Arbitration Round Up 2011

Victoria Reaume[1]
Robyn White[2]

I. Introduction

In the education sector, as with most other sectors in the labour and employment sphere, a lot can happen in a year or two. Some of developments may be minor (after all, most change is incremental), others may be more substantial.

In the past two years there have been numerous arbitration decisions in the education realm which may be of interest to administrators and education workers.

Our discussion in this paper canvasses selected labour arbitration decisions in the education sector over the last two years, highlighting the types of grievances that are proceeding to arbitration and the rulings and results of those grievances, noting trends and shifting jurisprudence in areas of dispute between teachers and other education workers and school boards across the country. Within this framework we provide summaries of the arbitrators' decisions to highlight their impact on the practical reality of labour relations in the education sector, hopefully to provoke discussion about the approaches followed in the cases.

We have not included all cases decided across the country, but instead have focussed on three loosely defined areas: discipline of educational workers for a variety of offences from the banal to the serious; medical issues at arbitration which are always thorny and which appear to be on the rise; and decisions addressing teaching assignments and other working conditions in our schools.

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[1] Victoria Réaume is a partner at Cavalluzzo Hayes Shilton McIntyre & Cornish. She is co-editor of the leading text Education and Employment Labour in Ontario, 2nd Edition, Canada Law Book. Victoria represents teacher federations and their members in all aspects of their working lives including professional regulation, labour arbitration, and administrative tribunals.

[2] Robyn White is an associate at Cavalluzzo Hayes Shilton McIntyre & Cornish and is part of the labour and education law practice group. She represents teachers and members of other unions in litigation before arbitrators and administrative tribunals. Robyn's practice includes a focus on workplace safety and insurance benefits.

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II. Review of Arbitration Decisions

A. Inappropriate Behaviour

Harassment Generally

Despite increased awareness of human rights issues in our society, the implementation of policies and programs by employers and the plethora of case law with respect to harassment and related conduct, harassment continues to be an ongoing concern in workplaces across the country. The education sector is in no way exempt in this regard. Harassment can occur in a multitude of ways in the school environment, including between teachers and administration, between teachers and students, between teachers and parents, between teachers and school staff and among colleagues.

All educational workers are entitled to work in an environment free from harassment and students are entitled to learn in an harassment-free school environment. As Arbitrator Herman stated[3], "[t]eachers are role models for their students and must adhere to high professional standards. They stand in positions of trust, and because of the age and developmental stages of their students and the teaching setting, a teacher's conduct can have a profound effect on his/her students".

Harassment of Students

There is no question that sexualized comments and/or gestures by a teacher towards students attract serious consequences, including harsh discipline but also, potential criminal charges and charges of professional misconduct by the provincial regulatory body.

The following two cases illustrate that at arbitration such behaviour may warrant severe discipline, but not necessarily the ultimate sanction of termination.

In *Near North District School Board and O.S.S.T.F., District 4 (Reinders)* the school board fired a high school teacher following allegations of sexual abuse and harassment from a number of female students. The grievor had been charged criminally, but the charges were dismissed following a trial; moreover, charges of professional misconduct against him before the Ontario College of Teachers were withdrawn. On an examination of the merits, the arbitrator determined that a number of the allegations were not proved, but found that the grievor's physical contact with the female students—draping his arms over shoulders,

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[3] *Near North District School Board and O.S.S.T.F., District 4 (Reinders) (Re)* (2009), 85 L.A.C. (4th) 403 (Herman) at para 94

resting a hand on a shoulder, hugging one student, kissing another on the cheek and making comments about breast size–constituted sexual harassment.

Notably, the teacher continued to deny most of the allegations, including those that were found to be substantiated. However, Arbitrator Herman reinstated him to employment. In light of the various mitigating factors, including six years of employment with a good record, the arbitrator imposed a lengthy suspension of approximately two school years, which coincided with the date the criminal charges were dismissed. Arbitrator Herman commented that "[t]he failure to provide the grievor with the details of these allegations earlier in the process and the resultant hampering of his ability to fully respond to them probably contributed to the Board's view that [t]he grievor was being less than forthright"[4].

Contrast this case with the approach taken by the school board *in British Columbia Public School Employers' Assn. and B.C.T.F. (Davies)*[5]. The teacher in this case was suspended without pay, transferred to another school and forced to attend a course on professional conduct following allegations that he had inappropriately touched some female students. The teacher claimed that the touching at issue had not occurred, and that the allegations of touching had been fabricated by the complainant students. The arbitrator disagreed, and concluded that the allegations were proved, and as such, "the grievor [had] thoughtlessly invaded the personal space of a number of vulnerable girls and caused them to be uncomfortable in a setting in which they should have felt safe"; the grievor's denials of the inappropriate conduct showed a failure to acknowledge the nature and consequences of his behaviour. Notably, in upholding the discipline and five day suspension, the arbitrator drew on the fact that this teacher had been previously warned some ten years previously "to keep out of the space of female students". As a result of this warning, an increase in disciplinary penalty was warranted when the behaviour recurred.

