Irene Holden Ltd.
Arbitration · Mediation · Investigation · Conflict Resolution

July 22, 2014 File: 1448

VIA EMAIL ONLY

Roper Greyell
800 Park Place
666 Burrard Street
Vancouver, BC V6C 3P3

Attn: Najeeb Hassan

McGrady & Company
Box 12101, Nelson Square
Suite 1105 – 808 Nelson Street
Vancouver, BC V6Z 2H2

Attn: Michael Prokosh

Dear Sirs:

Re: St. Margaret's School –and- Professional Employees' Association
(Interest Arbitration)

The following constitutes a letter decision regarding the current jurisdictional issue between the parties.

LETTER DECISION REGARDING JURISDICTION

INTRODUCTION

In August of 2000 the Professional Employees' Association ("the Union") became certified for a bargaining unit comprised initially of teachers at St. Margaret's School (the "Employer), a private girls' school in Victoria. The original certification was varied in April of 2002, to include bus drivers, office and maintenance staff and employees in the kitchen and housekeeping departments. The parties successfully negotiated several collective agreements. The most recent one had a term of July 1, 2012 to June 30, 2016. On March 8, 2013 the residence staff at the school or "housemothers" were varied, by the Labour Relations Board, into the existing bargaining unit.

Following the variance, the parties entered into a Letter of Agreement to "establish a process to bring the recently certified house staff into the collective agreement". The process

included a continuation of the current terms and conditions of the house staff; as well as the immediate applicability of certain Collective Agreement articles such as the scope clause and the general wage increase negotiated for the balance of the bargaining unit. The process established that "other changes to terms and conditions" would be subject to negotiation and failing agreement, the parties would "engage in a mediation/arbitration process to resolve the outstanding issues".

In January of 2014 the Employer introduced at the bargaining table an extensive proposal for a new residence model which included a number of issues: revised hours of work, rationale for a new residence model, changed positions, new excluded positions and implementation proposals. On April 8, 2014 the Employer gave the Union notice, pursuant to Section 54 of the *Labour Relations Code,* of its intention to implement the new model. On May 30, 2014 the parties agreed to an adjustment plan. The plan again included the referral to arbitration for the outstanding issues. Section 9 of the plan reads as follows:

> If needed, the parties shall engage an arbitrator named in the collective agreement to assist with mediation/arbitration to bring final resolution to the outstanding terms and conditions of employment for residence staff under the new residence model with a target date of June 18 and 19 for the arbitration.

The parties continued to negotiate until mid to late June, 2014 at which point they appointed me as the mediator/arbitrator identified in both the Letter of Agreement and the Section 54 Adjustment Plan.

THE ISSUE

The issue which is the subject of the current dispute is whether or not I have jurisdiction to arbitrate the exclusion from the bargaining unit of the newly created position(s) in the new residence model.

SUBMISSIONS

The Employer submits that I have no authority as an interest arbitrator to "determine whether a newly created position is included or excluded from the bargaining unit". The Employer argues that the issue falls within the exclusive jurisdiction of the Labour Relations Board pursuant to Section 139 of the *Labour Relations Code* – albeit with some exceptions granted to rights arbitrators, not interest arbitrators. The Employer submits that the Employer has never granted such authority to me as an interest arbitrator and has always claimed that it is a matter for the Labour Relations Board to decide, at the appropriate time. In this regard, it relies on *British Columbia Hydro and Power Authority,* BCLRB No. B64/98; *North Shore Union Board of Health and Health Sciences Association of British Columbia* (1996), BCLRB No. 326; *W.G. McMahon Ltd. and Miscellaneous Workers, Wholesale and Retail Delivery Drivers and Helpers' Union, Local No. 351*, [1978] 2 Can. LRB 222.

