Education Law Newsletter

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TSDB's mandatory vaccination policy does not breach section 7 of the *Charter*, arbitrator finds

In a decision issued earlier this year, *The Toronto District School Board v. CUPE, Local 4400 (Re COVID-19 Vaccine Procedure)*[1], Arbitrator William Kaplan upheld the mandatory vaccination policy of the Toronto District School Board (TDSB). In his decision, issued March 22, 2022, Arbitrator Kaplan concluded that the policy did not infringe section 7 of the *Canadian Charter of Rights and Freedoms*, which protects the right to life, liberty and security of the person — a right that can be denied only if the denial does not breach fundamental justice. Arbitrator Kaplan also determined that the policy was a reasonable exercise of management rights. The decision is another example of labour arbitrators' attempts to balance the rights and interests of employees with the risks of harm associated with the COVID-19 pandemic.

Background

TDSB's mandatory vaccination policy required all employees with direct contact with staff or students at a TDSB workplace to be fully vaccinated (two doses) against COVID-19. The TDSB implemented the policy

1 2022 CanLII 22110 (ON LA)

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on September 14, 2021. Employees were required to provide evidence of compliance with the policy by November 1, 2021 or establish they had a valid medical or *Human Rights Code* exemption. Students and their families were not subject to the policy. Employees who did not disclose their vaccination status by the deadline (which was extended to provide further compliance opportunities) and employees who did not become fully vaccinated within prescribed timelines were to be placed on non-disciplinary leaves of absence without pay.

In October and November 2021, CUPE Local 4400 wrote to the TDSB's Director of Education to request that the policy be reconsidered, pointing out the hardship that unpaid leaves of absences would cause and observing that neither the Minister of Education nor Ontario's Chief Medical Officer had called for mandatory vaccination. The union also argued that the policy was unreasonable, since being fully vaccinated was not effective against Omicron and the policy was never amended to require a booster shot. The union's position was that rapid antigen tests were effective in reducing the likelihood of introducing infection into a school setting if the testing protocol and other mitigation protocols were followed. As a result, the union suggested that Local 4400 members be accommodated through frequent testing and other measures.

The TDSB declined the request, but it did grant temporary exemptions to approximately 300 members because of staffing requirements. In addition, a smaller number of unvaccinated employees remained at work, with testing obligations, pending decisions on their exemption requests for medical and *Human Rights Code* reasons.

On March 10, 2022, following the second and final day of the arbitration proceedings, the TDSB Board of Trustees passed a resolution rescinding the mandatory vaccination policy effective March 14, 2022.

The arbitration decision

There were two issues before Arbitrator Kaplan:

1. Did the policy infringe section 7 of the *Charter* and, if so, could it be saved by section 1?
2. Was the policy reasonable?

Both parties submitted expert reports on the merits of the policy and the viability of alternatives. Although the experts agreed on the efficacy of vaccination at keeping COVID-19 out of schools, the union's expert report concluded that rapid testing was a viable alternative to mandatory vaccination. The TDSB's expert disagreed, opining that daily rapid tests were not an effective alternative or substitute to mandatory vaccination in preventing or reducing workplace transmission.

Section 7 of the *Charter*

Arbitrator Kaplan concluded that the policy did not breach section 7 of the *Charter*, finding that section 7 protects an individual's right to decide, including to decide whether or not to be vaccinated. The policy did not require mandatory vaccination, mandate a medical procedure or seek to impose one without consent, and therefore did not violate anyone's life, liberty or security of the person. As Arbitrator Kaplan emphasized, "Employees are not prevented in any way from making a fundamental life choice." Arbitrator Kaplan noted, however, that "Section 7 does not insulate a person who has chosen not to be vaccinated from the economic consequences of that decision."

In addition, he concluded that there had been no violation of the principles of fundamental justice, and the policy was not arbitrary ("There was a clear connection between attestation and full vaccination and the achievement of the stated objective…a return to safe and sustained in-school learning"), overbroad ("it was tailored and nuanced"), or disproportionate ("The consequences of non-compliance are purely economic and they are proportionate to the objective of preventing the transmission of COVID to employees and students in TDSB schools").

Management rights

Arbitrator Kaplan disagreed that the policy was an unreasonable exercise of management rights, as argued by the union. The mandatory vaccination policy was consistent with the TDSB's requirements under the *Occupational Health and Safety Act* (*OHSA*), as "expert evidence is that vaccination was the number one and best method of reducing the contraction and spread of COVID-19." The requirement that employees attest to their vaccination status was a necessary corollary of this and no complaint has been raised that personal information has been anything but properly safeguarded and protected.

In assessing the reasonableness of the policy, Arbitrator Kaplan also applied the test in *KVP & Lumber/Sawmill Workers' Union*, which requires that a management rule or policy:

1. Not be inconsistent with the collective agreement;
2. Not be unreasonable;
3. Be clear and unequivocal;
4. Be brought to the attention of employees before the employer can act upon it;
5. Inform affected employees that breach could result in discharge if the policy was being used as foundation for discharge; and
6. Must be consistently enforced.

Arbitrator Kaplan found that the policy met all of the *KVP* requirements. The TDSB was allowed to promulgate rules and policies, and there was nothing in any of the applicable collective agreements that restricted this management right.