In both cases, the allegations against the teachers were proved at arbitration in the face of their denials. In both cases, boundaries courses were considered the appropriate remedial measure along with punitive unpaid suspensions and, in the latter case, a transfer.

When considering whether or not to impose the ultimate sanction of termination, administrators may wish to consider a combination of remedial and punitive measures to correct inappropriate behaviour towards students, especially where other mitigating factors such as a lengthy good history of teaching are present and where it appears the teacher understands the impact of such conduct.

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4 *Ibid* at para 107

5 *British Columbia Public School Employers' Assn. and B.C.T.F (Re)* (2010), 103 C.L.A.S. 169 (Jackson)

Co-workers

In another case involving harassment, but this time between adult colleagues, discharge was the penalty imposed on the teacher[6]. The teacher was terminated after a co-worker with whom he had an off and on again sexual relationship claimed that he harassed her following the break up of their relationship by staring at her, calling her and making derogatory comments about her to others in the school community. The arbitrator ordered the school board to reinstate him with full pay on the basis that the school board had failed to prove that the alleged harassment had occurred. The arbitrator noted that despite the "many opportunities for the complainant and grievor to interact in a school day or school year", there were remarkably few instances of inappropriate conduct. Again the teacher participated in a remedial sensitivity course post discharge. The school board judicially reviewed the arbitration decision, and was successful in having the original decision quashed and the matter sent to a new arbitrator for a second hearing. The teacher's federation has applied for leave to appeal the court's decision.

Off Duty Conduct

Off duty misconduct by educational workers who are role models in their communities can have workplace consequences, especially if the conduct is of a criminal nature. However, one arbitrator reinstated a child and youth worker found guilty of sexual assault of an adult woman, occurring off duty. In *Toronto District School Board and O.S.S.T.F. (Moursalien)*[7] the arbitrator set aside the grievor's discharge, since the school board "had no clear evidence that there was a likelihood of the Grievor repeating his behaviour in the workplace". Notably, the criminal sentence the grievor received for the assault was expressly designed to allow the grievor to continue working for the Board.

A similar result ensued (again in Toronto) when the grievor in *Toronto District School Board and C.U.P.E., Local 4400 (Van Word)*[8], who was employed as a "'School Based Safety Monitor'", assaulted a man while off-duty. The man, unbeknownst to the grievor, was the father of a student at one of the two schools at which the grievor worked. The grievor was charged criminally, but the charges were withdrawn when the grievor entered into a recognizance preventing him from having contact with the man or the student for twelve

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6 *Thames Valley District School Board and E.T.F.O.* (2010), 103 C.L.A.S. 217 (Starkman)

7 *Toronto District School Board and O.S.S.T.F. (Moursalien)* (2010), 199 L.A.C. (4th) 36 (Albertyn)

8 *Toronto District School Board and C.U.P.E., Local 4400 (Van Word) (Re)* (2009), 181 L.A.C. (4th) 49 (Luborsky)

months. The board terminated the grievor because of the assault. On the merits, the arbitrator noted that the grievor was not subject to the statutory obligations imposed on teachers, though the nature of the grievor's position in itself imposed "high expectations of conduct" However, since the grievor admitted the misconduct, the misconduct occurred off-duty and the criminal charges against the grievor were withdrawn, the arbitrator concluded that there was no reason that a member of the public would believe that the school was not providing "a secure environment" by continuing to employ the grievor. Indeed, the arbitrator commented that the termination while the charges were still pending was "odd in its timing, given the Employer's partial reliance on those charges in supporting a disciplinary response". However, the arbitrator also concluded that a suspension was appropriate to warn him of the consequences of repeated off duty misconduct.

A Manitoba school board's decision to transfer a teacher because she was having an intimate relationship with the principal of her school was ordered rescinded in *Rolling River School Division and Rolling River Teachers' Assn. of the Manitoba Teacher's Society (Burgess)*[9]. The superintendent was found to have used management's discretion over transfers inappropriately because the discretion was tainted by the influence of community perceptions; moreover,the board had failed to consider that no problems deriving from the principal/teacher relationship at the school had emerged.

Mitigation of penalty was not the result in the case of an Ottawa custodian who stole money repeatedly from the school where he worked. Here, the discharge was upheld due to the prolonged period of theft, the lack of any credible reason for the grievor's conduct, the grievor's lack of remorse and the planned nature of the thefts.[10] Also, where a school board learned of a bus driver's two previous convictions for drunk driving and terminated her employment, the arbitrator refused to reinstate her as a result of her dishonestly, her inability to perform her work, and the impact on the school board's reputation.[11]

Pornography, Cyberbullying

Despite the high profile these types of offences garner in the education setting, there are few decided cases over the last two years involving misuse of school computers and the sanctions resulting from this type of activity.