The Union submits that the parties granted me jurisdiction as mediator/arbitrator to resolve the outstanding issues. Such authority was granted in the Letter of Agreement which partially described how the newly varied staff would be included in the Collective Agreement; and again when the Section 54 Adjustment Plan was agreed to by the parties. Currently all issues remain outstanding since no Memorandum of Agreement has been signed, asserts the Union. One outstanding issue is the issue of the exclusions of the new positions which the Employer placed on the bargaining table in its proposal of January 9, 2014. The Union submits it merely wants the Employer to abide by its agreement in the Letter of Agreement and the Adjustment Plan. Further, the Labour Relations Board has granted overlapping jurisdiction for arbitrators to decide inclusions/exclusions, argues the Union. The Union relies on the following to uphold its argument: *Diversicare Canada Management Services Co. v. Hospital Employees' Union (Jurisdiction Grievance)*, [2007] B.C.C.A.A.A. No. 126; *Repap Carnaby Inc.,* BCLRB No. B31/94; *Chubb Edwards v. International Brotherhood of Electrical Workers, Local 213*, [2013] B.C.C.A.A.A. No. 89.

DECISION

I have reviewed the submissions and the arbitral authorities relied upon by the parties. However, I shall concentrate on *Repap Carnaby, supra,* since it is the seminal Labour Relations Board decision regarding the overlapping jurisdiction between the Board and an arbitration board. The circumstances in *Repap Carnaby, supra,* were somewhat different than the case at hand since it involved a determination of employee status as it related to a "contracting in" situation. The appropriate jurisdiction was sought as to whether the issue should be heard by the tribunal or an arbitrator. Two arbitrators had deferred to the tribunal as a result of the *Versa Services* line of cases, which had been heard under the jurisdiction of the Industrial Relations Council.

In *Repap Carnaby, supra,* the Board provides a comprehensive review of decisions which determined the jurisdictional boundaries between the Board's authority and that of an arbitration board. It uses as its starting point a review of the *Labour Relations Code* itself, and references the applicable sections of the previous *Industrial Relations Act*:

> The statutory starting point for determining the jurisdictional boundary between the Board's authority and that of an arbitration board is Sections 84(2) and 139 of the Code (previously Sections 93(2) and 34 respectively of the Act). The former requires that every collective agreement contain a provision for the final and conclusive settlement, by arbitration or another method, "of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable"; the latter gives the Board "exclusive jurisdiction to decide a question arising under this Code" including whether a person is an employer or employee (emphasis added). **Taken literally, Section 139 could preclude arbitrators from determining issues addressed in that provision. However, section 89(g) of the Code (previously Section 98(g) of the Act) expressly empowers arbitrators to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement". This by definition includes the Labour Relations Code:** Geddes Contracting Co. Ltd., BCLRB No. L233/82.
>
> (emphasis added)

The Board consequently dispels with the notion that the Employer is putting forward in this case – i.e., that exclusions from the bargaining unit remain the exclusive jurisdiction of the Board.

Further, in *Repap Carnaby, supra,* the Board reiterated its policy to defer to arbitration for the resolution of disputes arising under the Collective Agreement. At page 7 of the decision the panel provided a summary of the general delineation of the overlapping jurisdiction of the Board and arbitrators:

> (a) There is a general policy in favour of deferring to the private grievance and arbitration process for the resolution of disputes concerning the interpretation, application, operation or alleged violation of a collective agreement between parties to a collective bargaining relationship…..
>
> (b) Arbitrators have the jurisdiction, and often the duty, to apply provisions of the statute when addressing matters arising under a collective agreement; however they are reviewable on a "correctness" test…
>
> (c) The general policy has led arbitrators (in the course of adjudicating grievances) to deal with questions of employee status, whether a collective agreement is in force, whether certain conduct constitutes strike activity, and other matters which might be the subject of an application to the Labour Relations Board. The policy has even extended to a deferral to arbitration of allegations which might constitute an unfair labour practice complaint under the statute…
>
> (d) The policy of deferral to arbitration and the jurisdiction of arbitrators to interpret and apply the statute are not without limitation. Exceptions arise, and the Board will take jurisdiction where: the grievance and arbitration provisions will be incapable of affording an adequate remedy; the issue is unusual and not a matter normally subject to third party arbitration; the contract interpretation dispute is inextricably intertwined with the law and policy of the statute; or a collective agreement interpretation issue is necessarily incidental to the disposition of a matter properly before the Board…
>
> (e) An arbitrator does not have jurisdiction to hear a grievance which raises an inter-union work jurisdiction dispute. As the arbitration process is not capable of binding a non-party without consent, an arbitrator is unable to provide a final and conclusive resolution of the dispute (i.e., there is the potential of conflicting arbitration awards)…
>
> (f) While the arbitration cannot bind non-parties in the absence of consent, not all third parties who may be affected by an arbitration award are entitled to standing and/or entitled to challenge the award on review. A settled example is third party contractors who may be affected by a grievance over the contracting out of bargaining unit work…
>
> (g) Arbitration is the appropriate forum for dispute resolution where the employee status of an individual engaged directly by the employer is in issue and the remedies being sought in a grievance relate predominantly to the alleged violation of the collective agreement…

