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What's New in Statute and Case Law

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Introduction & Overview

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Bargaining & Legislated Bills

The Crown v. OSSTF & ETFO, 2024 CanLII 8967 (ON LA) – Arbitrator Kaplan

- Interest arbitration held in January 2024 due to the declaration by the Ontario Superior Court that Bill 124 was unconstitutional was of no force and effect.
- The appropriate compensation amount for OSSTF and ETFO members over the three relevant years (Sept 1, 2019 – Aug 31, 2022) was the issue to be resolved after the court decision.
- The parties settled the compensation increases for the first two years; year 3 was to be decided by way of interest arbitration with set parameters: anywhere between 1.5% and 3.25% (in addition to the 1% previously prescribed under Bill 124).

Bargaining & Legislated Bills

- OSSTF & ETFO sought the full increase of 3.25% due to current recruitment & retention difficulties with teachers (supported by the Ontario College of Teachers); inflation; strong economic conditions and the impact of Bill 124 on bargaining.

- The Crown argued that this was not a collective agreement wage re-opener; only an additional 1.5% wage increase should be awarded for year 3 as no more would have freely been negotiated but for Bill 124; Ontario teachers are already the best paid in Canada; inflation is noted in hindsight; and it blamed high absenteeism as the bulk of staffing challenges.

- Arbitrator Kaplan strongly rejected the Crown's "point-in-time" analysis regarding inflation and downplayed how much historical bargaining patterns govern. Kaplan relied on high inflation and an "established" recruitment and retention problem and found that an additional 2.75% increase for a total of 3.75% was appropriate.

- Dissents: Arbitrator Bass and Arbitrator Wright found a 3% total increase and a 4.25% increase were appropriate, respectively.

Bargaining & Legislated Bills

OECTA v. Ontario (Attorney General), 2024 ONCA 101

- Ontario appealed the Ontario Superior Court decision, which found that Bill 124 was unconstitutional pursuant to the right to freedom of expression (s. 2(b)), freedom of association (s. 2(d)) and equality under the *Charter* (s. 15).
- The majority of the Ontario Court of Appeal agreed that Bill 124 was unconstitutional but only with respect to represented employees. The lower Court erred in finding that the entire Bill 124 was void and of no effect, as it still applied to non-represented employees who were also subject to the wage restrain provisions.
- On the same day when the Court of Appeal decision was released, MAG announced that it would take steps to repeal Bill 124 and it confirmed that it would not appeal the decision of the Court of Appeal.
- Since OSSTF and ETFO had already settled their claims with Ontario, they withdrew from participation in the appeal concerning school board employees.

Bargaining & Legislated Bills

OSSTF v. Ontario, *2023* CanLII 6284 (On Div. Crt.)

- OSSTF and ETFO sought judicial reviews of the OLRB decisions in response to applications for declarations that the Crown violated its duty to bargain in good faith pursuant to the *Labour Relations Act.*
- Bill 115 was imposed on OSSTF and ETFO by the Crown resulting in a "grid delay" for the 2012-2013 and 2013-2014 school years. OSSTF and ETFO successfully challenged the constitutionality of Bill 115 and a Court found that it breached s. 2(d) of the *Charter*.
- OSSTF and ETFO brought applications with the OLRB, which found that the Crown **did not** violate its duty to bargain in good faith vis-a-via OSSTF but found the Crown **had** violated its duty to bargain in good faith vis-à-vis ETFO, but opted not to award damages. ETFO brought the judicial review alleging that the decision not to award damages was unreasonable.

Bargaining & Legislated Bills

- OSSTF settled its damages through negotiations for the 2012-2013 and 2013-2014 school years and withdrew its "grid grievances" for the 2014-2015 school year. In contrast, OECTA and AEFO obtained settlements with the Crown with a term that permitted the 2014-2015 grid grievances to be maintained.

- ETFO withdrew its "grid movement" grievances as the Crown advised it that all other unions were required to withdraw them. OECTA and AEFO were ultimately successful in pursuing their "grid movement" grievances.

- As part of the arguments made at the OLRB, OSSTF & ETFO argued that the Crown had intentionally misled them during the bargaining process in violation of the *LRA* and the *SBCBA* and induced them to settle the grid movement issues.

- The OLRB dismissed OSSTF's application as it found that the Crown did not demand for the grid grievances to be withdrawn as a condition of settlement. The Court found that this decision was reasonable and gave deference to the OLRB and its expertise in all matters of labour relations.

Interpretation of Sick Leave

CUPE Local 4400 Unit B v. TDSB, 2024 CanLII 21236 (ON LA) – Arbitrator Kugler

Issue: Can a general instructor receive sick pay benefits when they become ill when the school board cannot find a replacement instructor and subsequently cancels the assigned courses?