The policy was not unreasonable: based on the expert evidence, being fully vaccinated was "a reasonable rule and appropriate condition of employment for employees who wished to attend at work" especially when compared to "the self-evidently fallible RAT regime proposed by the Union."

The policy was also clear and unequivocal: the TDSB explained it to employees and so too did the union. There is no evidence that anyone was under any misunderstanding about what the policy required in terms of vaccine attestation and becoming fully vaccinated. Finally, the policy was consistently applied. By introducing a regime to allow for exemptions for essential workers and by allowing employees with human rights claims to continue to work under a testing regime, the policy was not being inconsistently applied but was, rather, being applied in a careful and nuanced fashion.

The grievances were dismissed.

Commentary

Since the decision was released in March 2022, the conclusion that mandatory vaccination policies are reasonable and enforceable has been relied on in numerous other arbitration decisions in Ontario. Manadatory vaccination policies satisfy an employer's obligation under the *OHSA* to take every reasonable precaution to protect the health and safety of its employees so long as they comply with the *Human Rights Code*. Arbitrator Kaplan's conclusion that rapid antigen tests are not necessarily a viable alternative to vaccination in the context of educational facilities, in particular, has been referred to by other arbitrators, including Arbitrator Mark Wright in his decision in *Wilfred Laurier University and UFCW (Lemon), Re*, 2022 CanLII 69168 (ON LA).

However, it is also worth noting that both Arbitrator Kaplan's decision and subsequent arbitration decisions dealing with mandatory vaccination policies have emphasized the importance of context in determining whether these policies are reasonable. This case was decided during the emergence of the highly transmissible Omicron variant of COVID-19 and before vaccines had been approved for children in Canada. Had the policy been challenged at a different time, it is possible that Arbitrator Kaplan would have reached a different result. In other words, the question of validity must be considered based upon the situation as it existed at the time. As the COVID-19 pandemic continues to evolve, there is no guarantee that manadatory vaccination policies will continue to be upheld in the future in accordance with this decision In implementing mandatory vaccination policies, employers should assess their own circumstances and determine what is proportionate and reasonable to meet their obligations under the *OHSA*.

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Ontario school vaccine mandate found to be a reasonable exercise of management rights

Arbitrator Michelle Flaherty's decision in the *Elementary Teachers' Federation of Ontario v. Ottawa-Carleton District School Board*[1], issued on June 21, 2022 upheld the mandatory vaccination policy (the Policy) of the Ottawa-Carleton District School Board (OCDSB). In doing so, she found that that the policy was a reasonable exercise of management rights and that it fell in line with the precautionary principle.

Background

On September 1, 2021, the OCDSB's Board of Trustees (Trustees) unanimously passed a motion requiring that staff work collaboratively with Ottawa Public Health (OPH) to develop a protocol requiring that employees be fully vaccinated against COVID-19, subject to the Board's duty to accommodate under the *Human Rights Code*. Notably, this proposed protocol went over and above the requirements outlined by the Ministry of Education (MOE). Indeed, while the MOE required Board staff to disclose their immunization status, vaccination was not mandated. Instead, under the MOE's standards, unvaccinated staff were required to undergo regular Rapid Antigen Test (RAT) testing.

Prior to passing their September 1, 2021 motion, the Trustees held a number of public meetings in conjunction with OPH. Board staff were advised that one of these meetings would "include a discussion about vaccine policies." Subsequent to the September 1, 2021 motion, the Board met with bargaining unit representatives (including "the Federation" which represented elementary and occasional teachers at the OCDSB) in which a draft protocol was shared. The Federation's comments were restricted to "implementation issues" and did not touch on any "substantive feedback."

The resulting Protocol was issued on September 20, 2021 and was only lifted in March 2022. Absent a human rights exemption, the policy did not allow for RATs as an alternative to vaccination. Therefore, unvaccinated employees who did not have a *Code*-based exemption were required to get their first dose of the COVID-19 vaccine by September 30, 2021. This deadline was extended to October 7, 2021. Failure to comply meant being placed on administrative leave without pay. Despite this deadline, some un-exempted and partially vaccinated staff continued to work in person – with the condition of undergoing RATs – until the end of December. Moreover, individual circumstances allowed for timeline extensions.

Ultimately, 16 contract teachers were placed on leave without pay. Of these, seven requested to be added to the Ottawa-Carleton Virtual Schools (Virtual Schools) list of occasional teachers, five of which received Virtual Schools assignments of varying durations. Two long-term occasional teachers had their assignments terminated, and a further 34 occasional teachers were restricted to accepting online work assignments only. An additional 292 occasional teachers did not complete the vaccine attestation as required by MOE's Immunization Disclosure Policy.

The arbitration

The Arbitrator was tasked with addressing two issues: the first relating to accommodating the small number of unvaccinated teachers who were not granted a human rights exemption. The second was whether the protocol as a whole was a reasonable exercise of management rights, especially to the extent that they diverge from the MOE's policy. The particular stringencies of the protocol under dispute included the fact it:

- did not allow for RAT as an alternative to vaccination;
- placed teachers on an indefinite administrative leave of absence, only allowing them to accept virtual work assignments and/or apply for opportunities at the Virtual Schools; and
- removed occasional teachers from long-term occasional in-person assignments and restricted them accepting in-person work assignments.