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9 Rolling River School Division and Rolling River Teachers' Assn. of the Manitoba Teacher's Society (Burgess) (Re) (2009), 101 C.L.A.S. 424 (Peltz)

10 *Ottawa Carleton District School Board and Ontario Secondary School Teachers' Federation, District 25 (Pappin Grievance)*, [2009] O.L.A.A. No. 16 (Starkman)

11 *New Brunswick (Department of Education) and C.U.P.E., Local 1117 (LeBlanc) (Re)* (2009), 102 C.L.A.S. 101 (McEvoy)

In *School District No. 39 (Vancouver) and U.B.C.J.A., Local 1995 (Hawco)*[12], a carpenter employed by the school board was discharged for receiving, sending, viewing, saving and searching material of a pornographic nature in the workplace using the employer's equipment and on the employer's time. In upholding the termination, the arbitrator stressed the importance of employees' exercising "common sense and...good judgment", which was clearly lacking here. In using his work e-mail address, which contained the employer's name, the employee "was extremely reckless...and demonstrated a wanton disregard for the potential damage to the reputation of the Employer". The arbitrator concluded that "the grievor's voluminous pornographic email activity represents a patent breach of the employer's trust in circumstances where it was self-evident that the objective of the employer in ensuring the care and education of children could be compromised".

A teacher's behaviour was viewed harshly in another case from British Columbia, *British Columbia Public School Employers' Assn. and B.C.T.F. (Deol)*[13]: The grievor was discharged because he repeatedly accessed the private email accounts of at least sixteen teachers and his principal over a period of two years, and was the author of two particularly damaging emails sent from another teacher's email account. Despite evidence of a medical condition, bipolar disorder, the arbitrator upheld the termination on the basis that there was an insufficient link between the disorder and the impugned conduct. In upholding the penalty of termination, the arbitrator stated that, "[s]hort of inappropriate interaction with a student or actual physical harm to another person, one is pressed to envisage a more egregious breach of a teacher's obligations to his employer and professional colleagues".

Inappropriate Physical Contact with Students

Teachers are strongly advised by their professional regulating bodies, their unions and their school boards not to engage in physical contact with students, especially for the purpose of discipline or as a classroom management tool. Nonetheless, many teachers each year become the subject of police, Children's Aid Society ("CAS") and/or school board investigations as a result of engaging in physical contact with students.

School board investigations into allegations involving the use of physical contact with students often result in discipline, regardless of whether the teacher intended to or actually caused any harm to the student(s) in question, and regardless of the result of any police

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12 *School District No. 39 (Vancouver) and U.B.C.J.A., Local 1995 (Hawco)* (2010), 197 L.A.C. (4th) 421 (Ready)

13 *British Columbia Public School Employers' Assn. and B.C.T.F. (Deol)* (2009), 195 L.A.C. (4th) 1 (Hall)

or CAS investigation. The discipline for such conduct by teachers may range from a letter of caution up to and including discharge from employment.

Section 43 of the *Criminal Code of Canada* expressly offers teachers a defence in criminal cases where the teacher uses reasonable force to discipline a student. The section provides:

> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.[14]

However, despite the existence of s. 43, school boards routinely attempt to enforce "no touch" policies imposing virtual zero tolerance for any physical contact with students absent a compelling health and safety risk.

In *British Columbia Public School Employers' Assn. and B.C.T.F. (Gillespie)*[15] the teacher appeared to use physical force as a means of exerting control over two six year old boys in her class when she placed her hands on the back of their necks to return them to their seats. She claimed she was "guiding" them to their seats while the school board claimed that she had "grabbed" the students on their necks to force them to return to their seats. The arbitrator found that it was more likely than not that the teacher's actions went beyond simply guiding the boys. In reaching his finding, the arbitrator noted that the teacher considered "speaking to the boys loudly, but expressly rejected that option" and "apparently did not consider any other option or approach other than direct physical action".The suspension of five months was upheld in light of the teacher's short length of employment, her full opportunity and failure to explain to the board of education what she had done and her failure to accept responsibility for her actions and their consequences.

B. Letters of Discipline

For instances of relatively minor misconduct, school boards sometimes issue letters of discipline. The wording of such letters is an source of ongoing dispute between unions and school boards, as is the preliminary issue of whether of not a particular letter is in fact disciplinary in nature and therefore grievable. In certain labour relations contexts, letters of discipline are considered a mild form of punishment sometimes not worthy of litigating

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14 *Criminal Code*, R.S.C. 1985, c. C-46 at s. 43

15 *British Columbia Public School Employers' Assn. and B.C.T.F. (Gillespie)* (2009), 185 L.A.C. (4th) 129 (Dorsey)

to arbitration. This view is not shared in the teacher context where "sunset clauses" designed to remove such letters after a reasonable passage of time are rare, and where such letters can hinder a teacher's reputation and professional growth.

