IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Frayn v. Quinlan, 2008 NSSC 63

Date: 20080212
Docket: SH 284574
Registry: Halifax

Between:

Patricia Frayn

Plaintiff

and

Terry Quinlan and Michael Nee

Defendants

D E C I S I O N

Judge:	The Honourable Justice Suzanne M. Hood, in Halifax, Nova Scotia
Heard:	December 6, 2007
Written Decision:	March 6, 2008 *(Oral decision rendered February 12, 2008)*
Counsel:	Ian Pickard, for the Applicant Janet M. Stevenson and Lyndsay C. Jardine, for the Defendants

By the Court:

INTRODUCTION

[1] Patricia Frayn is a guidance counsellor with the Halifax Regional School Board (HRSB). She commenced an action against her former principal and vice-principal for mental suffering and mental distress resulting from alleged bullying and harassment by the principal and vice-principal. The defendants seek to set aside or strike the statement of claim.

ISSUE

[2] Does the Supreme Court have jurisdiction to hear these claims? Are the claims within the exclusive jurisdiction of an arbitrator pursuant to the collective agreements?

FACTS

[3] Ms. Frayn is a guidance counsellor employed by the HRSB and in 2003 she was employed at J.L. Ilsley High School where Michael Nee was the principal and Terry Quinlan was the vice-principal. In the fall of 2003 Mr. Nee, having retired, Terry Quinlan became the principal. All three are members of the Nova Scotia Teachers' Union.

[4] In April 2003, an incident involving a student threatening self-harm sparked a series of events leading to this action. Patricia Frayn alleges she had a rapport with the student, developed over two years, and she did not consider that the student would injure herself or others. She promised the student she would not contact her parent. When Terry Quinlan became aware of the situation she expressed concern over Ms. Frayn's handling of the matter to Michael Nee. When Mr. Nee and Ms. Quinlan could not convince Ms. Frayn to contact the parent, Mr. Nee did so. Ms. Frayn says the confrontation between the defendants and her was bullying and harassment.

[5] Ms. Quinlan wrote a letter to Ms. Frayn dated April 22, 2003 and Ms. Frayn received a letter from Michael Nee dated June 27, 2003. Ms. Frayn says that after Mr. Nee retired and Ms. Quinlan became the principal, Ms. Quinlan continued to bully and harass her. She alleges she had to take leave beginning in January 2004 to recover. During the time she Ms. Frayn was off, Terry Quinlan reportedly said that she did not want Ms. Frayn to return to the school.

[6] A meeting was held in September of 2004 with respect to Ms. Frayn's return to work. In October 2004, her doctor said she was able to return to work and she was offered a reassignment to another school, which she refused. She was transferred to the new school effective mid-December 2004.

[7] Ms. Frayn, in April and May of 2005, grieved the conduct of Michael Nee and Terry Quinlan and the transfer respectively. The transfer grievance was dealt with by arbitration by Susan Ashley in 2007.

[8] An investigation was conducted into the allegations of bullying and harassment by legal counsel for the HRSB, Rene Gallant, and his investigation

report is dated October 20, 2005. He concluded there was no bullying or harassment.

Legislation and Civil Procedure Rules

[9] *Civil Procedure Rule* 11.05 provides in part:

> 11.05A A defendant may, at any time before filing a defence or appearing on an application, apply to the court for an order,
>
> (a) setting aside the originating notice or service thereof on him;
>
> ...
>
> and the application shall not be deemed to be a submission to the jurisdiction of the court.

[10] *Civil Procedure Rule* 14.25(1)(d) provides:

> 14.25(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> ....

> (d) it is otherwise an abuse of the process of the court;

[11] The Nova Scotia Teachers Union is a body corporate pursuant to the *Teaching Professions Act*, R.S.N.S. 1989, c. 462 and it requires all teachers to be members. Section 12(1) of the *Act* provides:

> Every teacher as defined by this Act shall be a member of the Union for the purpose of this Act.

[12] The *Teachers' Collective Bargaining Act* (TCBA), R.S.N.S. 1989, c. 460 also provides that all teachers shall be Union members.

[13] Section 29 of the TCBA contains a no strike provision. It provides that all differences about "the meaning or violation" of collective agreements are to be dealt with without work stoppage "by arbitration or otherwise". Section 29(1) reads:

> 29(1) Every professional agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

Section 30 of the TCBA sets out the powers and duties of an arbitrator or an arbitration board.

[14] The Nova Scotia Teachers Union is a party to two collective agreements in each school district: the Teachers' Provincial Agreement which applies to all teachers in the province and a Local Agreement, in this a case a collective agreement between the HRSB and the NSTU effective from January 1, 2001 to July 31, 2006. Each agreement sets out grievance and arbitration procedures and contains a clause required by the *TCBA* about resolution of disputes. The Provincial Agreement in Article 42 sets out the grievance procedure and that Article provides:

> 42.01 The parties agree that a grievance means a dispute or difference of opinion concerning the interpretation or an alleged violation of any provision of this Agreement.

Step Three of the procedure provides for a referral of a dispute to arbitration.

