CITATION: Weatherup v. Campbell, 2024 ONSC 728
COURT FILE NO.: CV-21-660327
DATE: 20240202

SUPERIOR COURT OF JUSTICE - ONTARIO

2024 ONSC 728 (CanLII)

RE: JOHN WEATHERUP on his own behalf and on behalf of all of the members of CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 4400, BRANDON HAWKINS, SEAN NORRIS and PETROS VLOGIANNITIS, Plaintiffs

-and-

BILL CAMPBELL, DAN CROW, GARY GODDARD, TAMMY GRAHAM, KAREN McRAE, WANDA MUIRHEAD-TOPOREK, TERRI PRESTON, DEBRA TATTERS and DAVID WRIGHT in their capacities as trustees of the CANADIAN UNION OF PUBLIC EMPLOYEES EDUCATION WORKERS' BENEFITS TRUST and on behalf of all beneficiaries of the Trust other than those represented by the Plaintiff, Defendants

BEFORE: FL Myers J

COUNSEL: *Sean Dewart and Ian Mckellar*, for the plaintiffs

Clio Godkewitsch, for the defendants

HEARD: February 1, 2024

ENDORSEMENT

[1] The defendants move for summary judgment to dismiss the action. Both sides agree that there are no issues of fact requiring a trial. The issue involves an interpretation of a trust deed that can be dealt with on this motion. The outcome of the motion will resolve the action with finality one way or the other. The order implementing this decision should state expressly that it is a final order as required by the Court of Appeal in *Skunk v. Ketash*, 2018 ONCA 450 (CanLII),

[2] The plaintiffs object to a significant amount of the evidence adduced by one of the defendants' witnesses. The defendants rely on only one piece of that evidence involving the provincial purpose in centralizing the collective

bargaining process and administration of employee benefits for employees in the education sector.

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[3] Nothing turns on the detail in this evidence. It is self-evident from the statutory scheme that there has been a centralization of some aspects of the collective bargaining process. It is common sense to note that one element of centralizing employment benefits is to eliminate individual cost centres associated with each school board in the province having to administer its own separate employee benefits plan.

[4] The plaintiffs are one local union and three of its members. They seek an order that the current centralized health and benefits trust wrongly denies to members of this local, the benefit of an ongoing, annual, open enrollment window to which they were entitled under their prior local collective bargaining agreement.

[5] For the reasons that follow, in my view, read in its grammatical sense and as a whole, with regard to the trust deed and the documents incorporated in it, and consonant the purpose of the trust deed in the context of the collective bargaining regime, the centralized trust deed does not and was not required to continue the annual, open enrollment window that the plaintiffs enjoyed in the local benefits plan that had been provided previously by their employer.

[6] The impugned centralized CUPE Education Workers Benefits Trust deed under which CUPE education workers' employment benefits are provided is dated February 28, 2018.

[7] It provides in Art. 12.2:

> **12.2 Membership in the CUPE EWBT Plan**. Subject to any requirements or restrictions in the Central Collective Agreement, the CUPE EWBT Plan shall define the persons eligible to participate in it as well as the terms and conditions of their eligibility for Benefits. [Emphasis in original]

[8] This provision uses the root word "eligible" twice. The trust is to define which employees are eligible to participate in the benefits plan. It is also to define the terms and conditions of employees' eligibility to receive benefits under the plan.

[9] The trustees have determined that all permanent employees of the relevant CUPE education workers' locals are eligible for benefits under the plan provided by the trust. In addition, union members who are not permanent (part-time, casual, students etc.) can be eligible to participate if their local collective agreements so provide.

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[10] The issue in the case is whether the defendants, as trustees, have violated the trust or their obligations as trustees in how they defined the terms and conditions of eligibility for benefits.

[11] Although an employee is eligible for benefits under the plan provided by the trust deed, he or she does not necessarily have to receive them.

[12] Employees are required to contribute to some of the costs of benefits under this plan. The costs vary depending on which of three tiers of employment a member occupies. An employee's tier turns on how many hours per week the employee works.

[13] Permanent CUPE members who work more than 20 hours per week, for example, pay 4% of their health benefits. But employees who work less than that pay 50% or even 100% of their health benefits.

[14] Employees may be eligible to participate in the benefits plan and yet decide that they do not want to pay for benefit coverage. This might happen particularly if a member has access to similar or better benefits under a spouse's benefits plan.

[15] The trustees' duties include the design of the benefits plan. Under the plan that the trustees have put in place, to receive benefits an eligible employee must take positive steps to enroll in the plan. Enrollment can be done as of right at various times:

a. within thirty days of employment;

b. after a defined significant life event (like marriage and divorce, for example); and

c. after changing the tier of employment and thereby changing the amount of the employee's required contribution towards his or her benefits.