The characterisation of a letter issued to several teachers was the source of the dispute in *Toronto District School Board and E.T.F.O.*[16]. The issue centered around whether a letter sent to five teachers regarding supposed irregularities in the administration of EQAO assessments was disciplinary in nature, and therefore grievable. The arbitrator concluded that the tone of the letter was "disapproving", but not in substance a punitive measure intended to correct misconduct. Rather, the letter merely communicated performance expectations, and offered support and assistance by inviting the grievors to call someone if they would like to access professional development opportunities. This letter stood in contrast to an earlier letter, which was received by all of the teachers and contained language which was accusatory in nature and contained various sanctions including a written warning.

The content of a letter of discipline issued to a teacher was also the subject of a grievance in *Toronto District School Board and E.T.F.O. (Bandurak)* [17]. In that case, the teacher took a grade 4/5 class on a walking trip to a local university in close proximity to the school. However, some of the students, guided by a parent volunteer, became separated from the rest of the class, and a student under the volunteer's care scratched his leg when he jumped on a parked motorcycle. The grievor received a letter of discipline as a result of the incident. The arbitrator upheld the discipline and concluded that the teacher's conduct involved a lack of proper care which resulted in her losing contact with a group of students. While the arbitrator decided that a disciplinary letter was justified because the teacher had lost contact with part of the group, he found that the statements made in the disciplinary letter went beyond the conduct that justified the discipline and, accordingly, the school board was ordered to amend the letter to more accurately reflect the precise nature of the teacher's error.

In another case in Toronto,[18] the teacher was issued a disciplinary letter for conduct he admitted which consisted of touching a student to "guide him to his desk" and also "slamming" his hand on a student's desk. In this case the arbitrator concluded that the letter of discipline was imposed for just cause, but given the impact of such a letter on the teacher's career, it was to be removed from his file eighteen months after the incident if no further incident occurred.

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16 *Toronto District School Board and E.T.F.O.* (2010), 102 C.L.A.S. 66 (Howe)

17 *Toronto District School Board and E.T.F.O. (Bandurak)* (2010), 100 C.L.A.S. 193 (Springate)

18 *Toronto District School Board and E.T.F.O.* (2010), unreported (Johnston)

In the Toronto cases discussed above, letters of discipline were issued for conduct that could be considered at the low end of the spectrum. In one British Columbia case, *British Columbia Public School Employers' Assn. and B.C.T.F. (Merrick) (Re)*[19], arguably more serious conduct was in question. A high school counselor gave money to a 15-year-old student to travel to Vancouver by bus for the purpose of obtaining an abortion. The employer disciplined the counselor through a letter of reprimand. The arbitrator asserted, in upholding the discipline, that, although counseling on the various options in the circumstances of this case was appropriate, the facilitating of one of the options by the provision of personal funds and without ensuring the personal safety of the student crossed those boundaries. In doing so, the grievor acted in a role that went beyond that of a high school counselor. These actions, moreover, adversely affected the reputation of the school district . The grievor's unrepentant attitude was also cause for concern.

These cases illustrate the wide spectrum of behaviour that will provoke a letter of discipline. It appears clear, though, that the letter must accurately reflect the events giving rise to it, and may be time limited.

In assessing the circumstances of each case, school boards may wish to consider cautionary, or advisory letters that document an incident but which are not disciplinary and do not provoke grievances if this will achieve the desired result.

C. Medical, Illness and Accommodation issues

School boards are legally bound by human rights legislation and the duty to accommodate to the point of undue hardship any educational worker with a disability. Questions arise as to the nature and timing of accommodations, and the reasonableness of the school board's response. In situations involving medical illnesses and disabilities, questions arise concerning access to sick benefits, the nature of the particular disability and the school board's entitlement to information concerning the disability at issue, including whether or not an independent medical examination ("IME") of the employee is appropriate.

Where an employee's behaviour is altered and the employer has suspicions concerning the employee's fitness and/or suspects the presence of a medical condition, both the employer and the union have a responsibility to make inquiries, and, where appropriate, suggest medical intervention.

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[19] *British Columbia Public School Employers' Assn. and B.C.T.F. (Merrick) (Re) (2009),* 181 L.A.C. (4th) 426 (Burke)

The school board in *Niagara Catholic District and CUPE, Local 1317* [20] took those steps. However, its efforts to assist were not successful. The grievor was suspended and ultimately fired for erratic and aggressive behaviour, resulting from illness. At various points leading up to the discharge, the school board suspected that "something was not quite right with the grievor" and proactively urged the grievor to seek medical assistance. In light of the diagnosis of a serious psychiatric disability, the grievor's reinstatement was limited to ensuring that she retained employee status, presumably for the ability to apply for benefits, because of the absence of any medical information demonstrating her fitness to return to work.