1 2022 CanLII 53799 (ON LA)

Importantly, both parties agreed on the safety and efficacy of the COVID-19 vaccines and that vaccination is the most effective strategy to reduce the transmission of COVID-19 in schools. Rather, it was the Board's insistence on a hardline vaccine mandate going beyond what was required by the MOE that fuelled the dispute.

The decision

Arbitrator Flaherty concluded that — despite their small number — the Board was not required to accommodate un-exempted employees who remained unvaccinated. Similarly, Arbitrator Flaherty ruled that the vaccine mandate fell within the gambit of the Board's management rights and was a proper application of the precautionary principles. Lastly, the fact the Board shifted from their original position on RATs and opted to not use a decision matrix was not seen as an issue.

Small number of unvaccinated teachers does not create an obligation to accommodate

The mere fact that there were very few teacher who remained unvaccinated did not create a duty to accommodate them. On this point Arbitrator Flaherty noted the Board's submissions that the low number unvaccinated teachers may be a consequence of the protocol itself. However, she also acknowledged that such an exercise is speculative, and that "absent a legitimate human rights ground, the Board had no obligation to accommodate employees who decided not to be vaccinated."

Management rights

In determining the appropriate scope of management's unilateral rule-making authority under a collective agreement, Arbitrator Flaherty referenced *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP* (*KVP*). Under *KVP,* a unilaterally imposed policy must meet the following criteria:

a. It must not be inconsistent with the collective agreement.
b. It must not be unreasonable.
c. It must be clear and unequivocal.
d. It must be brought to the attention of employees affected before the company can act on it.
e. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
f. Such rule should have been consistently enforced by the company from the time it was introduced.

As Arbitrator Flaherty noted, only conditions b) and f) were in dispute. Moreover, she observed that she had the benefit of a significant amount of jurisprudence applying *KVP* to compulsory vaccination policies. Of the established case law, context, the precautionary principle and balancing employee rights with the risk of harm, emerged as the guiding principles.

Context, precautionary principle, and rights balancing

Contextually, Arbitrator Flaherty noted the importance of in-person instruction for children and the fact that children were initially ineligible for vaccination thereby making staff vaccination all the more prescient.

On the issue of balancing interests, Arbitrator Flaherty reasoned that an employee's personal belief were less significant than the Board's interest in ensuring schools remained open.

On the precautionary principle front, Arbitrator found the Boards decision to go beyond the MOE was warranted. As she noted, the Board did not require scientific certainty on RATs in order to reasonably decide against using them. Instead, the Board action was to be evaluated based on the information that they were equipped with at the time of making their decision, which given the stakes, was viewed as reasonable.

Shifting consequences not unreasonable

Furthermore, Arbitrator Flaherty was not persuaded that the Board's initial contemplation (and subsequent rejection) of RATs reflected an unreasonable exercise of management rights. Given the inherent uncertainty created by the pandemic, modification to the Board's Protocol over time was seen as reasonable.

Board was not required to use a decision matrix

In the strikingly similar decision of *The Toronto District School Board vs. CUPE, Local 4400 (Re COVID-19 Vaccine Procedure)*[2]*(TDSB)*, a decision matrix was used to determine the fate of unvaccinated employees as opposed to the automatic leave of absence employed in this case. However, Arbitrator Flaherty distinguished the case at hand, as the *TDSB* decision involved a bargaining unit representing "almost 15,000 employees working in a range of classifications across the school board." By contrast, this decision only dealt with "teachers and occasional teachers." This, combined with the fact that the consequence of non-compliance was consistent (with the only variable being timing), lead Arbitrator Flaherty the decision matrix was not necessary.

On this issue, the Federation argued that:

i) The Board failed to review the protocol regularly; and

ii) The Board's decision to rescind the protocol during the more transmissible Omnicron (as opposed to the less transmissible Delta strain) demonstrated that the protocol could have been lifted earlier.

Arbitrator Flaherty found that the measures were reasonable at the time they were applied, and could not be judged on the basis of hindsight.

Commentary

This decision, combined with the *TDSB* decision, provide compelling authorities for a school board's right to impose mandatory vaccination policies in the school setting. As a caveat, both decisions stress the unique circumstances of the pandemic. Put simply, when dealing with diseases that are not seen as warranting extraordinary measures, management's rights may not be a sufficient basis for unilaterally imposing a vaccine mandate. In addition, both decisions emphasized the fact that vaccines were unavailable for children. The fact that the COVID-19 vaccines are now available for children, may change the calculus.

Nevertheless, to the extent that COVID-19 variants continue to mutate or other diseases become an issue, school boards can be rest assured that tribunals will likely be deferential to management rights in an effort to protect the health and safety of students and school staff.

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2 2022 CanLII 22110 (ON LA)

Ontario Labour Relations Board rules union fairly represented unvaccinated teacher

In a recent decision[1], the Ontario Labour Relations Board (the Board) dismissed a complaint by a teacher unvaccinated against COVID-19. The teacher claimed that her union, the Ontario Secondary School Teachers' Federation (the Federation), breached its duty of fair representation under s.74 of the *Labour Relations Act*.

As detailed below, the Board concluded that the Federation's decision to effectively represent vaccinated members over its unvaccinated members is not a breach of its duty of fair representation to unvaccinated members.