[15] The Local Agreement in Article 14 deals with resolution of grievances. Articles 14.01 and 14.03 provide:

> 14.01 For the purposes of considering and attempting to settle any dispute or complaint regarding the interpretation, application or operation of this Agreement, the procedure set forth in this Article shall be followed.
>
> ...
>
> 14.03 Where a teacher or the Union has a dispute with the Board or its representative regarding interpretation, application, administration or any alleged violation of this Agreement, the dispute shall constitute a grievance and the teacher or the Union shall make this known in writing to the Board.

Article 14.04 provides for referral of the grievance to arbitration.

ANALYSIS

Positions of the Parties

[16] Patricia Frayn says the collective agreements are silent on the issues of bullying and harassment and therefore they fall outside the scope of the collective agreements. Accordingly she says the courts have jurisdiction to deal with these issues.

[17] The defendants say there are four reasons why the courts have no jurisdiction to deal with these claims. They say they are solely within the jurisdiction of an arbitrator pursuant to the collective agreements.

[18] The defendants refer to Article 6.05 of the Provincial Agreement which provides:

> 6.05 The Union and the Employer recognize the responsibility of School Boards to establish a policy for the protection of teachers from harassment and abuse pursuant to *The Education Act*, S.N.S., 1995-96, c.1, sub clause 64(2)(t).

Ms. Frayn says all this section does is create an obligation to have such a policy. She says there is no such policy with the result that this provision cannot be said to bring her claims within the collective agreements.

[19] The defendants also refer to a Letter of Understanding (L.O.U.) attached to the Provincial Agreement and which forms a part of the agreement, entitled Harassment and Abuse of Teachers. It states in paragraphs .01 and .02

> .01 The parties to this Agreement recognize the importance of maintaining a learning and work environment that is free of harassment and abuse.

> .02 The parties to this Agreement also recognize that pursuant to *The Education Act*, S.N.S. 1995-96, c.1 School Boards are responsible for establishing a policy for the protection of students and employees from harassment and abuse. The parties agree that harassment includes sexual harassment.

Ms. Frayn says that the L.O.U. is only a recognition that HRSB is to establish a policy but there is none in either the Provincial or Local Agreement.

[20] In the Local Agreement, Article 27.01 provides:

> 27.01 The Board, the Union and the teachers agree to cooperate in the prevention of accidents and the promotion of safety and health. All parties agree to comply with all applicable provisions of the *Nova Scotia Occupational Health and Safety Act* and Regulations under the Act.
>
> 35.02 The Board shall exercise its rights under this Agreement fairly and reasonably, in good faith and without discrimination, and in a manner consistent with the provisions of this Agreement.

Ms. Frayn says in response to these arguments that she is not alleging discrimination and she does not address the other parts of this Article.

[21] In addition, the defendants point out the HRSB Race Relations, Cross-Cultural Understanding and Human Rights Policy (RCH). It contains a section entitled “Harassment” and its introductory paragraph is:

> For the purpose of this policy, harassment is defined as “...engaging in a course of derogatory or vexatious comment or conduct that is known or ought reasonably to be known as unwelcome”.
>
> ...
>
> 6. The Board supports the right of all employees and students to work in an environment which respects the dignity and basic human rights of all individuals.
>
> 6.1.1 Within this environment, any form of harassment which undermines the integrity of working relationships, threatens personal well-being and performance is unacceptable.

[22] It goes on in para.7 to specifically mention “racial or ethnic harassment” and continues in para.8:

> 8. Harassment of any Board employee and/or student is a serious infraction which warrants immediate action.
>
> 8.1 The Board ensures a high quality working environment for all employees and students and all complaints will be treated seriously, objectively and without fear of reprisal.

In response to this, Ms. Frayn says it was drafted in the context of race relations, human rights and discrimination and does not encompass her claims.

The Law

[23] The leading case on the appropriate forum for adjudication of disputes when the parties are subject to a collective agreement is *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929. In that case McLachlin, J. (as she then was) writing for the majority adopted what is called "the exclusive jurisdiction model". In para. 54 of *Weber* she said:

> 54 This approach does not preclude all actions in the courts between employer and employee. Only disputes which expressly or inferentially arise out of the collective agreement are foreclosed to the courts. ...

[24] In such cases the courts have no jurisdiction. The arbitrator has exclusive jurisdiction. The test to determine whether the matter is one over which the arbitrator has exclusive jurisdiction is set out in paras. 51 and 52 of the *Weber* decision where McLachlin, J. said:

> 51. On this approach, the task of the judge or arbitrator determining the appropriate forum for the proceedings centres on whether the dispute or difference between the parties arises out of the collective agreement. Two elements must be considered: the dispute and the ambit of the collective agreement.
>
> 52. ...The question in each case is whether the dispute, in its essential character, arises from the interpretation, application, administration or violation of the collective agreement.

[25] In Nova Scotia the Nova Scotia Court of Appeal followed *Weber* in *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, [2007] NSCA 38. Cromwell, J.A. said in para.18 with respect to the *Weber* analysis:

> 18 To carry out the required analysis, the court must address two main questions. The first concerns the ambit of the dispute resolution scheme and the second concerns whether the dispute falls within it. The court must look at the essential character of the dispute, determined according to its full factual context, and not at the legal characterization which the parties have chosen to place on it: ... Any other approach would leave it open to innovative pleaders to evade the dispute resolution process established by the legislation and the collective agreement. This would undermine the purposes of the legislative scheme and the intention of the parties: ...