The nature of accommodation duties was explored in *Toronto District School Board and C.U.P.E., Local 4400 Unit C (B.(J.)*[21]. The union alleged that the grievor, a special needs assistant, had not been properly accommodated following the still-birth of her child. The grievor had desired to be reassigned to a school closer to her home as an accommodation measure, but there was initially no precise evidence supporting this type of accommodation. A later medical note clarified the need for such accommodation, but the employer did not respond appropriately, either by requesting further information or by acting to accommodate the grievor. The arbitrator found that the grievor was entitled to compensation dating from the time the final (and more complete) medical note was sent to the employer. With respect to the earlier period of time, the arbitrator found that the school board had been sensitive to the grievor's situation, and acted appropriately in not compelling the grievor to return to work. Thus, compensation for that period was not warranted.

The issue at the heart of grievances filed both by the union and the school board in *Fort McMurray Roman Catholic Separate School Division No. 32 and A.T.A. (MacLeod)*[22] was whether the grievor was entitled to sick leave for all or some part of a three month period. An independent medical examiner concluded that the grievor "had not had a disabling psychiatric illness at any point during her absence from her teaching duties". However, the majority of the board of arbitration preferred the evidence of the grievor's own family physicians over that of the medical examiner. In comparison, it was found that the treating physician's assessments were based on direct treatment of the grievor over the period in question, as opposed to the independent doctor who had focused on the narrow issue of psychiatric disability.

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20 *Niagara Catholic District and CUPE, Local 1317* (2010), C.L.B. 22410 (Surdykowski)

21 *C.U.P.E., Local 4400 Unit C (B.(J.)* (2010), 102 C.L.A.S. 35 (Knopf)

22 *Fort McMurray Roman Catholic Separate School Division No. 32 and A.T.A. (MacLeod)* (2009), 97 C.L.A.S. 56 (Jones)

A different, more positive, use was made of an IME in *Toronto District School Board and Ontario Secondary School Teachers' Federation, District 12 (B.P. Grievance).*[23] This case concerned a grievor who had been diagnosed with Multiple Chemical Sensitivity, and had not yet been returned to full-time work because of the accommodation difficulties caused by her condition, and despite the accommodation plan signed by the parties. An interim award concerned whether the employer acted appropriately in deducting sick leave credits from the grievor's sick leave bank. The award, however, also addressed the employer's request for all of the grievor's medical records for a period of time following the signing of the accommodation plan. The school board's request for medical records had no foundation and it was inappropriate to access the medical history for the time period in question to allow the employer to revisit the accommodation plan. Nonetheless, an IME was found to be appropriate to enable the school board to assess the need for continued of amended accommodations.

Can a teacher access sick time if there is no current illness but if she would become ill if she returned to the classroom? In *Waterloo Catholic District School Board and Ontario English Catholic Teachers' Assn. (Sick Leave Grievance)* [24], the arbitrator concluded that she could. Sick leave was available to a teacher notwithstanding that he or she was not currently sick or ill but where attendance at work would likely result in sickness or illness. Only if no accommodation were available, sick leave would be available for a teacher having some currently dormant, but underlying physical and/or mental disability that could pose a significant medical risk if the teacher were returned to the classroom.

In the context of a school board policy which required medical certificates for any and all absences from work on the workday before or after a statutory holiday, an arbitrator ruled that the policy violated the collective agreement[25]. The board was prevented from demanding this as a blanket provision since the principal and not the board , had the discretion to require a medical certificate under the collective agreement. The board's policy attempted to remove this discretion.

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[23] *Toronto District School Board and Ontario Secondary School Teachers' Federation, District 12 (B.P. Grievance),* [2009] O.L.A.A. No. 9 (Knopf)

[24] *Waterloo Catholic District School Board and Ontario English Catholic Teachers' Assn. (Sick Leave Grievance),* [2011] O.L.A.A. No. 55 (Ontario - Carrier)

[25] *Toronto District School Board and O.S.S.T.F.* (2010), 101 C.L.A.S. 298 (Burkett)

E) Terms and Conditions of Employment

Travel and Lunch

The terms and conditions of employment of Educational Assistants ("EAs") were the subject of various grievances over the past two years. The grievance at issue in *Toronto District School Board and C.U.P.E.*[26] concerned whether the employer was obligated to pay EAs who accompanied students on an overnight trip. The employer argued that the EAs had volunteered to participate in the trip. The arbitrator allowed the grievance on the basis that the collective agreement had clear language on overtime and overnight trips which clearly provided that employees who accompany students on such trips would receive five hours of pay. He noted that "...[i]t is completely inconsistent with the scheme of collective bargaining, and the specific terms of the collective agreement, that employees 'volunteer' to do their own jobs for nothing".

In Toronto District School Board and Canadian Union of Public Employees, Local 4400 - Unit C (Lunch Break Grievance)[27] lunch breaks available to Educational Assistants were at issue. Because the Educational Assistants often had to travel to another assignment during their respective lunch periods, they frequently missed their unpaid lunch period. The arbitrator concluded that the travel time and the lunch period cannot be the same. The lunch period was mandated by the collective agreement and the *Employment Standards Act*. The lunch period was a time that was for the employee to do as s/he chooses.

