

Arbitrator States That Under The Restraint Legislation, A Director's Compensation Plan Is Frozen

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In a decision released on January 22, 2018, Arbitrator William Kaplan ruled on whether **the provisions of the** Broader Public Sector Accountability Act, 2010 ("BPSAA") applied to an employment agreement entered into between Superior-Greenstone District School Board (the "Board") and its Director of Education, David Tamblyn.

Mr. Tamblyn entered into an employment agreement with the Board on June 15, 2011. The agreement provided for an annual salary of \$151,950.00 in the first year and **significant staged increases every year thereafter ending on August 31, 2016**. During this term, Mr. Tamblyn's compensation remained at the start rate. Mr. Tamblyn alleged that had the agreement been given effect, he would currently be enjoying a salary of \$192,550. He alleged that his loss was \$154,131 from September 1, 2012 to January 1, 2018 and it is continuing.

The BPSAA was proclaimed on April 1, 2012. The effective date of the legislation was March 31, 2012. The BPSAA applied to "every school board" and to "designated executives". The dispute concerned the interpretation and application of certain BPSAA provisions, including:

No Increases under compensation plan

7.6 No designated employer shall, before the end of the restraint period, amend the compensation plan that is in effect on the employer's effective date for the position of a designated executive or the office of a designated office holder, in any manner that would increase the salary, the salary range, or any benefit, perquisite or non-discretionary or discretionary payment that is required to be, or that may be, provided to a holder of that position or office under the compensation plan.

No increase in salary

7.7 The salary of a designated executive or designated office holder under the compensation plan that is in effect for the position or office on his or her effective date cannot be increased before the end of the restraint period.

No increase in benefits, perquisites and payments, etc.

7.8 (1) Subject to subsection (3), a benefit, perquisite or payment provided to a designated executive or designated office holder under the compensation plan that is in effect for the position or office on his or her effective date cannot be increased before the end of the restraint period, and no new or additional benefits, perquisites or payments may be provided to a designated executive or designated office holder before the end of the restraint period.

Submissions of the Applicant

It was Mr. Tamblyn's submission that there was nothing in the BPSAA that required the Board to freeze his salary. It was argued that absent clear and unambiguous language to the contrary, legislation must be interpreted so as to avoid interference with vested contractual rights.

The applicant submitted that the Legislature had the power to deprive persons of their civil rights without being heard, but could only do so with express language. The applicant stated that such language was absent in this case.

The applicant argued that this outcome was consistent with Picard and Windsor-Essex Catholic District School Board, which was an unreported award, dated September 12, 2016. The applicant stated that all the legislation intended to do was to prohibit further increases and not interfere with those already contractually agreed upon.

Submissions of the Respondent

The Board stated that the situation was truly unfortunate. The Board indicated that it would like nothing more than to honour the employment agreement with Mr. Tamblyn, but as a matter of law, its hand were tied.

The Board argued that the clear purpose of the BPSAA was to restrain broader public-sector spending. Section 7.6 prohibited changes to compensation plans that would increase compensation of designated executives. Section 7.7 was the operative provision. It prohibited any increases to salaries in compensation plans that were in effect on the effective date and left those salaries frozen until the end of the restraint period. The Board argued that in light of this provision, the staged increases of the compensation plan set out in the employment agreement, cannot be given effect. Mr. Tamblyn was a designated executive and his salary would stay frozen until the Legislature decided otherwise.

The Board also argued that the Picard case was factually distinguishable from the case before Arbitrator Kaplan, as the circumstances of the Picard case took place while under Ministry supervision and certain increases were paid by the school board, which later sought to recapture them.

Arbitrator's Decision

Arbitrator Kaplan confirmed that the purpose of the statute is comprehensive salary restraint across the broader public sector. The Arbitrator ruled that read together, sections 7.6, 7.7 and 7.8 make manifest that compensation, salaries and benefits are frozen on the effective date and stay frozen until the Legislature decides otherwise.

The Arbitrator held that under the legislation, with limited and inapplicable exceptions, the entire compensation field is covered. The legislative objective is "categorical". He stated:

"The Legislature has clearly evidenced its objective to freeze the applicant's compensation, meaning in his case, the salary in place on the effective date. There is no construction of the legislation that would admit any outcome other than a finding that the applicant's salary was, and remains, frozen."

Arbitrator Kaplan indicated that it is hard to imagine how the Legislature could have more unambiguously frozen salaries, including increases to salaries previously provided for in Mr. Tamblyn's employment agreement. The legislation clearly states that as of the effective date the "salary of a designated executive ... under the compensation plan that is in effect for the position or office on his or her effective date cannot be increased before the end of the restraint period."

Arbitrator Kaplan ruled that compensation plans cannot be changed. He stated that compensation and salaries cannot be increased. Pre-existing entitlements are not grand-parented. The salary in place on the effective date is frozen. He stated, "whatever was in place on the effective date remains in place during the restraint period."

On March 31, 2012, Mr. Tamblyn's salary under the compensation plan was \$151,950.50. The Arbitrator ruled that even though the agreement provides for salary increases – they cannot be given effect as they have been nullified by act of parliament. Arbitrator Kaplan held that future scheduled salary increases are prohibited by operation of law. The Arbitrator concluded that the provisions of the BPSAA override the Director's employment agreement.

With respect to the Picard case, Arbitrator Kaplan stated that it was factually distinguishable and, in any event, legally unpersuasive.

Moving forward, in 2014, the Ontario Government began the process of developing public sector compensation frameworks to ensure a consistent approach to executive compensation. The Broader Public Sector Executive Compensation Act, 2014 applies to all Ontario public sector employers, including school boards. In compliance with the Act, all 72 Ontario school boards developed a comprehensive Executive Compensation program to support executive compensation management across the Province. This new legislation applies to all directors of education, superintendents and other designated executives.

Under the legislation, all Ontario school boards were required to conduct a 30-day public consultation on their draft Executive Compensation Program. The legislation provides that if a school board's Executive Compensation Program is finalized before February 28, 2018, the school board may select a date that is as early as September 1, 2017 for the purpose of administering increases to its pay envelope.

By

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