School Board Update

OSSTF Found to Have Engaged in Unlawful Local Strikes

Date: May 28, 2015

In its decision released on May 26, 2015, the Ontario Labour Relations Board (the "OLRB") ruled that the ongoing Ontario Secondary School Teachers' Federation ("OSSTF") teacher strikes occurring at the Durham, Peel and Rainbow District School Boards were unlawful. This conclusion was reached on the basis that the scheme of the *School Boards Collective Bargaining Act, 2014* (the "*SBCBA"*) prohibits local strikes "in respect of central bargaining" unless the parties to central table negotiations have undertaken all of the necessary steps to be placed in a legal strike position in respect of central bargaining. This is true even if all of the statutory prerequisites for a strike in respect of local bargaining have been met. In this *FTR Now School Board Update*, we review this significant decision.

BACKGROUND

The specific issue put to the OLRB in this case was quite straightforward – whether the strikes occurring at the three School Boards were unlawful on the basis that they were strikes "in respect of central bargaining". However, the simplicity of the question posed belied the complexity of the underlying issues.

Indeed, in arriving at its conclusion, the OLRB was required to consider for the first time how the scheme of the two-tiered collective bargaining process that now exists under the *SBCBA* ought to function and whether it prohibits local strikes in respect of central issues. The OLRB was then required to assess whether the evidence in the case before it disclosed that this was, in fact, occurring.

THE *SBCBA*

In first arguing that the *SBCBA* prohibits local strikes in respect of central issues, the School Boards relied on the statutory structure of the *SBCBA* and well-established principles of statutory interpretation. They argued that the two tiers of collective bargaining under the *SBCBA* are intended to remain separate and independent of one another. This is evidenced by the fact that once the central and local issues have been determined, the remainder of the central and local processes operate completely independently of one another. This specifically includes the processes to be followed in advance of lawful strikes "in respect of" local or central bargaining.

The School Boards further argued that it would be fatal to the implementation of the *SBCBA* if the parties to the separate tiers were permitted to "jump the fence" and bargain concurrently in respect of the very same issues or, worse still, to impose sanctions in one tier in respect of issues that were properly the subject of negotiation in the other tier. It could not be the case, for example, that the Crown could legally threaten to consent to a province-wide lockout unless a particular proposal was removed from a specific local bargaining table. The fact that the central parties might have reached a strike/lockout situation in respect of their own central bargaining process would not change this conclusion.

The OLRB accepted this interpretation. It found that there was no ambiguity with respect to the intention of the legislature and that the correct interpretation of the *SBCBA* was relatively clear.

THE EVIDENCE

Having settled upon this approach to the *SBCBA*, the OLRB went on to consider the evidence necessary to establish whether unlawful strikes were indeed occurring. It was clear that the OSSTF had put itself in the position of striking legally "in respect

of local bargaining" – in each of the three Boards, conciliation in respect of local issues had occurred, a "local" no board report had been received, the 17-day waiting period had elapsed and five days' notice of the local strike had been given. The critical factual question was whether or not, despite all this, the strikes, as they unfolded, were in reality strikes "in respect of central bargaining".

In that regard, the OLRB made it clear that a mere "scintilla or whiff" of evidence would not be a sufficient basis upon which to determine that the strikes were in respect of central issues. However, it also stated that if it was satisfied that some part of what the employees were striking about was in respect of central bargaining, the prohibition in the *SBCBA* would be engaged.

In the result, the OLRB concluded that there was more than a mere scintilla of evidence to support the School Boards' position that the strikes were in respect of central bargaining.

In particular, the OLRB found that class size and professional judgment (which it regarded as indisputably central issues as set out in the December 9, 2014 Memorandum of Understanding between OSSTF, OPSBA and the Crown) were certainly issues on the various picket lines. This was significant because the evidence also established that OSSTF monitored the picket lines and had specifically approved the picket signs related to these central issues. The OLRB noted further that among all of the many photographs of picketers entered into evidence, there was not a single picket sign identifying a substantive local issue. All of this indicated that the local strike was, in fact, being conducted "in respect of central bargaining".

The OLRB also noted that picketers at all three Boards had verbally indicated to witnesses that they were on strike over such things as class size and professional judgment. Additionally, OSSTF communications to its members had identified these central issues as significant irritants. By contrast, little, if any, information about the local issues in dispute had been given to members.

Finally, the OLRB quoted public statements from the OSSTF President that drew unequivocal connections between central table issues, particularly class size, and the pursuit of strike action in the three local Boards.

The OLRB therefore concluded that while there was nothing per se unlawful about OSSTF's bargaining tactics at the three local tables or its decision to put the three local districts in a strike position early in the bargaining process, the strikes were nevertheless unlawful because of the subject matter that supported them – they were strikes "in respect of central bargaining" that were taking place before sanctions in respect of central bargaining had become legal.

THE REMEDY

In light of the foregoing, the OLRB imposed a two-week moratorium on the local strikes. This was based on its determination that this would give OSSTF an opportunity to "cleanse" the strikes of their orientation towards "central bargaining" but would not result in a complete prohibition of local strikes in this round of bargaining.

Should you have any questions about the OLRB decision or its possible implications for your board, please contact Michael A. Hines at 416.864.7248 or Amanda E. Lawrence at 416.864.7030 who jointly represented the three School Boards in this case, or your regular Hicks Morley lawyer.

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