In another travel time case, *Upper Canada District School Board and Elementary Teachers' Federation of Ontario (Widenmaier Grievance)*[28], the parties disputed the remedy appropriate for the employer's violation of the mileage allowance provisions of the collective agreement. The arbitrator held that the "base location" to be used in calculating the allowance for teachers required to travel between schools in performing their assignments should be the school to which the teacher was first assigned, and not the school that would provide the greatest financial benefit to the teacher.

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26 *Toronto District School Board and C.U.P.E.* (2010), 195 L.A.C. (4th) 375 (Kaplan)

27 *Canadian Union of Public Employees, Local 4400 - Unit C (Lunch Break Grievance)*, [2009] O.L.A.A. No. 226 (Knopf)

28 *Upper Canada District School Board and Elementary Teachers' Federation of Ontario (Widenmaier Grievance)*, [2009] O.L.A.A. No. 18 (Raymond)

Replacement by Occasional Teachers

The terms and conditions of employment of teachers is historically an area of dispute between school boards and unions. Recently, the issue of replacing regular teachers with occasional teachers was addressed. In *Ottawa-Carleton District School Board and Ottawa-Carleton Elementary Teachers' Federation (Re)*[29] three grievances alleged that the principal of a school was failing to make every reasonable effort to replace absent teachers with qualified occasional teachers. The arbitrator allowed the grievance and held that it was only if every reasonable effort turned up no qualified teacher replacement that an absent teacher need not be replaced. Such efforts were vital in ensuring that principals and school boards complied with their statutory obligations.

Preparation Time

In *Ontario North East District School Board and E.T.F.O., Ontario North East Local (Preparation Time)*[30] the school board cancelled two teachers' assigned preparation time when the teachers were directed to attend a meeting. The arbitrator held that the cancellation violated the collective agreement: the teachers fell below the minimum amount of preparation time set out in the agreement, and there was no clear language in the agreement permitting the employer to derogate from its preparation time obligation. Indeed, according to the arbitrator, the school board's reading of the provision would do "unwarranted damage to the integrity of the provision" on preparation time.

Class Size

It is clear that class size is a hotly contested issue in British Columbia and numerous cases have examined this issue. In *British Columbia Teachers' Federation and British Columbia Public School Employers' Assn. (Class Size Grievance)*,[31] principals would not provide documents setting out information to teachers about class size and class organization. Based on a class size regulation under the governing statute, the arbitrator found that the requirement to consult meant meaningful consultation and must involve professional dialogue that did not diminish teacher involvement and participation. Principals were thus required to provide copies of the documents to the teachers.

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29 *Ottawa-Carleton District School Board and Ottawa-Carleton Elementary Teachers' Federation (Re)* (2009), 99 C.L.A.S. 356 (Surdykowski)

30 *Ontario North East District School Board and E.T.F.O., Ontario North East Local (Preparation Time)* (2010), 104 C.L.A.S. 107 (Herlich)

31 *British Columbia Teachers' Federation and British Columbia Public School Employers' Assn. (Class Size Grievance)*, [2009] B.C.C.A.A.A. No. 101 (Dorsey)

In a follow up to earlier cases on the issue, the parties were back before the arbitrator to determine appropriate remedies for violations of the class size and organization provisions of the *School Act* in the 2006-07 and 2007-08 school terms in *British Columbia Teachers' Federation and British Columbia Public School Employers' Assn. (Class Size and Composition Grievance)*[32]. Compensation for exceeding class size was awarded to ten teachers who were found to have had too many individual education plan students. For other teachers who where not properly consulted about class size, nominal compensation was considered appropriate. A tiered formula compensation structure depending on the nature of the breach was ordered to compensate the teachers for their lost release time.

Meetings

Meetings and the requirement to attend them, whether with administrators or parents, are always a hot topic for teachers. Two recent cases touch on these issues.

A principal was found to have violated the collective agreement when a meeting went overtime and infringed on the teacher's classroom responsibilities. In *Algonquin and Lakeshore Catholic District School Board and O.E.C.T.A.*[33] a lunchtime meeting went beyond the end of the lunch period and well into the instructional period when teachers should have been in their classrooms. Despite characterizing the event as "minor", the arbitrator recognized that the union had decided it was important enough to litigate the issue, and therefore issued a ruling that the employer had violated the provisions of the *Education Act* and its regulations requiring teachers to supervise students and maintain a safe environment by requiring the teachers to stay at the meeting.

The issue of requiring teachers to participate in consultations with parents outside of classroom hours was addressed once again in *BC Public School Employers' Assn. and B.C.T.F.*[34]. The union claimed that teacher attendance at Meet The Teacher Night was not mandatory, since it fell within the extracurricular activities language of the collective agreement. The arbitrator disagreed and found that extracurricular activities, as described in the collective agreement, could not encompass "events that cater to only the parents". Moreover, Meet The Teacher Night fell within a teacher's duties under the *School Regulation* and the union had treated the night as mandatory "for many years", which entitled the school board to rely on that representation.

