FTR Now

Ontario Government's March 2010 Budget Directions Considered at Interest Arbitration

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Recently, Arbitrator MacDowell released an interest arbitration award involving SEIU Local 2 and Sunnybrook Health Sciences Centre that considered the impact of the Ontario government's 2010 Budget directions on collective bargaining. This award is the first of a number of expected interest arbitration decisions addressing the government's new fiscal directive. We discuss the decision and its ramifications in this *FTR Now*.

BARGAINING HISTORY CONSIDERED

The award specifically concerns the collective agreement governing approximately 28 security/protection officers that was to be in effect between January 1, 2008 and December 31, 2010, as agreed by the parties.

In deciding the case, Arbitrator MacDowell reviewed the bargaining history of the parties closely. The parties had first met after the last agreement expired in December of 2007. A conciliation officer was appointed in late 2008 and conciliation took place on July 7, 2008. The matter was referred to interest arbitration under the *Hospital Labour Disputes Arbitration Act* ("*HLDAA*") in late 2008 or early 2009.

In the spring or summer of 2008, Sunnybrook had presented proposals to the Union which included monetary increases and language related to the introduction of part-time employees. The Union was vehemently opposed to Sunnybrook's proposal to hire part-time security employees.

In late March of 2010, the Ontario government tabled Bill 16, *Creating the Foundation for Jobs and Growth Act, 2010*, which was intended to give effect to initiatives outlined in its 2010 Budget. Although this Bill exempted employees represented by a trade union, the government did state that while it would honour existing collective agreements, there would be no provision in the fiscal plan for funding increases in compensation for future collective agreements.

After the government's pronouncement, the Union attempted to accept all of Sunnybrook's proposals, including the proposal regarding the introduction of part-time employees and a wage increase in late March of 2010. However, at this time, Sunnybrook took the position that it could no longer advance these proposals in light of the direction from the government.

Arbitrator MacDowell rejected Sunnybrook's argument, stating that there had been nothing in the material presented indicating that Sunnybrook had any reservations about its proposals prior to the government's statements in March of 2010. In fact, as he noted, these proposals were based on budget allocations that Sunnybrook had already received and deemed reasonable at the time.

HLDAA CRITERIA RELEVANT

Arbitrator MacDowell also specifically referenced the criteria that arbitrators are required to take into consideration under section 9(1.1) of the *HLDAA* . Arbitrator MacDowell said that these factors are a catalogue of micro and macro economic considerations that have to be considered, but that arbitrators must still make their own independent determinations.

Taking into account the criteria in *HLDAA* , the course of bargaining between the parties and the well-founded interest arbitration "replication" principle, Arbitrator MacDowell determined that Sunnybrook's earlier proposals should form the

award.

While it was unclear whether the Union's late acceptance of Sunnybrook's outstanding proposals constituted a "binding deal" on the parties, Arbitrator MacDowell nonetheless determined that Sunnybrook's offer was both proper and objectively reasonable. Arbitrator MacDowell further noted that the government as of yet had not precluded an arbitration board from making an order it considered appropriate in the circumstances.

IMPACT OF GOVERNMENT'S BUDGET DIRECTIONS

In assessing the impact that the government's Budget directions should have, Arbitrator MacDowell stated that it is not clear what the budget statement really means, especially in relation to a collective agreement that goes back to January 1, 2008. However, he said that the pronouncements do not appear to be intended to be retroactive, as the government stated it would honour **existing** collective agreements, and that the fiscal plan contemplated no funding for incremental compensation increases for any **future** collective agreements. Arbitrator MacDowell also emphasized that these statements were not a legislative limit or interference on collectively bargained outcomes, but rather, a political statement alone.

SIZE OF BARGAINING UNIT A RELEVANT CONSIDERATION?

It is worth noting that Arbitrator MacDowell acknowledged that Sunnybrook had not elaborated upon a specific ability to pay argument. He also made reference to the small size of the bargaining unit (28 employees), which he characterized as a "tiny sliver of its workforce," and the fact that these employees had been without a collective agreement for almost three years. However, in his dissent, the Employer nominee criticized the majority's decision to focus on the fact that the bargaining unit was small, stating that the bargaining unit's size should not be regarded as only having a small impact:

> What the majority members failed to consider is the history of negotiations in Health Care and the "me too" effect on the replicating principle, which are common in Health Care negotiations. Thus, it is all but certain that other groups in the system would use what was obtained here as a measure of their successors at negotiation

MATTERS STILL NOT DETERMINED

It is important to be aware of the matters that Arbitrator MacDowell specifically stated that he was not determining, including whether it was reasonable for Sunnybrook to have withdrawn from its former bargaining position in light of the government's pronouncement. Arbitrator MacDowell did however make reference to a recent decision successfully argued by Hicks Morley's John Saunders, *Ontario Public Service Employees Union v. Municipal Property Assessment Corporation*. In that case, the employer was deemed to have not violated the duty to bargain in good faith under the *Labour Relations Act, 1995*, when it withdrew previously proposed monetary increases in light of the government's Budget directions.

Finally, Arbitrator MacDowell stated that he was not pronouncing on the impact of the government's statements on the next collective agreement, and acknowledged that these new "governmental considerations" might influence future rounds of bargaining. Ultimately, however, he determined that these directions should not retroactively affect the contents of a 2008 to 2010 collective agreement.

CONCLUSION

As this award illustrates, there is still a degree of uncertainty as to how the government's 2010 Budget directions will be interpreted and applied by arbitrators at interest arbitration.

For more information about this award or the consultation process, please feel free to contact the following lawyers or your regular Hicks Morley lawyer:

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