CITATION: Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario v. Toronto District School Board, 2024 ONSC 6839
DIVISIONAL COURT FILE NO.: 131/24
DATE: 20241205

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Matheson, and Jarvis JJ.

BETWEEN:	
Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario Applicant	*Richard J. Charney and Samantha Cass*, for the Applicant
– and –	
Toronto District School Board, International Brotherhood of Electrical Workers, Local 353, Maintenance and Construction Skilled Trades Council and The Ontario Labour Relations Board Respondents	*Christopher West and Zachary Lebane*, for the Respondent, Toronto District School Board *Kamal Bakhazi*, for the Respondent, International Brotherhood of Electrical Workers, Local 353 *David Ragni*, for the Respondent, Maintenance and Construction Skilled Trades Council *Andrea Bowker*, for the Respondent, Ontario Labour Relations Board
	HEARD at Toronto: October 31, 2024

H. SACHS J.

Overview

[1] The Applicant, the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (the "ETBA"), made an unfair labour practice complaint (the "Complaint") to the Ontario Labour Relations Board (the "Board"). In a decision dated February 2, 2024, the Board exercised its discretion under s. 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1 as amended (the "Act") to dismiss the Complaint without convening a hearing on the merits (the "Decision").

[2] The ETBA seeks to judicially review the Decision on the basis that it is unreasonable.

[3] The ETBA failed to request that the Board reconsider the Decision before bringing this application. The TDSB requests that the application be dismissed as premature.

[4] For the reasons that follow, I would allow the application to proceed, but I would dismiss it because the ETBA failed to meet its onus of establishing that the Decision was unreasonable.

Background

The Parties

[5] The ETBA is the designated employer bargaining agency in respect of the electrical trades in the industrial, commercial, and institutional ("ICI") sector of the construction industry.

[6] The Respondent, the International Brotherhood of Electrical Workers, Local 353 ("Local 353") is a trade union. It is an affiliated bargaining agent of the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario ("IBEW CCO"). IBEW CCO is a designated employee bargaining agency in the ICI sector of the construction industry.

[7] The ETBA and the IBEW CCO are the parties to a provincial collective agreement, which is currently in effect from May 1, 2022, to April 30, 2025 (the "ICI Agreement").

[8] The Toronto District School Board (the "TDSB") was created following the amalgamation of numerous individual school boards that existed in what was then Metropolitan Toronto.

[9] As a result of a decision of the Board in 1998, the Maintenance and Construction Skilled Trades Council ("Council") became the bargaining agent for all the skilled trades working in maintenance and/or construction for the TDSB.

[10] The TDSB and the Council are parties to a collective agreement (the "TDSB Agreement"). During the time relevant to this application, the TDSB Agreement was effective from September 1, 2019, to August 31, 2022.

The Provincial Bargaining Scheme in the ICI Sector of the Construction Industry

[11] The Act and the Board have separated the construction industry in Ontario into seven sectors, each of which encompasses a different type of construction work. One of those sectors is the industrial, commercial, and institutional sector (the "ICI Sector").

[12] This application concerns construction work performed at properties owned or controlled by the TDSB. That work primarily falls within the industrial, commercial, and institutional sector.

[13] There are two types of bargaining models in the ICI Sector.

The Affiliated Bargaining Agents Model

[14] The first type of bargaining model in the ICI Sector occurs if an employer is bound to a union that is an "affiliated bargaining agent…"

[15] Under this bargaining model, the ICI Sector is split up into individual trades and the two parties who negotiate the applicable collective agreement for each trade are a designated employer bargaining agency (representing all employers bound to an affiliated bargaining agent) and a designated employee bargaining agency (representing all affiliated bargaining agents).

[16] For the electrical trades in Ontario, the designated employer bargaining agency is the ETBA. The designated employee bargaining agency is the IBEW and the IBEW CCO.

[17] The affiliated bargaining agents in the electrical trades are the IBEW CCO itself and several local unions of the IBEW, including Local 353.