In not one of the preceding principles does the panel draw a distinction between interest arbitration and rights arbitration as did the Employer in its submission in the case before me when it submitted that exceptions to the Board's jurisdiction under Section 139 of the *Labour Relations Code* are sometimes granted to rights arbitrators but not interest arbitrators. Conversely the preceding principles apply to arbitrations in general and identify not only an overlapping jurisdiction between the Labour Relations Board and arbitration boards, but a deferral to arbitration on issues such as "employee status" as in the case before me (see sections (c) and (g) in particular); and any other matters which might be the subject of applications before the Labour Relations Board (section (c)). Having said that, I understand that the roles and the tests utilized in interest arbitrations may be different than in rights arbitrations – as is the standard of review.

At page 9 of the *Repap Carnaby, supra,* decision, the Labour Relations Board panel defers to arbitration generally to avoid bifurcation of the proceedings since such bifurcation would impair the expeditious resolution of arbitral disputes:

> The foregoing review readily leads us to conclude, from a policy perspective, that the preferred forum for the adjudication of such disputes should be the grievance and arbitration process. The alternative (i.e., vesting exclusive jurisdiction in the Board) has at least two immediate and unsatisfactory ramifications. First, a requirement that the Board determine matters arising under the statute, and defer remaining issues to arbitration, will create a bifurcation of proceedings and impair the expeditious resolution of arbitral disputes. Second, if bifurcation is to be avoided, the Board will be required to adjudicate contract interpretation issues**.** This runs squarely afoul of the general policy of deferral to arbitration and the principle of "private ordering" which unions and employers seek to achieve through collective bargaining**. What is required is a practical labour relations solution – one which will put an end to the "evils" of delay, lack of finality, and increased litigation and costs inherent in the present circumstances. As will be seen, this can be accomplished in a manner which is consistent with the Board's long established policy of deferring to arbitration for the resolution of disputes arising under collective agreements.**
>
> (emphasis added)

So too in the case at hand. To narrowly read the authority which the parties vested in me in the Letter of Agreement to deal only with outstanding terms and conditions of the Collective Agreement, rather than the outstanding issue of the exclusions which the parties had been bargaining since January 2014, would be an unnecessary and costly bifurcation of the

proceedings. Further, the exclusion issue may have a direct impact on the terms and working conditions for the balance of the residence staff and should be dealt with in one forum – rather than two, as is suggested by the Employer.

CONCLUSION

I therefore conclude that the jurisdiction to deal with all outstanding issues related to bringing into the Collective Agreement the residence staff at St. Margaret's School forms part of my jurisdiction agreed to by the parties in the Letter of Agreement and the Section 54 Adjustment Plan. The phrase "all outstanding issues" includes the proposed excluded position(s) in the new residence model.

My assistant will be in touch with the parties to schedule a day of mediation to start, in which we will hopefully resolve all the outstanding issues. Failing such resolution, we will proceed to arbitration.

Awarded this 22nd day of July, 2014 in the City of Vancouver, British Columbia.

Yours truly,

IRENE HOLDEN LTD.

Irene Holden, Arbitrator

IH/cls