School Board Update

School Board Update – The Prep Time Payback Saga

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School boards will recall that the topic of “missed preparation time” was addressed in the 2009 Provincial Discussion Table (“PDT”) negotiations. This led to provincial template language that stated “missed preparation time shall *only* be re-scheduled where a teacher is required by the principal to provide instruction during his or her scheduled preparation time for a teacher absent from work.” (emphasis added)

This language has been the subject of two recent arbitration decisions. Unfortunately, the results have not been favourable to school boards, and reflect a tendency of the arbitrators to read this language as narrowly as possible. This Update will discuss the cases and their implications for school boards.

District School Board Ontario North East

The first case is *District School Board Ontario North East* (“*DSB ONE*“). The case was argued before Arbitrator Bram Herlich, the arbitrator who, in March, 2008, had decided the prep time payback issue against the *Trillium Lakelands DSB* under its 2004-2008 collective agreement. That earlier collective agreement, of course, did not contain the “missed preparation time” language that was negotiated into the 2009 PDT Agreement (“PDTA”).

Mr. Herlich was urged by *DSB ONE* to regard the new PDTA language as an attempt to reverse, through negotiation, the results of his earlier *Trillium Lakelands* decision. In rejecting this position in an Award released on December 6, 2010, Mr. Herlich paid primary attention to the “entitlement” language of Article 12.05(b) of the 2008-2012 DSB ONE collective agreement, which (as is typically the case) called for teachers to be “assigned” a certain number of minutes of preparation time per each cycle of five instructional days. Arbitrator Herlich found this language to provide “a clear entitlement”. He then held that the PDTA language “addresses circumstances different from the ones currently under consideration”, i.e., it addressed situations in which one teacher replaces another teacher rather than a situation involving prep time cancelled due to a professional development event.

Based on this analysis, he concluded that the PDTA’s new “missed prep time” language was essentially irrelevant to the case before him. This narrow interpretation of the PDTA language allowed Arbitrator Herlich to reach the conclusion that “there is no explicit provision relieving or exempting the Employer from the obligation to assign the requisite number of preparation time

minutes within the 5-day cycle. In these cases [i.e., cases not involving the substitution of one teacher for another] nothing empowers the Board to ignore its obligation under Article 12.05(b).”

After holding that the PDTA language did not apply to the case before him, Arbitrator Herlich went on to describe the circumstances under which it would apply. Specifically, he held that the PDTA language would only apply under “emergent unexpected circumstances”, situations “where a teacher must be replaced in the classroom on short notice.”

Importantly, Arbitrator Herlich accepted the ability of the Board to cancel a scheduled prep period, provided that it was re-scheduled within the five-day cycle.

The *DSB ONE* decision is, respectfully, subject to criticism on at least three accounts. First, Arbitrator Herlich completely rejected the relevance of the historical framework within which the PDTA language came into existence and the very evident connection it has to his earlier Award in the *Trillium Lakelands* case. Second, his conclusion that the PDTA language was confined in its application to certain narrow circumstances is completely at odds with the use by the parties of the word “only”. The PDTA language states that missed preparation time shall be rescheduled “only” in one circumstance, namely in cases involving teacher substitution. This implicitly but clearly addresses *all other* situations as well – missed preps will *not* be rescheduled. Arbitrator Herlich accepted the ability of boards to cancel scheduled prep time, but only in situations where the “missed” prep time was re-scheduled. This is nothing more than an obligation (imposed by the Arbitrator) to re-schedule “missed prep time” in situations other than the singular circumstance described in the PDTA language. Third, by limiting the application of the PDTA language to “emergent unexpected circumstances”, Arbitrator Herlich has effectively but materially amended the scope of the clause. This is something arbitrators are legally prohibited from doing.

Keewatin-Patricia DSB

The second case involving arbitral interpretation of the PDTA language, *Keewatin-Patricia DSB*, was released by Arbitrator Charles Humphrey on January 21, 2011. As in *DSB ONE*, the Arbitrator held that the Board violated its collective agreement with ETFO when it required teachers to attend a PLC at times when they would otherwise have received prep time, without re-scheduling the missed prep time. Importantly, however, the reasoning expressed by the Arbitrator Humphrey in *Keewatin-Patricia* is markedly different from that followed by Arbitrator Herlich in *DSB ONE*.

