

**IN THE MATTER OF AN ARBITRATION UNDER THE
LABOUR RELATIONS CODE, R.S.B.C. 1996**

BETWEEN:

HEALTH EMPLOYERS' ASSOCIATION OF B.C.

(the "Employer")

AND:

HEALTH SERVICES & SUPPORT FACILITIES SUBSECTOR
BARGAINING ASSOCIATION

(the "Union")

***Re: Criminal Record Check
Fee Grievance***

ARBITRATOR:

John Steeves

COUNSEL:

Mathew Prescott
for the Employer

Jacque de Aquayo
for the Union

DATE OF HEARING:

November 5, 2010

PLACE OF HEARING:

Vancouver, B.C.

DATE OF DECISION:

December 9, 2010

A. INTRODUCTION

1. Under the *Criminal Records Review Act* a criminal record check is required for employees who work with children. This is a decision about whether six health authorities (the “Health Authorities”) in British Columbia are required to pay the fees for employees to take a criminal record check.

2. The Union submits that the Health Authorities are required to pay this fee for two reasons. First, section 21(2) of *Employment Standards Act* states that an employer must not require an employee to “pay any of the employer’s business costs”. According to the Union, the fee for the criminal record check of an employee is part of the “business costs” of the operations of the Health Authorities. Second, the Union submits that the Health Authorities paid the fees for employees in the past and they are estopped from ending that practice.

3. The Union also submits that “external applicants” who have a contract of individual employment conditional on obtaining a satisfactory record check are employees under the collective agreement. Therefore, the Health Authorities must pay the fees for the record checks of those individuals (as well as employees who are subject to a re-check of their criminal records).

4. By way of remedy, the Union seeks a declaration that the Health Authorities are required to pay the fees for employees who are required to undergo a criminal record check.

5. The Health Authorities, through their representative the Health Employers' Association of B.C., submit that the fees for criminal record checks are not “business costs” under the *Employment Standards Act*. With regards to estoppel the Health Authorities say there was an inconsistent practice to pay a one-time fee for the checks. However, the *Criminal Records Review Act* was amended in 2008 to require checks every five years and there is no practice to pay the fees for

this new requirement. The Health Authorities also submit that “external applicants” are not employees under the collective agreement. Therefore, even if there is some obligation on the Health Authorities to pay the fees in dispute, it does not apply to external applicants.

6. The Health Authorities seek the dismissal of the grievance.

7. There is a potential second issue between the parties. If there is no obligation on the Health Authorities to pay the fees in dispute then an issue arises as to whether this money can be recovered through the pay cheques of employees. By agreement, the parties will consider this issue after the publication of this award.

B. BACKGROUND

8. The Employer, the Health Employers' Association of B.C. (HEABC), is the accredited bargaining agent for a large number of employers who operate in the health care sector in British Columbia, including the Health Authorities. There are six Health Authorities: Vancouver Coastal Health Authority, Fraser Health Authority, Vancouver Island Health Authority, Interior Health Authority, Northern Health Authority and Provincial Health Services Authority. HEABC has conduct of this grievance on behalf of the Health Authorities.

9. The Union is an association of a number of trade unions who represent employees in various facilities in the health sector in B.C. For example, they represent cooks, clerks, and various trades. The Hospital Employees' Union (HEU), a member of the association, has conduct of this grievance.

10. The parties have prepared an Agreed Statement of Facts and I reproduce that document as follows (I have deleted references to tab numbers in the joint book of documents submitted in evidence),

1. *This dispute arises from a policy grievance filed by the Facilities Bargaining Association (FBA) on July 20, 2010, and in accordance with article 9.05 of the 2010-2012 Health Services & Support Facilities Subsector Collective Agreement (the FCA) between the FBA and the Health Employers' Association of BC (HEABC).*
2. *The FBA is an association of unions that bargains exclusively on behalf of unionized employees employed in the facilities subsector bargaining unit prescribed by the Health Authorities Act.*
3. *In accordance with the Public Sector Employers Act, RSBC 1996, c.384, and the Labour Relations Code, RSBC 1996, c. 244, the Health Employers Association of BC (HEABC) is accredited by the labour relations board to act as bargaining agent for health sector employers, including employers whose employees fall in the facilities subsector bargaining unit.*
4. *The grievance was filed after confirmation from HEABC, in a letter dated June 22, 2010, that the Health Authorities would require employees working in positions that required a criminal records check under the Criminal Records Review Act to pay the fee associated with that record check, and that the payment of the fee be authorized by the employee as a payroll deduction.*