Application of the law to the present case

[26] Flowing from *Weber* and *Cherubini* there is a two part process in determining if the dispute arises expressly or inferentially from the collective

agreement. First the court must consider the ambit of the collective agreement and secondly the dispute itself.

The Ambit of the Dispute Resolution Process

[27] The combined effect of the *Teaching Profession Act*, the *TCBA* and the two collective agreements is to provide for the settlement by arbitration of all disputes between teachers and their employers with respect to the meaning or violation of a collective agreement. The *TCBA* has a provision which is deemed to be contained in each agreement. That section provides:

> (2) Where a professional agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:
>
> > Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any questions as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any teacher or employer affected by it.

[28] This provision specifically mentions “interpretation, application, administration or violation of the agreement.” Section 29 is identical in wording to s. 42 of the *Trade Union Act*, R.S.N.S. 1989, C. 475 which was the *Act* in question in *Cherubini, supra*. As Cromwell, J.A. said in *Cherubini* in para. 22:

> 22 The judge correctly found that the collective agreement dispute resolution processes in this case were the exclusive means of addressing disputes falling within their terms.

[29] He continued at para.25:

> 25 ... the question is whether the claims made by the respondent in its court action are such disputes.

[30] I conclude that the ambit of the legislation in the two collective agreements is such that the intent is that disputes are to be resolved by arbitration. I must now consider the nature of the claims and whether they fall within the collective agreement.

The Nature of the Claims

[31] Patricia Frayn says this analysis must be based upon the contents of the pleadings. That is certainly the starting point, but the analysis does not end there. As McLachlin, J. said in *Weber, supra*, I must determine what the essential character of the dispute is and whether it arises from the interpretation, application, administration or violation of the collective agreement. She cautioned that at para. 52

> 52 ... not everything that happens on the workplace may arise from the collective agreement...

[32] Nor is the framing of the pleadings a complete answer. As Laskin, J.A. said in *Piko v. Hudson's Bay Co.*, [1998] O.J. No. 4714, 410.R (3d) 729 (Ont. C.A.) at para. 9:

> ... Parties cannot avoid arbitration simply by pleading a common law tort.

[33] Cromwell, J.A. referred to *Piko, supra*, in *Cherubini* at para. 49 commenting that "regardless of how an action is legally framed" the courts do not have jurisdiction over a matter which in its essential character deals with the interpretation, application, administration or violation of a collective agreement.

[34] The focus of the analysis is on the conduct complained of not the remedy sought in the action. I must examine the factual context of the dispute.

[35] Ms. Frayn alleges she has suffered damages as a result of the defendants' bullying and harassment. The incident which she said precipitated the conduct of the defendants occurred in the course of Ms. Frayn's work as a guidance counsellor. Ms. Frayn says the letter she received from Terry Quinlan "attacked her professional capabilities"(quoting from para. 8 of the statement of claim) as did the letter from Michael Nee ("a significant number of allegations and accusations respecting Ms. Frayn's professional capacity") (quoting from para. 9 of the statement of claim). She also refers in para.10 of her statement of claim to "a working environment not conducive to professional success or development". In para. 13 she states "There is no provision in the collective agreement either

expressly or inferentially prohibiting workplace bullying or any provision relating to intentional infliction of mental suffering."

[36] It is not determinative of the issue that Patricia Frayn is suing Michael Nee and Terry Quinlan not the HRSB, which is the party to the collective agreement. As Laskin, J.A. said in *Piko (supra)* in para.13:

> 13. Where an employee has sued another employee for a workplace wrong, this court has held that bringing an action against a person who is not a party to the collective agreement will not give a court jurisdiction if the dispute, "in its essential character", still arises under the collective agreement...

[37] Ms. Frayn filed a grievance against Terry Quinlan and Michael Nee dated April 29, 2005 which is at Tab 7 of the O'Kroneg affidavit. In it she refers to Article 14 of the Local Agreement and says that:

> ... this letter constitutes a grievance pursuant to the Teachers' Provincial Agreement."

She also says:

> ...the conduct of Terry Quinlan and Michael Nee in June 2003 and Ms. Quinlan's continuing conduct constitute personal harassment and bullying. Such harassing and bullying behaviour is a violation of the Teachers' Provincial Agreement and the Local Agreement.

[38] In her submissions, Ms. Frayn says the HRSB did not respond to this grievance, but dealt only with the transfer grievance. The latter went to arbitration and the arbitration award of Susan Ashley is attached as Exhibit A to the affidavit of Mark Dunning. As part of her history with respect to the transfer, Ms. Ashley, in paras.7, 8 and 9, referred to the background. In para. 7 she said:

> ...The Grievor believes strongly that she was the victim of bullying and harassment at the hands of the administration, most specifically the current and former Principals at J.L.Ilsley.

