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FILE NO: 310006-006

February 17, 2021

VIA Email - alrb.edm@gov.ab.ca

Alberta Labour Relations Board
501, 10808 – 99 Avenue
Edmonton, Alberta T5K 0G5

Attention: Tannis Brown, Director of Settlement

Dear Madam:

Re: A bad faith bargaining complaint pursuant to s.50 of the *{Public Service Employee Relations Act (the “Act”)* brought by the Alberta Union of Provincial Employees (the “Union” or “AUPE”) affecting the Crown in Right of Alberta (the “Employer”) alleging a breach of ss. 21, 45, and 48 of the Act – Board File No. GE-08436 (the “Complaint”)

We hereby respond on behalf of the Employer to the Complaint submitted by AUPE on January 20, 2021.

The Employer denies each and every allegation contained in the Complaint unless expressly admitted herein. The Employer denies that there have been any breaches of the Act, as alleged or at all.

I. BACKGROUND

1. The Employer does not dispute paragraphs 1 to 3 of the Complaint.
2. AUPE is a trade union under the Act and is a bargaining agent who represents a group of the Employer’s employees.
3. The Employer and AUPE are parties to a collective agreement effective from April 1, 2017 to March 31, 2020 (the “Collective Agreement”).

4. The Collective Agreement continues in effect pursuant to section 24(2) of the Act.

II. BARGAINING TIMELINE

5. On November 28, 2019, Tim Grant, Public Service Commissioner (the “Commissioner”) provided a disclosure letter to Guy Smith, President of AUPE relating to the upcoming round of bargaining.
6. On December 9, 2019, AUPE provided its notice to commence bargaining. On December 16, 2019, the Employer provided AUPE with its list of individuals who would form the Employer’s bargaining committee.
7. On January 3, 2020, AUPE wrote the Commissioner asking for further information regarding the bargaining disclosure letter. On February 5, 2020, the Employer provided AUPE with a response to their request.
8. The parties scheduled 12 bargaining dates during 2020:
 - February 6, 2020 – For the exchange of ingoing proposals
 - March 4, 5, 24, and 25, 2020
 - April 1, 2, 21, and 22, 2020
 - November 5, 12, and 13, 2020
9. On January 31, 2020, Arbitrator Phyllis Smith rendered her award in the wage re-opener arbitration, awarding a 1% increase on wages for the bargaining unit covered by the Collective Agreement for the period of April 1, 2019 to March 31, 2020.
10. The Employer admits that, on February 6, 2020, it presented its opening proposal which included a 1% decrease in wages amongst other financial and non-financial matters.
11. The Employer also admits that on February 12, 2020 it sent AUPE a consultation invitation concerning possible contracting out of services rendered by RAM employees, and that on June 10, 2020 it sent AUPE a consultation invitation concerning possibly contracting out of services rendered by the CSS employees. In both instances AUPE filed a complaint with the Labour Relations Board alleging a violation of the statutory freeze. Both of those complaints have been withdrawn by AUPE.



12. On March 31, 2020, the parties entered into a memorandum of settlement to delay bargaining in response to the COVID-19 pandemic. The bargaining dates of March 25, April 1, 2, 21, and 22 were cancelled.
13. On April 1, 2020, the Commissioner provided a notice to all employees that collective bargaining and that previously planned job abolishments had been suspended.
14. On April 8, 2020, AUPE provided the Employer with a notice to negotiate an essential services agreement.
15. On April 14, 2020, the Employer responded to the notice to negotiate an essential services agreement by declining to commence negotiations while collective agreement bargaining was suspended.
16. The parties extended the suspension of bargaining several times throughout the spring and summer of 2020 and bargaining was not scheduled to resume until November 5, 2020.
17. On November 5, 2020, the first day of the resumption of bargaining, the Employer provided updated proposals which it explained were based on the impact of COVID-19, the collapse in world oil prices, and new economic forecasts for the Province. This included a proposal for a 4% wage reduction, a change in its original proposal of a 1% wage reduction, but it also included a significant narrowing of the Employer's opening proposals.
18. At this first day of the resumption of bargaining the Employer gave the following opening remarks to explain why its position had been forced to change:

"Since bargaining began, COVID-19 and the collapse in world oil prices have severely impacted Alberta's economy and resulted in a fiscal crisis. As a result, Government has changed our bargaining mandate.

As reflected in provincial updates, Alberta's economy has seen a severe contraction. In 2020, real GDP is expected to contract by 8.8%, the largest annual decline in Alberta in recent history. Employment is forecast to fall by a record 7.0% and the unemployment rate is expected to average 11.6%. The pace of Alberta's recovery is expected to be gradual. Consumers may be slow to resume regular activities and



government expects oil prices to remain low, hampering a recovery in the energy sector.