5. *The grievance states:*

"(...) whether the or not the employer is or should be responsible for the payment of the prescribed fee for the criminal record check or re-check. It is the view of the FBA that the Health Authorities have paid the fee for association members in the past."

6. *The parties are in agreement that there are two issues to be resolved:*

(1) whether employers covered by the FCA are responsible for payment of the prescribed fee for a criminal record check under Part 3 of the Criminal Records Review Act (the "Act") RSBC 1996, c.86; and

(2) if the employee must pay the fee, whether the employer may require that the employee pay the fee by authorization payment through a payroll deduction.

However, the parties have agreed that the hearing scheduled for November 5, 2010, will concern only the first issue and the Arbitrator shall retain jurisdiction to adjudicate the second issue if the grievance is allowed and if requested by either party.

The Criminal Records Review Act

7. *The Act came into force on January 1, 1996.*

8. *There have been three significant amendments to the Act since its coming into force in 1996. [Bill 51 – 2002: Public Safety and Solicitor General*

Statutes Amendment Act, 2002; Bill 16 – 2007: Public Safety Statutes Amendment Act, 2007; Bill 20 -Miscellaneous Statutes Amendment Act (No.2) 2009; [There have also been two applicable Regulations, BC Reg 238/2002 and BC Reg 386/2007]

Labour Relations

9. *The Health Authorities have been in existence since approximately December, 2001.*
10. *Collective agreements were in place between the FBA and the HEABC as follows: 1996-1998; 1998-2001; 2001-2004; 2004-2006; 2006-2010; and 2010-2012.*
11. *Neither party to the collective agreement has ever proposed language dealing directly with the payment of fees for criminal records checks. In December 2009, the FBA and HEABC engaged in an early, expedited process for renewal of the FCA collective agreement. A tentative agreement was reached on February 6, 2010, and it has since been ratified. The collective agreement expires on March 31, 2012.*
12. *During the last round of bargaining, the HEABC did not put the FBA on notice that any of its members would not pay the fee associated with criminal records checks. The FBA did not table language dealing with the payment of fees for criminal records checks. However, had the FBA been advised during bargaining that the payment of the \$20 fee to the Registrar of the Criminal Records Review Program would be borne by employees, the FBA Negotiating Committee would have considered the issue, including whether to make it the subject of negotiation and/or the possibility of tabling collective agreement language.*

Payment of Fees to the Registrar

13. *The Act was amended in 2002 to require payment of a “prescribed fee” to the Registrar of the Criminal Records Review Program at the time a criminal record check authorization was submitted. Pursuant to the Criminal Record Check Fee Regulation (BC Reg. 238/2002), effective October 1, 2002 the prescribed fee was \$20. Prior to October 1, 2002, there was no fee payable for criminal record checks under the Act.*
14. *The Criminal Records Review Program (the Program) is operated under the Ministry of Public Safety and Solicitor General. It is responsible for processing criminal records checks forwarded to it by organizations subject to the Act. Each of the six Health Authorities is assigned an identification number for the purposes of submitting authorizations, and fees, to the Program. For example, Fraser Health’s identification number is 104693, and Vancouver Coastal is assigned number 415569 and it is reflected in their Consent to Criminal Records Check authorization forms. These forms are consistent among the Health Authorities, and they were provided to the Health Authorities by the Registrar for the purpose of obtaining authorization under the Act.*

