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Ontario government failed to make "reasonable efforts" to secure jobs for "privatized" employees

October 1, 1997

The Ontario government's plans to privatize many of its services has recently received a setback due to two arbitration rulings. The decisions were made in connection with grievances brought by OPSEU against the Ministry of Transportation (MTO) and the Ministry of Community and Social Services (MCSS).

"REASONABLE EFFORTS" TO SECURE COMPARABLE EMPLOYMENT

At issue in each case was a provision in the collective agreement between OPSEU and the government negotiated after the 1996 strike. The provision required the government to make "reasonable efforts" to ensure that employees affected by the sale or transfer of services

"are offered positions with the new employer on terms and conditions that are as close as possible to the then existing terms and conditions of employment of the employees in the bargaining unit, and, where less than the full complement of employees is offered positions, to ensure that offers are made on the basis of seniority."

Where the new employer offered a salary of less than 85% of the employee's current salary, or where the employee's service or seniority were not to be carried over to the new employer, the employee could refuse the offer of employment without losing entitlement to enhanced severance provisions under the collective agreement.

The MCSS grievance involved the closure of facilities providing services to developmentally handicapped persons. The evidence showed that by way of fulfilling its obligation to make reasonable efforts, the Ministry set up meetings with the new employers at which they were urged to consider hiring MCSS employees, and sent them letters to the same effect. No incentives were offered to the new employers to hire current staff. These efforts met with virtually no success, as the new employers had little interest in giving preference to MCSS employees.

The MTO grievance concerned bids on six highway maintenance contracts. One component of determining whether the bidder would be awarded the contract was the "Human Resource Factor" (HRF). Under the HRF, points were awarded to the bidder according to the number of MTO employees to whom the bidder extended job offers, the salary offered, whether the bidder recognized the employee's years of service with the MTO, and whether job offers were made on the basis of seniority.

The preference extended to a bidder who met these terms approximately matched the savings the MTO would realize from being spared the costs of enhanced severance it would otherwise have to pay.

Minimum requirements were established for some other factors in order for bids to be considered, but not for the HRF. However, the Ministry believed that the preference conferred by the HRF met the reasonable efforts obligation of the collective agreement. Nevertheless, one of the three finalists had made no employment offers to MTO employees, and while the successful bidder had agreed to hire 39 employees, this had no impact on the final result.

In both cases, the arbitrator ruled that the employer had not met its obligation to make "reasonable efforts".

NEGLIGIBLE EFFORTS

In the MCSS case, the arbitrator held that the employer had made only negligible efforts:

"[T]he evidence amply demonstrates that the efforts management made were *de minimis,* at best… By any measure, holding a job information day, writing letters, making telephone calls to follow-up, and attending at meetings does not come close to complying with this provision of the collective agreement. These are the kinds of actions many employers would take absent a legal requirement that it do something proactive."

The arbitrator outlined a number of measures management should take by way of reasonable efforts, including involving the union in a meaningful exchange about how to meet the obligation, adopting a stronger position in negotiations with the new employers, and using as a financial incentive in these negotiations at least the amounts saved by avoiding enhanced severance costs.

EFFORTS MADE NO DIFFERENCE

In the MTO grievance, the arbitrator found that the HRF had made no difference to the ultimate result of the bidding, and something that made no difference could "hardly be said to be consistent with the employer's proactive obligation" to make reasonable efforts. Further, the arbitrator found that the HRF was flawed in that it failed to take into account differences in bids in terms of benefits, salary level, vacation entitlement and other features. He ordered that the HRF be refined and that the employer use all savings on enhanced severance costs in negotiations to preserve jobs, both during and after a bidding process.

In Our View

These decisions have required the government to meet with OPSEU to discuss how best to discharge its obligation to make reasonable efforts, and have caused a 60-day suspension of privatization projects. The government has indicated that it is seeking judicial review of that part of the MTO

decision that requires the employer to negotiate job preservation with a successful bidder. Officials say they believe this runs counter to the law covering tendering procedure, and argue they are limited in making job preservation a condition in a tendering process.

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