[18] In practice, the IBEW CCO and the ETBA negotiate a single collective agreement on behalf of all affiliated bargaining agents and all employees bound to those affiliated bargaining agents. If an employer is unionized in the ICI Sector by any of the above-noted affiliated bargaining agents, they are automatically bound by the collective agreement negotiated between the ETBA and the IBEW CCO, namely the ICI Agreement. As a result, they may not negotiate their own independent collective agreement with the IBEW or any of its locals. The ICI Agreement is a province-wide agreement.

The Independent Construction Unions Model

[19] The second type of bargaining model in the ICI Sector occurs if an employer is bound to a union that is not an affiliated bargaining agent. If a union that is not an affiliated bargaining agent is certified to represent employees of an employer in the ICI Sector, it negotiates a collective agreement directly and independently with the employer.

[20] There are several unions in the construction industry that are not affiliated bargaining agents. The Council is one of them. Each of these unions has individual collective agreements with the individual employers that cover work in the ICI Sector.

TDSB and the Council's Bargaining Relationship

[21] In *Toronto District School Board,* [1998] O.L.R.D. No. 2038, the Board determined that the Council was the bargaining agent for all skilled trade employees of the TDSB working in maintenance and construction.

[22] The Council is not an affiliated bargaining agent and is not a designated employee bargaining agency. After it was certified by the Board (and thereby obtained bargaining rights to represent TDSB construction and maintenance employees in collective bargaining), it bargained for an individual collective agreement directly with the TDSB.

[23] The Council comprises several member unions of various trades. One of them is the Respondent, Local 353. However, Local 353 has no bargaining rights or legal character of its own with respect to the relationship between the Council and the TDSB. Put another way, the member unions are akin to an advisory board, not a legal representative.

[24] This is very different from the statutory relationship that Local 353 has with respect to the IBEW and the ICI Agreement. If an employer in Ontario is certified by Local 353 in the ICI Sector, there is no dispute that they are bound to the ICI Agreement, not the TDSB Agreement.

[25] There is no collective agreement between Local 353 and the TDSB. Instead, the TDSB has had a collective agreement with the Council for the past 26 years. While Local 353 is a member of the Council, the Council is its own entity and negotiates the TDSB Agreement independently.

The TDSB Agreement

[26] As already noted, the TDSB Agreement covers the terms and conditions of employment for all employees of the TDSB represented by the Council. Employees of the TDSB must be members of the Council to perform work covered by the TDSB Agreement. There is nothing in the TDSB Agreement that requires employees in the electrical trade to be members of Local 353.

[27] Despite having full-time construction and maintenance employees, the TDSB cannot perform all its construction work itself. As such, the TDSB sometimes contracts out its construction work to subcontractors.

[28] The TDSB Agreement permits contracting out, with some limitations. In many cases, the TDSB is only permitted to contract out construction work to subcontractors that agree to be bound to the Council or to subcontractors who are already bound to the ICI Agreement. In the latter case, the TDSB Agreement requires the subcontractors to execute Appendix X of the TDSB Agreement, which states that the subcontractor is bound by and will perform all its work in accordance with the ICI Agreement.

[29] Appendix X does not require a subcontractor to comply with any of the terms of the TDSB Agreement. Nothing in Appendix X requires subcontractors to apply the TDSB Agreement in favour of the ICI Agreement.

Events Giving Rise to the Complaint

The Communications Section of the ICI Agreement

[30] The ICI Agreement contains a "Communications Work Section..." It contains several classifications of employees with corresponding differences in required professional certifications and predetermined rates of pay.

[31] One of these classifications is a "Communications Cable Installer." Communications Cable Installers do not possess a 309A electrician's licence and are not licensed electricians.

[32] Another classification is a "Communication Electrician." Communication Electricians are electricians who hold a 309A licence.

[33] The ICI Agreement contemplates that Communications Work can be conducted by either a Communications Cable Installer or a Communication Electrician. It specifically contemplates higher qualified workers performing work that would ordinarily be assigned to lesser qualified workers:

> Any classification of Employee may be required to perform the work of a lesser qualified worker provided that their wage rate is maintained: "ICI Agreement…" Section 300, at p. 456.

