School Board Update

Recent Cases of Note

Date: May 12, 2022

Welcome to our latest edition of the *School Board Update*.

In this *Update* we discuss three significant decisions. The first decision is from the Ontario Labour Relations Board. It clarifies that, with the revocation of O. Reg. 274/12 Hiring Practices, school boards are obliged to comply with Policy/Program Memorandum No. 165, School Board Teacher Hiring Practices, when establishing and administering their hiring practices.

The second decision, an arbitration award, finds that Joint Health and Safety Committees of the Ontario Catholic district school boards may have discretionary access to the online reporting tool used to report incidents of workplace violence.

Finally, we discuss the arbitration award that upheld the (now rescinded) mandatory vaccination policy of the Toronto District School Board.

We hope you find these cases of interest.

Ontario Labour Relations Board Clarifies PPM 165 Applies to School Board Hiring Practices

By: Grant R. Nuttall

In *Elementary Teachers' Federation of Ontario v The Crown in Right of Ontario as represented by the Ministry of Education, and The Ontario Public School Boards' Association*, the Ontario Labour Relations Board (OLRB) dismissed the application of the Elementary Teachers' Federation of Ontario (ETFO) which alleged the Crown had violated its duty to bargain in good faith in connection with the revocation of Ontario Regulation 274/12 "Hiring Practices" (O. Reg. 274/12) made under the *Education Act*.

The OLRB found that the Crown had not breached the duty to bargain in good faith and was not acting as an employer under the *Labour Relations Act, 1995* (*LRA*) or exercising rights, privileges or duties under the *School Boards Collective Bargaining Act, 2014* (*SBCBA*) when it exercised its authority to revoke a regulation. As a result, the decision clarifies that school boards are obliged to comply with Policy/Program Memorandum No. 165, School Board Teacher Hiring Practices (PPM 165) when establishing and administering their hiring practices.

Background

During the 2019–2022 round of central collective bargaining, ETFO, the Ontario Public School Boards' Association (OPSBA) and the Crown negotiated regulated hiring practices at length. After over six months of bargaining, the parties agreed to a renewal of the central terms which removed any references to O. Reg. 274/12.

On October 15, 2020, approximately seven months after bargaining concluded, the Ministry of Education (MOE) announced that O. Reg 274/12, which governed the hiring of teachers across the province, would be revoked effective October 29, 2020. It was replaced temporarily by the MOE's Interim Policy for School Board Hiring Practices and then ultimately by the PPM 165, effective March 31, 2021.

ETFO's unfair labour practice application was accompanied by several applications against individual school boards alleging a breach of the statutory freeze provisions in the *LRA* and the *SBCBA*. In a decision dated June 4, 2021, the OLRB found that the failure of the school boards to follow the revoked O. Reg 274/12 while engaged in local bargaining, and instead complying with the MOE's Interim Policy and PPM 165, violated the statutory freeze applicable to local terms and conditions of employment.

Before the OLRB in this Case

ETFO alleged that that by revoking O. Reg 274/12, the Crown had contravened section 32 of the *SBCBA* (the duty to bargain in good faith) and sections 70 (interference with the administration of a trade union) and 86 (the statutory freeze) of the *LRA*.

In making its determination, the OLRB considered evidence regarding the 2019 round of central negotiations. During those negotiations, the Crown and OPSBA made a joint proposal for the deletion of Letter of Agreement #2, which referred to O. Reg 274/12. In the face of the proposal, ETFO's chief negotiator asked if the Crown was seeking to revoke O. Reg 274/12. The Crown's chief negotiator responded that the Crown was not advancing a proposal to delete the regulation, but offered to take ETFO's questions back to the Crown. The parties exchanged proposals concerning O. Reg 274/12 and hiring practices over the next six months.

Following failed attempts to preserve O. Reg 274/12, either in the central terms or by way of any commitment by the Crown to maintain the regulation, ETFO withdrew its outstanding proposals on O. Reg 274/12. After that occurred, the Crown attempted to ensure that everyone had a clear understanding of the consequence of the parties' withdrawal of their proposals, specifically that the Crown maintained regulatory authority over O. Reg 274/12.