Facts:

- General instructors (GI), like the grievor, teach adult courses that run on evenings and weekends, and are a part of Seniority List C.
- GI courses are funded on a fee-per-service model and not through the MOE. The collective agreement does not require the School Board to maintain a supply list for GI instructors.
- The Board's practice is to cancel courses when there is not enough enrollment. If a GI becomes ill or injured, the Board seeks a replacement GI who is qualified and vetted and if unable to do so, the course is cancelled, and the GI instructor is not paid sick pay. If a replacement GI is found, sick pay is paid to the GI.

Interpretation of Sick Leave

- The grievor submitted a medical note that she could not return to in-person teaching due to medical reasons and any accommodation to teach remotely was denied by the Board.

- Many courses were cancelled as a replacement GI was not found by the Board. Sick pay was not paid out to the grievor for these courses.

- The Board took the position that sick pay is meant to replace wages that the employee would have earned over the absence period – only payable for the "regularly scheduled hours of employment". Since work was not scheduled for the cancelled courses, the Board said there is no entitlement to sick pay.

- The Arbitrator found the grievor was entitled to sick pay regardless of whether the Board secured a replacement instructor. The central terms for sick pay are clear in that the Board ***will*** *provide…sick leave days and short-term disability coverage*. Wages for sick leave are the amount the employee would have received *but for* the absence and should not depend on factors beyond the employee's control.

Interpretation of Sick Leave

CUPE v. CTA, 2023 CanLII 122852 (ON LA) – Arbitrator Stout

Issue: Are school board employees allowed to exhaust their sick leave and STD benefits before being required to receive LTD payments?

Facts:

- The grievor commenced sick leave in April and it continued in the following school year. The grievor was approved for LTD benefits before the 120 STD days were used up. The School Board also sought to recover an amount of wages paid to the grievor which were later covered by LTD due to approval being backdated.
- Employees have voluntarily applied for LTD benefits.
- Central Terms provide permanent employees with eleven (11) days of sick days at 100% and 120 days of short-term disability days at 90% of regular wages.

Interpretation of Sick Leave

- LOU #2 under Central Terms states when a School Board's LTD policy has a waiting period greater than 131 days, the employee is eligible for additional STD days up to a maximum difference between LTD waiting period and 131 days.

- LTD policies have varying waiting periods and % of regular wages that are paid to employees.

Positions:

- CTA took the position that STD benefits are only intended to provide a bridge to LTD; if an employee is approved for LTD benefits prior to the exhaustion of STD benefits, the LTD policy becomes first payor and STD benefits are no longer payable.

- CUPE took the position that employees must be allowed to exhaust their sick leave and STD benefits before being required to receive LTD benefits.

Interpretation of Sick Leave

Arbitrator:

- Employees are not specifically provided with a right to elect or choose to receive sick leave and STD instead of LTD (or WSIB). Sick leave and STD benefits provide immediate income protection for a defined period of time, which employees may draw upon until they receive either LTD benefits (or WSIB).

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- Employees do not have a right under the Central Terms to drawn upon and exhaust their sick leave and STD allocation prior to receiving LTD benefits. Once employees in approved for LTD or WSIB, they no longer need income protected provided by sick leave and STD benefits.

Interpretation of Sick Leave

CUPE Local 4400, Units C & D v. TDSB, 2023 CanLII 46167 (ON LA) – Arbitrator Flaherty

Issue: **WHEN** are employees entitled to a refresh of sick leave and STD allocations pursuant to the Central Terms?

Facts:

- All grievors commenced sick leave in a school year but worked their regular working hours on the last day
- All grievors worked their regular working hours on the first day of the new fiscal year and commenced new sick leaves for different conditions for which they accessed sick leave in the previous school year.
- Depending on the timing of when they accessed sick leave in the new school year, the School Board allocated a fresh allocation of sick leave and STD after 11 consecutive days at regular hours were worked by the employee, i.e. the fresh allotment was delayed

Interpretation of Sick Leave

Article C6.1(d) of Central Terms (an **exception** to providing new sick leave allocation on first day of school year):

> Where a permanent Employee is accessing sick leave and/or the short-term disability plan in a fiscal year and the absence continues into the following fiscal year for the same medical condition, the permanent Employee will continue to access any unused sick leave days or short-term disability days from the previous fiscal year's allocation.
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> A new allocation will not be provided to the permanent Employee until s/he has returned to work and completed eleven (11) consecutive working days at their regular working hours.

