School Board Update

School Board Update – April 2008

Date: April 22, 2008

IN THIS ISSUE:

STAFF MEETINGS

The issue of mandatory attendance at staff meetings scheduled outside of the instructional day, and the topics or material discussed at such meetings, has arisen at various Boards. An October 29, 2007 arbitral decision should prove helpful.

The case involved a challenge by ETFO to the authority of the Avon Maitland DSB to schedule mandatory divisional meetings outside of the instructional day. The meetings involved teachers in a particular division and were held in addition to the regularly scheduled staff meetings.

Arbitrator Brent found that there was nothing in the Collective Agreement or the legislative framework that specifically prohibited the Board from requiring teachers to attend divisional meetings held outside the instructional day. The Arbitrator then examined whether or not the schedule of meetings was reasonable. In so doing, she followed the reasoning in the *Winnipeg Teachers* line of cases regarding Board mandated activities or meetings, and held that such meetings must be “related to the enterprise”, “in furtherance of the principal duties” of teachers and be “seen as fair to the employee”.

The Arbitrator found that there was no violation of the Collective Agreement in holding mandatory divisional meetings outside of the instructional day. The meetings were both reasonably related to the enterprise and to teacher duties, and were not presumptively unfair just because they were held outside of the instructional day. However, the Arbitrator further ruled that such meetings *may* be unfair (and therefore in violation of the Collective Agreement), depending on the specific nature and circumstances of the meetings. In this particular case, the Arbitrator did not have any evidence of unfairness and therefore dismissed the grievance.

If you would like more information regarding this important case, please contact your regular Hicks Morley lawyer.

WSIB CASE MANAGEMENT

The WSIB and labour relations functions within school boards are often imperfectly integrated (if they are integrated at all). However, the successful management of a WSIB claim frequently requires the corresponding careful consideration and management of related labour and employment issues and consequences. A board's failure to consider these ramifications when responding to a WSIB claim can result in costly mistakes, particularly given the "dollar-for-dollar" status boards enjoy as Schedule 2 employers.

A perfect example arises when a board succumbs to temptation and decides that it can no longer accommodate an employee with permanent medical restrictions. The employee then becomes eligible for re-training through a WSIB Labour Market Re-entry (LMR) Plan. As soon as this occurs, the board effectively loses control over the costs of the WSIB claim, despite the fact that it will end up bearing those costs directly. This is because after making the decision to invoke the LMR process, the board will have no involvement in the creation of the LMR plan for which it will end up paying.

The consequences of this reality are demonstrated in a particular case involving a Schedule 2 municipal employer and an LMR plan that involved extensive academic upgrading at a cost of approximately $360,000.00. Even more disconcerting than the cost was the fact that the targeted LMR job was a general office clerk position with an hourly wage rate of only two thirds of the worker's pre-accident earnings.

The employee completed the academic upgrading. However, as she had not been terminated, she continued to have employment rights under the collective agreement and asked to be placed in an office clerk position with her employer. Needless to say, this was a very expensive method of filling a clerical vacancy. One wonders whether the municipality could have been somewhat more pro-active in identifying how the employee might have been accommodated. Although the case law would not likely have legally required the employer to retrain the employee, it may well have saved itself a great deal of money had it done so.

Before an LMR plan is contemplated or when an LMR plan is proposed, a Schedule 2 employer should consider entering into an Agreement pursuant to section 63 of the *Workplace Safety and Insurance Act*. These Agreements often resolve employment issues, human rights considerations, collective agreement and termination of employment considerations along with workplace safety and insurance issues. The consideration of a WSIB claim within a larger human resources and labour relations context will provide employers with a greater ability to craft successful outcomes.

If you would like to explore issues concerning general WSIB claims management, Section 63

agreements or the development of an integrated strategy to complex cases, contact your regular Hicks Morley lawyer.

PREP TIME PAYBACK

In a decision released on March 17, 2008, Arbitrator Bram Herlich has added another decision adverse to school boards on the “prep time payback” issue.

