MORNING RECESS

Labour Relations Update

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Topics & Issues

Introduction

1. **Extra-curricular Activities & Striking**

   (a) Update on the decision of the Ontario Labour Relations Board in Elementary Teachers' Federation of Ontario and Trillium Lakelands District School Board, Upper Canada District School Board, released April 11, 2013

In summary the Ontario Labour Relations Board made the following findings:

Regardless of the fact that ETFO directed teachers to refrain from their withdrawal from extra-curricular activities just prior to the decision in this case and argued that no decision was necessary, the OLRB found that the decision was still relevant and should be issued because of its importance to labour relations in education in Ontario generally and specifically to the school boards that brought the application.

Despite the repeal of the *Putting Students First Act* (Bill 115), the collective agreements imposed by that legislation continue to exist and to operate;

The withdrawal in concert from voluntary extracurricular activities as identified by the parties constituted a "strike" within the meaning of the *Education Act.*

The Orders made by the OLRB were interim orders because *Charter* challenge to the definition of strike in the *Education Act* remains outstanding.

I think that it is important to communicate a statement made by the Chair of the OLRB when discussing the history of this case, and I quote:

"*What has complicated this application from the outset was ETFO's dispute was with the Government – not its employers. The mechanism that ETFO chose to express its displeasure with the Government about Bill 115 was through the workplace parties – so that to the extent there was any dispute between the workplace parties, ETFO, and the applicant school boards, it was over that mechanism that ETFO has used (not necessarily the dispute with the Government over Bill 115 with which the applicants may not have been pleased either).*"

Mootness

ETFO argued that the issue of extra-curricular withdrawal was moot and that the OLRB should not issue a decision, despite hearing 9 days of evidence and argument. ETFO argued that there was no evidence that they would resume this tactic, but the Chair of the OLRB identified that there has been a long history of the use of withdrawal of voluntary extracurricular activities as a tactic by teacher unions in Ontario. For this reason as well as the impact that the tactic has had the OLRB found that a decision on the matter was of significant public interest. As a result, the Chair of the OLRB issued a decision, reasons and applicable interim orders.

Did Collective Agreements Exist After the Repeal of the Putting Students First Act?

ETFO argued that since the Government repeal of the legislation had to have some meaning, therefore: either:

(a) the collective agreements imposed under the Act no longer exist after the repeal; or

(b) even if the terms and conditions imposed by the Act survived the repeal, they do not legally amount to a "collective agreement" either under the Putting Students First Act, the *Labour Relations Act* or the *Education Act*.

This was a significant argument for ETFO because if there were no collective agreements in force then ETFO members were in a legal strike position and ETFO's counseling regarding extra-curricular activities would be lawful.

The OLRB agreed with the Applicants that the *Legislation Act,* protects the "previous operation" of repealed legislation and protects a "right, privilege, obligation or liability that came into existence" under the repealed legislation, in this case the *PSFA*.

ETFO also argued that the definitions of collective agreement, whether in the *LRA* or the PSFA require an agreement in writing between the employer and the union to have been "freely negotiated" – and there are none that were freely negotiated by ETFO. However, the OLRB found that there were examples of valid collective agreements that are not freely negotiated between the employer and the union, and that the legislation does not state or require in other terms that the agreement between the parties be "freely negotiated", as proposed by ETFO. Although ETFO might desire for all collective agreements to be freely and voluntarily negotiated that is not the case in all circumstances in Ontario.

Does the withdrawal in concert of participation in voluntary extracurricular activites identified constitutes a "strike" within the meaning of the *Education Act*?

The activities were divided into A and B lists.

The A list were agreed by the parties to be completely voluntary and teachers could not be subject to discipline by their school board for choosing or failing to participate in such activities. They included interscholastic sports teams with practices, games and tournaments outside the instructional day, chess clubs with tournaments outside the instructional day, and arts activities such as band, choir, and drama clubs all functioning outside the instructional day.

The B list constituted activities which the parties did not agree were completely voluntary and could not be the subject of discipline by the school boards. Examples included, distribution of information for parents in class such as newsletters, permission slips for field trips and class outings, enrolment forms and issue-specific communications (for example, regarding H1N1), and the participation by teachers in intramural sports.

ETFO's head office and locals emailed teachers advising them not to volunteer and it was not disputed that ETFO's Constitution included the potential for penalties for refusal to comply with such directions, such as fines.

The definition of strike in the Education Act includes the following langauge:

277.2 (1) The *Labour Relations Act, 1995* applies with necessary modifications with respect to boards, designated bargaining agents and Part X.1 teachers, except where otherwise provided or required by this Part.

...

(4) For the purposes of subsection (1)(a) the definition of "strike" in section 1 of the *Labour Relations Act, 1995* does not apply; and

(b) "strike" includes any action or activity by teachers in combination or in concert or in accordance with a common understanding that is designed or may reasonably be expected to have the effect of curtailing, restricting, limiting or interfering with,

(i) the normal activities of a board or its employees,

(ii) the operation or functioning of one or more of a board's schools or of one or more of the programs in one or more schools of a board, or

(iii) the performance of the duties of teachers set out in the Act or the regulations under it,

including any withdrawal of services or work to rule by teachers acting in combination or in concert or in accordance with a common understanding.