[39] Ms. Ashley referred again to the allegations of harassment and bullying in para. 38 when commenting on Ms. Frayn's testimony. She said:

> ... I listened closely to her evidence and observed her demeanor while she gave it. She reacted very emotionally to her perception of the harassment and bullying, confirming in my mind that there existed a total breakdown in her relationship with the Principal at J.L. Ilsley and others in that and, to a lesser extent, the previous administration.

[40] She specifically said of the bullying and harassment allegations in para.43, however:

> ...(I reiterate that the merits of these claims are not before me, and I take no position on them.)

[41] After concluding that the Board violated the transfer provisions of the collective agreement Ms. Ashley dealt with the damage claims by Patricia Frayn in paras. 55, 56 and 60.

> 55. Counsel for the Union seeks the following damages:
>
> - an award in my discretion for 'pain and suffering' that the Grievor suffered because of the Board's actions;
>
> - an award of $5000.00 for legal fees incurred in relation to the investigation of bullying and harassment against the administration at J.L. Ilsley
>
> - an award in my discretion to defer costs incurred by the Grievor in relation to personal and business assistance in a part-time business venture that she claims she would not have incurred if not for the Board's breach.

> 56. I have concerns about all of these grounds for damages. Damages will only be awarded if they are found to flow from the Employer's breach. The Board Initiated Transfer arose in December 2004/January 2005, and it is from that point that any claim for damages would arise. The alleged harassment took place well before that point and is not before me.
>
> ...
>
> 60. I decline to award damages to cover private legal fees incurred in pursuing the harassment investigation. This matter is separate from the Board Initiated Transfer issue, and these expenses do not arise from the violation of the agreement.

[42] The transfer grievance was filed after the bullying and harassment grievance. There is a dispute about whether Ms. Frayn agreed to have the investigation of the latter be a response to that grievance. Ms. Frayn says she did not agree and therefore the Halifax Regional School Board has never acted on her grievance. On her behalf, her Union representative Joan Ling agreed to have the transfer grievance held in abeyance while the Rene Gallant investigation was done.

[43] Ms. Frayn also says the investigation did not encompass an investigation of Michael Nee's conduct. She says that the Board did not view the allegations as a grievance then and to do so now to strike or set aside the pleadings is in bad faith.

[44] Tracy O'Kroneg, the Human Resources Coordinator for the Halifax Regional School Board, attached to her affidavit copies of correspondence from Don Buck, the Acting Director of Human Resource Services; Joan Ling, Executive Staff Officer at the Nova Scotia Teachers' Union; and copies of Joan Ling's notes. She also attaches a copy of Rene Gallant's investigation report.

[45] In his report Mr. Gallant says at p. 2:

> ... I also received communication and had telephone discussions with Janet Stephenson of Wickwire Holm. Ms. Stephenson is representing Ms. Frayne (sic) in this matter. Ms. Frayne (sic) is not represented by the NSTU in this matter, although she has indicated to me that the NSTU is informed and aware of this matter. It appears her "grievance" against Principal Quinlan is not properly filed through the NSTU.

[46] He refers to the letter from Terry Quinlan of April 22, 2003 which Patricia Frayn alleges in her statement of claim as part of her bullying and harassment. He says of the letter (p. 2):

> ... I note Ms. Quinlan's letter is not disciplinary and was not placed on Pat Frayne's *(sic)* personal file.

[47] It is instructive to look at the wording of the letter from Terry Quinlan to Patricia Frayn. Ms. Quinlan refers to an incident in Patricia Frayn's office on April 11, 2003 (Tab 1 to Gallant report). She refers to

> ... a personal attack on my professional role as both an educator and as a vice principal...

She also mentions an accusation by Patricia Frayn in which she says:

> ... conflicts with the administrative responsibilities that I am assigned ...

[48] Ms. Quinlan concluded her letter by saying that this was not the first time this has happened and if it happens again she will forward "a letter of reprimand to your personal file"... and "pursue a course of action through the N.S.T.U. under their code of ethics for all professionals".

[49] Ms. Frayn's undated response to Ms. Quinlan refers to several incidents involving students in the school and Patricia Frayn's allegation that Terry Quinlan

"misread and misrepresented" her role as a guidance counsellor. She repeats back to Ms. Quinlan that she will put a letter of reprimand on her file and report her to the N.S.T.U. She also refers to Terry Quinlan's tactics as "... tactics used by bullies and can be more accurately interpreted as administrative harassment".

[50] Mr. Gallant also refers to the letter from Michael Nee to Ms. Frayn dated June 27, 2003 (Tab 2A) and Patricia Frayn's response (Tab 2B). Rene Gallant concluded the letter was not disciplinary. In reviewing it, it appears that Michael Nee was reflecting on a number of situations in the school which caused him, as principal, concern. He referred not only to himself and Terry Quinlan but also the other vice-principal, some department heads at the school and the Registrar. He concluded by recommending Ms. Frayn take advantage of HRSB's counselling services.

[51] Ms. Frayn's undated response of more than seven pages refers in detail to the incidents at the school to which Michael Nee referred in his letter. At p. 7 she says:

> ... I intend to challenge both your insults as slander and your accusations and treatment as administrative harassment and bullying ...

