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Back to Work! Labour Board Ends Strike and Grants First Collective Agreement Arbitration

Bradford West Gwillimbury Public Library v CUPE Local 905

In September 2023, our firm represented the Bradford West Gwillimbury Public Library (the "Library") in their successful application to have their first collective agreement with CUPE settled by binding arbitration.

On September 29, 2023[1], the Ontario Labour Relations Board (the "Labour Board") agreed with the Library that CUPE's refusal to move from its wage position was unreasonable ordering the first collective agreement be settled by binding arbitration, which also forced the striking employees to cease striking and return to work 'forthwith' pursuant to section 43 of the Ontario *Labour Relations Act, 1995* (the "LRA").

This decision provides employers with a valuable tool to rely upon should a union become unreasonably intransigent in its position during first collective agreement bargaining and bring an end to unnecessary strike action.

a) Background

The parties engaged in a long and fraught bargaining process. CUPE was certified as a bargaining agent for the Library's 34 employees in September 2021. The parties began bargaining a year later in September 2022. By July 2023, there was still no agreement on wages.

CUPE promised the bargaining unit flat-rate wage increases of $1.35 in 2023 and 2024, which represents a significant increase and an unconventional method of providing increases in a unionized environment.

The Library proposed more conventional percentage-based wage increases. The Library's proposals addressed many of the concerns expressed by CUPE at the bargaining table and in the media:

- in addition to a 3% retroactive increase for non-student employees in 2023;
- non-student employees would also earn, at minimum, the Simcoe County living wage;
- red-circled employees would receive bonuses amounting to the same wage increases they would have received had they not been red-circled; and
- the wages of some of the lowest-paid workers were raised.

[1] *Bradford West Gwillimbury Public Library v. Canadian Union of Public Employees,* 2023 CanLII 95938 (ON LRB)

CUPE did not accept the Library's proposals.

Despite movement from the Library, CUPE was unwilling to compromise on its demands for a $1.35 per year wage increase. It refused to consider any proposal that did not contain a $2.70 increase over the course of two years. CUPE did not provide any justification for its $1.35 proposal.

On July 21, 2023, the bargaining unit went on strike. While striking, CUPE continued to refuse to compromise on its wage proposal. In fact, "after a month on strike, [CUPE] increased the value of its wage demand."[2]

CUPE was bargaining backwards, and the Library was placed in a position in which it had to bargain against itself. Despite its best efforts, the Library was unable to negotiate an agreement with CUPE.

In total, the parties met approximately 30 times for bargaining, conciliation, and mediation.

As of the date of the hearing between the parties, the bargaining unit had been on strike for 9 weeks with no end in sight.

b) Application for Arbitration

Given CUPE's refusal to move from its position on wages, the Library was left with no choice but to apply for arbitration with the Labour Board.

The Library had two goals in mind when it made its application. Firstly, it wanted to ensure that a fair collective agreement could be put in place. Secondly, the Library wanted to end a 50+ day strike and resume providing library services to the community.

The Library determined that by applying for first collective agreement arbitration, it could satisfy both of those goals:

- → An order for arbitration of a first collective agreement would result in the implementation of an agreement whose terms were determined by an impartial third party.
- → An order for arbitration would automatically end the strike and require the employees to return to work under their existing working conditions until the arbitration of the new collective agreement.

[2] *Bradford West Gwillimbury Public Library v. Canadian Union of Public Employees,* 2023 CanLII 95938 (ON LRB) at para. 55.

Section 43(2) of LRA sets out the test that the Library had to meet in order to be granted arbitration of its first collective agreement:

> **43 (2)** The Board shall [...] shall direct the settlement of a first collective agreement by arbitration where [...] the process of collective bargaining has been unsuccessful because of,
>
> (a) the refusal of the employer to recognize the bargaining authority of the trade union;
> (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
> (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
> (d) any other reason the Board considers relevant.

The Library argued before the Labour Board that bargaining failed due to CUPE's uncompromising position on wages. The Library further argued that CUPE's position on wages was unjustified. The Labour Board agreed with the Library's position.

The Labour Board found that:

- CUPE had, in refusing to negotiate on the issue of wages, created a situation in which bargaining was unlikely to be successful;
- CUPE had not offered any justifications which specifically supported its demand for a $1.35 wage increase; and
- even where CUPE can justify the need for a wage increase, it cannot justify the specific need for a flat-rate $1.35 wage increase.