The economic impact has had a significant impact on Alberta's finances. As of the first quarterly update, a deficit of \$24.2 billion is forecast for 2020-21, \$16.8 billion higher than estimated in Budget 2020. This is due to a severe decline in revenue, down \$11.5 billion from budget, coupled with increased expense, mainly from temporary initiatives to address COVID-19, and to support Albertans, Alberta businesses, and the economy. Credit agencies have downgraded Alberta's rating twice since this began and it is clear that this fiscal emergency is beyond just a debate concerning tax policy.

The global, Canadian, and Alberta economic outlook is extraordinarily uncertain. As we have already seen, some sectors of the economy have or are undergoing structural changes amid restrictions, which has led to permanent business closures and layoffs. A resurgence in COVID-19 cases around the world, along with ongoing uncertainty of resource revenue, could also derail the recovery in Alberta's economy.

As Albertans, we all have a role to play in our economic recovery and the public sector must be part of the solution. Compensation is government's largest expenditure, representing 54% of operating expenses. Now, more than ever, the government needs to pursue opportunities to deliver core services more cost effectively.

I'll be tabling a new compensation framework along with a narrowing of the employer's proposals so that we can have a frank discussion on how we can achieve a reduction in the compensation footprint of the government."

19. During this presentation, members of the AUPE bargaining team did not make any comment or make any response to the new proposals, and continued to bargain.
20. The parties continued to bargain on November 12 and 13, 2020 agreeing to numerous items.



21. An agreed bargaining session for November 23-24 was canceled by AUPE because it disagreed with holding bargaining in a virtual format. It wanted face-to-face bargaining.
22. On January 11, 2021, AUPE cancelled the upcoming January 19 and 20, 2021 bargaining dates because of its desire to hold negotiations in person, which was not possible because of new COVID-19 restrictions in the Province. In conjunction with the cancellation, AUPE proposed instead meeting on February 2 and 3, 2021.
23. On January 20, 2021, the Complaint was filed.
24. On February 2 and 3, 2021 the parties met once again for bargaining and once again were able to make significant progress. AUPE's published bargaining update dated February 5 is attached as Attachment A.
25. The parties agreed to continue bargaining on March 4 and 5, 2021.

III. RESPONSE TO ALLEGATIONS IN THE COMPLAINT

The Employer's Initial Proposal

26. AUPE alleges that the Employer's bargaining proposal violated its obligation to bargain in good faith and interfered with AUPE's representational rights.
27. The requirement to bargain in good faith was discussed by the Board in *United Food and Commercial Workers, Local Union No. 401 and European Cheesecake Factory Ltd.*, [1993] Alta LRBR 596 at pages 5 and 6:

The duty to bargain in good faith includes two main aspects. First, it requires the employer recognize the trade union as the bargaining agent. Second, the parties must meet and engage in full and rational discussion with a view to entering into a collective agreement.

28. The Board is reluctant to intervene in bargaining, preferring the parties arrive at their own agreements. As stated in *SNC-Lavalin ATP Inc. (Re)*, [2007] ALRBD No 1 at para 4:

Many decisions of this Board have commented about the importance of allowing parties the freedom in collective bargaining to arrive at their own agreements.



Where allegations of bad faith bargaining arise, this Board is cautious “not to intervene in free collective bargaining except where necessary to preserve the integrity of the legislation.”: Brewery Workers Local 287 v Molson Breweries, [1991] Alta LRBR at p. 607.

29. The Employer submits that it has met both requirements of the duty to bargain in good faith. It has consistently recognized AUPE as the exclusive bargaining agent and it has engaged with AUPE in full and frank discussion, including discussing the rationale for its proposal of wage decreases.
30. AUPE’s argument alleging the Employer has failed to bargain in good faith is premised on the allegation that the outcome of the interest arbitration awards is representative of the outlook of the economy and, as such, the Employer’s proposals are somehow arbitrary or unreasonable.
31. This argument is flawed.
32. The interest arbitration awards dealt with different time periods than the bargaining between the Employer and AUPE and many of them dealt with different industries than the employees in the bargaining unit.
33. The other interest arbitration awards dealt with the following time periods:
 - ATA and TEBA, decision of arbitrator Jones, dated January 10, 2020 dealt with the time period of April 1, 2019 to March 31, 2020;
 - AHS and UNA, decision of arbitrator Jones, date January 10, 2020 dealt with the time period of April 1, 2019 to March 31, 2020;
 - AHS and AUPE, decision of arbitrator Smith, dated January 31, 2020 dealt with the time period of April 2, 2019 to March 31, 2020;
 - AHS, Lamont Health Center and AUPE, decision of arbitrator Smith, dated January 31, 2020 dealt with the time period of April 1, 2019 to March 31, 2020;
 - University of Calgary and University of Calgary Academic Staff Association, decision of arbitrator Sims, dated July 21, 2020 dealt with the time period of July 1, 2019 to June 30, 2020; and
 - Alberta University of the Arts and AUPE, decision of arbitrator Tettensor, dated November 9, 2020 dealt with the time period of July 1, 2019 to June 20, 2020.

