UNIVERSITY OF MANITOBA
Faculty Association

June 11, 2020

Court finds in UMFA's Favour -- PSSA declared unconstitutional

Hi everyone,

I just wanted to give you a brief update on some amazing news: Manitoba's Court of Queen's Bench has just released its decision regarding the government's interference with our negotiations in 2016 and 2017.

Justice J McKelvey has just declared that both the Pallister government's interference in our collective bargaining process and the wage-restraint legislation (the PSSA) it introduced shortly thereafter are violations of your fundamental right to Free Association (Section 2(d) of the Charter of Rights and Freedoms).

The government's actions toward UMFA in particular are singled out for mention.

I provide the text of her conclusions, below. If you read nothing else, read paragraphs 427 and 429.

This evening we're meeting with other union leaders and our legal team to discuss the implications and next steps. We'll update you further in the days to come.

In solidarity,

Michael Shaw
President, UMFA

CONCLUSION

[426] I have concluded that the ***PSSA*** operates as a draconian measure that has inhibited and dramatically reduced the unions' bargaining power and violates s. 2(d) associational rights. There is no meaningful bargaining leverage afforded in the current situation. Any improvements which have been collectively bargained since 2017 are minor and reflect the lessened degree of bargaining power because of the removal of monetary issues from the bargaining table.

[427] The "negotiations" that have transpired, based upon the ***PSSA,*** demonstrate that:

• employers have not necessarily embraced the concept of wage restraint (ex., UM, BU, MGEU, FLBSD), but have felt compelled to bargain in full compliance, even where no budgetary constraints existed, and because of the retroactivity provisions;

• employers, at the outset of negotiations, have indicated the need for compliance with the ***PSSA.*** This has created a vacuum in which the collective bargaining process must function without the ability to utilize the leverage afforded by monetary issues;

• certain employers have chosen not to collectively bargain and delayed negotiations or are uncertain as to the applicability of the ***PSSA*** to their workplaces, which has, again, created delay. There have been 21 negotiated ***PSSA*** agreements. Most have been achieved under duress and the threat of the claw back provisions. These were conditionally ratified, subject to the ***PSSA's*** constitutional status. Further, these agreements have affected only 7.9 per cent of Plaintiffs union members.

[428] Unions were able to negotiate zero per cent increases over two years in and around 2010. Those were successfully bargained, albeit with trade-offs. This Government said it wanted certainty and found collective bargaining to be unacceptable to achieve that result. As Stevenson indicated, zero per cent increases were bargained in the past; however, other non-monetary benefits had to be conceded. There is no question that monetary wage benefits are generally a very high priority with union membership. The limits on bargaining of monetary provisions has resulted in a loss of bargaining power which does not afford membership with a robust and meaningful ability to collectively bargain on non-monetary issues.

[429] The bargaining that transpired in 2016 with UMFA, found to be an unfair labour practice, was remarkable in that what transpired was UM's proposal over four years of a 17.5 per cent general wage increase plus market adjustments, being reduced to 1.75 percent. This occurred because of a Government mandate, of which UMFA was not advised until arbitration had begun. The University of Winnipeg and BU had previously agreed to more substantive wage increases (a range between 1.5 per cent and 2.5 per cent for 2016-2018). Consequently, it cannot be said that the ***PSSA*** wage caps were consistent with the going rate reached in other agreements, as existed in ***Syndicat canadien*** and other ***ERA*** cases. Interestingly, as well, UM felt it was in a sufficiently advantageous financial position to offer increased monetary wages/benefits and pleaded with Government representatives to allow such bargaining to transpire. This represented a substantive disruption of the collective bargaining process, harmed the relationship between UM and UMFA, and, as the evidence demonstrated, significantly altered the relationship between the union and its membership — both with respect to the 2016 and the 2017 negotiations. What transpired was a violation of s. 2(d) of the ***Charter.*** This is but one clear example of the violations of s. 2(d) that have occurred. The same infringements can be seen with respect to MTS, DSM Westman Labs, MGEU, and others.

[430] There have been examples where Government has "bargained" above the ***PSSA*** limits. However, such bargaining has generally transpired in the healthcare sector in order to secure

equality with other units as a consequence of the realignments that have and will take place in healthcare. There have been other examples, such as the ***IATSE*** bargaining, EMS Superintendents, Direct Support Workers, and Trades employees at Winnipeg hospitals, who have all received higher than ***PSSA*** amounts. However, again, those agreements were accomplished to bring symmetry of wages with similar units or to resolve evident inequities. Those employees will still be subject to four years of sustainability when it comes time to negotiate their next collective agreement. Further, many of those contracts were concluded on a take-it-or-leave-it scenario from the employer without collective bargaining transpiring. As indicated, other agreements have been conditionally ratified. The existence of 21 agreements does negate the existence of substantial interference. Those agreements were not concluded as a consequence of meaningful bargaining, and, as was said by Justice Lederer in ***OPSEU,*** represented, "more capitulation than negotiation" (at para. 142). There have also been significant delays occasioned with respect to collective bargaining, as evidenced by MTS, MGEU, ArlingtonHaus, and others.

[431] The ***PSSA,*** despite the fact that it has not been proclaimed, is effectively in force in the Province of Manitoba. It is clear from the "mandates" and policies utilized by the Government that the wage levels of zero per cent, zero per cent, 0.75 per cent and 1.0 per cent have been the applicable standards when dealing with unions. Further, the proclamation of the ***PSSA*** represents a looming presence for union representatives — particularly with regard to the claw back and debt due provisions of the legislation. The ***PSSA*** has been enacted and its application has clearly been impactful in this Province. It has created substantial interference with collective bargaining.

[432] The ***PSSA*** has made it impossible for the Plaintiffs to achieve their collective goals and limits the right to freedom of association. The s. 2(d) right cannot be exercised in a meaningful fashion. The ***PSSA*** is not saved by virtue of s. 1 of the ***Charter.***

[433] I have concluded:

1. this court has the requisite jurisdiction to rule on the constitutionality of the ***PSSA;***

2. the Government has violated the unions' s. 2(d) of the ***Charter*** with respect to the rights of public sector employees and the collective bargaining process;

3. the violation of s. 2(d) ***Charter*** rights was not justified pursuant to s. 1;

4. the Government was not required to afford the unions with an opportunity to engage in bargaining prior to enacting the ***PSSA*** (s. 2(d));

5. the Government was not required to conduct meaningful pre-legislative consultation with the unions with respect to the ***PSSA*** (s. 2(d)). [434] I am satisfied that the Plaintiffs are entitled to the relief sought pursuant to paras. 1(c) and (f) of the Amended Statement of Claim, as the Government violated s. 2(d) of the ***Charter*** respecting the rights of employees represented by

UMFA, which violation cannot be justified under s. 1 of the ***Charter.*** Further, ss. 9-15 of the ***PSSA*** violates the rights and freedoms guaranteed by s. 2(d) of the ***Charter*** and cannot be justified under s. 1 of the ***Charter.*** Those provisions are invalid and of no force and effect. They represent the heart and substance of the ***PSSA.*** The relief sought under s. 1(i) is redundant, and, hence, dismissed, as is the relief requested pursuant to paras. 1(d) and 1(e).