15. *With regard to employees who the Health Authorities have identified in 2010 as being required to undergo a new criminal record check at least once every five years under s. 10(1)(b) of the Act, the Health Authorities have used a slightly different Consent to Criminal Records Check authorization form, which provides employees with an option on page 1 to authorize a criminal record check on an on-going basis every five years. These forms were also provided to the Health Authorities by the Registrar for the purpose of obtaining authorization under the Act.*
16. *Currently, each of the Health Authorities have elected to participate in the electronic submission process offered by the Program. As a result, the consent to a criminal record check authorization and payment of the prescribed fee for each criminal record check is submitted by the Health Authority in accordance with the Online Program options.*
17. *Employers who have not opted to participate in the electronic submission process offered by the Program must forward a copy of criminal record check authorization forms completed by employees or applicants for employment, together with payment, to the Program, in accordance with the checklists on page two of the criminal record check authorization form available on the Program's website.*
18. *From October 1, 2002 until 2010, with the exception of Northern Health Authority, the Health Authorities paid the prescribed \$20 fee on behalf of external applicants who were offered employment involving work with children. Northern Health Authority did not have a consistent practice with regard to payment of the fee for external applicants who were offered employment involving work with children. The parties have not been able to ascertain the scope of the inconsistency beyond the following: the NHA has generally sought and received payment for external applicants who have been offered employment, and for existing employees, they have paid in some cases and not others.*
19. *The consistent practice of each Health Authority with regard to criminal record checks for external applicants required under s. 9(1) of the Act was to make the offer of employment conditional upon completion of the criminal record check.*
20. *With regard to payment of the \$20 fee for criminal record checks required for existing employees who obtained a position requiring a criminal record check under Part 3 of the Act and who had not previously undergone one, during the same time period (October 1, 2002 until 2010), the practice of the Health Authorities has been as follows:*
 - a. *no existing employees of Vancouver Coastal Health Authority were identified by Vancouver Coastal Health Authority as being required to undergo a criminal record check since they were either checked upon the introduction of the legislation in 1996 or upon hire thereafter;*

b. Northern Health Authority did not have a consistent practice with regard to responsibility for payment of the \$20 fee for existing employees (see para. 18, above);

c. all other Health Authorities paid the \$20 fee on behalf of existing employees who were required to undergo a criminal record check under the Act.

21. On May 14, 2010, the Fraser Health Authority wrote to the FBA to advise of certain changes resulting from the 2008 amendments to the Act. [Letter from Fraser Health Authority (FHA), dated May 14, 2010; FHA letter to an existing employee containing a cover letter dated May 14, 2020, a consent to payroll deduction, an authorization for a criminal records check, and a Q&A].

11. A joint book of documents was also submitted in evidence and I next reproduce portions of those documents.

12. On June 22, 2010, Ms. Elaine Doyle, Coordinator Support Services Bargaining, for HEABC wrote to the Union about criminal record checks in general and the fees for those checks in particular. She advised the Union that employees are “required” to pay the prescribed fee of \$20.00 in the following terms,

... Although the health authorities would be facilitating payment, there is no requirement under the Act [the Criminal Records Review Act] or the collective agreement for a health authority to assume the financial responsibility for payment. The new five-year re-checks are not an employer-required initiative. It has been asserted that the health authorities have a practice of paying for the checks. In response, no practice has been established under the collective agreement for the payment of five-year re-checks as this requirement has just been established. The health authorities may have paid for the checks prior to employees being hired; however, this is not a collective agreement requirement as the collective agreement does not apply to individuals pre-hire.

The approach taken by the health authorities ensures consistency and fairness between health sector employees. Employees who are members of governing bodies are required to undergo checks through their governing bodies and also pay for the checks. For example, nurses, pharmacists, social workers, dietitians, LPNs, occupational therapists, and physical therapists employed at health authorities submit to and pay for checks through their governing bodies.

13. An undated document from the Interior Health Authority set out a number of “FAQs” including the following,

I didn't have to pay for this check when I was hired. Why do I have to pay for it now?

Changes to the Criminal Records Review Act prompted a review of process and administration of the CCRA Criminal Records Checks across health authorities in BC. IH [Interior Health] changed its processes to accommodate the 5 year re-check as recommended by HEABC.