Background

Tina Di Tommaso (the Applicant) was a secondary school teacher with the Toronto District School Board (the School Board). She took issue with the School Board's COVID-19 vaccination policy.

The Applicant sent a series of emails to the Federation describing her anger and unwillingness to comply with the policy. In one of the emails, she expressed extensive concern on the scientific acceptance of the COVID-19 vaccine, the government's vaccination policy, mainstream media, and the policy positions of the Ontario Human Rights Commission and Canadian Human Rights Commission.

The Applicant used these emails, as well as a copy of the School Board's vaccination policy and a lack of response from the Federation on some correspondence, to show that the union had been acting in a manner that was arbitrary, discriminatory or in bad faith in representing her. She claimed that the Federation was being discriminatory because it was only effectively representing the interests of vaccinated members, not all members.

The School Board had advised the Applicant she would be placed on a non-disciplinary administrative leave of absence without pay for failure to comply with the policy. Upon failure to comply, the School Board did put her on non-disciplinary administrative leave of absence without pay.

The Applicant requested representation for a constructive dismissal claim for failure to comply with the vaccination policy.

Legal concepts involved: arbitrariness, discrimination and bad faith

Section 74 of the *Labour Relations Act*, titled "Duty of fair representation by trade unions", states:

> A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The Board defined "arbitrary", "discriminatory" and "in bad faith" as follows:

(a) "arbitrary" means conduct which is capricious, implausible or unreasonable, often demonstrated by a consideration of irrelevant factors or a failure to consider all the relevant factors;

(b) "discriminatory" is broadly defined to include situations in which a trade union distinguishes between or treats employees differently without a cogent reason or labour relations basis for doing so; and

(c) "bad faith" refers to conduct motivated by hostility, malice, ill-will, dishonesty, or improper motivation.

1 *Tina Di Tommaso v. Ontario Secondary School Teachers' Federation*, 2021 CanLII 132009 (ON LRB)

Issues before the Ontario Labour Relations Board

The issue before the Board was whether the Federation had breached its duty of fair representation. In order to determine this, the Applicant had to establish that the Federation acted in a manner that was arbitrary, discriminatory or in bad faith in the representation of employees.

The Board stated that the Applicant's assertion that the Federation was being discriminatory because it was only effectively representing certain members and not all employees did not breach s.74 of the *Labour Relations Act*.

The Board used *Ford Motor Company of Canada, Limited*, [1973] OLRB Rep. 519, which states that a union does have a duty to consider all the interests of its members in the performance of its obligations. However, "it is not a duty which makes the union the guarantor or insurer for every situation in which an individual employee is aggrieved or adversely affected; rather, the statute attempts to have the union consider the position of all groups and to weigh the competing interests of minorities, individuals and other like groups in arriving at its decision." Therefore, the emphasis is on fairness and acting with the interests of all members in mind, including the majority.

The Applicant did not provide any facts to suggest that the Federation acted without cogent reasons. As a result, the Board concluded that the Applicant had not raised any facts that established the Federation's conduct to be arbitrary, discriminatory, or in bad faith.

Jurisdiction of the Ontario Labour Relations Board

The Board stated that it was not the forum for debating or complaining about vaccination, scientific studies, the government's directions, or a particular employer's policy. It was clear the Applicant disagreed with the School Board's vaccination policy. However, the Board stated that a duty of fair representation complaint at the Board was about a union's conduct in the representation of its members, not about the School Board's policies.

The Applicant requested the Board to order the Federation to file an injunction. The Federation raised questions regarding the Board's jurisdiction to do so. The Board concluded that even if it had jurisdiction, which remained undetermined here, the usual recourse for a Board order regarding the duty of fair representation was the grievance process. The Board determined that nothing in this application made out a case for a remedy, much less an extraordinary remedy such as an injunction.

Comment

The decision in *Tina Di Tommaso v. Ontario Secondary School Teachers' Federation* makes it clear that a section 74 complaint is not an effective route for employees who wish to challenge their employer's policy or to have the Board order the employer to change their policies.

This decision defers to a union's expertise in balancing the individual interests and the majority interests of its members. It also gives unions more ground to trust their proficiency in meeting the duty of fair representation in the performance of their obligations.

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Ontario court confirms Math Proficiency Test for teacher candidates no longer required

In *Ontario Teacher Candidates' Council v. The Queen*, 2021 ONSC 7386, the Ontario Divisional Court confirmed that the standardized math test that all candidates must pass to become certified teachers in Ontario is a violation of the *Charter of Rights* and Freedoms (the *Charter*) due to the evidence that it stops the entrance of racialized candidates into the teaching profession.

Background

In order to become a certified public school teacher in Ontario, teacher candidates are required to obtain a qualification certificate. Candidates must receive this certification from the Ontario College of Teachers (the College) by meeting the specific criteria outlined in the *Ontario College of Teachers Act* (*OCTA*).

In recent years, statistics have shown that math scores of students in Ontario have declined. In order to address this trend, the provincial government passed legislation to amend section 18(1)(c) of the *OCTA*, which specified that the College will issue a certificate of qualification to a teaching candidate who successfully completes "any prescribed examinations relating to proficiency in mathematics that are required for the issuance of the certificate", among other requirements.