She concludes on p. 8:

> Teachers are notorious for avoiding confrontation and for not holding administration accountable, we all need to stand up and speak against those who do not have the students or our best interests at heart. Accountability need *(sic)* to become a positive process and user friendly.

She copied her letter to the Superintendent of Schools for the HRSB, among others.

[52] I must assess the claim in the context of the dispute resolution process. The conduct complained of occurred in the workplace but that is not a sufficient answer to the question of whether the claim is covered by a collective agreement. The question is what is the essential character of the dispute and does it arise from the interpretation, application, administration or violation of the collective agreement.

[53] Firstly, Patricia Frayn grieved the alleged bullying and harassment by Michael Nee and Terry Quinlan. The fact that the grievance has not been

proceeded with for whatever reason is not relevant to a determination of the essential character of the dispute.

[54] Although there is nothing explicit about bullying or harassment in either the provincial or Local Agreement, the Provincial Agreement does refer to the need for a policy on harassment (Clause 6.05) and the L.O.U. attached to and forming part of that agreement sets out a procedure whereby such a policy will be established. Certainly the parties to that agreement believe such a policy to be within the purview of their collective agreement.

[55] If that is not considered to be explicit then, even if the collective agreement did not explicitly deal with harassment and bullying, it may be implicitly within the collective agreement. As Cromwell, J.A. said in *Cherubini*, *supra*, in para. 20:

> 20 The collective agreement need not deal with a matter explicitly, provided that the essential character of the dispute arises implicitly from the interpretation, application, administration or violation of the agreement.

[56] In my view, it is implicit in Clause 6.05 and the L.O.U. that harassment is a proper subject for a collective agreement. Furthermore, the preamble to the

Provincial Agreement refers to “conditions of employment” and “well being of employees”. Part of Ms. Frayn’s complaint is that the alleged harassment and bullying adversely affected her working environment and so badly affected her well being that she suffered mental suffering and mental distress in the form of depression.

[57] Article 35.02 of the Local Agreement is not particularly helpful where it refers to the Board exercising its rights “fairly, reasonably and in good faith”, but it is possible to infer that this includes the obligation to ensure there is no bullying or harassment. This is bolstered in my view by the recognition of the need for a policy on harassment in the Provincial Agreement and the L.O.U. More significant, in my view, is Article 27.01 whereby both parties to the Local Agreement agree to “cooperate in the prevention of accidents and the promotion of safety and health”. They also agree to comply with the *Occupational Health and Safety Act*, S.N.S. 1996, c. 7 and its regulations. Certainly prevention of bullying and harassment would promote the health of employees including their mental health.

[58] The *Occupational Health and Safety Act*, states in s.13 an employer's obligations under the *Act*, one of which is:

> 13(1) Every employer shall take every precaution that is reasonable in the circumstances to
>
> (a) ensure the health and safety of persons at or near the workplace;

[59] As well, in s. 45 it prohibits what are defined as discriminatory actions. The definition of discriminatory action is:

> 45 ... an action that adversely affects an employee with respect to terms or conditions of employment or any opportunity for employment or promotion and includes dismissal, layoff, suspension, demotion, transfer of job or location, change in hours of work, coercion, intimidation, imposition of any discipline, reprimand or other penalty including reduction in wages, salary or other benefits, or the discontinuation or elimination of the job of the employee.

[60] Section 46 provides for a grievance procedure where an employee alleges discriminatory action. It states:

> 46(1) An employee who complains that

...

(b) an employer or a union has taken, or threatened to take, discriminatory action contrary to subsection 45(2),

may

...

(d) where the employee is subject to a collective agreement under which the employee is entitled to file a grievance,

(i) have the complaint dealt with by final and binding arbitration under the collective agreement, or

(ii) within thirty days, make a complaint in writing to an officer, if an arbitrator has not seized jurisdiction over the matter under the collective agreement, in which case the matter shall be dealt with by the arbitrator under the collective agreement.

[61] Ms. Frayn says I should not interpret the definition of discriminatory actions broadly enough to include her allegations of harassment and bullying. However the definition includes “an action that adversely affects an employee with respect to conditions of employment”. In her claim Ms. Frayn specifically says that the

defendants' actions were undertaken to "create a working atmosphere not conducive to professional success or development".

[62] The definition also includes coercion and intimidation. In my view it is difficult to distinguish bullying from intimidation and coercion. There is also an element of intimidation and harassment particularly when juxtaposed with bullying as Ms. Frayn has done. The statement of claim in para.8 says the letter from Terry Quinlan of April 22, 2003 was "judgmental, intimidating and threatening".

[63] In *Severance v. Oliver*, [2007] P.E.I.J. No. 4, 2007 PESCAD 2, the employee alleged behaviour which caused her "mental distress" (para. 9). In that case the preamble to the collective agreement referred to "general working conditions." Article 29 required the employer to

> ... make all necessary provisions for the occupational safety and health of employees. (para. 22)

[64] At the time of the alleged misconduct the employer did not have a workplace harassment policy as it did later, nor did the collective agreement specifically

address harassment until a later collective agreement which was only in place approximately three years after the alleged harassment occurred.

