School Board Update

Arbitrator Rules MOE Memo Restricting Payment of Post-Retirement Benefits Cannot Override Terms of Employment Contract

Date: June 29, 2016

In Piddisi v Toronto Catholic District School Board, a decision released on June 7, 2016, Arbitrator William Marcotte awarded a retired Supervisory Officer (SO) formerly employed by the Toronto Catholic District School Board (TCDSB) damages for the TCDSB's failure to pay premiums for post-retirement benefits.

The Applicant Piddisi commenced employment as an SO with the TCDSB on August 1, 2006, and he held that position in March, 2012, when the compensation restraint provisions of Part II.1 of the *Broader Public Sector Accountability Act, 2012* (*BPSAA*) were enacted. While not evident from the decision itself, we have been advised that the TCDSB held the view at the time (and subsequently) that its SOs engaged in "collective bargaining" for the purposes of the *BPSAA*, and so were exempt from its provisions.

This inapplicability of the *BPSAA* to the Applicant later subjected him to the compensation restraint provisions of the *Putting Students First Act, 2012* (*PSFA*), including Regulation 2/13 which was promulgated on January 2, 2013. That regulation, combined with section 2 of the *PSFA*, purported to render unenforceable certain existing contractual provisions concerning, among other things, post-retirement benefits for SOs retiring on or after September 1, 2013, and deemed such provisions to have been deleted from existing employment contracts.

The *PSFA* was itself repealed on January 23, 2013.

The Applicant then entered into an employment contract with the TCDSB on July 11, 2013. That contract provided that effective August 1, 2013, the TCDSB was to pay 100% of all required premiums, including employer medical, health, dental and LTD, until the SO reached age 65.

The Applicant retired August 3, 2015 and will reach age 65 on May 28, 2017. The TCDSB declined to provide the post-retirement benefits upon the Applicant's retirement, leading to this Arbitration.

The TCDSB agreed before the Arbitrator that on the date of the contract (July 11, 2013), the *PSFA* was no longer in effect and therefore did not control the situation. However, it relied upon Memorandum 2013:B2, issued by the Ministry of Education on January 3, 2013, to all directors of education entitled "Technical Clarification to the Memorandum of Understanding". This "B Memo" effectively re-stated the provisions of Regulation 2/13 as they applied to, among other things, post-retirement benefits. The TCDSB argued that the B Memo continued to control its actions in 2015 (when the SO retired) and beyond.

The Applicant argued that the Minister was not privy to his employment contract and that the B Memo had no force of law. It therefore could not override the benefit he negotiated in July, 2013.

Arbitrator Marcotte agreed with the Applicant. He stated:

A Memo authored by the Ministry of Education does not have the force of law; indeed, its title suggests otherwise in that it is a "clarification", much less an interpretation of the MOU or of legislation. As well, the Ministry is not a party to the Applicant/Respondent contract nor privy to it. The Memo is simply not binding on the parties to the Applicant's contract.

Thus, I am left with the language of that contract which unambiguously requires the Respondent to pay 100% of the Applicant's post-retirement benefits. I find, therefore, the Respondent is in breach of the contract in failing to pay those

premiums for the Applicant.

In regard to remedy, I order the Respondent to pay damages to the Applicant in a monetary amount equivalent to its contractual obligations from the date of his retirement, on or about August 31, 2015, until his 65th birthday on May 28, 2017, as requested by the Applicant.

The decision reflects the impact of the repeal of the *PSFA* on employees who were initially affected by it – namely, that they can renegotiate with their Boards the terms of their employment that had been initially affected by the now-repealed *PSFA*. Since the provisions of the *BPSAA* were not material to the outcome of the case, the decision should have no impact on Boards whose SOs were subject to that legislation. Specifically, if your Board did not take the position that its SOs engaged in ”collective bargaining” for the purposes of the *BPSAA*, the decision will have no impact on retiree benefits for your SOs.

If you have any questions regarding this decision, please contact your regular Hicks Morley lawyer.

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