14. The Health Authorities have also written to individual employees to advise them that they are required to pay the \$20.00 fee for a criminal record check. The following is an excerpt from a letter by the Vancouver Island Health Authority and it is representative of the letters sent by all the Health Authorities,

Employees are now responsible for the cost of the CRC, and we are enclosing a consent form and authorization for deduction of the \$20.00 fee from your pay for you to complete and return to VIHA at the address below within 20 days of the date of this letter. [Emphasis in original]

Employees were also given the option of paying the fee by cash, cheque or credit card.

C. DECISION AND REASONS

15. As above the general issue in this grievance is whether the Health Authorities are required to pay the fee required for employees to undergo a criminal record check.

16. There is no dispute that the *Criminal Records Review Act* RSBC, c. 86 (CRRA) applies to the Health Authorities. Similarly, there is no dispute that employees are required to undergo a criminal record check if they work with children, as required by section 9(1) of the CRRA. There have been some

significant amendments to the CRRA since it came into force in 1996 and these changes are included in the Agreed Statement of Facts.

17. A criminal record check is an important matter for employees since they may not be able to be hired or continue to work if there is a "risk of physical or sexual abuse to children" (section 11, CRRA). It is not an issue in this grievance, but it is perhaps important to say that the fact of a criminal record by itself is not an absolute bar to employment. Rather, if an employee has a criminal record a process commences to determine the nature and degree of risk. Ultimately, it may turn out that the person is not suitable for the position being considered.

18. As set out in #18 of the Agreed Statement of Facts, "From October 1, 2002 until 2010, with the exception of Northern Health Authority, the Health Authorities paid the prescribed \$20 fee on behalf of external applicants who were offered employment involving work with children". This will cease as of December 21, 2010, according to the Health Authorities, as a result of amendments to the CRRA that were effective in 2008. The significance of these amendments for this grievance is that a record check is now required every five years for all employees who work with children (as well as prior to being hired and when an employee moves into a position where there is work with children). This new requirement is called a "five-year check" and the effective date of December 21, 2010 is pursuant to BC Reg. 386/2007. The Employer was not and is not responsible for the creation of the fee; that was a decision of the Government of British Columbia.

19. The Union submits that the Health Authorities are required to continue to pay this fee for two reasons. First, under the *Employment Standards Act* the fee is part of the "business costs" of an employer and it cannot be recovered from an employee. Second, there is a previous practice of the Health Authorities paying the fees and they are estopped from ending the payment until the expiry of the current collective agreement. There is also an issue as to the status of "external applicants", individuals who have been given conditional offers of employment.

20. I will consider each of these issues in turn.

(a) *The Criminal Records Review Act and the Employment Standards Act*

21. The Union submits that the beginning of the obligation of Health Authorities to pay the criminal record fee under the CRRA is in the three duties ascribed to employers under section 8. I set out that provision as follows,

General duty of employers

8 (1) *An employer must ensure that every individual who is hired for employment involving work with children and every employee who works with children undergoes a criminal record check in accordance with this Part;*

(2) *Despite subsection (1), an employer must not require an applicant for employment to authorize a criminal record check unless the employer has offered employment to the applicant.*

(3) *The employer must inform individuals of the requirements of this Act if those individuals are employed by or are applicants for employment with the employer in a job that involves working with children.*

22. According to the Union, section 8 places a positive duty on the Health Authorities to make sure that all employees who work with children have a criminal record check. It follows from this duty that the Employer is also required to bear the cost of the record check.

23. I accept that the Health Authorities are subject to the positive duties set out in section 8 of the CRRA. I also note sections 9 and 10 of the CRRA that are directed at existing employees and individuals who apply for employment,

Applicants for employment

9 (1) *When an individual is offered employment that involves working with children, the individual must provide a criminal record check authorization to the employer.*

(2) *An employer must not employ an applicant in a job that involves working with children unless the applicant has provided the criminal record check authorization in accordance with subsection (1).*

Existing employees

10 (1) *An employee who works with children must provide a criminal record check authorization to his or her employer*

(a) *before the date prescribed by regulation, and*

(b) *at least once every 5 years after the date on which the authorization is provided in compliance with paragraph (a).*

(2) *If an employee does not provide a criminal record check authorization as required by subsection (1) or section 12,*