In *Keewatin-Patricia*, the Arbitrator seized upon the fact that the Board had scheduled all of the subject PLCs during the summer break that preceded the school year in question. In other words, each teacher knew as of the first day of school precisely when each of the subject professional development events would occur. Arbitrator Humphrey observed that the language relied upon by the Board in supporting its position spoke to situations (and only to situations) involving “missed preparation time”. He stated:

In my view preparation time is not “missed” if it is never scheduled, that is if the opportunity to receive it was never potentially available. The evidence in this case is that the teachers were advised in August of their schedule of preparation time and PLC’s.…If, as in this case, a teacher is presented *in advance* with a schedule which requires them to attend a PLC at a time that is normally scheduled as preparation time, and as a result that time cannot be used for preparation time then in my view they have not “missed” that preparation time as contemplated by Article 36.08.…To put it another way the time in question was always PLC time not preparation time, by the Board’s own direction it never was preparation time. (emphasis added)

In the course of reaching this decision, Arbitrator Humphrey confirmed (as had Arbitrator Herlich in *DSB ONE*) the right of the Board to *require* teachers to attend PLC’s “even if by so doing the teacher does not receive the required amount of preparation time”. In addition, he accepted that “the right of the Board to alter the time during the instructional day or the five day cycle that preparation time is received is not a matter of dispute”.

While obviously this Award is unhelpful to school boards generally, a number of points can be made. First, the central interpretative principle established by this case may not be entirely harmful to school boards, and certainly will not be harmful in the case of every single professional development event. The scheduling/planning practice described in *Keewatin-Patricia* (i.e., the development of a comprehensive schedule of PLCs *before* the first day of school) may not be common to all or even many boards.

Where, by contrast, PLCs (or other professional development events) are scheduled during the course of the school year (i.e., after the distribution of teacher timetables that, among other things, “schedule” prep time for the coming year), the *Keewatin-Patricia* test would indicate that the prep periods cancelled as a consequence will properly be regarded as having been “missed” for the purposes of the PDTA language.

Contrary to the *DSB ONE* analysis, Mr. Humphrey held that, in such situations, boards will clearly be relieved of any obligation to re-schedule the “missed preparation time”. Such cases can, nevertheless, be expected to generate ETFO claims for monetary damages. These thoughts are reflected in the following words of Arbitrator Humphrey:

[The PDTA language], in particular the use of “only” leads to the conclusion that *other types of “missed preparation time”* [i.e., that do not involve teacher substitution] *will not be re-scheduled.* This of course leaves open the question of whether the Article precludes access to a remedy other than re-scheduling. (emphasis added)

The next point relates to discipline, whether imposed in the past or which may be imposed in the future. Both Arbitrators Herlich and Humphrey have stated unequivocally that school boards have the right to require teachers to attend PLCs “even if by so doing the teacher does not receive the required amount of preparation time.” In the various arbitration cases to date (and in many school

boards where arbitrations are not in process), teachers have simply walked out of PLCs or refused to attend them. These actions are in obvious violation of the well-accepted labour relations principle "obey now, grieve later." This accepted workplace requirement applies even if it is subsequently determined that the employer had no contractual basis for the direction originally given.

In such cases, teachers may properly be subjected to discipline for insubordination. Where they act in concert, they may also be guilty of having participated in an illegal strike. Where teachers act in concert on the advice of or at the instigation of ETFO (as has evidently been the case to date), ETFO may be found guilty of encouraging an illegal strike. These last two scenarios constitute unfair labour practices under the Ontario *Labour Relations Act*. The endorsement of the Arbitrators of the right of boards to require teachers to attend professional development events even if preparation time is not re-scheduled is critically important and should not be overlooked by boards if they wish to consider matters from a disciplinary perspective.

Finally, accordingly to Arbitrator Humphrey's analysis, it should be possible for ETFO or any affected teachers to determine at the outset of the school year whether or not their schedules reflect violations of the Collective Agreement. In other words, teachers can be expected (with the assistance of their Federation) to identify potential breaches well in advance of their occurrence. Where they do not do so, boards may argue that grievances filed at or after the time at which the professional development event takes place are out of time. Alternatively, school boards may wish to argue that any remedy that might otherwise arise ought to be withheld or at least reduced by virtue of the Federation's delay in making an issue of the matter.

Conclusion

Obviously, school boards will not be encouraged by the results to date in the prep time payback saga. Boards should remember that these Awards are only legally binding on the specific boards involved, and that other arbitrators may be persuaded to adopt a different approach. Boards should also understand that two other prep time payback cases are actively in progress. The first involves Lakehead District School Board. This case was argued by the parties before Arbitrator Mary Ellen Cummings on Monday, January 21, 2011, the day that *Keewatin-Patricia* was released. The Lakehead case is similar in its factual background to the *DSB ONE* case. It is hoped, however, that Arbitrator Cummings will disagree with Arbitrator Herlich by attributing more significance to the word "only" in the PDTA language.

The second case, involving Rainbow District School Board, considers language that is somewhat different from the standard PDTA template. As in *Keewatin-Patricia*, the *Rainbow* case may turn on the timing of the scheduling of the challenged professional development events relative to the scheduling of the prep time periods that were affected. A third case involving the Lambton Kent District School Board is presently in abeyance.

If you have questions regarding prep time payback issues, please feel free to contact your regular

Hicks Morley lawyer or Michael Hines, who argued the *DSB ONE* and *Lakehead* cases, at 416.864.7248.