ETFO argued that the legislative history demonstrated a legislative intent that the definition of strike in the *Education Act* not include voluntary extra-curricular activities, such as the ones identified in list A and B.

The OLRB found that there was a clear legislative intent to have a definition of strike unique to the education sector. The OLRB also found that while there were attempts to centralize and create provincial consistency regarding the performance of extra-curricular activities as mandatory duties assigned to individual teachers, supervised by individual principals, supervised by individual school boards, and all supervised by the Ministry of Education, attempts were not successful. It was not disputed by either party that these activities are purely voluntary on the part of individual teachers – they cannot be compelled to volunteer to do them, they cannot be disciplined for not doing them and they are not paid any more for doing them.

However, the school boards argued that failure to participate in these activities on mass interfered with the operation or functioning of program in the board's schools; interfered with the normal activities of the board or its employees; and/or was work to rule all within the meaning of strike in the Education Act. The school boards argued that fact that individually teachers could choose not to volunteer did not address a ban on mass which fell within the definition of strike because the Education Act approached the meaning of strikes on the basis of the behaviour's effect or impact.

The OLRB found that ETFO's argument that the failure to volunteer could not be considered work to rule because the activities were voluntary missed the point of work to rule, namely that in a work to rule

employees are only strictly complying with employer rules so if there are none, employees do not have to do it. The OLRB found that the activities identified came within the definition of strike in the Education Act notwithstanding that they were unpaid and voluntary. This was, in the opinion of the OLRB the better interpretation because the education sector had a long history of expectations of delivery of these activities.

(i) Additional issues to be litigated; and

As indicated, the orders by the OLRB were interim Orders because the Constitutional issues remain to be litigated.

I would not be surprised if it took close to another decade to obtain a final decision on the issue of what activity is protected by the Charter.

(ii) Future impact of the decision.

This decision settles that to withdraw extra-curricular activities on mass constitutes a strike and can only be done when the union is in a lawful strike position. The fact that an individual teacher may choose not to volunteer is not relevant to the issue of mass refusal to volunteer.

The decision also articulated the importance of extra-curricular activities to the educational experience. There is a long history of students participating in extra-curricular activities and parents have an expectation that they will form part of their children's education.

2. **Employee Privacy Interests in School Board Owned Equipment**

Background

Mr. Cole was provided with a board owned laptop for the purpose of assisting with his duties at the school, which ironically included monitoring student activity on the internet. Mr. Cole was permitted to use the laptop at home and there was no restriction on him using it for personal matters as well as school board matters.

While doing his duty, Mr. Cole came across semi-nude photographs of a student that had been sent between students. Rather than addressing this issue with his principal, Mr. Cole retained the photos for his own use.

While doing routine maintenance on its systems, a school board IT employee found the nake photos and immediately informed the school principal (something Mr. Cole should have considered doing). The principal directed that the photos be copied to preserve them and that the laptop be seized and the contents of Mr. Cole's hard-drive be copied so that it could be searched for other evidence of potential wrongdoing and so that the contents could be preserved. The school principal then reported Mr. Cole to the police.

As part of the police investigation, the school principal when asked turned over the laptop to the police on the assumption that because it was school board property the school board could determine whether it should be turned over to the police.

The police subsequently searched the lap-top's contents.

The Supreme Court of Canada held that Mr. Cole had a reasonable expectation of privacy and right to privacy regarding the laptop's contents, despite the fact that it was a board owned equipment.

Mr. Cole's right to privacy regarding the contents of the laptop meant that the police should have sought a warrant before searching its contents. However, Mr. Coles right to privacy in his employment context was diminished. It did not extend to restrict the school board's routine technical check ups and updates, nor did it make unlawful the subsequent actions of the principal upon the finding by school board staff of the inappropriate content because.

The SCC identified that the school board had policies in place regarding the appropriate use of technology as well, the principal had reviewed these policies with staff members. Mr. Coles diminished right to privacy in the school setting was also related to the requirement that school boards have for maintaining safe school environments for staff and students. The principal was found to have acted with proper authority because the principal pursuant to s. 265 of the Education Act, Regulation 298 and the common law had responsibilities for student safety, which permitted seizure, search and retention of the contents of the laptop.

(a) What does *R. v. Cole* mean for school boards?

This decision further articulates the parameters of the expectation of privacy that can exist in a school setting, due to its nature. The SCC has again articulated that privacy rights will be diminished in a school setting. Arguably, had evidence of fraud been identified on Mr. Cole's laptop the right to seize, search and turn it over to police might have been different because there would be no risk to student safety and security and therefore, Mr. Cole's right to privacy might have been greater as it related to the school board.

(b) What steps should school boards take in response to the privacy interests of employees identified by the Supreme Court of Canada?