[65] At para. 61 MacQuaid, J.A. said:

> 61. More significantly, pursuant to article 29.01 of the collective agreement, which was not argued before this court or the motion judge, the employer had an obligation to provide a safe workplace. This provision of all the relevant collective agreements explicitly obligated the employer to "...make all necessary provisions for the occupational safety and health of employees." Conduct which is harassing and abusive toward an employee to the point where she allegedly has an emotional breakdown, would be a violation of the employer's obligation to provide a safe workplace. The obligation to provide such a workplace surely contemplates the obligation to provide for the psychological health and safety of the employees as well as their physical health and safety. Article 29.01 is an explicit provision of the collective agreement which obligates the employer to protect an employee from abusive and harassing conduct of all types. Furthermore, Article 29.02 provides that the failure to do so gives rise to the right to file a grievance and to ultimately have the matter determined by the adjudication board.

[66] The wording of the Local Agreement is stronger in this case than the wording in *Severance*, since the Local Agreement specifically incorporates the *Occupational Health and Safety Act* by reference. The collective agreement in *Severance* referred to the occupational health and safety without referring specifically to the legislation.

[67] In *Toronto Transit Commission v. Amalgamated Transit Union* (2004), 132 L.A.C. (4th) 225, the Union argued that the employee suffered mental stress and ultimately had to have medical care. The employer argued that the arbitrator did not have jurisdiction to deal with the matter. The arbitrator said at p. 237:

> ... First, and at the very least, if management is not required to exercise its responsibilities reasonably, it must not abuse its authority and act in a manner that constitutes abuse or harassment of employees. Following O'Leary, even absent an express provision referring to managerial abuse or harassment, and apart from the management rights provision, I determine it is an implied term of the collective agreement that the work of a supervisor must be exercised in a non-abusive, non-harassing manner.

[68] The arbitrator also said at p. 237:

> ... I further determine that the use of the word "safety" in the collective agreement embraces both an employee's physical, as well as the employee's psychological safety...

[69] The arbitrator went on to consider the Ontario *Occupational Health and Safety Act.* He said at p. 238:

> ... Accordingly, I determine that when a supervisor exercises his/her authority under the collective agreement it is an implied term that the supervisor do so in a manner consistent with the legislation.

[70] Although the relationship between Patricia Frayn and the school administration is different under the legislation and collective agreement schemes in this case than was the case in *Toronto Transit Commission v. Amalgamated Transit Union, supra,* because Michael Nee and Terry Quinlan also are Union members, it is clear to me that they have a supervisory role with respect to other teachers in their school. This is reflected in the provincial collective agreement in Appendix "F": entitled Supervisory and Administrative Time. That appendix provides that principals in schools with more than ten teachers shall be non-teaching principals. In that same appendix it provides that any school with more ten teachers shall have a vice-principal who shall be given time away from teaching to carry out administrative duties. Similarly, appendix "E" sets salary rates for principals depending upon the number of teachers in the school. In the hierarchy of appendix "E," principal is followed by vice-principal, followed by department head, followed by guidance counsellor.

[71] Article 44.11 specifically refers to “supervisory time” for principals. It is implicit in Article 45 about evaluations of teaching staff, that these evaluations are done by the principal. Also Article 11.01 (xix) provides that the records teachers keep are subject to inspection by, among others, the school principal.

[72] In my view, it is clear that a school guidance counsellor would be subject to the supervision of the school’s principal and vice-principal.

[73] Furthermore, the supervisory duties are referred to in the correspondence both to Patricia Frayn and from her. Of particular note is Ms. Frayn’s letter to Michael Nee which she copied to the Superintendent of Schools. In her letter, she referred to holding administration accountable and the need to speak out against those who do not have the students’ or teachers’ best interests at heart. In my view, Ms. Frayn was commenting on issues involving school administration, matters which are within the collective agreement and the dealings in the collective agreement between the employees and administration. It is of course common that grievances arise in the context of employee-supervisor relations.

[74] Just as the arbitrator concluded in *Toronto Transit Commission v. Amalgamated Transit Union, supra,* that supervision must be done in a manner that is not abusive or harassing, so I conclude that it is an implied term of the collective agreement that teachers supervising other teachers, including guidance counsellors, must do so as well.

[75] In *Ferreira v. Richmond (City),* [2007] B.C.C.A. No. 373, 2007 BCCA 131, the plaintiff alleged that several city employees had "harassed him to the point of personal injury and the city did nothing about it." (quoting from para. 2). He claimed damages as a result of the harassment which caused depression, anxiety and a panic disorder. The collective agreement did not contain a specific provision against harassment but the city had a general anti-harassment policy which specifically referred to the continuation of employees' rights under the collective agreement. Ryan, J.A. said in para. 57:

> 57. Accepting Mr. Ferreira's genuine conviction about his mistreatment, I nevertheless cannot escape the conclusion that at a basic level, his dispute is about how he has been treated at work and, in turn, how this treatment has escalated to claims of tortious and perhaps criminal behaviour. In other words, the heart of his complaint is about his employer's failure to prevent or address allegedly shocking working conditions and to provide a safe work environment. All of these allegations are intrinsically linked to the employment relationship. Thus, while the claims are framed in relation to tortious conduct related to

> whistleblowing, this does not, as the Chambers judge found, mean that "the dispute is far outside of the spectrum of typical employment disputes.