Since amalgamation in 1998, the Trillium Lakelands-ETFO contract had required the Board to ensure that each teacher was “assigned” a specified number of minutes for preparation time “for each period of five (5) instructional days”. Pursuant to the 2005 Provincial Framework Agreement, this amount was increased to 200 minutes. In September, 2006, a teacher was required to attend a half-day Professional Learning Community (“PLC”) program at a time which interfered with one of her assigned prep time periods. The teacher grieved.

The Board pointed out that the teacher’s instructional responsibilities had been reduced by her release to participate in the PLC, and consequently a reduction in prep time was not unreasonable. The TLDSB was also able to establish a long-standing, consistent (albeit informal) practice across its elementary schools pursuant to which principals did not mechanically “replace” or “pay back” prep times lost for any number of reasons (e.g., field trips, professional development, school-wide and board-wide activity days, etc.). Rather, principals used available occasional teachers in a discretionary fashion, at times making up lost preps, while in other cases simply letting the lost preps “disappear” and providing release time to other teachers for other reasons. This informal system had persisted since amalgamation (and before). Prior to 2006, it had never been grieved.

The Board also established that in the 2005 negotiations incorporating the Provincial Framework, ETFO had attempted unsuccessfully to change the entitling language from “each teacher shall be assigned” to the more definite “each teacher shall receive”. The Board argued at arbitration that the original obligation merely to “assign” prep time to teachers did not prevent it from cancelling an “assigned” prep for legitimate operational reasons. The Arbitrator accepted that the Board had, in negotiations, advised ETFO of its understanding that the “shall be assigned” language which was left in place did not guarantee anything.

Despite these arguments, Arbitrator Herlich held that the Board was obliged to “pay back” the “lost” prep time period. The Arbitrator accepted the distinction advocated by ETFO between the loss of prep time due to Board-mandated initiatives or decisions (e.g., PLC programs, IPRC meetings, emergency coverage for an absent teacher) and the loss of prep time due to functions voluntarily undertaken by teachers (e.g., field trips, participation in co-curricular activities, etc.). The former, said the Arbitrator, would result in an obligation to pay back “lost” prep time, whereas the latter would not.

This decision, coupled with another similar decision by Arbitrator Albertyn involving the Ottawa-

Carleton DSB (January 28, 2008), signals the difficulties inherent in the prep time language typically found in school board contracts, even language which, comparatively speaking, suggests that some measure of flexibility exists. While the mandatory/voluntary distinction accepted in *Trillium Lakelands* is easily stated, its application in certain cases (e.g., voluntary acceptance of a subject-based "team leader" position which then involves mandatory training, participation of an individual class in a school-wide "activity day") may well generate further debate. The problems faced by boards are exacerbated by the Provincial Framework language which states that prep time shall be used "as determined by the teacher". These various difficulties may well become significant issues for boards in the upcoming 2008 ETFO negotiations.

If you have questions regarding prep time issues, please feel free to contact **Michael Hines** (416-864-7248) (who represented the Trillium Lakelands DSB in this case), who has been advising boards on this issue, or your regular Hicks Morley lawyer.

PROGRAM PRINCIPALS

In the face of declining enrolment across the province, provincial teacher federations find themselves scrambling to identify school board positions for their members to bump into as a means of preserving and potentially expanding the size of their bargaining units.

As part of this strategy, the Ontario English Catholic Teachers' Association has, on three occasions, successfully challenged the exclusion by boards of administrator or "program principal" positions from their bargaining units. While each of the challenged positions was different, in each case the school board had recruited a principal to oversee the delivery of a program at a Board-wide level, without any connection to a particular school.

At each of the arbitrations, the board relied upon its hiring criteria and designation of the position as being that of a principal in nature. In each case, OECTA argued that the actual duties of the position did not accord with the statutory duties and responsibilities of "principals" under the *Education Act* and regulations. OECTA argued that, by default, the positions remained "teacher" jobs and so fell within the bargaining unit.