The Contract Between the TDSB and Electric Group Limited

[34] Electric Group Limited ("EGL") bid on and was contracted to replace a public announcement system at Pleasant View Middle School, a TDSB school. EGL is bound to Local 353 and is therefore subject to the ICI Agreement. EGL started work on the project by employing Communications Cable Installers (who are not licensed electricians). The contract between TDSB and EGL did not specify what kind of communications worker EGL had to use to perform the communications work under the contract.

The Events that Triggered the Complaint

[35] In early August of 2022, representatives of the Council attended the worksite and directed EGL's Communications Cable Installers to leave the site after informing EGL that it should be using Communication Electricians. The TDSB Agreement does not recognize Communications Cable Installers as a classification.

[36] The Council filed a grievance against TDSB in relation to the work performed by EGL. In the grievance the Council took the position that the TDSB should only subcontract out to contractors who use licensed 309A electricians.

[37] The TDSB directed EGL to stop using Communication Cable Installers and to instead employ licensed 309A electricians.

[38] EGL contacted the ETBA, which represents EGL's bargaining rights in the province-wide negotiation of the ICI Agreement. On August 18, 2022, counsel to ETBA wrote to the TDSB and expressed concern that the TDSB was improperly and unlawfully requiring EGL to apply the TDSB Agreement (which did not allow the use of Communications Cable Installers) over the terms of the ICI Agreement, which did. The TDSB never formally responded to the ETBA.

[39] Following the ETBA's intervention on EGL's behalf, TDSB removed EGL from its "bidders list."

The Complaint

[40] The ETBA filed the Complaint with the Board, alleging that the TDSB, the Council, and Local 353 had violated sections 55 and 162 of the Act. According to the ETBA, the work performed by EGL at Pleasant View was communications work that fell within the scope of the ICI Agreement, which allows the use of Communications Cable Installers. By insisting that EGL hire Communication Electricians, the TDSB, the Council and Local 353 were imposing on EGL the terms of the TDSB Agreement. The ETBA complained that this was a violation of s. 162 of the Act, which provides that there can be no other agreement affecting employees represented by an affiliated bargaining agent other than the provincial agreement (in this case the ICI Agreement). Similarly, s. 55 of the Act provides that there can only be one collective agreement at a time between a union and an employer.

[41] The Complaint also alleged that the Council and Local 353 had violated ss. 71 and 73(2) of the Act, which prohibit unlawful interference with employers' organizations or employee bargaining rights. Section 71 prohibits a trade union or a person acting on a trade union's behalf from interfering with the administration of an employers' organization. Section 73(2) of the Act prohibits a trade union, council of trade unions or someone acting on their behalf from entering into a collective agreement with an employer in respect of employees who are already in a bargaining unit represented by another union. The ETBA alleged that the Council, and Local 353 as a member of the Council, violated ss. 71 and 73(2) by negotiating and enforcing the TDSB Agreement, which purports to apply to contractors that are legally required to comply with the ICI Agreement.

[42] In addition, the Complaint alleged that the Council and the TDSB had violated s. 76 of the Act, which prohibits any person or trade union from seeking to intimidate or coerce any person to refrain from exercising any rights under the Act or from performing any obligations under the Act. According to the ETBA, the following actions violated s. 76: (i) the direction to EGL to stop work on the Pleasant View site, including the attendance of Council representatives at that site; (ii) the direction to EGL to dismiss its Communication Cable Installers from the project and to hire Communications Electricians, (iii) removing EGL from the TDSB bidder's list, which ETBA alleged constituted a reprisal; (iv) directing

EGL to stop work on a different project at a different school until "whatever dispute you have is resolved", which ETBA alleged also constituted a reprisal.

[43] The ETBA also alleged that the TDSB refusal to permit EGL to continue work on the second project constituted a violation of s. 87(1)(d) of the Act, which prohibits intimidation, coercion, or penalty on a person in relation to that person's involvement or expected involvement in a proceeding under the Act.

