**School Board Update**

# School Board Update – Arbitrator Rules in Board's Favour in Lakehead DSB Prep Time Payback Case

**Date:** April 21, 2011

In our School Board *FTR Now* of January 31, 2011, we traced a series of disappointing arbitration decisions concerning the issue of "prep time payback", the supposed obligation of school boards to reschedule prep time periods that are "missed" due to mandatory professional development activities, the monitoring of EQAO testing, the participation at the direction of the principal in a meeting with a parent or fellow teacher, and so on. This *FTR Now* discusses a recent arbitration decision which expressly rejects the rationale of these earlier decisions.

## BACKGROUND

Public school boards had anticipated some relief from adverse arbitration decisions released as the 2004-08 ETFO collective agreements came to an end, based on the negotiation of language in the Provincial Discussion Table ("PDT") Agreement reached in early 2009 for inclusion in their 2008-12 contracts. This language expressly stated that "Missed preparation time shall only be rescheduled where a teacher is required by the principal to provide instruction during his or her scheduled preparation time for a teacher absent from work".

Despite the evident clarity of this language, the obligation to reschedule missed prep time was re-asserted by ETFO and confirmed by Arbitrator Bram Herlich in *DSB Ontario North East* (December 6, 2010). The same result was reached in *Keewatin Patricia DSB* (January 21, 2011), in which Arbitrator Charles Humphrey held that the PDT language did not even apply to the case before him because the professional development events in dispute were scheduled so early (i.e., prior to the commencement of school in September) that it could not be said that the prep time in question had ever been scheduled, let alone "missed".

## THE *LAKEHEAD DSB* DECISION

Happily for school boards, their arbitral fortunes have recently taken a significant turn for the better. On April 15, 2011, Arbitrator Mary Ellen Cummings released her decision in *Lakehead DSB* in which she unequivocally dismissed ETFO's assertion that a principal is obliged to reschedule prep time missed due to mandatory participation in a professional development session. In so doing, she expressly declined to follow the rationale adopted by Arbitrator Herlich in the *DSB ONE* case.

Ms. Cummings parted ways with Mr. Herlich early on in the analysis, accepting (as he had not) that the PDT language "could not be a clearer response" to the prep time payback cases decided under the 2004-08 collective agreements. Most importantly, Ms. Cummings refused to subordinate the PDT's "missed prep time" clause to the basic grant of a specified number of prep time minutes found earlier in the relevant article of the contract. She stated that the presence of the two clauses in the very same article of the agreement created "a strong suggestion that they should be read together to understand how the article [as a whole] is to be applied". She concluded:

I find that the plain and ordinary meaning of those words requires the Board to replace lost preparation time in some circumstances, and those circumstances do not include preparation time lost because of the scheduling of a professional development opportunity.

Ms. Cummings refused to endorse ETFO's stated concern that permitting boards to schedule professional development

sessions in conflict with anticipated prep time would effectively “gut” the collective agreement. She observed that there was no evidence the Lakehead Board had ever behaved in such a manner and that, in any event, ETFO could call on an arbitrator to ensure that the Board lived up to its contractual promise to exercise its management rights “in a fair and reasonable manner”. She also rejected the argument that the common provision guaranteeing that teachers can use their prep time as they determine was relevant, observing that it did not answer the question as to whether a board, having cancelled an anticipated prep time period, was obliged to reschedule it.

Finally, Arbitrator Cummings expressly disagreed with Arbitrator Humphrey to the extent that the latter had intimated in the *Keewatin Patricia* decision that the “missed prep time” language was only available to boards in circumstances where the failure to provide the anticipated prep time was due to an *unexpected* event. Ms. Cummings observed that the PDT language “is not so specific”.

In concluding her decision, Arbitrator Cummings said:

I believe that the matter is a fairly simple one of contact interpretation. The parties have negotiated a single collective agreement clause around preparation time. One part of the clause grants preparation time. Another part anticipates that prep time will be missed and in some circumstances, the missed prep time will be re-scheduled. It follows that in other circumstances, the missed prep time will not be rescheduled. I find that the Board did not breach the collective agreement when it failed to reschedule prep time missed as a result of professional development activities.

## CONCLUSION

As we have noted in the past, arbitration decisions only bind the particular parties involved in the dispute. Consequently, other school boards cannot conclude with certainty that the *Lakehead* analysis will be adopted should the matter be arbitrated under their collective agreement. Nevertheless, the *Lakehead* decision is the first good news boards have had in this ongoing dispute. Certainly their hope is that arbitrators adjudicating subsequent cases will see the matter in the same way.

If you have any questions regarding the *Lakehead DSB* case or prep time issues generally, contact Michael A. Hines at 416.864.7248, who represented the Lakehead Board in the case, or your regular Hicks Morley lawyer.

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