(a) *the employee must not work with children until the employee has provided the criminal record check authorization, and*

(b) *the employer of the employee must ensure that the employee does not work with children until the employee has provided a criminal record check authorization.*

24. I have looked more broadly at the CCRA in order to find some guidance about who is required to pay the fees for criminal record checks. Section 29(2) states that the Lieutenant Governor in Council may make regulations "prescribing the fee payable for a criminal record check". B.C. Reg. 238/2002 is titled "Fee Payment" and it simply states the fee is \$20 and describes what are acceptable methods of payment. There are other references to "the prescribed fee" in the CCRA (see sections 4(1) and 27.1, for example) but they are not helpful. Taking

these provisions together I conclude that, unfortunately, there is no direction in the CRRA as to who pays the fees for criminal record checks.

25. I am urged by the Union to resolve this issue by the application of sections 21(2) and (3) of the *Employment Standards Act*, RSBC 1996, Chapter 113 (ESA). They are as follows,

Deductions

21 (1) ...

(2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

(3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

I take it as settled that an arbitrator has jurisdiction to consider and apply employment standards legislation (section 89(g), *Labour Relations Code*, RSBC 1996, c. 244; *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)*, [2003] 2 S.C.R. 157).

26. According to the Union, the fees for criminal record checks are "business costs" under section 21(2) and it is contrary to that provision to pass on those costs to employees. I note, first of all, that the term "business costs" is not defined in the ESA. Nor was I directed to any regulation as referenced in section 21(2) of the ESA that is applicable to the issues in this grievance.

27. What, then, are "business costs" under section 21(2) of the ESA?

28. There is a previous arbitration award that considered a similar issue. In *Health Employers Assn. of British Columbia and British Columbia Nurses' Union (Panes Grievance)*, [1997] B.C.C.A.A.A. No. 27 (Kelleher) the issue was whether the employer was required to pay a modest fee for a medical certificate.

The employee had been off work sick and the employer requested that she obtain a certificate from her doctor. The employer refused to pay for the certificate and a grievance was filed. The grievance was denied primarily on an interpretation of the collective agreement provisions related to medical examinations and proof of sickness.

29. However, as an alternative argument, the union also relied on section 21(2) of the ESA, as the Union does in the grievance before me. Arbitrator Kelleher denied the grievance on that basis as well,

29. Finally, the Union relies on the Employment Standards Act. Section 21(2) refers to the "employer's business costs". As I have said, it is up to the employee to provide satisfactory evidence of illness as a reason for not being at work. Thus, I agree with the Employer's argument that the cost of the medical certificate is not a business cost to the Employer.

30. The Union points out there are significant differences between a medical certificate from a doctor and a criminal record check. I acknowledge that point but, in my view, the *Panes* award is nonetheless of some assistance in this grievance.

31. Returning to sections 8, 9 and 10 of the CRRA, there are different duties on employers, employees and applicants for employment. In the case of employers, the duty is to "ensure that every individual who is hired for employment involving work with children and every employee who works with children undergoes a criminal record check ..." (section 8(1)). On the other hand, an employee or applicant for employment "must provide a criminal record check authorization" to his or her employer (sections 9(1) and sections 10(1)). That is logical since it is the privacy of the employee or applicant for employment that is at stake when checks such as these are done.

32. I conclude from this that an employee or applicant for employment has the responsibility to initiate a record check, by means of providing an authorization.

This suggests that the intent of the CRRA is for employees to do what is necessary to provide the authorization. This is analogous to the requirement in the collective agreement in *Pane* for an employee to provide a medical certificate on request of the employer. I conclude that the fee for a criminal record check is not one of the "business costs" of the Health Authorities. It is a cost borne by an employee who is required to authorize the check under the CRRA.

33. As a final matter under this issue, the Union is concerned that Health Authorities have stopped paying the fees for criminal record checks because of reductions to their funding. This is a passing on of costs to employees as a result of funding cuts to health care and it is objectionable on that ground as well, according to the Union. This is an understandable concern but I am required to apply the collective agreement, employment related legislation and previous arbitration awards. I have decided above, that requiring employees to pay the fees is not a breach of the CRRA or the ESA. I address issues under the collective agreement below.