[44] The Complaint requested the following relief: (i) declarations that the Council, the TDSB and Local 353 had violated the Act and an order to cease and desist such violations; (ii) a declaration that the TDSB Agreement has no force and effect in relation to construction work in the ICI Sector that is covered by the ICI Agreement; (iii) a declaration that EGL was required to apply the terms of the ICI Agreement to its work on the Pleasant View project; (iv) a declaration that the Council, the TDSB and Local 353 cannot compel EGL or any other contractor who is bound to the ICI Agreement to apply the terms of the TDSB Agreement to work that is covered by the ICI Agreement; (v) a direction that the TDSB place EGL on its bidders list; and (vi) damages.

[45] EGL did not complain to the Board and did not appear at any of the Board proceedings in relation to the Complaint despite being given notice of those proceedings.

[46] The TDSB, the Council, and Local 353 responded to the Complaint and alleged that the Board should exercise its discretion to dismiss the Complaint without inquiring into its merits because (i) the ETBA did not have standing to bring the Complaint; (ii) the Complaint failed to establish a *prima facie* violation of any sections of the Act; and/or (iii) there was not a sufficient labour relations purpose to justify the Board inquiring into the Complaint.

[47] The parties made written and oral submissions with respect to the preliminary objection to the Complaint.

The Decision

[48] The Board began its analysis by detailing the factors that the Board is to look at in determining whether to exercise its discretion under s. 96 of the Act to authorize a labour relations officer to inquire into the Complaint. According to the applicable Board jurisprudence (for example, *Wal-Mart Canada Corp*., 2011 CanLII 44470 (Ont. L.R.B.)) those include (i) delay in filing the complaint; (ii) whether the complaint makes out an arguable case for breach of the Act; (iii) the likelihood of success; (iv) the nature and utility of any remedy that might flow; (v) the cost implications for the parties and the public; and (vi) whether some statutory or labour relations purpose is served by the litigation exercise.

[49] The Board found that there was a "real question" as to whether the Complaint made out an arguable case for breaches of the Act. In coming to this conclusion, the Board found that the TDSB and the Council were seeking to abide by the terms of the TDSB Agreement to which they were bound. That agreement allowed the TDSB to contract out work and to impose requirements on those contractors. Given this, it was "difficult to see how a case of

unlawful interference, intimidation or coercion could be made out within the meaning of sections 71, 76 or 87 of the Act." The Board also found at para. 23:

> It is also difficult to understand how, in the context of two sets of parties with two different collective agreements, ETBA could successfully argue that there was more than one collective agreement binding on employees in the bargaining unit (section 73(2)) or more than one provincial agreement binding on the provincial unit represented by ETBA (section 162). Even if there is an arguable case for a breach of the Act (which is tenuous), the Board has serious doubts about any likelihood of success.

[50] The Board found that the issues raised in the Complaint could more suitably be "framed within traditional contractual frameworks." If the Council believed that the TDSB breached the TDSB Agreement by hiring a contractor who used non-licensed electricians to perform the communication work in question, the proper recourse would be through the processes set out in the TDSB Agreement. If EGL believes that the TDSB wrongly insisted that they use licensed electricians to perform the work, "its recourse would be through its contract with the TDSB." Finally, whatever avenues of redress existed, the most appropriate party to seek that redress was not the ETBA and the most appropriate manner of seeking that redress was not by way of a s. 96 inquiry.

[51] The Board then focused on the relief sought in the Complaint. It noted that most of the claims were for declaratory relief "and the Board is generally loath to inquire into complaints where the only or primary remedy is declaratory." Even if damages were available, they would be owed to a non-party, EGL and the Board would not make an order to a non-party.

[52] The Board found that it would be unlikely to make a declaration about the application of the TDSB Agreement to work covered by the ICI Agreement in a situation where the facts are very specific and the two agreements at issue have existed for many years without an issue like the one being raised by the ETBA. Therefore, any remedies that would flow from a s. 96 inquiry would be of "limited practical utility."

