

## **Court of Appeal: teacher returning from leave has no right to be returned to same teaching assignment**

Under Ontario's *Employment Standards Act (ESA)*, an employee on pregnancy or parental leave is guaranteed the right to return to the position they held before going on leave or, if their former position no longer exists, to a comparable position. Does this mean that teachers are guaranteed the right to return to the teaching assignments they previously held? In *Elementary Teachers' Federation of Ontario v. Toronto District School Board* (October 14, 2005), the Ontario Court of Appeal has said no.

The case involved an elementary school teacher whose assignment before taking pregnancy leave was Senior French. While on leave, she was advised by the principal that upon her return, she would be assigned to teach Senior Science. While she was formally qualified to teach Senior Science, she had never done so and was uncomfortable with the assignment.

The union filed a grievance, citing subsection 43(1) of the *ESA* [currently subsection 53(1), with minor modifications], which provided:

"The employer of an employee who has taken pregnancy leave or parental leave shall reinstate the employee when the leave ends to the position the employee most recently held with the employer, if it still exists, or to a comparable position, if it does not."

The majority of a board of arbitration dismissed the grievance, holding that the position that the employee had most recently held with the employer was a position at the same school teaching subjects for which she was qualified. The union applied to have the board's decision judicially reviewed and, in a decision issued on July 6, 2004, the Divisional Court upheld the board's award.

### **COURT: NO RIGHT TO A TEACHING ASSIGNMENT FROM YEAR TO YEAR**

The Court noted that the issue to be resolved in the case was whether "the position the employee most recently held" means, in a school/teacher context, that the employee teaches the same subjects she taught before or that she teaches subjects for which her teaching certificate qualifies her at the same school. The union argued that the term "position" must mean the most recent work assignment held by the grievor. The Court disagreed, noting that the *ESA* must be interpreted in light of the "normal dynamics of a particular workplace". In this case, those dynamics were to be understood in the context provided by the *Education Act*:

"Pursuant to s. 265(1)(e) of the *Education Act*, R.S.O. 1990, c.E.2, a principal has the power to assign classes and subjects to a teacher, while s. 264(1) states that it is the duty of a teacher to teach "subjects assigned to the teacher by the

principal". The collective agreement between the parties clearly contemplates an annual assignment of teaching duties, taking into account the staffing model for the following academic year. Thus, no teacher has a right to a particular teaching assignment from year to year, nor can it be said that a teacher has a reasonable expectation to continue teaching the same subjects every year. Thus, it cannot be said that the arbitration board's characterization of the teacher's position was unreasonable, given the provisions of the *Education Act* and the terms of the collective agreement."

The Court of Appeal agreed with the Divisional Court's analysis, and dismissed the union's appeal.

### In Our View

It should be noted that, in another arbitration award dealing with the interpretation of subsection 53(1) of the *ESA* in the public school setting, the arbitrator held that a teacher's particular assignment was her "position" for the purposes of the provision. However, even in that case, the arbitrator held that the provision should not be interpreted mechanically and that some latitude must be granted to employers in their assignment of employees returning from leave. This decision would seem to expand the latitude granted to school boards, in light of the provisions of the *Education Act*.

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