In order to satisfy the legislative requirement, the provincial government implemented a standardized math test called the Mathematics Proficiency Test (MPT), which aspiring teachers must pass to obtain their certification.

Prior to the institution of the MPT, the general accreditation process of provincial teachers did not have a mathematic competency requirement, and therefore, it was the decision of the faculty whether candidates were required to demonstrate math proficiency in order to complete their initial teacher education program.

The MPT and racialized candidates

In 2019, during the implementation process of the MPT, the Education Quality and Accountability Office (the EQAO) reviewed and concluded that the standardized math testing had a "serious impact on racial diversity within the teacher pool". The EQAO found that current research did not support the widespread implementation of standardized teacher testing at this time, in part because of bias against marginalized groups. The EQAO suggested that increasing required math courses at an earlier stage in teacher education was a way in which the provincial government could address the declination of math scores among students.

In a field test conducted by the EQAO, demographic data showed that candidates who identified as belonging to non-White ethno-racial groups failed at a significantly higher rate than White candidates did.

The demographic data from the first administration of the MPT between May 10 and June 26, 2021 showed that success rates differed "significantly across race categories". Candidates who identify as Indigenous and Black had 20 per cent lower success than those of White candidates.

Commencement of litigation

The Ontario Teacher Candidates' Council (OTCC) brought an application for judicial review of the MPT, arguing that the MPT violated the rights of prospective teachers under section 15 of the *Charter*. The OTCC advanced the argument that the implementation of the MPT discrimination against racialized teaching candidates.

The decision

The Court found in favour of the OTCC in that the MPT violated the section 15 rights of aspiring teachers. The Court declared that section 18(1)(c) of the *OCTA* was of no force or effect.

Section 15 of the *Charter* states that every individual in Canada must be treated equally, regardless of "their race, religion, national or ethnic origin, colour, sex, age, or physical or mental disability". The government's laws and programs must not discriminate against individuals on any of these enumerated (or analogous) grounds.

In its analysis, the Court noted that the integral issue in this application was whether the MPT had a disproportionate adverse impact on entry to the teaching profession for racialized teacher candidates and if so, whether such impact could be justified under section 1 of the *Charter*.

The Court found that the evidence pointed to significant disparities in success rates of standardized testing based on race, including statistical evidence of racial disparities with respect to the MPT specifically. In making this finding, the Court accepted the data gathered during the field test, the first administration of the MPT and the statistical success rates of candidates as evidence. The Court found that the MPT had serious deleterious effects on diversity within the teaching population.

The Court concluded that the MPT breached the section 15 rights of prospective teachers. Nonetheless, the *Charter* provides a saving mechanism whereby section 1 of the *Charter* allows a law or state action to limit a right guaranteed under the *Charter*. Where the law or state action has a pressing and substantial legislative goal and there is proportionality between the goal and the means to achieve it, the violation of rights ought to be upheld.

In its analysis of section 1 of the *Charter*, the Court found that though the MPT promoted a pressing and substantial objective and was rationally connected to that objective, the MPT did not minimally impair the rights of racialized teaching candidates. The provincial government had not met the burden of showing proportionality between the furtherance of their goal and the actions taken to achieve the goal.

Specifically, the Court rejected the government's arguments that there were no reasonable and available alternatives to the MPT. In fact, the Court found there were reasonably available alternatives to the MPT that on their face appear to be less impairing and at least as effective in achieving the goal of improving student achievement in math. Alternatives included requiring a minimum number of hours of math instruction or a math courses within the teacher education program, requiring an undergraduate math course as an admissions requirement for teacher education programs.

What's next?

The decision confirms that the College must revert to granting a certification of qualification to prospective teachers without the completion of the MPT, so long as other all teacher certification requirements are met.

The provincial government has sought leave to appeal the decision to the Ontario Court of Appeal.

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Ontario early childhood educator's suspension over wandering child overturned

Applying a contextual analysis in *Halton District School Board v. Elementary Teachers' Federation of Ontario*[1], Arbitrator Gedalof overturned a one-day suspension imposed on a designated early childhood educator (DECE) who did not notice a four-year-old wandered off school property unsupervised.

Background

On September 14, 2016, a Halton District School Board (the Board) DECE employee (the Grievor) was working with an Occasional Teacher (OT) to supervise a class of four- and five-year-old kindergarten students. While the class was returning to the classroom from the morning break in the kindergarten pen, a four-year-old student left the school property unsupervised and unnoticed by the Grievor and the OT.

It is not clear exactly how or when the student managed to leave the school but the Arbitrator concluded that it was likely before he got back into the classroom. Within minutes, the Grievor noticed and left the school to look for the student. She found him unharmed. The Grievor returned the student to the school without further incident.

It is noteworthy that this student had a history of leaving places unsupervised, which made him a "flight risk". During the previous school year, he had left the school and walked on his own to a grocery store down the street. The Grievor was aware of this incident and knew that the student had an individualized safety plan in place, including wearing an identification bracelet with his phone number on it.

Despite admitting to being aware of the student's safety plan, the Grievor maintained that his safety plan was not updated in the new school year and it was not specifically discussed with her. As a result of this incident, the Grievor was suspended for a day before returning to the classroom.