ETFO and the Crown eventually agreed that following the execution of Minutes of Settlement (MOS), a message would be sent from ETFO's representative to the Crown's representative confirming that the Crown retains regulatory authority and O. Reg. 274/12 would not be listed in the *status quo* items, notwithstanding the typical consequences of withdrawing proposals during collective bargaining.

The Decision

Vice-Chair Patrick Kelly concluded that neither the *SBCBA* or the *LRA* had been breached by the Crown.

The OLRB found ETFO was aware at the time it entered into the MOS, which concluded central bargaining, that the Minister of Education and Training might, with the approval of the Lieutenant Governor in Council amend, replace or revoke O. Reg 274/12. Knowing this risk, ETFO nonetheless entered into the MOS.

Duty to Bargain in Good Faith

The OLRB has previously held that the duty to bargain in good faith requires employers to respond honestly when asked in bargaining if they are contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit and to reveal to the union, on the employer's own initiative, those decisions already made which may have a major impact on the bargaining unit.

Consistent with its past jurisprudence, the OLRB found that the Crown had an ongoing obligation to disclose relevant information that would have a material impact on the course of bargaining. However, it found there was no evidence that the Crown had failed to communicate relevant information at the bargaining table.

The Statutory Freeze

The OLRB found that the Crown could not breach section 86 of the *LRA* as it applies to an "employer." In the circumstances

of this case, the school boards, not the Crown, were the employers of the ETFO-represented teachers.

Employer Participation, Interference under Section 70 of the *LRA*

Similarly, the OLRB found that the Crown was not an "employer, an employers' organization and a person acting on behalf of an employer," so the Crown could not breach section 70 of the *LRA*.

The *LRA* applies only to the Crown to the extent necessary to enable it to exercise its rights and privileges and perform its duties under the *SBCBA*. By exercising regulatory authority to revoke a regulation, the Crown was not acting as an employer or exercising rights, privileges or duties under the *SBCBA*.

With this decision, the OLRB has ended any uncertainty concerning the revocation of O. Reg. 274/12. It is clear that the regulation is no longer in force and that school boards are now obliged to comply with PPM 165 when establishing and administering their hiring practices. This will assist the central and local parties understanding the regulatory landscape for hiring practices in advance of the commencement of the 2022 round of bargaining.

OPSBA was represented in this decision by Hicks Morley's Grant Nuttall.

Arbitrator Finds Joint Health and Safety Committees Entitled to Discretionary Access to Online Reporting Tool

By: Sean M. Reginio

In *Ontario English Catholic Teachers' Association v Ontario Catholic School Trustees' Association*, Arbitrator Hayes found that the Joint Health and Safety Committees (JHSCs) of the English-language Ontario Catholic district school boards are entitled to discretionary access to documents on an Online Reporting Tool (ORT).

The Ontario English Catholic Teachers' Association (OECTA) had filed a notice of dispute with the Ontario Catholic School Trustees' Association (OCSTA), which alleged a violation of Article 21 of the applicable central collective agreement and the *Occupational Health and Safety Act* (*OHSA*). Article 21 provides that all incidents of workplace violence arising in all school boards are to be reported using an ORT. While the parties shared the objective that incidents of workplace violence in schools be reported and addressed in an appropriate manner, they sharply differed as to whom ORT access should be provided, and, if access is provided, in what form.

Specifically, the parties sought clarity on whether members of a JHSC, individually and/or collectively, were entitled to any discretionary access to documents on the ORT. If so, the parties further sought determination on:

- to which category or categories of documents does that discretionary access apply,
- whether JHSC members are entitled to access the actual documents or document summaries only, and
- whether discretionary access to documents by JHSC members included the ability to search by document type and to filter searches.