(b) The collective agreement and estoppel

34. The collective agreement between the parties does not contain a provision that specifically deals with the payment of fees for criminal record checks. It does have the following general provisions,

5.09 Union Advised of Changes

The Senior Union Official shall be informed in writing of any change contemplated by the Employer which shall affect the terms of this Agreement.

...

6.01 Management Rights

The management of the Employer's business, and the direction of the working forces including the hiring, firing, promotion and demotion

of employees, is vested exclusively in the Employer, except as may be otherwise specifically provided in this Agreement.

The Union agrees that all employees shall be governed by all rules as adopted by the Employer and published to employees on bulletin or notice boards, or by general distribution, provided such rules are not in conflict with this Agreement.

...

14.14 More Favourable Rate or Condition

No employee who is at present receiving a more favourable rate or condition than is specified herein shall incur a reduction in such rate or condition unless a reduction in such rate or condition was negotiated.

35. Looking at Article 5.09, that provision addresses changes that "shall affect the terms of this Agreement". Similarly, Article 14.14 provides protection from a reduced "rate or condition than is specified herein". Since there are no "terms" in the agreement, or "specified herein" in the agreement, that relate to the payment of fees for criminal record checks, I am unable to find that these provisions assist the Union (*Lions Gate Hospital and HEU, Local 180*, April 10, 1986 (Morrison), at pages 25-26).

36. With regards to management rights under Article 6.01, I accept that this provision is subject to a reasonableness standard. The question then is whether it is an unreasonable exercise of management rights for the Health Authorities to require individuals to pay the fees for criminal record checks. As above, such a requirement is not contrary to the CRA or the ESA; indeed, it is consistent with the statement in the CRA that an employee must provide the authorization for the check (section 10(1)). I conclude that it is not a violation of Article 6.01, or an unreasonable application of that provision, for the Health Authorities to require employees to pay the fees in dispute.

37. There is then the issue of estoppel. The elements of estoppel are well known and the following is a useful summary,

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

Combe v. Combe, [1951] 1 All E.R. 767 (C.A.), at page 770; also *CN/CP Telecommunications v. Canadian Telecommunications Union*, (1981) 4 L.A.C. (3d) 205, at paragraph 11; and *Brown and Beatty, Canadian Labour Arbitration*, Fourth Edition (September 2010), paragraph 2:2211.

38. As indicated in the above cite from *Combe v. Combe* an estoppel must be based on a promise or assurance that was intended to affect the legal relations of the parties. This promise or assurance can be by words or conduct and is based on a "course of conduct" (*Canadian General Electric Co.* (1971), 22 L.A.C. 149 (Johnston), at pages 150-151). Moreover, neither an indulgence nor a practice over many years will necessarily constitute an estoppel (*Eurocan Pulp & Paper Co.* (1991), 14 L.A.C. (4th) 103 (Hickling), at pages 114-115). Some benefits that an employer provides are gratuitous and they do not carry the legal expectation that they will continue. Among other things, what is required to establish estoppel is a clear and consistent intention, by word or conduct, to change an existing legal relationship.

39. What is the promise or practice in this case and has it been consistent?

40. As set out in the Agreed Statement of Facts, the Health Authorities, with the exception of Northern Health Authority, used to pay the fees for individuals for their criminal record checks (paragraph 18). This started in 2002 and will end in December 2010. Again, the Union submits that the Health Authorities are estopped from changing this practice until the expiry of the current collective agreement.

41. Paragraph 18 of the Agreed Statement of Facts also explains that Northern Health Authority did not have a consistent practice from 2002 to 2010: "The parties have not been able to ascertain the scope of the inconsistency beyond the following: the NHA has generally sought and received payment for external applicants who have been offered employment, and for existing employees, they have paid in some cases and not others". The Union seeks a remedy that all Health Authorities, including Northern Health Authority, must continue to pay the fees for criminal record checks because they have done so in the past. However, as evidenced by the situation with the Northern Health Authority, the practice has not been consistent and this creates some difficulty for the Union's argument.