[53] The Board then found that there would be a "muted" labour relations purpose in having a s. 96 inquiry in a circumstance where the main party affected by the events giving rise to the Complaint, EGL, has chosen not to participate.

[54] Finally, the Board found that the cost and resource implications for the parties and the Board of holding a s. 96 inquiry were not justified in view of the limited likelihood of success, the limited remedies, the limited utility of those remedies and the lack of a compelling labour relations purpose.

[55] For these reasons, the Board chose to exercise its discretion not to inquire further into the Complaint and dismissed ETBA's application.

Issues Raised

[56] This application raises the following issues:

1. Should the application be dismissed as premature in view of ETBA's failure to seek reconsideration of the Decision?

2. Is the Decision unreasonable? In this regard, ETBA alleges that the Decision is unreasonable for three reasons:

    a. the Board ignored the important context of province-wide bargaining in the construction industry.

    b. the Board took an unjustifiably narrow view and employed circular reasoning in assessing whether permitting the Complaint to proceed served any labour relations purpose.

    c. the Board ignored the significance and utility of the relief being sought.

Standard of Review

[57] The parties agree that the applicable standard of review is reasonableness.

[58] ETBA emphasizes that reasonableness is a "robust form of review": *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 13. The fact that the Board was exercising discretionary authority does not insulate it from judicial scrutiny. It must still exercise its discretion reasonably and employ reasoning that is both rational and logical. According to the ETBA, the Decision does not bear the hallmarks of reasonableness, namely, justification, intelligibility, and transparency.

[59] The responding parties emphasize the long-standing jurisprudential commitment to affording labour relations decision makers the highest degree of deference. As put by the Ontario Court of Appeal in *Maystar General Contractors Inc. v. International Union of Painters and Allied Trades, Local 1819*, 2008 ONCA 265, 90 O.R. (3d) 451, at para. 42:

> The decisions of the Supreme Court of Canada, over the course of many decades, show an unbroken commitment to affording labour relations boards the highest levels of judicial deference on matters within their exclusive jurisdiction.

[60] More recently, the Court of Appeal has emphasized that the Board is a "highly specialized tribunal with considerable expertise, placing it in an elevated position to interpret its home statute": *Turkeiwicz v. Bricklayers, Masons Independent Union of Canada, Local 1*, 2022 ONCA 780, 476 D.L.R. (4th) 421, at para. 77; *Enercare Home & Commercial Services*

Limited Partnership v. UNIFOR Local 975, 2022 ONCA 779, 476 D.L.R. (4th) 342, at para. 64.

[61] This court has repeatedly recognized that the Board has specialized expertise in the construction industry. As put by the Divisional Court in *I.B.E.W. Local 894 v. I.B.E.W. First District-Canada*, 2014 ONSC 1997, [2014] O.L.R.B. Rep. 423, at para. 34, "the Board's work within the construction industry is essentially a specialty within a specialty."

The Application Should Not Be Dismissed as Premature

[62] The TDSB argues that the application is premature because the ETBA should have sought reconsideration of the decision by the Board before making an application for judicial review.

[63] Section 114(1) of the Act confers on the Board the discretionary power to reconsider its decisions "at any time, if it considers it advisable to do so". To encourage finality, the Board's threshold for reconsideration is a high one: *Anonymous Applicant v. CAW-Canada, Local 40*, 2012 CanLII 30623 (Ont. L.R.B.).

[64] While this Court clearly has the discretion to dismiss an application for judicial review because the applicant has not sought reconsideration, the Supreme Court of Canada has held that reconsideration is not an absolute prerequisite to judicial review *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 57.

