School Board Update

Prep Time Payback – The Last (Good) Word?

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School board labour relations practitioners will recall the efforts made by OPSBA in its 2009 PDT negotiations with ETFO to ensure that public school boards would not be obliged to reschedule preparation time that was missed due to such factors as board-imposed professional development held during the instructional day. The OPSBA/ETFO language stated:

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. Such rescheduling of missed preparation time shall occur as soon as administratively feasible, but no later than three months after the loss of the preparation time and in any event within the same school year.

This language led to a series of arbitration cases yielding a perplexing set of irreconcilable results. As public school boards head into bargaining, they may be reassured by the “last word” on the subject, a Supplementary Award released by Arbitrator Mary Ellen Cummings on July 13, 2012. This award followed her earlier decision in *Lakehead District School Board* (April 15, 2011). In this *FTR Now* we discuss the most recent award and prior cases involving prep time payback.

Unlike Arbitrators Herlich (*District School Board Ontario North East,* December 6, 2010) and Kaplan (*Avon Maitland*, October 13, 2011), Arbitrator Cummings had, in the April 2011 *Lakehead* award, held that the language cited above meant exactly what it said – missed preparation time is only to be rescheduled in one circumstance, namely where a teacher is required to provide instruction over and above his or her normal teaching obligations when replacing an absent colleague.

The other two arbitrators had held that this language was not clear enough to overcome the usual basic contractual grant of prep time, whereby boards “shall provide” teachers with specified amounts of prep time over a designated time frame. The *Lakehead* approach was, by contrast, consistent with that expressed in passing by Arbitrator Humphrey in *Keewatin Patricia* (January 21, 2011).

Arbitrator Cummings’ most recent Supplementary Award of July 13, 2012 addressed ETFO’s alternative position. ETFO claimed that even if the Board had no obligation to “reschedule” missed prep time, there nevertheless remained an unaddressed breach of the basic grant, since the teachers in question had not received the amount of prep time that the collective agreement said that the Board “shall provide”. It argued that those teachers were entitled at least to some form of remedy that could, for example, be quantified in monetary terms according to a notional “hourly rate of pay”. It also argued that the Federation was entitled to a prospective order prohibiting the Board from violating the “basic grant” in the future.

Arbitrator Cummings disagreed, preferring the School Board’s argument that all of the prep time provisions in the collective agreement had to be interpreted together in a way that gave no greater priority to one than another. She agreed that the Board had not violated the collective agreement in not rescheduling the missed prep time in question and said:

[I]t is difficult to accept the Federation’s claim to an alternative remedy when it is not able to point to a breach of the collective agreement by the Board. … Since the collective agreement contemplates that preparation time will be missed [in cases where] the Board is not required to reschedule it, the Board does not violate the collective agreement when a teacher misses preparation time for those other reasons. In the absence of a breach of the collective agreement, there is no right to a remedy.

It would, of course, have been preferable for school boards had the holistic *Lakehead* approach to contract interpretation been adopted uniformly in the treatment of the PDT prep time language. However, as public boards prepare to engage in

negotiations with ETFO once again, the solid, start-to-finish reasoning behind the *Lakehead* analysis should be of assistance at the bargaining table.

If you have any questions regarding the prep time payback issue, contact your regular Hicks Morley lawyer or Michael A. Hines (416.864.7248) who successfully represented the Lakehead DSB in this matter.

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