[76] Ryan, J.A. concluded in para.67:

> 67. In my view, an evaluation of the collective agreement demonstrates that this dispute fell inferentially within its ambit....

[77] In this case, Ms. Frayn's dispute is also about how she was treated at work. She alleges that two supervisors harassed and bullied her and created a bad working environment. She initiated a grievance about how she was treated, just as she initiated a grievance about the Board Initiated Transfer. The fact that the two people about whom she complained are also members of the same union, although acting in a supervisory capacity in the school, does not mean that the complaints are outside the collective agreement. In fact, in my view, it is a further indication that this dispute is within the collective agreement.

[78] In *Coleman v. Demers*, [2007] O.J. No. 922 (S.C.J.), Pomerance, J. said in para.31:

> 31. The courts have often found that claims alleging harassment, conspiracy, intentional infliction of suffering and other similar wrongdoing are, in their essence, matters arising out of a collective agreement.

[79] She then referred to the decision of Hill, J. in *Maynard v. Arvin Ride Control Products*, [2000] O.J. No. 69. In that case, he summarized, in para. 42, some of the cases including *Ortiz v. Patrk* (1998), 40 C.C.E.L. (2d) 84 (Ont. Ct. Gen. Div.), where the claims were for malicious prosecution, libel, intentional infliction of suffering and false imprisonment.

[80] Ms. Frayn alleges intentional infliction of suffering by Michael Nee and Terry Quinlan. If the conduct which forms the basis of the dispute is in its essential character a matter involving the interpretation, administration, application or violation of the collective agreement, it is not within the jurisdiction of the courts.

[81] Ms. Frayn relied on *Piko (supra)* as support for her claim being outside the collective agreement. In *Piko*, Laskin, J.A. concluded in paras.17 and 18:

> 17. But her claim that the Bay maliciously prosecuted her in the criminal courts lies outside the scope of the collective agreement. The Bay itself went outside the collective bargaining regime when it resorted to the criminal process. Once it took its dispute with Piko to the criminal courts, the dispute was no longer just a labour relations dispute. Having gone outside the collective bargaining regime, the Bay cannot turn around and take refuge in the collective agreement when it is sued for maliciously instituting criminal proceedings against Piko.
>
> 18. The difference between this case and cases such as Ruscetta and Dwyer is that although the dispute between the Bay and Piko arises out of the employment relationship, it does not arise under the collective agreement. A dispute centred on an employer's instigation of criminal proceedings against an employee, even for a workplace wrong, is not a dispute which in its essential character arises from the interpretation, application, administration or violation of the collective agreement.

[82] In that case, it was significant that the employer went outside the collective agreement by going to the criminal courts. Although the dispute was in the context of the employee employer relationship, it was not within the scope of the collective agreement. The court in *Piko* distinguished its facts from those in *Weber* on the basis of the breadth of the collective agreement in *Weber* and because the conduct in *Weber* was "directly related to a process which is expressly subject to the grievance procedure". (para.19 *Piko* quoting *Weber* at p. 608) .

[83] In this case, Ms. Frayn initiated a grievance. The Board's response was to have its solicitor conduct an investigation. The Board did not start a civil or

criminal proceeding against Ms. Frayn as Hudson's Bay Company did in *Piko* (prosecuting Ms. Piko in the criminal courts). The unusual circumstances in *Piko* or similar ones do not exist in my view in this case.

[84] Ms. Frayn says that, because the Board commenced an investigation rather than dealing with the grievance, it went outside the collective agreement and therefore her action is similar to the action in *Piko* for malicious prosecution. In *Piko* the employee was fired because she allegedly marked down the price on a comforter which she then bought herself. She was fired and The Bay brought criminal charges against her for fraud. The charges were ultimately withdrawn at trial by the Crown. The employee grieved her discharge, but the grievance was dismissed because of delay. She then sued The Bay for malicious prosecution and mental distress caused by the criminal proceedings.

[85] This submission might have merit if Ms. Frayn was suing HRSB just as Ms. Piko was suing The Bay. Even if it was determined that the Board went outside the collective agreement, which I do not decide, by conducting an investigation, that does not mean that her claim against Michael Nee and Terry Quinlan, not the

Board, is therefore outside the collective agreement as a result. Whether the Board improperly dealt with Ms. Frayn's grievance is not the issue before me. This submission by Ms. Frayn does not address the issue before me which is to characterize the essential nature of the dispute and determine if it is with respect to the interpretation, administration, application or violation of the collective agreement. The fact that the Board had its legal counsel conduct an investigation may be more an indication that the Board's view that it was a collective agreement issue. Otherwise, it could have responded to the grievance by simply saying - it's not our problem, take it up with the two individuals involved.

[86] In the introductory paragraphs of his report, Rene Gallant says he reviewed HR Services files on the matter, Patricia Frayne's *(sic)* personal file and "file materials collected over time by Human Resource Services in their attempts to address employment and disciplinary area issues in respect of Ms. Frayne's *(sic)* work as a Guidance Counsellor at J.L. Ilsley High School." He does note that the Union was not representing Ms. Frayn in this matter and says he had communication with her counsel who is "representing Ms. Frayn in this matter".