42. Another aspect of the facts in this case is also significant: there has been a change in the practice. That is, the Health Authorities paid the fees for the criminal checks when the check was required at the point of hire or when required for existing employees (when they move into a position where work with children is required). Now that five-year checks are required the Health Authorities will no longer pay the fees. The result is that there was a practice to pay the fees under the previous legislation but the payment of fees for the five-year checks, pursuant to different legislation, is a change in the practice. It is true that it is still a payment for fees for criminal record checks. However, as a result of new legislation, the checks are every five years instead of once at the point of hire. This amounts to a change in frequency as well as administration.

43. Turning to a different issue under estoppel, the distinction between using it as a shield or a sword is now settled and estoppel can be used by either party in an arbitration (*CN/CP Telecommunications, supra*, at paragraphs 12). But the doctrine does not create a cause of action by itself; "... it only applies in the circumstances where there already exists a pre-existing agreement" or where there is "some pre-existing legal relationship (*CN/CP Telecommunications, supra*, at paragraphs 12, 13). Estoppel requires a contractual provision and "a promise by one party to vary the application of that provision" (*Brinks Canada*

Ltd. and Independent Canadian Transit Union, Local 1, [1997] C.L.A.D. No. 806 (Kelleher); citing *Western Pulp Inc. (Woodfibre Pulp Operations) and Pulp, Paper and Woodworkers of Canada, Local 3* (1983), 17 L.A.C. (3d) 228 (MacIntyre)).

44. In this case I have found above that there is no provision in the collective agreement that specifically addresses fees for criminal record checks. There is a general management rights clause but this is not sufficient to ground a finding of estoppel (*Brinks Canada Ltd., supra*, paragraph 43). Therefore, I am unable to find a right under the collective agreement that can be the subject of a finding of estoppel. Employers change their operations all the time. In order to bring those changes under the doctrine of estoppel there must be some existing right that is being altered by a consistent practice, by words or by conduct.

(c) "External Applicants"

45. The parties use the term "external applicants" to describe individuals who have been given an offer of employment, with conditions, but who have not commenced employment with a health authority. As above, the CRRA uses the term "applicants for employment" to describe the same group of people. They are new hires who have been given an offer of employment but subject to a satisfactory criminal record check.

46. Speaking generally, it is well established in arbitral jurisprudence that an individual can become an employee by being engaged to render services, rather than actually rendering the services (*Saint John (City) and Saint John Fire fighters' Assn., Loc. 771 (Davidson)* (2003), 115 L.A.C. (4th) 193 (Christie), at pages 208 - 210). In that case there had been an offer and acceptance of employment thereby creating an employment relationship.

47. The question arises, therefore, as to when an employment relationship is created between an external applicant and a health authority.

48. The evidence in this case includes an example of an offer of employment from Interior Health Authority. It includes the following statement,

This offer of employment is conditional upon the successful completion of a CRRA Criminal Record Check as required under the BC Criminal Records Review Act. Should you be identified through this process as presenting a risk, this offer of employment will be rescinded.

I was advised in argument that individuals who receive this offer do not work until they have successfully completed the criminal record check process. This is because of the potential but significant liability if a person works with children without a criminal record check.

49. According to the Union, external applicants are in the bargaining unit and the collective agreement applies to them. Therefore, for labour relations purposes, they are to be considered employees because, under modern labour legislation, there is no longer any place for individual employment contracts (*Ainscough v. McGavin Toastmaster Ltd.*, [1975] S.C.J. No. 51). The result is that the Health Authorities are required to pay the fees for criminal record checks for external applicants. I note that, if the Union is successful in this submission, there may be other consequences. For example, it may be that disputes between external applicants and the Health Authorities about the rescission of an offer of employment would be grievable under the grievance procedure of the collective agreement (Article 9.04.01(b)). Similarly, it may be that external candidates, if they are employees, would be able to make complaints against the Union under section 12 of the *Labour Relations Code* with regards to the Union's duty of fair representation.

50. The collective agreement has a recognition clause and I reproduce it as follows,

5.01 Sole Bargaining Agency

The Employer recognizes the Association as the sole bargaining agency on behalf of the employees for whom the Union has been certified as bargaining agent with respect to wages, hours of work, terms and conditions of employment during the life of this Agreement.