[16] Eligible members can also apply to enroll in the plan at other times. But, to do so, they need to provide medical proof of insurability. Based on the employee's insurability, the administrative agents retained for the plan will decide whether each applicant ought to be allowed to enroll in the plan or any applicable terms and conditions that ought to apply.

[17] The individual plaintiffs chose not to enrol for benefits coverage when they were entitled to do so as of right within the first thirty days. When they applied

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to receive benefits later, they were all required to submit medical evidence of insurability.

[18] One of the plaintiffs submitted proof of insurability and has been enrolled in the plan.

[19] The other two plaintiffs have been found to be uninsurable and have not been allowed to enroll for health care benefits. They will be unable to obtain health benefits under the plan unless they undergo a specified life event or change their employment tier. As discussed above, those events will trigger a window during in which they can elect to receive benefits without proof of insurability. They will also be able to obtain health coverages if their insurability changes.

[20] I note that employees are notified of the thirty-day time limit to apply for benefit coverage without proof of insurability when they become employed. One of the plaintiffs actually received three written warnings of the important thirty-day deadline.

[21] In addition, late employees are not necessarily excluded from all benefits. This plan provides health, dental, AD&D, and life insurance. For permanent employees who work more than 20 hours, AD&D and life insurance coverage do not require any employee contribution. The plan does not require proof of insurability for coverages provided at no cost to employees even if they apply late or outside the three listed application windows.

[22] So the permanent CUPE members who apply late and are not insurable may still be enrolled in the plan. But their coverage may be limited. All three individual plaintiffs are receiving at least some benefits under the plan.

[23] Not surprisingly, this action is really about expensive health insurance benefits.

[24] Why does a plan administrator or insurer care when a beneficiary applies to participate in a benefits plan?

[25] One obvious reason is for the employee to have the option to opt out of coverage to avoid paying contributions that she or he does not want to pay. In addition, each employee needs to tell the insurance administrators what coverages he or she wants and what tier of employment he or she occupies.

[26] But obtaining information does not seem to be linked logically to a need to exclude people from applying outside specified times without proof of insurability.

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[27] The plan's actuary testifies without challenge that there is something referred to as "anti-selection" risk. Anti-selection is the tendency of members who must share in the cost of a plan to enrol for benefits only when they need the benefits.

[28] Insurance plans are funded based on actuarial calculations driven off available sources of funding including premiums paid by covered individuals. It is expected that premiums will be collected from people who are usually paying into the plan more than they take out. If people can join a plan only once they know they will be drawing benefits, the plan's funding will be prejudiced.

[29] The trustees' actuarial consultant testifies:

> 5. It is a common practice in group insurance and benefit plans to have structures in place to limit anti-selection, in order to control the tendency of members who must share in the costs of a benefit plan to enrol in the plan only when they need the benefit. In other words, anti-selection is when an individual enrols for coverage when it best suits them from a cost perspective.
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> 6. One of the means to control anti-selection is to have restrictions on when individuals are allowed to enrol in benefits plans, such as within a set period from the date of hiring, or during a time-limited enrolment period triggered by certain life events like having a child or losing benefit coverage through a spouse. The measures taken to control anti-selection are part of the design of the CUPE EWBT Plan.
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> * * *
>
> 12. Offering an open enrolment window to individuals who are required to pay a larger share of the benefit costs, similar to the tier 2 and tier 3 members within the CUPE EWBT, exposes a plan to significant anti-selection risk. This is because individuals with greater need for coverage at the time of the open enrolment will tend to seek coverage, while individuals with lesser need for coverage will tend not to enroll. It is not possible to precisely quantify the risks and costs of providing an annual open enrolment window to eligible CUPE members of Local 4400, or to members of any of the previous benefit plans, and the Trustees have chosen to avert the cost and risk altogether.

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[30] The trust provides for the plan to be funded by a fixed dollar formula to be negotiated every few years in collective bargaining. Counsel for the defendants submits that with the funding of the plan fixed during the term of each centralized collective bargaining agreement, the trustees were prudent to adopt the recommendations of their consultants to include in their plan design standard industry approaches to minimize unquantified risks and costs caused by anti-selection risk.

[31] This seems consonant with the trustees' duty of prudence as set out expressly in the trust deed and at law.

[32] However, the plaintiffs point to Article 5.1 of the trust deed that says:

> **5.1 Establishment of the CUPE EWBT Plan**. Subject always to the requirements of this Agreement, and the Central Collective Agreement, the Trustees shall establish the CUPE EWBT Plan. The CUPE EWBT Plan shall define the Eligibility Requirements, the Benefits to be provided to Participating Employees covered by the Central Collective Agreement and their eligible beneficiaries and such other Participating Employees and their eligible beneficiaries as are covered by a Participation Agreement that requires their participation in the CUPE EWBT Plan. [Emphasis in original]

[33] Under this provision, the trustees' power to establish the benefits plan and its eligibility requirements is "subject always to the requirements of…the Central Collective Agreement."