[87] In his conclusions, Mr. Gallant commented on HR Services role in the matter. His report on p. 6 says in conclusion:

> ...It is critically important to the successful resolution of these types of matters that written documentation of performance, through formal or informal appraisals, be collected for employees on a regular basis.

Evaluation of teaching staff is dealt with in Article 45 of the Provincial Agreement to which I have referred above. Rene Gallant's conclusion quoted above focussed on issues clearly dealt with in the provincial collective agreement

[88] In my view, the dispute in this case is therefore not at all like the dispute in *Piko*. No third party was involved, but counsel for the Board, a party to the collective agreement and the employer of Patricia Frayn and also of Michael Nee and Terry Quinlan, did an investigation. It was not binding on the parties. Rene Gallant said on p. 5:

> It is not my intent in this report to make recommendations on a response to my findings of fact. I do not intend to advise on what should be done about Ms. Frayne's *(sic)* behaviour...

This is quite unlike the actions of The Bay in *Piko* where the employer brought criminal charges against the employee, that is, sought the outside sanctions of the criminal courts for its employee's actions.

[89] The RCH policy, parts of which are quoted above, principally deals with race relations and understanding of diversity in the context of human rights and defines harassment very broadly. In my view, although the definition is broad it must be considered in the context in which it is found, which is not the same context as the harassment allegation in the statement of claim. The dispute here is not one otherwise covered by the RCH policy. As an example, I note that it says under the harassment definition:

> 1. The board recognizes the pluralistic nature of Canadian society.

The next item refers to "racial, religious, cultural, ethnic or social" diversity. For these reasons I cannot conclude that it is relevant to determination of whether Ms. Frayn's claims fall within the collective agreement.

[90] In summary, the provisions of the collective agreements deal with teachers' working conditions, their well-being and the Board's obligation to act fairly and reasonably in exercising its rights under the collective agreement. There is also a positive obligation on HRSB to establish a policy with respect to harassment and abuse. There is no evidence that such a policy has been established but the Provincial Agreement has a L.O.U. attached and forming part of it which deals with how the policy will be established. The Local Agreement also refers to the obligation of both parties to cooperate in promoting health and safety. That same provision incorporates by reference the *Occupational Health and Safety Act* provisions prohibiting discriminatory actions and establishing a grievance procedure to deal with such allegations.

[91] Previous decisions where similar provisions exist have found an implied obligation on the employer to safeguard employee's health, including mental health, and to require supervisors to supervise in a manner that is not abusive and harassing. A grievance procedure exists under the collective agreement and also under the *Occupational Health and Safety Act* to deal with disputes such as this.

[92] To suggest that striking the claim or setting it aside will leave Patricia Frayn without a remedy is not determinative. In any event, the grievance crystalized when filed and Patricia Frayn is in the same position with respect to the grievance as she was in 2005 when it was filed.

[93] Furthermore, if the employer did not respond to the grievance, the Union had the ability to proceed to the next step in the process according to Article 14.08 of the Local Agreement. If the grievance had been dealt with, or if it is dealt with, an arbitrator has the authority to award damages as the arbitrator did in *Toronto Transit Commission v. Amalgamated Transit Union, supra*.

[94] In *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union,* Local 219, [1986] S.C.J. No. 34, 1 S.C.R. 704, the Supreme Court of Canada in 1986 discussed the role of the courts vis-a-vis the arbitration process. Estey, J. said in para.16:

> 16. The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the

> subject of actions in the courts at common law...The more modern approach is to consider that labour relations legislation provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.

He concluded in para. 20:

> 20. What is left is an attitude of judicial deference to the arbitration process. This deference is present whether the board in question is a "statutory" or a private tribunal...It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration, when adopted by the parties as was done here in the collective agreement, is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.

[95] My conclusion is consistent with the principles set out in *St.Anne Nackawic* and *Weber*. The collective agreements between the N.S.T.U. and the province and the N.S.T.U. and the School Board generally govern the relationship between the employer and the teachers. It would do a disservice to the whole scheme of dealing with labour relations matters in the collective agreement, and ultimately through arbitration, to allow matters such as this to be dealt with in the civil courts.

A forum has been designated to deal with disputes under the collective agreement and its expertise has been given great deference by the courts. To allow the courts, in essence, to enforce matters which are the subject of a collective agreement would in my view subvert the carefully crafted process called for in the *Teachers' Collective Bargaining Act*, *supra*, and put into effect in the provincial and Local Agreements.

[96] As Cromwell, J.A. said in *Cherubini (supra)* at para. 41, referring to *Weber* and the comments of McLachlin, J. therein:

> 41 ... she noted that permitting concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines the goal of collective bargaining labour relations of resolving disputes quickly and economically with a minimum of disruption to the parties and the economy.

[97] The application is granted. The alternate argument of the defendants was that the issue was *res judicata*. In light of my decision on their first argument, it is unnecessary for me to deal with this issue.

[98] I award costs to the successful party in the amount of $750.00.

Hood, J.