Interpretation of Sick Leave

- CUPE's position was that the sick leave allocation should have been on the first day – Sept 1. The exception at article C6.1(d) only applies where there is a *continuing* and *uninterrupted absence*, which begins in the previous school year

- The Board's position is that *continues* means an ongoing absence that is not necessarily uninterrupted – the absence continues until the grievor has returned to work for 11 consecutive working days at their regular working hours. The Employer has a right to determine whether an absence for the same medical condition continues within the meaning of article C6.1(d) – the allotment is delayed until the employee works 11 consecutive days at regular hours.

Preliminary Issue:

- Does a previous arbitration award in the context of an expedited arbitration apply? Expedited arbitration agreement states the decision will be binding on parties but will have no precedential effect on other grievances.

Interpretation of Sick Leave

Arbitrator:

- An absence “continues” means an ongoing (and not necessarily an uninterrupted) absence into the following year unless and until the employee returns to work for 11 consecutive working days at their regular hours.

- The employer must consider working days in the previous *and* new school year. However, the “look back” period cannot exceed a total of 11 consecutive working days and the Employer cannot look back to consider *any* absence in the previous school year.

- The refresh allocation is owed once the consecutive working days at regular hours is 11.

Teachers' Conduct and Terminations

OSSTF v. Durham District School Board, 2023 CanLII 96356 – Arbitrator Jesin

- The Union argued that a teacher's termination should be declared null and void as a result of being directed to attend a meeting without being offered a right to representation.
- At the meeting, the teacher was informed that he would be placed on home assignment with pay pending an investigation of allegations made against him relating to inappropriate physical contact with students and inappropriate racial and sexual comments made to students.
- After being sent home, the Board sent the grievor a letter indicating he would be invited to a meeting to respond to the allegations and that he had a right to representation at that meeting – this meeting indeed took place at a later date.

Teachers' Conduct and Terminations

- The Board took the position that the first meeting was not disciplinary. The grievor was asked no questions and was simply informed of the allegations that he would be placed on home assignment with pay pending the investigation. The Board never provides Federation representation when informing employees of a home assignment pending investigation.

Arbitrator:

- A right to union representation provided for in a collective agreement during the disciplinary process is fundamental and renders any resulting discipline null and void.

- However, the first meeting was not an interview within the meaning of the collective agreement (a disciplinary meeting). The meeting was simply to inform the grievor that an investigation would commence, and he was to be placed on a paid leave.

- Further, the fact that a letter summarizing the first meeting is later placed in the grievor's personnel file does not raise any relevant distinction.

Teachers' Conduct and Terminations

OECTA and Toronto Catholic District School Board, 2023 CanLII 70469 – Arbitrator Herlich

- The grievor was engaged in a physical altercation with another patron (20 years of age) outside a Starbucks during the school day.
- An investigation concluded that the grievor provoked the physical altercation. Police were called but no charges were laid as the altercation was deemed "consensual".
- The altercation pertained the fact that the grievor was not wearing a mask during a time when masks indoors were required except for medical reasons, which the grievor relied upon.
- A TikTok video was circulated purported to document the altercation and portrayed the grievor as an "anti-masker" who demanded to be served without her mask. The video went viral and attracted reports on the local news and newspaper.

Teachers' Conduct and Terminations

- The grievor expressed remorse and regret and acknowledged that this was an example of poor judgment (however, only at the arbitration hearing). The grievor had a 13-year unblemished record as a teacher.

- The Board terminated the grievor's employment. The Board took the position that the grievor did not have a mask exemption and her actions negatively impacted the reputation of the Board. The Board did not terminate the grievor's employment because she was an "anti-masker".

- The Union acknowledged the grievor's conduct amounted to an assault but termination was unreasonable given the grievor's record, the fact that it was off-duty conduct and any alleged harm to the Board's reputation was not foreseeable.

Teachers' Conduct and Terminations

Arbitrator:

- Generally, a high standard of conduct applies to teachers (both on and off duty). The grievor entered into a "consensual fight" with a young individual, not much older than her high school students.
- While the Grievor did not identify herself as a teacher of the Board during the incident, the connection was made in the TikTok video.
- The Arbitrator acknowledged that the message disseminated that the Board employs *rabid anti-maskers* would significantly harm the Board's reputation and community, in addition to the public display of a teacher entering into a physical altercation with a young Starbucks patron.
- Termination was deemed too harsh of a penalty. The grievor was reinstated and a one-month suspension was implemented.

Teachers' Conduct and Terminations

OECTA v. Northwest Catholic District School Board, 2024 CanLII 6043 – Arbitrator Beatty

- The grievor unintentionally sent an email to all teachers of the Board. The Board Chaplain wrote to all teachers about the significant of Pride month. The grievor's response was intended for the Chaplain only.

- The grievor's email was deemed by the Arbitrator as *discriminatory, hateful, offensive and hurtful towards the LGBTQ2S+ community*. The Board took the position that the content of the email was in stark contrast to the Board's message and numerous policies, including PPM 119 and the Code of Conduct. Many Board staff expressed that they were offended by the email.

