School Board Update

Arbitrator Rules that Collective Agreements Include Memoranda of Understanding

Date: September 5, 2014

Arbitrator George Surdykowski has rendered a significant award in which he concludes that the Memorandum of Understanding ("MOU") between the Ontario English Catholic Teachers' Association ("OECTA") and the Ontario Government formed part of a school board's 2012-14 collective agreements with OECTA. This award addresses an outstanding issue about the status of the collective agreements imposed on school boards by the Government for the 2012-2013 and 2013-2014 school years.

In this *FTR Now*, we consider the award and its implications.

BACKGROUND

As the province and school boards enter into provincial negotiations for renewal collective agreements, several questions remain unanswered concerning the legal status of the collective agreements that the Government imposed for the 2012-13 and 2013-2014 school years pursuant to the *Putting Students First Act, 2012* ("*PSFA*").

One key question that has been subject to much debate amongst school boards, teachers' federations and trade unions has been whether the Government's Orders in Council, which imposed collective agreements on school boards across the province, had the effect of *amending* the earlier collective agreements so that they included the terms of provincial memoranda of understanding between the Government and various trade unions. Many school boards took the opposite view, arguing that the *PSFA* simply established terms and conditions for the past two school years but did not result in the amendment of the collective agreements to contain the terms of provincial MOUs. This issue has increased in significance as the various parties in the school board sector prepare for the next round of bargaining, and has been the subject of a number of grievances and applications to the Ontario Labour Relations Board.

The issue is of both immediate and longer term significance. Most immediately, if the MOUs are incorporated into collective agreements by amendment, their contents are subject to the statutory freeze that continues collective agreements pending their re-negotiation, rather than expiring on the expiry date of the collective agreement. In the longer term, if the MOUs are incorporated into collective agreements by amendment, their contents effectively form part of the "platform" for the commencement of the pending rounds of negotiations.

THE SURDYKOWSKI AWARD

On September 3, 2014, Arbitrator George Surdykowski issued an arbitration award in *Catholic District School Board of Eastern Ontario and Ontario English Catholic Teachers' Association* that considered the issue directly. The arbitrator concluded that the *PSFA* provided that the July 5, 2012 MOU between OECTA and the Ontario Government (the "OECTA MOU") did form part of the school board's 2012-14 collective agreements with OECTA. In arriving at this conclusion, the arbitrator considered subsection 4(1) of the *PSFA*, which established a school board's obligation to negotiate collective agreements that incorporated the terms of the OECTA MOU. Subsection 4(1) commences with the following provision:

When engaging in collective bargaining for a collective agreement that would apply during the restraint period, each board has a mandate to negotiate for collective agreements that include the following terms and are not inconsistent with the those terms.

In this school board's case, the relevant terms were those of the OECTA MOU. The parties had negotiated certain local changes to the 2012-14 collective agreements but took opposite views as to whether they were required to amend the renewal collective agreement to include the OECTA MOU. The provincial Government ultimately approved the parties' renewal collective agreement with a letter that referred back to the requirements of the *PSFA* and made other statements concerning the contents of the renewal collective agreements, but Arbitrator Surdykowski declined to consider those in the context of his determination as to whether the *PSFA* required the terms of the OECTA MOU to be included as part of the collective agreements.

Rather, Arbitrator Surdykowski relied principally on the fact that subsection 4(1) gave the school board a "mandate" to negotiate for a collective agreement that included the terms of the OECTA MOU. In the arbitrator's view, "Not only does the term 'mandate' as used in s. 4(1) provide both authorization and a command to comply, the clear authorization and command is to bargain collective agreements which contain the terms of the July 5, 2012 MOU, and which contain no terms or conditions which are in any way inconsistent with or inhibit the operation of those terms." In the result, the arbitrator issued an order to the parties that that the OECTA MOU and any prescribed changes to it "be appended to the collective agreements between the parties."

The arbitrator concludes his award with the following response to the concern raised by school board that a decision in favour of OECTA could have an impact on provincial bargaining: "Only the government knows the extent to which it took the long view in that respect, or whether this is a potential unintended consequence."

CONCLUSION

School boards and trustee associations will need to carefully consider this award as they prepare for negotiations and in responding to similar grievances from teachers' federations and unions.

Should you have any questions regarding the issues raised in this award, please contact Dolores M. Barbini at 416.864.7303, Michael A. Hines at 416.864.7248 or your regular Hicks Morley lawyer.

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