurisdiction of the arbitrator. The Court granted the insurer's motion to have the action dismissed. ■

Board confirms religious exemption from union dues

In *La Roy (Re)* [2017] A.L.R.B.D. No. 42, the Board held that as a result of recent amendments to the *Public Education Collective Bargaining Act* (*PECBA*), employees may be exempted from association fee payments on the basis of sincerely held religious convictions.

The applicant, a member of the Alberta Teachers' Association (the Association), sought an order exempting her from paying the association portion of her union fees due to religious beliefs that engendered objections to such payments. A previous application, filed by the applicant under section 29(2) of the *Labour Relations Code,* was dismissed by the Board because the *Code* did not give the Board jurisdiction to provide relief regarding association fee payments. Since the applicant's previous application, however, the Alberta government ratified section 6 of the *PECBA.* This section provides that the Board may exempt unionized employees from paying association fees on the basis of sincerely held religious beliefs. The applicant sought an order under section 6 of *PECBA* exempting her from association fee payments.

The Board noted that it was clear that the Alberta government introduced section 6 of the *PECBA* as a response to the applicant's previous application under section 29 (2) of the *Code.* According to the Board, section 6 of the *PECBA* makes clear that, if an employee holds a sincere religious belief regarding the payment of association fees,

the Board may exempt them from making such payments.

Based upon the evidence presented by the applicant, the Board found that the applicant held a sincere religious belief that engendered objections to making association fee payments. Accordingly, the Board exempted the applicant from paying the association portion of her dues.

The Board then had to determine what portion of the applicant's dues was being directed specifically towards association fees. It was determined, based on the Associations' annual budget, that approximately 25% of the applicant's dues were being directed towards association fees. As such, the Board held that the Association was to deduct 25% of any dues or other levies payable to the Association and direct those monies to the Family Centre Society of Alberta, a charitable organization agreed upon by the parties. The applicant would continue to be responsible for the remaining 75% of her dues. Significantly, the Board recommended that, rather than making a detailed calculation every time an employee requests an exemption regarding the payment of association fees, the 25% presumption established in this case should be incorporated into a Board Information Bulletin and be used as a baseline regarding cases of a similar nature in the future.

This case should provide comfort to those employees seeking exemptions regarding association fee payments due to sincerely held religious convictions. Additionally, this case serves to provide guidance to future arbitrators with respect to exemption amounts under such circumstances. ■

Court confirms available process must be followed prior to court application

In *Ross v. New Brunswick (Minister of Education)* (2017 NBQB 29), the Court held that where there are adequate statutory remedies available, they should be exhausted prior to pursuing judicial review.

The applicant, a former school teacher at Sussex Middle School in New Brunswick, was terminated after two complaints were filed against him under the Policy for the Protection of Pupils, a policy initiative intended to protect students from non-professional conduct committed by adults. After reaching a grievance settlement, the respondent, the Minister of Education of New Brunswick, informed the applicant that his Teacher's Certificate was being revoked, and that if the applicant wished to appeal the decision, he could do so by written notice to the Appeal Board on Teacher's Certifications, a statutorily created body under the *Education Act of New Brunswick*.

Despite the fact that the respondent informed the applicant of the available statutory remedy, the applicant applied for judicial review, requesting that the Court overturn the decision to revoke his Teacher's Certificate. However, prior to turning to the respondent's decision to revoke the Teacher's Certificate, the Court first examined a preliminary issue raised by the defendant that was ultimately determinative of the case at hand — whether judicial review was premature on the basis that the applicant had not fully exhausted the statutory remedies available to him.

The respondent sought to have the application dismissed on the basis that the applicant had failed to exhaust the statutory remedies available to him. Specifically, the respondent argued that the Appeals Board on Teacher's Certifications would have adequately addressed the applicant's grievance and that it would have been more expeditious and cost effective than judicial review.

In requesting the Court to dismiss the application, the respondent relied upon the recent decisions of

- *Christie v. New Brunswick (Attorney General),* [2016] NBJ No. 90 *(Christie);* and
- *Trudell v. Service New Brunswick,* [2016] NBQB 208.

In both decisions, the courts dismissed the requests for judicial review due to, amongst other things, the availability of adequate alternative remedies. Significantly, in the *Christie* decision, the court specifically noted that "… one of the discretionary grounds for refusing judicial review is the availability of an adequate alternative remedy".

The applicant accepted that statutory remedies are to be exhausted prior to invoking judicial review; however, the applicant asserted that in 'rare circumstances', immediate judicial review had been permitted at the exclusion of alternative proceedings. It was the position of the applicant that immediate judicial review was justified because the respondent had breached statutory preconditions by failing to provide documents relied upon in the decision to revoke the Teacher's Certificate, and because the respondent had unduly delayed in revoking the Certificate.

The court rejected the applicant's claim that there were 'rare circumstances' that justified immediate judicial review. Specifically, the court held that the respondent was not in breach of any statutory pre-conditions, and that even if the Respondent was in breach, the matter could have been addressed by the Appeals Board. Furthermore, in reviewing the claim regarding undue delay, the court held there was no evidence to suggest that the delay was unacceptable. The respondent was prohibited from revoking the Teacher's Certificate during the grievance period — which lasted more than four years — and informed the applicant that he would be revoking the Certificate immediately after the time that that grievance was settled. Accordingly, the court dismissed the applicant's claim with respect to undue delay.

Ultimately, the court dismissed the applicant's claim in its entirety, holding that that there were alternative statutory remedies that the applicant should have exhausted before pursuing judicial review. This case serves as a warning to those seeking judicial review prior to exhausting other available remedies. ■

— KC —

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