The decision

The bulk of the facts in this case were not in dispute. The primary issue in this case was whether the Grievor failed to exercise reasonable diligence in supervising the student and was culpable for him leaving the school property, considering the circumstances.

Arbitrator Gedalof concluded that while maintaining proper supervision of kindergarten-age children is a fundamental element of the DECE's role, the Grievor did not fail to meet a reasonable standard of supervision and as such, overturned the one-day suspension imposed by the Board.

In making this decision, he relied on *Halton District School Board v. Elementary Teachers' Federation* of Ontario, 2019 (*Vukaljevic*)[2], where due to competing demands during the end of day pickup, an early childhood educator failed to confirm the safe transition of a junior kindergarten student to their family member.

Arbitrator Gedalof agreed "one cannot conclude from the mere fact that a student managed to escape that discipline is warranted." Further, he agreed with *Vukaljevic*'s analysis where Arbitrator Hayes stated:

> "I also hold the view that not every employee mistake, failure or misadventure deserves or requires a disciplinary response. The employer obligation to demonstrate just cause is not a trivial burden. It may not be satisfied by simple identification of error. The particular facts will always matter. The employment record of a grievor will almost always matter."

1 2021 CanLII 39378 (ON LA)
2 2019 CanLII 96517 (ON LA)

Most importantly, Arbitrator Gedalof advised that it is "important to judge the Grievor against a standard of reasonable diligence, rather than one of perfection, and that it is important to consider the full factual context within which the incident took place." He further warned that in assessing such situations, "[o]ne should not work backwards from the unfortunate outcome [of the] case, and one should be cautious not to judge the grievor through the lens of hindsight."

He determined that the Grievor complied with the student's safety plan to the extent possible and did not fail to meet a reasonable standard of supervision.

Based on the foregoing, Arbitrator Gedalof concluded that the one-day suspension was not reasonable. Accordingly, he allowed the grievance with compensation.

Takeaways

There are two main takeaways from this decision:

1. While educators are responsible to supervise children under their care, each incident needs to be reviewed based on its individual facts and circumstances.
2. Employers should ensure students' individualized safety plans are well communicated to and understood by educators.

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Appellate court's decision on teachers' privacy rights in Ontario

Courts typically give school boards wide latitude to conduct school safety searches. Nonetheless, in *Elementary Teachers Federation of Ontario v. York Region District School Board*,[1] the Ontario Court of Appeal issued a decision in which it held that a school board breached two teachers' right to privacy under the *Canadian Charter of Rights and Freedoms* by searching a classroom computer. Although the facts render the case extraordinary, the court's reasoning is cautionary and warrants the attention of school boards across Canada.

Background

In this case, the Elementary Teachers' Federation of Ontario filed a discipline grievance on behalf of two elementary school teachers who had received a written reprimand for misusing board technology. They had created a "log" to record concerns about another teacher in their work group, who they believed was receiving preferential treatment. The possible existence of the log caused other teachers to complain about their work environment, which led the principal of the school to investigate.

The principal found the log, which the grievors had created and saved in the cloud by using an online application that could be accessed only through their password-protected Google accounts. However, while in a classroom in which a laptop used by one of the grievors had been left open, the principal touched the trackpad on the laptop. It is not clear whether this touching was intentional or accidental. The computer displayed the log, which the principal examined and took pictures of with his phone.

The arbitrator held that the grievors had a reasonable expectation of privacy, albeit a diminished one, given that they had left the log unsecured on a computer used by both students and teachers. In light of the diminished expectation of privacy and the principal's legitimate concern about a "toxic" workplace culture, the arbitrator held that each step in the principal's process of investigation was reasonable and did not violate teachers' privacy rights or the *Charter*'s "reasonable search" requirement.

Court of Appeal decision

The Court of Appeal held that the arbitrator's decision was erroneous, stating that she erred in her analysis of the grievors' expectation of privacy, particularly in finding that the grievors had a diminished expectation of privacy because they were using the school's computer and failed to secure the log. According to the court, the subject matter of the search was the grievors' private correspondence stored and secured in the cloud, and little significance came out of their having used a school computer to access it. The court was also forgiving of the failure of one of the grievors to secure the log: the grievors were not "indifferent to their privacy" and "did all they could to protect their privacy." It characterized the grievors' leaving the laptop open in the classroom as mere inadvertence.

The court also held that the arbitrator erred in finding the principal's search was reasonable. Although the principal had the authority to conduct a search given his duty under the *Education Act* to "maintain proper order and discipline in the school," the court said this particular search could not be justified:

> Once the principal realized he was looking at the grievors' log, it was as though he had found their diary. He had no legitimate purpose in reading it, let alone taking screenshots of it and submitting it to the Board. The principal failed to respect the grievors' reasonable expectation of privacy.

1 2022 ONCA 476 (Ont. C.A.).

The court also minimized the principal's concern that motivated the search in this case because it related employees and not students:

> School authorities such as principals are not responsible for the welfare of teachers and staff in the same way as students, and the need to act quickly concerning teachers and staff is less likely to arise. In my view, concerns arising out of employment relationships in the workplace are unlikely to justify a similarly broad and flexible search and seizure authority. Branding workplace relationships "toxic" does not alter this.

The Court of Appeal declared a violation of the *Charter* right to be free from unreasonable search and quashed the arbitration award.