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32 *British Columbia Teachers' Federation and British Columbia Public School Employers' Assn. (Class Size and Composition Grievance)*, [2010] B.C.C.A.A.A. No. 1 (Dorsey)

33 *Algonquin and Lakeshore Catholic District School Board and O.E.C.T.A.* (2009), 98 C.L.A.S. 287 (Slotnick)

34 *BC Public School Employers' Assn. and B.C.T.F.* (2010), 100 C.L.A.S. 339 (Brown)

Testing

Similarly, the administration of tests has been considered a legitimate management right. If a school board requires teachers to administer tests, a British Columbia arbitrator has ruled, the teacher must do so. In *British Columbia Public Employers' Assn. and B.C.T.F.*[35], the grievor refused to administer a data-gathering assessment of her students on the basis of professional autonomy. She was insubordinate and received a letter of discipline. In holding that the assessment at issue was "a bureaucratic directive for organizational purposes that consumes a teacher's time", the arbitrator found that there was nonetheless a requirement under the *School Act* and a long-standing employer policy mandating the use of assessment instruments as necessary. The employer was found to have exclusive authority to assign the assessment to the teacher and the assessment did not "diminish the art and profession of teaching by telling teachers what they cannot do."

Testing surfaced in a completely different context in *Calgary Board of Education and A.T.A.*[36] Principals and vice principals objected to the school board's use of a series of psychological tests as an additional tool in the selection process for principals and assistant principals, and to administering those tests on incumbent principals and assistant principals. The arbitration board concluded that the collective agreement permitted the school board to take leadership abilities into account and, since psychological testing had been "accepted by arbitrators" as a legitimate way of determining qualifications and ability, the school board was justified in using leadership-oriented psychological testing in the application process, provided it was useful and did not form the entire basis for the selection of principals and vice-principals. There appeared to be no attempt to use the tests for promoting or terminating administrators. But, the panel did conclude that the school board had acted unreasonably in the way it administered the testing to incumbents due to its "maladroit", unclear response to legitimate concerns about consent, privacy and the use to which the identifiable information might be put.

Pregnancy/Parental Leave and Top Up

Several cases have examined the issue of top up benefits for maternity leave, or entitlement to leave, especially during non-teaching periods. In *Hastings and Prince Edward District School Board and Elementary Teachers' Federation of Ontario*[37], the arbitrator had previously ruled that "teachers in receipt of employment insurance pregnancy

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35 *British Columbia Public Employers' Assn. and B.C.T.F.* (2009), 99 C.L.A.S. 269 (Dorsey)

36 *Calgary Board of Education and A.T.A.* (2010), 103 C.L.A.S. 98 (Jones)

37 *Hastings and Prince Edward District School Board and Elementary Teachers' Federation of Ontario,* [2009] O.L.A.A. No. 48 (Davie)

benefits were entitled to the SEB top-up set out in the collective agreement while on pregnancy leave during non-teaching periods of time". The parties later disputed the formula appropriate in calculating the top-up. Teachers in Ontario are required under the *Education Act* to work for 194 days and are remunerated only for these 194 days, though the remuneration is spread out over twelve months. As such, the pregnancy top-up benefits were to be calculated in accordance with a teacher's 194 days of work.

In the case of *British Columbia Public School Employers' Assn. and British Columbia Teachers' Federation (Parental Benefits Grievance)*[38], birth mothers were excluded from the supplemental unemployment benefits scheme under the collective agreement during parental leave. Birth fathers and adoptive parents were all entitled to these benefits. The union contended that the provisions violated the *Human Rights Code* ("*Code*") and s. 15(1) of the *Charter*. The arbitrator held that there was no rational basis for excluding birth mothers as a group from the benefit scheme: the purpose of the benefits was to allow parents to care for and bond with their children, and birth mothers obviously interacted with their children in ways that came within this purpose. Notably, the pregnancy leave benefits provided for under the collective agreement did not displace the need for parental leave benefits for birth mothers: the pregnancy benefits had a different purpose than the parental leave benefits. As such, this was not a case where benefits lost were compensated for by other benefits being enjoyed. Since no financial crisis would arise for the employer because of the inclusion of birth mothers in the benefits scheme, the current scheme was not saved under s. 1 of the *Charter*, and did not constitute a *bona fide* occupational requirement under the *Code*. On the remedy issue the arbitrator referred the matter back to the parties on the basis that they were to negotiate a new benefits scheme.

Health and Safety Issues

Construction or renovations occurring in schools can give rise to violations of the collective agreement. School boards are required under governing occupational health and safety laws to mitigate the effects of such projects on educational workers. Teacher federations are making use of the grievance procedure to enforce health and safety rights, and arbitrators are awarding monetary damages and other remedies for failures to protect workers. In *British Columbia Public School Employers' Assn. (School District No. 61 (Greater Victoria)) and BCTF (Health and Safety)*[39], major construction work was carried out at the school; this work significantly affected the teaching staff, and some teachers complained of physical discomfort, illness and stress. The arbitrator ordered that a

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38 *British Columbia Public School Employers' Assn. and British Columbia Teachers' Federation (Parental Benefits Grievance),* [2011] B.C.C.A.A.A. No. 12 (Kinzie)

39 *British Columbia Public School Employers' Assn. (School District No. 61 (Greater Victoria)) and BCTF (Health and Safety) (Re)* (2010), 104 C.L.A.S. 140 (Taylor)

construction fund be established by the employer and $30,000 contributed to it, to be used to mitigate the effects of future major construction projects. The arbitrator declined to award monetary damages to individuals because their claims were too vague and imprecise.