- The grievor was only remorseful that her email did not go the Chaplain only.

- The Board terminated the grievor's employment within hours of the email being sent. At arbitration, in the alternative, the Board sought damages in lieu of reinstatement given the grievor poisoned the Board's work environment.

Teachers' Conduct and Terminations

- The Union argued that the grievor was expressing her shock at the Board's position on the celebration of Pride month and inconsistencies the grievor perceived between the content of the this and her own beliefs and faith, which were live issues within the Catholic Church. The Union sought a lesser penalty and reinstatement.

- The Union also criticized the Board's failure to review the grievor's file or speak to the grievor or the Union before the decision to terminate was made – procedural fairness was breached.

- The Arbitrator accepted that the content of the grievor's email is an accurate reflection of her faith and the case *raises a tension between freedom or religion and freedom from discrimination*.

- A lack of trust towards the grievor on the part of the Board was acknowledged but could be reestablished. The grievor was reinstated and a time-served suspension was implemented.

Duty to Accommodate

CUPE, Local 4400 v. TDSB, 2023 CanLII 69411 – Arbitrator Kaplan

- The grievor, a long-service employee, commenced a sick leave and was later approved for LTD. Within a few months on LTD, the grievor was cleared to RTW. The grievor did not return to work until 1.5 years later.

- The Union argued that the Borad failed to accommodate the grievor to the point of undue hardship as it did not fully canvass the range of possible positions during the 1.5 years and improperly and repeatedly sought medical information.

- The Board took the position that it was required to follow-up with the grievor's physicians numerous times due to changing and/or conflicting medical information. The grievor's Functional Abilities Forms indicated limitations with respect to attention, concentration, decision-making, supervision and multi-tasking. Due to a previous incident, a restriction included the need to only toilet students in an open environment.

- The Board stated that few prospective positions were identified and/or available for the grievor due to restrictions of having to focus on one task and one student at a time.

Duty to Accommodate

Arbitrator:

- The Board had no choice but to seek further information. The requests were proportionate, reasonable and responsive to the information received.
- The Board had no obligation to accommodate the grievor's toileting restrictions. Given this restriction and the grievor's earlier cognitive restrictions, a potential position for the grievor was limited.
- The Arbitrator did not accept the Board's *inactivity* during the course of approximately 7 months when it was clear the grievor could return to work. It was not reasonable that not a single position was available, even for a limited term. Not enough evidence was presented by the Board to show that any attempts to accommodate were made.
- The grievor was awarded compensation during these 7.5 months.

Duty to Accommodate

OECTA v. Dufferin-Peel CDSB, 2023 CanLII 58551– Arbitrator Hayes

- The grievor was a 28-year employee before commencing a sick leave, which transitioned to an LTD leave. Upon expiration of LTD, the grievor provided the Board with periodically updated medical reports to support a return to work. The reports demonstrated low levels of functioning and significant restrictions, i.e. flexibility in scheduling, one-on-one or small groups of students, limiting stressful/anxiety provoking situations etc.

- As a result, the Board provided options, including an IME – all were rejected. The grievor requested a job shadowing opportunity.

- The Union alleged that the Board failed in its procedural and substantive duty to accommodate and it ought to have sought clarity from the grievor's physicians, it should have considered 'bundling' duties and/or allow the grievor to perform only a part of his job.

- The Board saw no ambiguity with the medical reports which would necessitate a follow-up with a physician.

Duty to Accommodate

Arbitrator:

- The Board's "essential duties of a teacher" assessment was reasonable
- The Arbitrator recognized that the medical reports indicated low ratings for cognitive functioning and did not on their face support the return to work recommendations made – as a result the Board acted reasonably when it decided not to follow-up with the grievor's physicians to seek any clarity.
- Due to the grievor's clear cognitive restrictions, the Board acted reasonably when it did not permit a job shadowing opportunity and when it did not engage in a job bundling search to either create work or increase its workforce.
- The grievor was clearly unable to perform the essential duties of a teacher
- There was no breach of the collective agreement or the *Code*.

Legislation

Bill 98, *Better Schools and Student Outcomes Act, 2023*

- Royal assent received on **June 8, 2023**.
- The *Early Childhood Educators Act, 2007* and *Ontario College of Teachers Act, 1996* were amended to authorize the relevant Committees to: (1) require a member to undertake a specified continuing education or remediation program, and (2) deal with members convicted of an offence under the *Criminal Code* in particular ways.
- The *Education* Act was amended to add various Minister powers, including the power to issue policies and guidelines setting out training to be completed by board members, directors of education, supervisory officers and superintendents.