The Labour Board stated:

> **[65]** The clearest justification for the $1.35 proposal was given by the responding party's negotiator on August 16, 2023 when she said:
>
> > As I'm sure you can surmise, we are keeping in close contact with our membership, and they have given us, the bargaining team, clear direction. From where it stands, **we will not be able to ratify this, because our members will be looking for the $1.35**. (emphasis in original)

A union's uncompromising proposals are not automatically justified by the support of a bargaining unit:

> **[66]** As the Board found in *Canada Bread Company, Limited, supra,* **the subjective wants of one party is insufficient to find that an uncompromising**

> **position is reasonably taken or maintained.** Absent some other objective justification for the $1.35 proposal, it is not reasonably maintained. As the Board said in *Canada Bread Company Limited, supra,* "**Acting in conformity with the members' wishes and instructions is not a sufficient answer to an accusation of conduct in conflict with statutory imperatives**."

Since CUPE's "arbitrary" proposal was supported by nothing more than the desires of the bargaining unit, it was not justified. The Labour Board went on to explain that even where a union's proposal may have been justified at the time it was proposed, it may not be justified in holding to that proposal as bargaining progresses:

> **[67]** …The ongoing economic impact of the strike on both parties acts to **undermine the economic justification** put forward by the responding party for the demand in the first place because the economic **balance of the return from wage gains against the cost of obtaining those wage gains** changes (in this case significantly) as the strike goes on.

In assessing the reasonableness of CUPE's position, the Labour Board noted that the ongoing strike did not make fiscal sense for the bargaining unit members. The value of the wages lost during the strike outweighed the potential value of CUPE's $1.35 wage proposal.

On average, employees lost $8,338.05 in income over the course of the strike, which "is almost $1,000.00 more than the increase in income over the term of the collective agreement if the Union were to be entirely successful in achieving its $1.35 proposal."[3]

The Labour Board ruled that CUPE's "refusal to consider any wage increase below that which it has arbitrarily set as its target does amount to maintaining an uncompromising position without reasonable justification."[4]

The Labour Board directed that the first collective agreement between the parties be settled by binding arbitration. As a result of this direction, the Library's employees were ordered back to work to resume providing services to the community.

c) Discussion

This case is particularly interesting because it was the employer, rather than the union, who sought an order for first collective agreement arbitration. This section of the LRA is more commonly relied upon by unions to request collective agreement issues decided by binding arbitration. There is very little case law in which employers have requested first collective agreements to be decided in this manner.

[3] *Ibid,* at para. 70.

[4] *Ibid,* at para. 72.

That said, this is a tool that employers should consider adding to their toolkits. It is not unheard of for unions to attempt to use first collective agreement negotiations to "push the envelope" in an industry, attempting to implement big changes in one workplace with the intention of industry-wide implementation down the line.

Unions may use strikes to exert significant financial pressure on employers. Well-funded unions may be able to afford to compensate bargaining unit members with significant strike pay, enabling prolonged strike action.

The *Bradford West Gwillimbury Public Library* decision provides a solution for employers who are facing this type of economic pressure. This decision makes it clear that unions are not allowed to hold uncompromisingly to unjustified proposals. It further seems to suggest that adjudicators should be very wary of prolonged strikes that cost the union more than its proposals are worth over the lifetime of the proposed agreement.

Since section 43(14) of the LRA requires unions to end a strike once first collective agreement arbitration has been directed, employers can rely on this provision to ensure stability in their workplaces until a fair deal can be implemented. This removes some pressure from employers who otherwise might be forced to accede to unreasonable demands.

Employers dealing with unsuccessful bargaining and prolonged strikes should look to this decision as a roadmap. First collective agreement arbitration can limit the economic losses suffered by both employers and their employees. This is a useful way to resolve any remaining issues between the parties and to force an end to prolonged, unreasonable strike action.

d) Major take-aways:

1. S. 43 of the *Labour Relations Act* protects the interests of employers, as well as unions.
2. S. 43 is a valuable and underutilized tool that employers can use to end unreasonable strikes and require employees to return to work when a union is uncompromising in its position.
3. Unions cannot hold onto bargaining positions without justification. The fact that the union has the support of the bargaining unit members does not constitute proper justification.
4. Uncompromising bargaining positions will not be justified where the cost of holding to those positions outweighs the economic benefits of those positions.

e) Note to Readers:

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CUPE has applied for judicial review of the Labour Board's decision in this matter.

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