Commentary

School boards should beware that searches of board-owned computers must be conducted in a manner that is "reasonable" — that is, based on sound justification and in a manner that minimizes their impact on privacy. This has been the law since the Supreme Court of Canada's decision in *R. v. Cole*,[2] which established that privacy expectations of employees will normally be diminished. Although the Court of Appeal did not recognize this diminishment in this case, the facts are unique in that the principal had accessed a cloud-based account. School boards should be very cautious in gaining access to content stored in teachers' and students' private (cloud-based) accounts, even if they are left unsecured on school computers.

Nonetheless, as a matter of law, the Court of Appeal's decision deserves critique. First, the forgiveness the court showed to the grievors' treatment of the log poses a data security problem. The law recognizes that one can abandon their expectation of privacy. For example, the Supreme Court of Canada has held that police may search garbage bags left out for pickup without prior judicial authorization because any expectation of privacy for the contents of the bag has been abandoned.[3] The concept of abandonment is important because its application encourages individuals to take steps to secure their private information. The failure to apply the abandonment principle (or equivalent analysis) in this case encourages computer users to rely on law for protection of their privacy rather than good data security practices. In plainer terms, the law should encourage people to log out of their cloud accounts when they access them on work computers as much as it encourages them to shred their receipts before they throw them in the trash.

Second, the court's minimizing of the workplace concern that motivated the principal's search is not consistent with employers' duties under occupational health and safety legislation and the seriousness with which employers ought to treat workplace disharmony and harassment. Indeed, in the *Robichaud* case the Supreme Court of Canada imposed strict liability on employers for workplace harassment because they "control [the workplace] and are in a position to take effective remedial action to remove undesirable conditions."[4]

Toxicity amongst a group of elementary school teachers would be of serious concern to any school board, particularly given the role of a teacher in respect of elementary school pupils; hence the principal's obligation in the *Education Act* to "maintain proper order and discipline in the school" and, even more salient, the teacher's duties under the *Act* to be an exemplar for students (s. 264(1)(c)) and to "assist in developing co-operation and co-ordination of effort among the members of the staff of the school" (s. 264(1)(d)). It is hard to understand why the possible flouting of such statutory duties by at least some teachers in this case, creating the toxic work environment said to exist among the staff at the school, would not be significant enough to warrant the court's application of a relaxed standard of reasonableness. The arbitrator was alive to the seriousness of this concern, but the Court of Appeal was not.

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2 2012 SCC 53
3 *R. v. Patrick*, 2009 SCC 17
4 *Robichaud v. Canada*, 1987 CanLII 73 (SCC)

School board must take action to protect student personal information online

Introduction

In *Halton District School Board* (*Re*)[1], the Office of the Information and Privacy Commissioner of Ontario (IPC) investigated allegations against the Halton District School Board (the Board) related to the collection, use and disclosure of student's personal information through the use of third party apps such as Google. The IPC's recommendations to bring the Board into compliance with the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) serve as a reminder that school boards must continually ensure that the use of education technologies does not compromise students' privacy.

Background

The Board had an agreement with Google to provide online educational tools for students (the G Suite). The Board determined which tools are available to students, and accounts were set up by both students and administrators.

The Board is subject to the *Act* as an Ontario-based institution. The purpose of the *Act* is to protect the privacy of individuals, and to safeguard personal information held by intuitions.

The complaint

The parents of two children enrolled at a Board elementary school filed a complaint with the IPC. The complaint alleged that the Board violated the *Act* through its collection, use, and disclosure of students' personal information to third party apps on the G Suite. Moreover, the complainants alleged that the apps collect excessive amounts of personal information from students. The complainants asserted that the violation threatened their children's' safety, security, and privacy.

Findings of the IPC

1. Student information is "personal information"

The *Act* regulates the collection and use of "personal information", which is defined as any information (a) about an individual in their personal capacity, (b) where it is reasonable to expect that an individual could be identified if the information were disclosed. Apps used by Board students collected information that included: full names, student numbers, Ontario Education Numbers, grade level, location, email, classes, date of birth, performance data, enrolment dates, and photos. The IPC found that students' information could reasonably identify the student and constituted 'personal information' under s.2 (1) of the *Act*.

2. Collection of students' personal information was necessary for accessing online apps

Section 28(2) of the Act requires that the collection of personal information be "necessary to the proper administration of a lawfully authorized activity". The Board had to show that their activities were lawful *and* necessary to administer education services through third party apps. Personal information only helpful to the Board's education services was not considered necessary.

First, the IPC agreed with the Board that the provision of education and education-related services to students under s. 169.1, 170(1), 171(1), 264(1) and 265(1) of the *Education Act* were lawfully authorized activities. Second, the Board argued that it is their role (not the individual receiving services) to determine necessity. Apps that over-collect personal information are not accessible for students. The IPC found that the assessment system adequately ensured only necessary personal information was collected. Therefore, the Board's collection of students' personal information was deemed necessary under s.28 (2) of the *Act*.

3. The Board did not provide adequate notice of collection to parents

The *Act* requires that institutions provide notice to individuals when collecting personal information. Adequate notice ensures respect for privacy and accountability. Section 29(2) of the *Act* stipulates three notice requirements:

a. The legal authority for collection is stated;

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b. The principal purpose for which information is intended to be used is stated; and

c. The title, business address, and business telephone number of an officer or employee of the institution who can answer the individual's question about the collection is stated.