Similarly, in Ontario in *Greater Essex County District School Board and E.T.F.O.*[40] the arbitrator ruled that she had the jurisdiction to determine violations of the *Occupational Health and Safety Act*, since, as an employment-related statute, it was deemed to be incorporated into the collective agreement. She concluded that the construction work in question had created an extremely uncomfortable atmosphere in which to work and issued a declaration that the collective agreement had been breached.

Another Ontario arbitrator enforced the provisions of the *Occupational Health and Safety Act* under the collective agreement and ruled that the teacher health and safety representative had the right under the *Act* to perform inspections of the school boiler, mechanical and other utility areas in *Toronto Catholic District School Board and O.E.C.T.A.*[41] " . The employer could not use a safety rationale to stop the inspections. The school board was required to take less drastic measures to protect the representative's health and safety while he performed the inspections.

Union Rights

Two interesting cases at different ends of the country reinforced union rights to represent their members and to visibly show their representation in schools. In Ontario, an arbitrator concluded that a union representative could not be excluded from the employer's informal, internal harassment investigation when a bargaining unit employee was being interviewed. In *Toronto District School Board and Canadian Union of Public Employers, Local 4400 (Representation Grievance)* [42] the employer proposed a waiver form that would permit the individual being interviewed to decline union representation. The union claimed that it had a right to be present during the interview, regardless of the wishes of the employee. The grievance was allowed because the employer's policy required the presence of the union. Moreover, the collective agreement mandated union representation under the informal process because an employee could be disciplined if s/he failed to stop the harassing conduct. The possibility of future discipline also triggered the union's right to representation.

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40 *Greater Essex County District School Board and E.T.F.O. (*2010), CLB 33143 (Brent)

41 *Toronto Catholic District School Board and O.E.C.T.A.* (2010), 102 C.L.A.S. 141 (Newman)

42 *Toronto District School Board and Canadian Union of Public Employers, Local 4400 (Representation Grievance)*, [2011] O.L.A.A. No. 64 (Albertyn)

In British Columbia, the removal of a sign reading "staff representative" from the wall outside of a teacher's classroom triggered a grievance claiming a violation of *Charter* rights. In *British Columbia Public School Employers' Assn. and B.C.T.F. (Head)*[43] the arbitrator found that the removal of the staff representative sign was contrary to s. 2(b) of the *Charter* because the sign had expressive content. The removal of the sign did not reflect a neutral objective, and it created an inaccurate perception that the staff representative and the union itself were excluded from the school. This action affected the identity of the grievor as a representative of the union and its members. Moreover, the removal of the sign was not justified under s. 1 of the *Charter*: The sign had "minimal impact " on the operation of the school but it had important political content that deserved a high degree of protection. Interestingly, the removal of the sign did not violate the collective agreement: Indeed, the removal was considered a proper exercise of the school's management rights under the agreement.

In another case, an arbitrator ruled that the school board had breached the *Charter*'s equality provision in enforcing its retirement policy. In a follow up award in *Toronto District School Board and CUPE*[44] the arbitrator concluded that monetary damages for the breach of the *Charter* right were appropriate.

Conclusion

From the perennial to the novel, from the sublime to the ridiculous (depending on your perspective) these cases illustrate that labour relations among teachers, their unions and administrators and school boards is a complex business. Good sense does not always prevail and human behaviour remains as quirky as always. These arbitration cases reflect hundreds of days of litigation, not to mention preparation time and witness appearance time before arbitrators over misconduct and how it was addressed; the struggles and uncertainties involved when illness affects education workers, and the importance of working conditions on the daily lives of educators. In the cases reviewed, rights to parental leave benefits and calculations of supplementary benefits were clarified by arbitrators, and union representation rights have been decisively recognized.

Workload issues, such as limits on class size, missed preparation time, or missed payments for work performed, are obviously issues of principle serious enough to lead to litigation for a variety of teacher unions across the country. Similarly, we are seeing greater enforcement of occupational health and safety laws by grievance arbitrators, and the use of grievances to enforce *Charter* rights.

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[43] *British Columbia Public School Employers' Assn. and B.C.T.F. (Head)* (2010), 193 L.A.C. (4th) 65 (Steeves)

[44] *Toronto District School Board and CUPE* (2010), C.L.B. 1655 (Kaplan)

Hopefully this review of the cases provides guidance for educators across the country in dealing with day to day issues arising in their administration of collective agreements.