[34] The Central Collective Agreement is a defined term. It means:

> **"Central Collective Agreement"** means the agreement on central terms between CTA/CAE and CUPE, and agreed to by the Crown pursuant to the *School Boards Collective Bargaining Act, 2014*, for the initial term of September 1, 2014 to August 31, 2017, inclusive, and including the Letter of Agreement dated December 20, 2016 between the OPSBA, OCSTA, ACÉPO, AFOCSC, CUPE, and the Crown, that replaces Letter of Understanding #9 re: Benefits, and the Extension Agreement dated December 20, 2016 between OPSBA, OCSTA, ACÉPO, AFOCSC, and CUPE, and agreed to by the Crown, together with any and all supplements, extensions and renewals thereof and successor agreements thereto;

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[35] The referenced central collective agreement is the product of the province-wide negotiating process put in place by the Legislature that led to the creation of the centralized benefits plan under the centralized trust deed.

[36] The Central Collective Agreement also includes a letter agreement that is said to be the replacement of Letter of Understanding #9 dated December 20, 2016. The replacement letter is not in evidence. Counsel are content however, that the relevant terms are the same in Letter of Understanding #9 that is in evidence.

[37] Letter of Understanding #9 predated and anticipated the creation of the centralized plan under the centralized trust deed. It provided, among other things:

- …once all employees to whom this memorandum of settlement of the central terms applies become covered by the Employee Life and Health Trust (ELHT) contemplated by this Letter of Understanding, all references to life, health and dental benefits in the applicable local collective agreement shall be removed from that local agreement;

- The terms of this letter of understanding will form the basis for a trust agreement setting out the terms of the ELHT to be approved by the parties;

- **3.1.1 - The Trust will maintain eligibility for CUPE represented employees in accordance with the Local Collective Agreement ("CUPE represented employees") as of August 31, 2014.** [Emphasis added.]

[38] Until recently, this action seemed to be a dispute over the meaning of the word “eligibility” in s. 3.1.1. of Letter of Understanding #9 as incorporated into the Central Collective Agreement to which the trustees’ powers to design a plan and define eligibility requirements are always subject under Art. 5.1 of the trust deed.

[39] Are the trustees required by s. 3.1.1 of Letter of Understanding #9 to maintain just the eligibility requirements of plan membership from local collective agreements as of August 31, 2014? Or are they required to maintain all terms and conditions of eligibility for benefits as provided for in each local collective agreement as of August 31, 20214?

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[40] In their factum, the plaintiffs' counsel has helpfully set out the basic eligibility requirement in the plaintiffs' local collective agreement with their employer as of August 31, 2014 (that I have edited slightly):

Unit B	Employees on Seniority List A who worked four hundred and fifty (450) hours or more from September 1 to August 31 of the previous year and have an assignment in the current year or are available for work, shall be eligible for benefits as set out below.
Unit C	An eligible Employee is a full-time Employee who is actively at work or a part-time Employee who is actively at work and is regularly scheduled to work a minimum of fifteen (15) hours or more per week in one or more positions. Employees who are temporary are not eligible for benefits.
Unit D	Eligible Employee is defined as follows: An eligible Employee is an Employee who is actively at work and regularly scheduled for more than thirty (30) hours per week, including twenty-five (25) hour per week Matrons, but excluding an Employee who is a Student, a Temporary, Seasonal, Occasional or Supply Employee.

[41] Note that there is no Unit "A" in Local 4400.

[42] Basically, eligibility for benefits under the plaintiffs' former collective agreement turned on issues of employees' status as "full-time" and/or their hours of work.

[43] The trustees of the centralized plan have widened this eligibility. They have decided that all permanent members of all relevant CUPE signatory locals are eligible to participate in the plan as are all non-permanent members who are entitled to benefits under their local collective agreement. The plaintiffs' eligibility for benefits is no longer limited or conditional on the number of hours members work.

[44] So there is little question that if eligibility in s. 3.1.1 of Letter of Understanding #9 refers only to basic eligibility to participate in the plan, the trustees have maintained and expanded eligibility from the plaintiffs' local collective agreement.

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[45] Mr. Dewart acknowledges that “eligibility” for the plan cannot be the same as “eligibility” to obtain benefits under the plan. Plan members who opt out of benefits are still eligible for the plan. Moreover, members who do not qualify for all benefits may still obtain some benefits under the plan as the plaintiffs receive their life insurance and AD&D benefits for example.

[46] If the matter stopped here, I would have no difficulty holding that the trustees have “maintained eligibility” in accordance with the prevailing local collective agreement as required by s. 3.1.1 of the Letter of Understanding #9 and Art. 5.1 of the trust deed.