In determining these cases, the arbitrators undertook a careful analysis of the relevant legislation and the specific tasks being performed by those in the challenged positions. Based on those analyses, the arbitrators concluded that the duties and responsibilities being performed were not consistent with the *Education Act* provisions defining principals and, therefore, could not be justifiably excluded from the bargaining units. The arbitrators observed that the duties were not unlike those performed by co-ordinators, which are bargaining unit positions.

In the most recent of these decisions, *Dufferin-Peel Catholic District School Board and Ontario English Catholic Teachers' Association*, Arbitrator Charney at least indicated a willingness to consider the "labour relations" functions performed by program principals (e.g., supervision,

scheduling, discipline), an approach which had not been considered in earlier cases. However, on the facts before him, even by this analysis, the grievance succeeded. In a judgment released on January 8, 2008, the Divisional Court upheld this decision.

Accordingly, school boards should expect that teacher federations will grieve the exclusion of similar positions with increasing frequency. In anticipation of these grievances, boards may wish to examine their comparable positions to determine if they are vulnerable and what, if any, changes can be made to ensure they remain outside the bargaining unit.

If you have any questions regarding program principals, contact **Greg Power** (416 864-7240) or your regular Hicks Morley lawyer.

RETURN FROM MATERNITY LEAVE

In *Hastings and Prince Edward District School Board* (December 10, 2007), Arbitrator Louise Davie has re-inforced the view that teachers returning from maternity leave (or other similar leaves) do not have the right to return to the precise teaching assignment which they held before taking leave.

The Collective Agreement in her case entitled the teacher to return to “the same position held prior to going on leave”. Ms. Davie held that this obligation would be satisfied by returning the teacher to the same school. [NB: The Federation conceded that the protection would not apply where, as a result of the annual staffing process, a returning teacher was obliged to change schools.]

This case follows earlier decisions by Arbitrator Beck in *Toronto DSB* (ultimately confirmed by the Ontario Court of Appeal; see our School Board Update of November, 2005) and Arbitrator Shime in *District School Board of Niagara* (School Board Update, March, 2004). Arbitrator Davie stated:

“As did arbitrator Shime I must conclude from a review of this collective agreement, and in the context of the Education Act provisions to which I have referred, that there is only one “position” – that of teacher – and that within that generic position of teacher one finds various grade assignments. The differences in these various grade or work assignments however do not go so far as to convert the position of teacher into many different positions based on grade assignment.”

NOON-HOUR ENTRY TIME

The Divisional Court has added another piece to the “entry time” puzzle under Regulation 298. Section 20(d) of that Regulation requires that, unless otherwise assigned by the principal, a teacher must be “present in the classroom or teaching area and ensure that the classroom or teaching area is ready for the reception of pupils” at least fifteen minutes before the commencement of classes in the morning and “five minutes before the commencement of classes in the school in the afternoon”. As described in our Client Updates of April and September 2006, this obligation was interpreted very narrowly by Arbitrator Surdykowski in two decisions concerning morning entry time

at the Hamilton-Wentworth DSB. The Board's judicial review application in that case was withdrawn prior to a hearing before the Divisional Court.

More recently, the Divisional Court considered a case involving "noon hour" entry time involving le Conseil scolaire de district catholique Franco-Nord. In that case, the Conseil changed its long-standing practice of requiring teachers only to arrive for the afternoon at the same time as their students. In 2005, teachers were, for the first time, directed to receive their students in their classrooms five minutes before instruction commenced.

AEFO alleged that this direction violated Article 10.3 of the collective agreement, which guaranteed teachers a lunch period "free of all assignments … during the period of time between the end of classes in the morning and the start of classes in the afternoon". In other words, the Conseil had expressly promised that teachers would *not* be required to perform *any* non-instructional duties during a school's lunch period prior to the actual resumption of instructional activities in the afternoon.

The Conseil argued that the supervisory duties in question were not actually "assigned" by it, but rather were mandated by Section 20(d) of the Regulation, and consequently the reception of pupils by teachers was not an "assignment" within the meaning of Article 10.3. It argued further that unless teachers were in a position to commence instruction precisely when the "afternoon bell" rang, they would be unable to deliver the 300 minutes of instruction required by Section 3 of Reg. 298 [NB: It was not explained why the Conseil could not extend the duration of the instructional day to overcome this problem].