34. The economic analysis undertaken and the conclusions drawn from the data and experts' forecasts were concerned about the state of the economy, and the appropriate wage rate, for the period of April 1, 2019 to March 31, 2020.
35. Since the parties' arguments in the interest arbitration awards in 2019, there have been many further developments which have impacted the Crown's budget and economic forecast. Unfortunately, these developments have worsened the economic outlook for the Province.
36. This is reflected not only in the proposal for a wage rollback, but also in the Employer's decisions regarding job abolishments and to continue to review service delivery models.
37. The Employer denies that its opening proposal constitutes bargaining in bad faith and rejects the proposition that its opening proposal must align with the outcome of interest arbitration awards for different time periods and different industries.
38. While fully recognizing the difficult realities of the current fiscal and economic situation in Alberta, the Employer's proposal was rationally formed and the Employer has at all times engaged in full discussion with AUPE. It has always intended to enter into a collective agreement and denies that it has at any times violated its obligation to bargain in good faith.

Revised Bargaining Proposal

39. AUPE further alleges that the Employer bargained in bad faith by engaging in receding horizon bargaining when it altered its financial proposal from 1% reductions to 4% reductions on November 5, 2020.
40. The Board has noted in *Finning v IAMAW, Local Lodge 99*, [2005] ALRBD No 83 at para 23 that "*not every change in position will amount to a breach of the duty to bargaining good faith. There is no presumption that a change in position is a breach*".
41. Fundamentally, the Employer submits that its change in position does not constitute a failure to bargain in good faith because the Employer was faced with a material change in circumstances as a result of the COVID-19 pandemic, the collapse of world oil prices, and as a result of changed financial circumstances for the province as briefly summarized in paragraph 18 above. AUPE's Complaint ignores the impact that COVID-19 and other changed financial circumstances had on the Employer's finances.



42. The Employer notes that the revised proposal occurred early in the collective bargaining process. The parties had only met for bargaining four times by November 5, 2020 and were not close to a new Collective Agreement. The revised proposal did not redefine bargaining nor represent a major expansion.
43. The Employer presented its revised proposal at the earliest possible opportunity and at the first session of bargaining after the agreed to suspension in bargaining.
44. Since the introduction of the revised proposal, the parties have met for an additional four days of productive bargaining. In those four days, the parties have signed off on many proposals and are making progress towards a new collective agreement. The introduction of the revised wage decrease has had no effect on bargaining and does not warrant intervention by the Board.
45. AUPE alleges that the revised bargaining proposal is contrary to the recent interest arbitration awards and therefore demonstrates bad faith.
46. All the interest arbitration awards cited by AUPE dealt with time frames prior to the onslaught of several severe impacts on the provincial economy, including the COVID-19 pandemic. The most recent award of arbitrator Tettensor, made this very explicit by stating at para 79:

...I conclude that the circumstances that are relevant here are those that existed from late 2019 to early in 2020, prior to the onset of circumstances resulting from the pandemic in March. As Arbitrator Sims notes in the University of Calgary case, the parties will no doubt face difficult choices when bargaining for the post July 1, 2020 agreement.
47. Not only did arbitrator Tettensor make it explicitly clear that the award did not include any data based on the impact of COVID-19, but Tettensor, like arbitrator Sims before him, recognized that the financial impact of the COVID-19 pandemic will lead to difficult choices in the next round of bargaining.
48. What was clear to arbitrators Tettensor and Sims is apparently not clear to AUPE. And it is not just the onset of circumstances from the COVID-19 pandemic alone that the Employer must now cope with. Those awards were also prior to the collapse of world oil prices and provincial revenues.

IV. CONCLUSION

49. The Employer submits that the Board ought to dismiss the Complaint.

Yours truly,

NEUMAN THOMPSON



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HJM/drc

Encl.

Client

cc: AUPE, Attention: Bill Rigutto