OCSTA first submitted that it was not an employer and, as such, a central arbitrator has no authority to make a determination in this matter. In the alternative, it argued that Article 21.6.3 "did not contemplate discretionary access to documents respecting health and safety by JHSC members either individually or collectively … JHSCs are entitled to information from the ORT only in the context of, and to be considered at, their regularly scheduled meetings." The submissions of the Crown, which participates in central arbitration by statutory right, generally lined up with the position of OCSTA.

OECTA submitted, among other things, that the language of the agreement permits the JHSC to track multiple incidents of violence and if "there had been an intention to restrict access to such reports, the parties would have expressly done so."

The Arbitrator noted that the Ministry of Labour had issued a guide titled “Workplace Violence in School Boards: A Guide to the Law,” developed by the Provincial Working Group on Health and Safety. The guide includes multiple references to JHSCs and explicitly notes the importance of the “reporting of violent incidents, and the sharing of information with workers.”

Addressing the submissions of the parties, the Arbitrator first noted that as a central arbitrator, he has jurisdiction to determine a “central dispute in a manner that will bind both the arbitration parties and school boards.”

He then stated that the “narrow interpretation advanced by OCSTA and the Crown is linguistically sustainable but much less convincing when placed in context. Accepting their submission would entail accepting that Article 21.6.3 confers no right upon JHSC members to use ORTs in the performance of their statutory duties.… Having viewed the surrounding circumstances objectively, that is not a conclusion that I am prepared to reach.” This interpretation would be inconsistent with language in Article 21.6.3: “information provided to the JHSC via the school board’s online reporting tool.”

Arbitrator Hayes also determined that the *OHSA* intends that JHSCs play an active, not passive, role in health and safety, and one that is independent of employers. He stated that the “OCSTA and the Crown see no role for JHSCs concerning ORTs other than as after-the-fact recipients of précised, edited information. Given the text of Article 21 and all the surrounding circumstances, I do not agree.”

As a result, Arbitrator Hayes allowed the grievance to the extent described below:

- Members of a JHSC are individually and collectively entitled to discretionary access to documents on the Online Reporting Tool, subject to appropriate redaction
- Documents to which there is entitlement to access through the ORT include:
    - Workplace Violence Risk Assessments
    - Employee’s Report of a Workplace Violent Incident
    - Supervisor’s Workplace Violent Incident Investigation Report
    - Supervisor’s Accident Investigation Reports
    - Those required for compliance with the *OHSA*.

Arbitrator Upholds Toronto District School Board Mandatory Vaccination Policy

By: Jordynne Hislop

On March 22, 2022, Arbitrator William Kaplan issued *Toronto District School Board and CUPE, Local 4400 (Re COVID-19 Vaccine Procedure)*, an award in which he upheld the mandatory vaccination policy (Policy) of the Toronto District School Board (TDSB). He found that the Policy did not infringe section 7 (life, liberty and security of person) of the *Canadian Charter of Rights and Freedoms* (*Charter*) and that it was a reasonable exercise of management rights.

Background

The Policy was implemented on September 14, 2021 and required all employees with direct contact with staff or students at a TDSB workplace to be fully vaccinated (two doses) against COVID-19. Employees were required to provide evidence of this by November 1, 2021 or establish they had a valid medical or *Human Rights Code* (*Code*) exemption. Students and their families were not subject to the Policy, as the TDSB had no authority to require them to be vaccinated. Employees who did not disclose their vaccination status by the prescribed deadline and those who did not become fully vaccinated within the prescribed timelines were to be placed on non-disciplinary leaves of absence without pay. The TDSB had consulted on the Policy before its implementation, including with the union, CUPE.

In both October and November 2021, CUPE wrote to the TDSB Director of Education requesting reconsideration of the mandatory vaccination requirement, suggesting members could be accommodated through frequent testing and other

measures. The TDSB declined the requests, but did, however, establish a decision matrix for the purpose of granting temporary exemptions to approximately 300 unvaccinated CUPE members due to staffing requirements. A smaller number of unvaccinated employees also remained at work pending determination of their medical or *Code* exemption requests. All temporarily exempted employees were required to comply with the attestation and testing requirements under the Policy.

