School Board Update

Arbitrators Consider Whether Statutory Freeze Applies to MOU Provisions

Date: September 24, 2015

In an award dated July 30, 2015 [1] ("CSDCEO Award"), Arbitrator Rowan held that the 97-day delay in salary grid movement for teachers, imposed in various teacher collective agreements by a centrally agreed Memorandum of Understanding ("MOU"), was subject to the statutory freeze in the *Labour Relations Act, 1995* (the "LRA"). Therefore, the provision could not be altered during the statutory freeze without the parties' consent. Arbitrator Rowan concluded that unlike other provisions of the MOU, the delay in salary grid movement was not subject to a specific time period and therefore it did not terminate upon the expiry of the collective agreements.

In an earlier award [2] ("Niagara Award"), Arbitrator Stout had held that the statutory freeze period **did not** apply to a provision in a "Letter of Understanding – Job Security" ("LOU") as that provision **was** subject to a specific time period.

In this *FTR Now School Board Update*, we review these significant decisions.

CSDCEO AWARD

BACKGROUND

Further to the *Putting Students First Act, 2012* ("PFSA"), an MOU was incorporated into the 2008-2012 collective agreements between the Conseil scolaire de district catholique de l'Est ontarien ("Board") and the Association des enseignantes et enseignants franco-ontariens ("AEFO") (covering regular teachers at the elementary and secondary levels and occasional teachers) (the "Collective Agreements"). The MOU formed an integral part of the Collective Agreements for the two-year restraint period from September 1, 2012 to August 31, 2014.

Among other things, the MOU contained a provision creating a 97-day delay for movement through the salary grid for specified teachers (Article J(1)). Unlike other terms of the MOU, Article J(1) was not time-limited. For example, Article G, Unpaid Leave Days, was specifically time-limited to only the 2012-13 and 2013-14 years.

The issue in this arbitration was whether Article J(1) was subject to subsection 86(1) of the LRA, which prohibits the parties to the collective agreement from altering working conditions after the agreement has expired but before the parties have completed the conciliation stage of the collective bargaining process.

THE ARGUMENTS

The AEFO argued that due to a latent ambiguity in the MOU, extrinsic evidence should be admitted to demonstrate the parties' intent during negotiations that Article J(1) only apply during the restraint period. The Arbitrator allowed that evidence to be admitted, but stated that while it could be considered to determine a latent ambiguity, its use in establishing the parties' intent would be treated cautiously.

The AEFO took the position that Article J(1) was a temporary provision which did not apply beyond August 31, 2014 and that the salary grid provisions from the 2008-2012 collective agreements (pre-MOU) should apply. Despite the absence of an expiry date, Article J(1) was tied to Article G, Unpaid Leave Days, which was time-limited. Therefore, on the basis of extrinsic evidence it presented, the AEFO asserted that a clear relationship existed between the salary grid movement and the unpaid leave days: if teachers were no longer required to take unpaid leave days, there was no longer any reason to continue to

delay the salary grid movement.

The Board asserted that in the absence of a stated expiry period, Article J(1) continued to apply and was covered by the statutory freeze upon the expiration of the Collective Agreements. It also argued that should AEFO's arguments prevail, Arbitrator Rowan would effectively be altering the terms of the Collective Agreements. Given the clear time limits in the MOU with respect to certain provisions (e.g. Article G), the absence of such a limit in Article J(1) was evidence there was no intent to limit its application to a specific period. Furthermore, with respect to the extrinsic evidence, the Board argued that much of what the AEFO presented occurred subsequent to the development of the MOU and was therefore not relevant to the interpretation of the terms of the MOU.

DECISION

The grievances were dismissed. Arbitrator Rowan held that neither the terms of the MOU nor the evidence of bargaining history suggested that the "parties were envisaging a return to normal salary progression after the collective agreement ran its course."

The Arbitrator concluded that, unlike other provisions in the MOU, Article J(1) did not contain an expiry period and its terms and conditions could not be altered during the statutory freeze absent the consent of the parties. In arriving at this conclusion, the Arbitrator noted the following:

- both the Ontario English Catholic Teachers' Association and AEFO agreed to meet with employers during the 2012-2014 period to discuss the future of the salary progression grid;
- the Collective Agreements were negotiated between AEFO and the Ministry of Education, not the Board, and it was "clear that the provision requiring that teachers take three days of unpaid leave was tied to the dropping of the government's initial position that there would be no salary progression"; and
- there was nothing in the PSFA and supporting regulations which specified an expiry date of the MOU terms.

NIAGARA AWARD

The issue before Arbitrator Stout was whether the Niagara Catholic District School Board ("Niagara Board") could lay off five ESL Instructors during the 2014-2015 school year in light of the LOU, which constrained the ability of the Niagara Board to lay off employees. The LOU specifically stated it was to expire on August 31, 2014.

The Union took the position that the LOU formed part of the Collective Agreement which also expired August 31, 2014. Therefore its terms were extended by the statutory freeze provisions of the LRA.

Arbitrator Stout disagreed, finding that the LOU was specifically limited to a two-year period. Upon its expiration, the Niagara Board no longer had any obligations under it. Therefore the statutory freeze period under the LRA did not apply to the LOU when its term expired on August 31, 2014.

The Arbitrator stated "Reading the language as a whole and in context it is clear that the Board's obligations were only for two specific school years, which ended on August 31, 2014." That date, he noted, "just so happens to also be the date when the Collective Agreement expires." To extend the Niagara Board's obligations beyond the specified period would be to amend the parties' clear agreement.

IMPLICATIONS

Since the commencement of the 2014- 2015 school year, school boards have faced many grievances regarding the statutory freeze and its application to MOU provisions. Some of these grievances assert that the statutory freeze applies to continue an MOU provision, while others assert that the freeze does not apply because the provision is time-limited.

These two awards provide clarity on the issue and may assist in the resolution of outstanding grievances relating to the MOUs.

Should you have any questions regarding these issues, please contact your regular Hicks Morley lawyer.

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[1] *Conseil scolaire de district catholique de l'Est ontarien and Association des enseignantes et enseignants franco-ontariens* (30 July 2015, Rowan).

[2] *Niagara Catholic District School Board and CUPE, Local 1317* (21 June 2015, Stout)

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