School boards should continue to put in place acceptable use policies and procedures and review and confirm their understanding by staff. To preserve the right to seize, search and utilize information found on board owned electronic equipment such as laptops, notebooks and smart-phones, school board should consider articulating in policies and procedures that, while some appropriate personal use might be permitted, there was no right to privacy if the employee chooses to utilize the equipment for such purposes as well as for employment purposes.

This notice, which should be articulated in school board policy, acceptable use procedures and the terms with upon which the employee acknowledges that s/her is being provided with use of the specific equipment, ight assist to preserve the rights of school boards in cases that not only pose a risk to students, but also are inappropriate for other employment purposes.

3. Accommodating Employee Disability Related Needs

Accommodating disability related needs of employees to the point of undue hardship can be a challenge. Employers must be mindful of the accommodation process in which they participate. For example, employers are restricted in the information that they can require an employee to provide. School boards, as large publicly funded institutions will rarely, if ever, be able to rely on financial undue hardship as a reason for not accommodating an employee.

There are cases in which the school board might believe or feel that the employee is taking advantage of their accommodations or failing to equally participate in the accommodation process. In some cases this might be true, but school boards must be mindful not to jump to such conclusions.

(a) Differential compensation;

One reason that school boards might feel that an employee is taking advantage of the accommodation process is the productivity of the employee. However, there are many arbitral decisions which confirm

that differential compensation is permitted where an employee is not able to perform all of the duties as a result of accommodation needs.

This principle that an employee is only entitled to paid for work done was recently reaffirmed in a recent decision involving teaching experience credit, sick leave credits and full benefits premiums. The teacher in question was not able to work full-time as a result of accommodation needs related to MS, but argued that she her accommodation did not impact on her right to full-time teaching experience credit, sick leave credits and benefits. The arbitrator disagreed.

The arbitrator relied on an Ontario Court of Appeal decision in which the Court held that adjustments to salary grids for employees who cannot work full-time due to disability related needs does not violate the Human Rights Code, provided that the employee is treated as other employees who are not able to work full time for other reasons.

In the present case, the employee was not entitled to be recognized as a full-time employee for experience credits, sick leave credits and benefits, when the teacher was not working full time due to her disability related needs.

(b) Psychological health and safety; and

Psychological health and safety is becoming a significant issue for employers from the perspective of both harassment, Bill 168 amended the *Occupational Health and Safety Act* to include harassment by individuals in the workplace and mental health disability accommodation.

In addition, the Cdn Standards Association recent released a standard for psychological health and safety in the workplace. The CSA is advocating that employers implement a psychological health and safety management system, which includes the following elements: (a) commitment, leadership and participation; (b) planning; (c) implementation; (d) evaluation and corrective action; and (e) management review.

The psychological health and safety management system being promoted by the CSA is comprehensive and may be a significant challenge for some school boards to implement. Nevertheless, if it becomes widely accepted and implemented, it might be the standard against which school board workplace health and safety is measured.

(c) Discipline of accommodated employee;

Discipline of employees who are being accommodated can be difficult for employers for several reasons, not the least of which is a fear of being challenged either by grievance arbitration or before the Human Rights Tribunal. It can often be difficult to identify when an employee's disability is the cause of their inappropriate behaviour.

(i) proportionality & contextual analysis; and

As with all discipline of employees, employees with disability related accommodation needs must be disciplined based on proportionality and there must be a contextual analysis of all factors, including discipline history, the circumstances of the event and behaviour and to what extent, if any, the employee's disability contributed to the behaviour at issue, to ensure that the discipline is fair and appropriate in the circumstances.

Understanding the employees disability related needs and whether or not the disability contributed to or explains the inappropriate behaviour is central to a contextual analysis. School boards may ask for information from the employee to better understand the impact of his/her disability related needs when making a decision regarding discipline. If discipline is not warranted, then the school board will need to consider the accommodation being provided to ensure that the inappropriate behaviour can be avoided in the future.

School boards should ask questions about disability related needs to ensure that they have a full understanding of the impact on the employee's behaviour. Appropriate accommodation requires a fulsome understanding of the employee's needs.

(ii) harassment allegations

In a recent arbitral decision, the discipline of a teacher with long standing disability related accommodation needs resulted in $20k in damages being awarded for harassment.

The teacher had taught at the same school for 3 decades without incident, but having ongoing disability related accommodation needs. The school board developed concerns about the extent of the teacher's disability, as well as her teaching ability and the state of her classroom. When 2 parents alleged that she had mistreated their children, she was assigned to home with pay pending an investigation. She remained at home for the balance of the school year.

The arbitrator found that there was animus against the teacher, and was highly critical of the school board investigation, finding that the school board had accepted as fact the allegations made by the children whose parents brought forward the concerns, without communicating the details of the allegations to the teacher and allowing for her response.

The arbitrator found that the assignment to home was for a protracted period, and despite her being paid, had contributed to and act of harassment on the basis of disability as defined by the Human Rights Code.

The arbitrator ordered that the disciplinary letters be expunged and awarded the teacher 20K in damages.