[47] But the collective agreement that set out the definitions of eligibility set out in the chart above actually expired in 2012. Its terms were extended to 2014 by a separate agreement between the CUPE parent union and the Minister of Education dated December 31, 2012.

[48] It appears that in 2012, with the government promising legislation to provide for centralized collective bargaining, the school boards and local unions agreed with the government to extend all expiring local collective agreements. I am assuming this was to avoid the need for numerous local negotiations at a time when province-wide negotiations were on the horizon.

[49] The promise of upcoming legislation for province-wide bargaining is contained in Part “P” of the December 31, 2012 agreement.

[50] The December 31, 2012 agreement calls itself a collective agreement with a term until August 31, 2014. The agreement has terms for local ratification by local school boards and unions. The parties seem to be content that this agreement binds the plaintiffs and their local school board employer.

[51] Part “H” of the December 31, 2012 agreement provides:

> **H. Benefits (Health, Dental and Extended)**
>
> **1. Benefits for Current Employees**
>
> a. ***All group benefit plan coverage levels, provisions and practices in place in 2011-2012 shall remain status quo for the 2012-2014 collective agreement.*** For clarity, status quo includes scheduled adjustments based on the contract definition(s) and these will occur as scheduled (e.g. If in September 2011 the ODA rate was set at 2010 rates, in September 2012 the ODA rate would be set at 2011 rates). [Emphasis added.]

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[52] Mr. Dewart submits that the collective agreement in force for the plaintiffs on August 31, 2014 required the school board employer to keep the *status quo* for not just plan eligibility but for "benefit plan coverage levels, provisions ***and practices*** in place in 2011-2012".

[53] The plaintiffs therefore submit that the requirement to "maintain eligibility" as of August 31, 2014 in s. 3.1.1 of Letter of Understanding #9 includes not just the plan eligibility set out in the chart above but protects all local practices that were in place for obtaining benefits at that time. That would include the plaintiffs' local right to annual open windows for enrolment to receive benefits without proof of insurability.

[54] As clever and inventive as this submission is, I do not agree with it.

[55] It is true, that the plaintiffs' collective agreement as of August 31, 2014 required the employer to protect its benefits practices. Even if "practices" include all enrolment and benefit eligibility criteria, all that s. 3.1.1 of Letter of Understanding #9 required was to the trust to "maintain eligibility" as of August 31, 2014.

[56] As quoted above, the opening words of Letter of Understanding #9 recognize that once the centralized plan came online, "all references to life, health and dental benefits in the applicable local collective agreement shall be removed from that local agreement." They are replaced by the new centralized collective agreements that will then be centrally negotiated to deal with a single, centralized plan applicable on a province-wide basis.

[57] The December 31, 2012 agreement applies across the province. If the plaintiffs are correct, then every benefits practice of ever different school board across the province must necessarily be enshrined in the centralized plan under the new centralized trust deed. What's the point of creating a centralized benefits plan and authority only to have to enforce the pre-existing individual peccadillos of every separate benefits plan managed by every school board across the province?

[58] I accept that as of December 31, 2021, the school boards agreed to keep all their existing benefits terms, conditions, and practices the same until August 31, 2014. But, in my view, the wording of s. 5.1 of the trust deed and s. 3.1.1 of Letter of Understanding #9 do not reach as far as to require the centralized trust to maintain every disparate local benefits practice. Rather, the trustees were required to maintain union members' existing eligibility to participate in the benefits as of August 31, 2014. They did this and more.

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[59] I note that I raised two concerns with counsel. First it seems to me that the meaning of the collective agreement is a matter for arbitration rather than a lawsuit. Second, if the issue was whether the trustees were entitled to exercise their discretion to decide to adopt the currently anti-selection enrollment criteria and exclude the plaintiffs from coverage, those decisions might properly be challenged by an application for judicial review. This is especially the case since one of the plaintiff exercised an internal appeal right within the benefits plan.

[60] These two concerns coalesced in a further issue. If I agreed with the plaintiffs, I am not at all comfortable that I could declare that the trust deed was required to or deemed to say X or Y. That is both a matter for collective bargaining and involves provincial funding priorities.

[61] Both experienced and specialized counsel assured me that the court was entitled to hear the matter and their clients wished me to do so. As I am dismissing the claim, I do not need to confront the remedial issue in any event.

[62] The defendants may deliver costs submissions by February 9, 2024. The plaintiffs may deliver costs submissions by February 16, 2024. Costs submissions shall be no longer than three pages and shall be accompanied by Costs Outlines. Parties may provide copies of any offers to settle on which they rely for costs purposes.

Costs submissions shall be filed with the court's online portal, uploaded to Caselines and provided to me *via* an email to my Judicial Assistant.

FL Myers J

Date: February 2, 2024

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