AEFO argued in response that the Conseil, by agreeing to Article 10.3, had effectively promised that all of its principals would "otherwise assign" their teachers (to no duties at all) under Section 20(d) during the entire lunch period. AEFO also argued that even if Section 20(d) required teachers to be physically present in their classrooms, nothing in that section obliged them to receive or supervise children.

AEFO succeeded before Arbitrator Kathleen O'Neil and the Conseil brought the matter before the Divisional Court by way of judicial review. In a decision dated October 1, 2007, the Divisional Court refused to overturn the Arbitrator's decision. However, in assessing the weight to be given to the Divisional Court judgment, it is critical to appreciate that the Court was only concerned to decide whether or not the Arbitrator's decision was "patently unreasonable". The Court was *not* determining whether any of her interpretations (whether of the contract or the Regulation) were actually *correct*.

With this in mind, the Court held that:

- the Arbitrator's conclusion that the principal's discretion under Section 20(d) could be controlled by the collective agreement was not patently unreasonable;

- the Arbitrator's conclusion that Section 20(d) does not, itself, require teachers to receive or supervise students was not patently unreasonable;
- the Arbitrator's conclusion that a teacher can be "otherwise assigned" under Section 20(d) to "no duties whatsoever" was not patently unreasonable.

While the results of this case, both at arbitration and at the Divisional Court level, are disappointing, it is important to understand that there continues to be no binding precedent which says teachers are *not* obliged under the *Education Act* to supervise students during entry time. Arbitrators remain free to disagree with either or both of the two decided cases. It is also significant that in neither *Hamilton-Wentworth* nor in *CSDCFN* did the adjudicators consider the impact of Section 264(1)(e) of the *Act*, which *statutorily* obliges teachers to "maintain proper order and discipline in the teacher's classroom".

Boards facing entry time issues under Regulation 298 should certainly be aware of these two cases, but may still wish to persevere in the view that entry time supervision within the classroom is not an "assigned duty" for the purposes of the collective agreement. If you have questions regarding entry time issues, you may wish to contact your regular Hicks Morley lawyer.

SICK LEAVE CREDITS

Boards and Federations continue to disagree on the entitlement of a teacher to accumulate sick leave credits during periods when the teacher is already absent. As we reported in our August 2007 School Board Update, Arbitrator Brian Etherington, in *ETFO v. Lambton Kent DSB*, confirmed an approach to the issue which provides considerable assistance to Boards in such disputes, holding that teachers must actually be actively employed in order to qualify.

Arbitrator Etherington's analysis has recently been followed in two similar arbitration cases. In *OSSTF v. Grand Erie DSB* (February 1, 2008), the Federation asserted that full-time teachers who were absent and in receipt of LTD benefits were entitled to the days of Sick Leave credit that would have been accrued if they had actually been at work.

Arbitrator Knopf adopted Arbitrator Etherington's reasoning from the *Lambton Kent* case, holding that there is a general understanding that sick leave credits are earned while at work, and are not an automatic entitlement which flows to teachers merely by virtue of a continuing employment relationship. The Arbitrator further held that any departure from this general understanding must be founded on something concrete in the Collective Agreement.

In *ETFO v. Toronto DSB* (December 21, 2007), the Collective Agreement provided LTO teachers with "one sick leave day upon completion of the first 10 school days of a long term occasional teaching assignment and one sick day for each 10 school days subsequently completed in that long term occasional assignment…". The Federation asserted that LTO teachers were entitled to credit towards sick leave accumulation even for those days that the LTO teacher was off work by

reason of illness.

The Arbitrator ruled in favour of the Board. He found that sick leave accumulation was based upon completion of school days taught and did not accumulate simply in respect of any day that an LTO teacher was employed.

If you would like further information regarding these decisions or an assessment of your own board's sick day credit language, contact **Michael Hines** (416-864-7248) who successfully represented these two Boards, or your regular Hicks Morley lawyer.
