School Board Update

OLRB: No Jurisdiction to Hear Union Appeals Under OHSA Regarding COVID-19 School Safety Guidelines

Date: October 7, 2020

On October 1, 2020, the Ontario Labour Relations Board (OLRB) dismissed four appeals which alleged that Ministry of Labour (MOL) inspectors had refused to inspect and / or issue orders to the Ministry of Education (MOE) under the *Occupational Health and Safety Act* (OHSA) to correct alleged deficiencies in the province-wide, MOE-issued, school safety guidelines for the COVID-19 pandemic. The appeals were filed by the Ontario Secondary School Teachers' Federation, the Ontario English Catholic Teachers' Association, the Elementary Teachers Federation of Ontario, and L'Association des enseignantes en enseignants franco-ontariens (collectively, the Unions).

The OLRB found that it did not have jurisdiction to hear the appeals.

Background

On March 12, 2020, the MOE issued its first order regarding the closure of public schools in light of COVID-19, which was subsequently extended to the end of the school year.

In July 2020, the MOE released its *Guide to Re-opening Schools* (Guide) as part of its return to school direction. The Guide built upon an earlier plan released in June 2020 which directed school boards to plan for three possible return to work scenarios: fully remote learning for all students; a complete return to conventional in-school learning; and a hybrid model. The MOE continued to develop its approach to implementing the Guide throughout the summer as the September school reopening approached.

Throughout this period, the Unions raised safety concerns about minimum standards for school reopenings that they did not feel had been adequately addressed. They delivered a joint letter to the MOL and the MOE requesting a meeting with them and other parties, including a request that an OHSA inspector (Inspector), pursuant to section 45(6) of OHSA, attend the meeting. They alleged that the MOE had violated OHSA by failing to "take every precaution reasonable in the circumstances to protect teachers and education workers."

The Minister of Labour responded to the Unions, stating that it "determines whether an employer has complied with Ontario's labour laws based on the facts at each specific workplace." He invited the Unions to meet with him and the province's Chief Prevention Officer (CPO), among others, to continue discussions. At the meeting, no Inspector was in attendance. In the course of the discussion, the Minister declined to make the orders requested by the Union with regard to the Guide, but they were told that Inspectors were in the process of visiting schools and school boards in preparation for the safe reopening of schools.

Following this meeting, the Unions sent another letter to the Minister of Labour repeating their requests for several orders to be made to remedy alleged deficiencies of the Guide, which was denied. The Unions subsequently filed the appeals that formed the basis of this decision, alleging system-wide violations of OHSA by failing to implement adequate safety measures to protect workers from the risk of COVID-19, and seeking amendments to the Guide.

Analysis

The OLRB addressed its limited jurisdiction to consider OHSA appeals. In this case, the scope of its jurisdiction turned on

whether an Inspector had refused to issue an order under section 61 of OHSA.

It determined that there was no Inspector present at the meeting with the Minister and the CPO. The Minister is not included in the definition of “inspector” under OHSA and therefore the meeting did not have the effect of having the Minister step into the role of Inspector, nor did the discussion between the parties amount to an investigation that could lead to a final decision of an Inspector that could be appealed under section 61 of OHSA.

In any event, the OLRB found that an Inspector could not issue the orders sought by the Unions because an Inspector’s authority is limited to *specific circumstances at specific workplaces*, whereas the Unions were seeking provincial minimum standards across all workplaces.

The OLRB rejected the Unions’ argument that because the Inspectors were relying on the Guide in their visits, the MOL and its Inspectors had already determined that the Guide was compliant with OHSA. The evidence established that the Inspectors were using the Guide as resource for safe reopening, along with numerous other documents. There was no indication that the Guide was being treated as independently sufficient to meet OHSA requirements. Moreover, the basis of the appeals at hand were with respect to the Unions’ meeting with the Minister and the CPO, not with how individual inspections had been conducted at various work sites.

Ultimately, the OLRB concluded it could not assume jurisdiction under section 61 of OHSA for an alleged failure to impose an order where an order could not have been given.

It stated that dismissal of this appeal for want of jurisdiction did not leave the Unions’ respective members without remedy or recourse. Individual members could still avail themselves of the right to refuse to perform unsafe work under OHSA. The OLRB again pointed to the fact that Inspectors do not have the power to impose province-wide standards, but rather can only impose orders on a case-by-case basis at specific workplaces.

Key Takeaways

The OLRB’s jurisdiction under section 61 of OHSA is limited to situations where an Inspector has inspected a particular workplace and made (or refused to make) an order pertaining to the safety of that workplace. Inspectors do not have the power to impose province-wide standards. Despite the unique and pressing circumstances of the COVID-19 pandemic, the OLRB could not expand its jurisdiction – or that of Inspectors – beyond the limitations of the language in OHSA.

The OLRB also emphasized that its decision did not amount to a judgment regarding the sufficiency or deficiency of the Guide in implementing minimum workplace safety standards relating to COVID-19. Individual members have the right under OHSA to refuse to perform *bona fide* unsafe work and to trigger an inspection of a specific workplace by an Inspector where members of a joint health and safety committee disagree as to whether there are dangerous circumstances present.

The appeals before the OLRB also raised the question of whether the MOE can be considered an employer of school board employees, as the request for an investigation was based on the Guide issued by the MOE stipulating workplace minimum standards. This position was disputed by the MOL, the MOE, and the Council of Trustees Association, the latter of which was granted intervenor status at the hearing.

However, the OLRB declined to answer this question as the preliminary jurisdictional issues under section 61 made it unnecessary to do so. As such, it remains to be seen whether this argument would be successful in future circumstances.

The Intervenor Council of Trustee Associations was represented by Hicks Morley’s Nadine Zacks

Please contact any member of our School Board Practice Group should you require any further information about this decision.