[65] In *United Brotherhood of Carpenters (Local 249) v. Matrix North Construction Ltd.*, 2019 ONSC 5647, [2019] O.L.R.B. Rep. 691, the Divisional Court refused to dismiss an application for judicial review as premature because the applicant had not sought reconsideration. In doing so the Court noted that reconsideration is a discretionary rather than a mandatory part of the Board's processes and that historically the Board has only granted reconsideration requests in very limited circumstances. The Divisional Court found at para. 41:

> There may be cases in which it is appropriate to require reconsideration before an application for judicial review is brought; for example, where there are conflicting decisions by the Board on a matter of policy, and the Court determines that the Board should be given an opportunity to clarify the issue. Similarly, reconsideration may be an adequate alternative remedy where the Board made an error in a step in the administrative decision-making process. However, given the limited scope for review, there is no basis for finding that parties before the Board should generally request a review by the Board before seeking judicial review. [citations omitted.]

[66] As put by the ETBA in its reply factum, its "application alleges that the Board failed to give proper effect to the province-wide bargaining regime under the Act. This is not a

'policy issue' as defined in the case law." I agree. Further, there are no conflicting decisions involving an issue that the Board ought to have a chance to reconcile. Finally, ETBA is not alleging that the Board made a procedural error in its process.

[67] In *The Society of United Professionals v. New Horizon System Solutions,* 2020 ONSC 3153 at para. 22, the Divisional Court found that the Board is likely to reject a request for reconsideration that it regards "as an attempt to reargue the case." In its reply factum, the ETBA acknowledges that it "is essentially making the same representations to this Court that it made before the Board but is contending that the Board's conclusions about those representations were unreasonable."

[68] I find that in this case reconsideration would not be an adequate alternative remedy and, therefore, the application should not be dismissed as premature.

The Decision is Reasonable

[69] It is acknowledged that the ETBA bears the onus of demonstrating that the Decision is unreasonable.

[70] As set out above, the ETBA asserts that the Decision is unreasonable for three reasons:

a. the Board ignored the important context of province-wide bargaining in the construction industry.

b. the Board took an unjustifiably narrow view and employed circular reasoning in assessing whether permitting the Complaint to proceed served any labour relations purpose.

c. the Board ignored the significance and utility of the relief being sought.

The Board did not ignore the context of province-wide bargaining.

[71] According to the ETBA, the core of the dispute raised in the Complaint "is that the TDSB Agreement impermissibly [overlapped] with the ICI Agreement, with the result that the TDSB and the Council were directing an employer-member of the ETBA (EGL) to apply the terms of the TDSB Agreement instead of the terms of the province-wide ICI Agreement." According to ETBA, the "Board ignored the interplay and overlap between the two collective agreements and did not grapple with the question of whether a single-employer agreement can intrude on the scope of a multi-employer agreement."

[72] The ETBA also submitted that the Board failed to give any consideration to the importance of the "level playing field." which is an important institutional feature of the system of collective bargaining in the construction industry.

[73] The ETBA argues that the Board misapprehended the facts when it found that the allegations in the Complaint concerned two sets of parties with two distinct collective

agreements. Local 353 is a member of the Council, which, according to the ETBA, means that Local 353 is bound to both the TDSB Agreement and the ICI Agreement.

[74] The ETBA argues that by ignoring and misapprehending the full context of the events giving rise to the Complaint the Board failed to appreciate that the case had important implications for the stability of the province-wide bargaining regime in effect in the construction industry. This caused it to unreasonably conclude that the dispute was "much more suitably framed within the traditional contractual framework."

[75] There are several problems with the ETBA's position. First, the Board clearly adverted to the fact that there were two separate collective agreements at issue in the Complaint. It noted that the TDSB Agreement specifically addressed the possibility of an overlap between the two agreements if the TDSB subcontracted out work to a contractor such as EGL that is bound to the ICI Agreement. In that event the work must be conducted in accordance with the ICI Agreement. The ETBA has not pointed to any provision of the TDSB Agreement that would require a contractor such as EGL to apply the terms of the TDSB Agreement instead of the terms of the ICI Agreement.

[76] While the TDSB Agreement only allows for communications work to be performed by licensed electricians, the ICI Agreement also makes it clear that communications work can be performed by licensed electricians. Thus, the two agreements can easily co-exist if the TDSB makes it clear in its contract with a sub-contractor such as EGL that the work can only be performed by licensed electricians.