CUPE took issue with the disclosure of vaccination status and the mandatory vaccination requirements under the Policy, which resulted in most (but not all) unvaccinated employees being placed on non-disciplinary unpaid leaves. CUPE argued that rapid antigen tests (RATs) were sufficiently effective in reducing the likelihood of introducing infection into a school setting if the testing protocol was being followed. It also argued that being fully vaccinated was not effective against Omicron, making the entire Policy unreasonable.

Before the Arbitrator

Two principal issues were to be determined before the Arbitrator: first, whether mandatory vaccination infringes section 7 of the *Charter*; and second, whether the Policy was reasonable, including its vaccine attestation and the requirement that non-compliant or unvaccinated employees be placed on a non-disciplinary leave without pay.

Both the TDSB and CUPE provided separate expert reports. The experts agreed on numerous issues, including the efficacy of vaccination. They disagreed on whether RATs reduce transmission of COVID-19 in the workplace and whether RATs are an effective substitute or alternative to vaccination. CUPE's expert said yes; the TDSB's expert said no. Where the two experts disagreed, Arbitrator Kaplan preferred the evidence of the TDSB expert.

The Decision

Arbitrator Kaplan concluded that the Policy did not violate section 7 of the *Charter* and that it was, while in force,* an entirely reasonable exercise of management rights (subject to any valid exemptions).

Section 7 of the *Charter*

Arbitrator Kaplan stated that section 7 of the *Charter* protects an individual's right to decide whether or not to be vaccinated. He noted that the Policy did not forcibly require anyone to get vaccinated. It did not mandate a medical procedure or seek to impose one without consent.

The Policy, therefore, did not violate anyone's life, liberty or security of the person. The Arbitrator stated that section 7 does not insulate a person who has chosen not to be vaccinated from the economic consequences of that decision: the law is settled on this point. He found no violation of the principles of fundamental justice.

Additionally, the Arbitrator found that the Policy was not arbitrary, overbroad or disproportionate in its requirements. Rather, it was tailored and nuanced.

Management Rights

The Arbitrator also found that the Policy, while in force,* was a reasonable exercise of management rights. The *Occupational Health and Safety Act* requires an employer to take every precaution reasonable in the circumstances for the protection of the worker. The expert evidence presented in this case was that vaccination is the best method of reducing the contraction and spread of COVID-19. The attestation requirement, albeit mandated by law, was a necessary corollary of this.

Applying the *KVP* test, the Arbitrator concluded that nothing in the applicable collective agreements fettered the right of management to promulgate rules and policies. The Policy was not unreasonable based on the medical evidence. It was clear and unequivocal, and both the TDSB and CUPE communicated it to employees. There was no evidence that anyone misunderstood what the Policy required or the consequences of non-compliance.

The Arbitrator also noted that the Policy was consistently applied. Introducing a regime which allowed exemptions for essential workers and which allowed employees with medical or *Code* exemption claims to continue to work under the testing regime did not mean that the Policy was inconsistently applied. Rather, it was being applied in a careful and nuanced fashion. The TDSB agreed to accept less than its desired outcome of full vaccination so as to respond to staffing issues, allowing schools to reopen and allowing it to await the determination of the medical or *Code* exemption claims.

The grievances were dismissed.

Conclusion

This award joins a growing number of arbitral awards which uphold employers' mandatory vaccination policies as reasonable.

The TDSB was represented by Hicks Morley's Steve Shamie, Sean Sells and Jordynne Hislop.

*On March 10, 2022—the day following the final day of these proceedings—the TDSB Board of Trustees passed a resolution rescinding the Policy effective March 14, 2022. This occurred after the Ministry of Education advised school boards they were no longer required to have the vaccination status disclosure in place.

Note that this article was originally published as a Case in Point on the Hicks Morley website.