51. I also note that the collective agreement includes a number of definitions in Article 2 including, "Definition of Employee Status" (2.01). There are three kinds of employees: regular full-time, regular part-time and casual. The definitions of full-time and part-time employees include reference to working "on a regularly scheduled basis". Casual employees are not regularly scheduled but they accumulate seniority on "an hourly basis" and they are entitled to benefits under a specific addendum to the agreement. These provisions seem to say that the parties have agreed to define employment status on the basis of actually performing regularly scheduled or hourly work.

52. In any event, I conclude that this issue can be resolved on the basis of the conditional nature of the offer of employment as typified in the above example from the Interior Health Authority. If the individual being offered a position fulfills the condition of a successful completion of a criminal record check process (and there are no other conditions to the offer) then he or she becomes an employee under the collective agreement. However, until that condition is fulfilled they are not employees. The recognition clause, Article 5.01, is consistent with this since it says the Union represents "employees". I might add that there could well be a different result if an individual, with an offer of employment conditional on a criminal record check, actually works without this condition being removed.

53. The Union directed me to the award in *MacDonald, Dettwiler and Associates Ltd. and S.P.A.T.E.A. (Re)* (2006), 149 L.A.C. (4th) 32 (Jolliffe). The facts of that case involved an individual who was offered employment, he accepted and then

the offer was withdrawn. Arbitrator Jollife found that the employment relationship was created at the point when the individuals signed and dated the letters offering employment. According to the award, the offer letters "included certain expressed conditions such as screening references and credentials, and doing criminal background checks, which, however, were not said to create any issues on the facts presented" (page 50).

54. This latter finding, that the conditions of the offer "did not create any issues", distinguishes the *MacDonald* award from the facts of the grievance before me. The evidence in the case before me is that the successful completion of the criminal record check process is a significant condition in any offer of employment involving work with children. It is significant because it is a statutory requirement and because of the potential risk to Health Authorities, employees and patients.

55. As a final matter under this issue I considered whether to declare it moot in light of my decision above that the Health Authorities are not required to pay the fees for criminal record checks. However, the parties did not argue the case on that basis. They were obviously concerned about this issue and they expected a decision.

C. SUMMARY & CONCLUSION

56. The Health Authorities paid the fees for criminal record checks from 2002 and they have advised the Union this will end in December 2010.

57. When the previous payments were made, a criminal check was required only at the point of hire or when an employee moved into a new position (in both cases, where the employee worked with children). As a result of changes to the CRRA in 2008 checks every five years have been added. The Health Authorities say they will no longer pay the fees for these five-year checks. The Union submits

that this change is contrary to employment standards' legislation and/or the Health Authorities are estopped from stopping the payment of the fees.

58. With regards to employment standards legislation, section 21(2) of the ESA prohibits an employer from requiring an employee to pay the employer's "business costs". An employee is required under section 10 of the CRRA to "provide a criminal record check authorization to his or her employer". It is the employee's privacy that is at stake and, therefore, the obligation to obtain an authorization is on the employee and not the Health Authorities. It follows that fees for criminal record checks are not "business costs" under the ESA.

59. With regards to estoppel there was a practice from 2002 to the present by most Health Authorities to pay the fees for record checks at the point of hire or when an employee moved into a position where work with children was required. However, declaring an estoppel is problematic with the inconsistency in one health authority because the Union seeks a remedy against all Health Authorities. As well, there is no right in the collective agreement to payment for fees for criminal record checks. Therefore, there is difficulty finding the right that is alleged to have been altered by the words or conduct of the Health Authorities.

60. In any event, the amendment of CRRA to require five-year checks is a significant change in the practice. The Health Authorities are entitled to make an operational change in response and estoppel does not apply.

61. Finally, "external applicants" are not employees under the collective agreement.

62. For all of the above reasons, the grievance is denied.

It is so awarded.

DATED in the City of Vancouver, Province of British Columbia, this 9th day of December 2010.

"JOHN STEEVES"

John Steeves