[77] On the facts of this case, it may be that the TDSB did not make this clear to EGL. However, as the Board found, if this is the case, that issue can be more appropriately dealt with through the remedies afforded under the commercial contract between the TDSB and EGL. Further, if the TDSB's actions in failing to be clear with EGL about the fact that it had to use licensed electricians violated the TDSB Agreement, the Council's remedy was through the processes provided for in that agreement.

[78] The fact that the TDSB Agreement and the ICI Agreement can co-exist without conflict means that there was no need for the Board to consider the concept of the "level playing field." In the cases cited by ETBA, this was a concept that was employed in assessing whether it was reasonable for an employer or union not to agree to a collective agreement on certain terms consistent with pattern agreements (such as the IBI Agreement) in the rest of the industry.

[79] I do not accept that the Board misapprehended the facts when it concluded that there were two collective agreements with two separate sets of parties. The *Toronto District School Board* case that created the bargaining relationship between the TDSB and the Council clearly appointed the Council as the bargaining agent. It did not award bargaining rights to the IBEW or any of its locals, including Local 353. The fact that Local 353 is a member of the Council does not change this reality. Local 353 is not bound to both the TDSB Agreement and the ICI Agreement. It is only bound to the ICI Agreement. The Board reasonably understood this fact, as stated at para. 23 of the Decision: "the TDSB and [the

Council] are not bound to the ICI Agreement, and the IBEW and EGL are not bound to the TDSB Agreement."

[80] Given this, it was reasonable for the Board to find that it was unlikely that the "ETBA could successfully argue that there was more than one collective agreement binding on employees in the bargaining unit (section 73(2)) or more than one provincial agreement binding on the provincial unit represented by ETBA (section 162)."

The Board reasonably concluded that conducting an inquiry into the Complaint would serve no labour relations purpose.

[81] A key aspect of the Board's analysis on the issue of whether inquiring into the Complaint would serve a labour relations purpose was the fact that EGL was not a party to the proceedings. According to the ETBA, this aspect of the Board's analysis was circular and lacked the hallmarks of reasonableness.

[82] The ETBA had filed extensive written submissions before the Board arguing that it had standing to file the Complaint and to seek damages on EGL's behalf. The Board found that it did not need to address the issue of the ETBA's standing and then found that the fact that EGL chose not to participate "muted" any labour relations purpose. According to the ETBA, the failure to address the issue of "standing" is a gap in the Decision that renders it unreasonable. The ETBA argues that the Board cannot both refuse to consider submissions on an issue and then rely on the same issue as a factor in refusing to inquire into the Complaint.

[83] The ETBA submits that the Board did not cite any case law in support of its finding that there was no labour relations purpose. If it had, it would have asked two questions: "does the situation that prompted the application still exist; and/or does the relief requested still make sense": *Teamsters Local Union 938 v. Stock Transportation Ltd.*, 2006 CanLII 21287 (Ont. L.R.B.), at para. 13. The ETBA submits that in this case the answer to both those questions is "yes". As put by the ETBA in its factum: "The issue of the overlap between the TDSB Agreement and the ICI Agreement persists, and the conduct of the TDSB and the Council toward EGL is unresolved."

[84] The ETBA also asserts that the Board unreasonably found that the Complaint involved "an isolated incident in the specific context of long-standing collective agreements and bargaining relationships that have co-existed." According to the ETBA, the fact that there may have historically been harmony between the two collective agreements at issue does not detract from the fact that a dispute has now crystallized. That dispute has not been resolved and, in the absence of a direction from the Board, there is every reason to believe that the TDSB and the Council will continue to maintain their positions that they can direct contractors to only hire licensed electricians. The ETBA states that this direction is the equivalent of a direction to apply the TDSB Agreement over the ICI Agreement.