The Board provided various notices, including during student registration and on their website. However, the notices only satisfied the first two requirements of s. 29(2). On the third requirement, only the principal's name and general email address were provided to parents. The IPC recommended that the Board revise notices to comply with the requirements of s. 29(2).

4. Personal information was used improperly by the Board

Under s.31 (b) of the *Act*, an institution can only use personal information in its custody or under its control for the purpose for which it was obtained *or* for a consistent purpose. A purpose is 'consistent' under s.33 "only if the individual might reasonably have expected such a use or disclosure". Compliance with s.31 of the *Act* requires that the Board restrict third party vendors' use of student information. Clauses 5 and 6 of the Board's common Usage Agreement stated that a Vendor shall not "collect, access, disclose, sell or share Personal Information for its own benefit or purpose". The IPC found that most Usage Agreements between the Board and third party vendors included sufficient limits on personal information use, however; the IPC recommended that the Board review all vendor agreements to ensure consistency.

The complainants also asserted two additional arguments. First, that students' personal information was posted on YouTube when they wrote comments and this was not a 'consistent' purpose under s.31 (b). When students leave comments on YouTube, the comments were publically available with their name and photo accompany the comment. The IPC found that where the Board determined YouTube should be used for education services, importing student profile information was a consistent purpose and permitted under s.31 (b) of the *Act*.

Second, the complainants argued that marketing and advertising material sent to students by third party vendors was not a consistent purpose and violated s.31 (b). There must be a "rational connection between the purpose of the collection and the purpose of the use", and rational connection is judged on a standard of reasonableness (not perfection). Part of "reasonableness" is that a person could foresee their information being used in the manner at issue. The complainant cited evidence that students received emails with the chance to enter prize draws. The IPC found that students and parents would not reasonably expect that information provided to obtain education services would be used to market goods and services to them. Therefore, the use of personal information for advertising and marketing by third party vendors violated s.31 (b). The IPC recommended that the Board revise its Usage Agreement to explicitly prohibit use of students' personal information for advertising and marketing, and take steps to prevent similar violations moving forward.

5. The Board did not technically disclose students' personal information

Save for the exceptions outlined in s. 32 of the *Act*, institutions cannot generally disclose personal information. In this case, the complainants argued that the Board violated s.32 and disclosed student information when they set up G Suite accounts. Furthermore, the complainants argued that student information was disclosed when students posted online and their comments were publically viewable. First, the IPC found that the Board was permitted to disclose personal information when setting up student accounts. Section 32 (d) permits disclosure to an agent of an institution if it is necessary for the institution's function. In this case, the third-party vendors were considered agents of the Board, and they required student information in order to set up accounts. Second, the IPC stated that posting comments on third party apps is an individual student's choice. Therefore, neither the Board nor the third-party vendors actually made any unauthorized disclosure.

6. The Board does not have sufficient contractual and oversight measures

Section 3(1) of *Ontario Regulation 823* requires that institutions have reasonable measures to prevent unauthorized access to records in their custody or control. However, there is no 'one-size-fits-all' protection system. Rather, measures must be reasonable in relation to the type of information being held. The standard is reasonableness, not perfection. When an institution subject to the *Act* retains a private sector entity to provide functions on its behalf, there must be appropriate contractual provisions to meet the same protection threshold. Contractual provisions relevant to assessing if an institution fulfilled its obligations include: (a) ownership of data, (b) collection, use, and disclosure, (c) confidential information, (d) notice of compelled disclosure, (e) subcontracting, (f) security, (g) retention and destruction, and (h) audits. In this case, the Board did not allow usage of apps unless there was a contract in place between the Board and the vendor. However, the IPC found that the Board's contractual provisions regarding, collection, use and disclosure, notice of compelled disclosure, security, retention and destruction, and audits were inadequate. The IPC recommended that all vendor contracts be revised to ensure sufficient protection of student information. The recommendation included:

1. that the Board should revise Usage Agreements to include a clause requiring the vendors provide notice to the Board of any disclosure of personal information it has made in compliance with applicable law;
2. the Board should update its Usage Agreements to ensure that Vendors' personal information protection obligations continue despite changes to business name, structure, or ownership;
3. the Board should add requirements to Usage Agreements that vendors delete data for student accounts no longer being used; and
4. the Board should add requirements to Usage Agreements that vendors perform audits for privacy and security compliance if requested.

The *Act* gives the IPC power to make an order after completing an investigation. As part of the investigation process, the IPC will likely follow-up with the Board to ensure that any recommendations made are being implemented.

Key takeaways

The IPC decision in *Halton District School Board* (*Re*) raises important issues regarding the protection of student data in an increasingly digital education era. The COVID-19 pandemic accelerated the adoption of education technologies, which is likely to persist for the foreseeable future. The decision in this case acts as a reminder that the protection of students' personal information should be paramount in school board decision-making regarding adoption of new technologies. School boards must remain alert to how third-party providers use students' data. On a practical level, school boards and their advisors should continually ensure that their contractual provisions adequately protect students and their personal information. Parents and regulators are sure to be keeping an eye on the safety and privacy of their students.

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