[85] With respect to the allegation that the Decision contains a "gap" because the Board found that it did not need to determine the issue of ETBA's standing to bring the application

before it, this submission ignores the fact that the Board's focus in this aspect of its reasons is on the claims for relief sought. This focus is directly relevant to the second question that forms part of the labour relations purpose analysis - does the relief requested still make sense? On this issue the Board found that the relief requested was largely declaratory and that "the Board is generally loath to inquire into complaints where the only or primary remedy is declaratory." The Board cited case law in support of this proposition and the ETBA concedes in its factum that "the authority cited by the Board does - generally speaking - support that broad principle." The ETBA had the onus of satisfying this Court that it was unreasonable for the Board to apply that principle in this case. It has failed to do so.

[86] To the extent that the ETBA was also making a claim for damages, the Board noted that the ETBA was seeking damages on behalf of a non-party, EGL. The Board then found that even if such damages were found to be owing, it would not make an order directing the payment of damages to a non-party. Again, the ETBA failed to satisfy its onus of demonstrating that this summary of the Board's jurisprudence was unreasonable. It produced no case, other than the one discussed below, where the Board had awarded damages to a non-party.

[87] The ETBA's reference to *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and joiners of America, Local 2486* (1975), 8 O.R. (2d) 103, was not persuasive. In *Blouin* the Ontario Court of Appeal found that in a situation where a company has broken a collective agreement by hiring non-union members to do work normally performed by union members, the Board could award damages to the union who could then distribute that award to the union members who were unemployed during the time that the work was carried out. Key to this finding was the fact that under the collective agreement between the parties, the union "had the status under the agreement to make this claim and to receive the moneys to be disposed of in accordance with the articles of the agreement." There is no agreement that gives ETBA the right to receive any moneys owing to EGL. As well, in *Blouin*, the damages were awarded to the union and not an individual employee because it is impossible to determine which individuals on the union's out of work list would have actually performed the work and therefore suffered the loss. In the case at bar, it is clear who suffered the loss: EGL. There is no need to pay the monies to the ETBA.

[88] With respect to the first question that forms part of the labour relations purpose analysis, the ETBA submits that the situation that gave rise to the Complaint still exists. As described by the ETBA, that situation is the "overlap between the TDSB Agreement and the ICI Agreement." However, as the Decision notes, the TDSB Agreement specifically addresses that overlap in a way that makes it clear how the TDSB can subcontract out to contractors bound by the ICI Agreement without creating a conflict. The Board noted that these two collective agreements have co-existed for a long time (26 years) without difficulty and the ETBA did not dispute that this was true. It was therefore reasonable for the Board to conclude that the incidents giving rise to the Complaint did not raise an "overlap" issue between the two agreements that it had to address and could be more appropriately resolved

through other routes, namely, a breach of contract claim or a grievance under the TDSB Agreement (which the Council has already filed).

The Decision did not ignore the significance and utility of the relief being sought.

[89] The ETBA argues that the Decision is unreasonable because the Board failed to appreciate the significance and utility of the remedies being sought. More specifically, the ETBA challenges the Board's finding that the remedies "would be of limited practical utility" because they were largely declaratory.

[90] According to the ETBA, the Board's analysis on the utility of the remedies being sought was "tainted" by its flawed analysis in other parts of its reasoning, which have already been discussed.

[91] Since I have already rejected the ETBA's submissions that the Board's analysis was flawed or unreasonable, I also reject the submission that the Board's analysis on the utility of the remedies sought was unreasonable.

Conclusion

[92] For these reasons I find that the Decision was reasonable.

Disposition

[93] The application for judicial review is dismissed. As agreed by the parties, the ETBA is to pay each of the TDSB, the Council and Local 353 $7,500 in costs.

"Sachs J."

"I agree Matheson J."

"I agree Jarvis J."

Released: 20241205

CITATION: Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario v. Toronto District School Board, 2024 ONSC 6839
DIVISIONAL COURT FILE NO.: 131/24
DATE: 20241205

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Matheson, and Jarvis JJ.

BETWEEN:

Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario

Applicant

– and –

Toronto District School Board, International Brotherhood of Electrical Workers, Local 353, Maintenance and Construction Skilled Trades Council and The Ontario Labour Relations Board

Respondents

REASONS FOR JUDGMENT

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