# Arbitration Bulletin

April, 1998

**COURT OF QUEEN'S BENCH - RE RELIGIOUS LEAVE**

---

**BETWEEN**
**WINNIPEG SCHOOL DIVISION NO.1**
**ASSINIBOINE SOUTH SCHOOL DIVISION NO.3**
**FORT GARRY SCHOOL DIVISION NO.5**
**SEVEN OAKS SCHOOL DIVISION NO. 10**
**THE PROVINCE OF MANITOBA (HUMAN RIGHTS CODE)**

**-and-**

**VARIOUS TEACHERS**

---

Winnipeg School Division No. 1, Assiniboine South School Division No. 3, Fort Garry School Division No. 5, Seven Oaks School Division No. 10 and the Province of Manitoba were the respondents to the application on behalf of a number of teachers from the divisions who applied to the Court of Queen's Bench challenging the religious leave provisions in these Divisions.

The following is the decision and reasons of **Justice G. Goodman**.

**ISSUES**

[1] There are five applications before the court. The applicants seek:

An order pursuant to sections 24 and 52 of the Constitution Act. 1982 declaring that:

**a.** sections 4 and 5 of MR470/88 under the Public Schools Act;

**b.** clause 5(a) of Form 2 of Schedule D under the Public Schools Act; and

**c.** Article 19.08(a) of the Collective Agreement between the Respondent Division and the Respondent Association (re: Lome Billinkoff et al v. Winnipeg School Division No. 1 et al.);

**d.** Article 6.07 of the Collective Agreement between the Respondent Division and Respondent Association (re: Eva Azuelos et al v. Seven Oaks School Division No. 10 et al);

**e**. The policy of the Respondent Division regarding religious leave (re: Terry Calof et al v. Assiniboine South School Division No. 3 et al and Marshall Carroll et al v. Fort Garry School Division No. 5 et al)

are all contrary to subsections 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms and thus are of no force and effect, or alternatively, can be rectified by reading in constitutionally permissible language or by interpreting them in a manner consistent with the Charter;

2) An Order pursuant to sections 9, 12, 14 and 56 of the Human Rights Code declaring that the Respondent Division must make reasonable accommodation for any bona fide request for religious leave without deduction in salary.

[2] Manitoba Regulation 470/88 has been repealed and replaced by Manitoba Regulation 101/95. The applicant's challenge must relate to the new Regulation. The refinements in Regulation 101/95 from Regulation 470/88 do not affect the basis of the submission of the applicants. Sec. 6 & 7 of Manitoba Regulation 101/95 correspond to sections 4 & 5 of Manitoba Regulation 470/88.

[3] Section 6 & 7 of Manitoba Regulation 101/95 states:

**Holidays**

6(1) The following days are to be holidays in all schools:

a) Good Friday;

b) Victoria Day;

c) Labour Day;

d) Thanksgiving Day;

e) Remembrance Day, when it falls on a weekday;

f) any other day designated as a holiday by the minister.

6 (2) A day designated as a holiday under clause 1 (f) counts as a teaching day.

**Vacations**

7. For all schools there must be

a) a Christmas vacation that begins not later than December 23, or an earlier day that the school board may determine, and extends to January 2 inclusive, or a later day that the school board may determine;

b) a spring vacation consisting of the week beginning on the last Monday in March; and

c) a summer vacation of at least six weeks beginning on July 1.

[4] Section 9 of the Human Rights Code defines "discrimination" to include "differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by religion or creed, or religious belief, religious association or religious activity".

[5] Section 12 of the Human Rights Code requires reasonable accommodation where "bona fide and reasonable cause exists for the discrimination, or where the discrimination is based upon bona fide and reasonable requirements or qualifications."

[6] Section 14 of the Human Rights Code prohibits discrimination "with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation".

[7] Section 56 of the Human Rights Code provides that: "every contract entered into by the Government, a Crown Agency or a local authority is deemed to contain as terms of the contract a stipulation that no party to the contract shall contravene this code in carrying out any term of the contract."

[8] In their written submission, the applicants proposed the following relief:

1) THAT sections 4 and 5 of the School Days. Hours and Vacations. Regulation MR 470/88 under the Public Schools Act; the standard form teaching contract, being Schedule 2, Form D of the Public Schools Act, and the modified standard form contract used by Winnipeg School Division No. 1 and Articles 6.07 and 19.08 of the collective agreements entered into between the Respondent Divisions (Winnipeg No. 1 and Seven Oaks School Division No. 10) and the Respondent Teacher's Associations are all contrary to subsection 15(1) [and 2(a)] of the Charter of Rights and Freedoms:

2) THAT the unconstitutionality be remedied by reading in constitutionally permissible language into clause 5(a) of the standard form teaching contract (clause 4(a) of the Modified Standard Form Contracts of Winnipeg School Division No. 1). At present the clause reads:

5. This agreement is subject to the following conditions:

a) The teacher shall not be required to teach on holidays and vacations prescribed by the law and the regulations.

The applicants request the court to read in the following phrase at the end of the present clause:

*or on any other day for which the teacher can show a bona fide reason to observe a religious holy day.*

3) THAT Articles 6.07 and 19.08 be severed from the relevant collective agreements and constitutionally permissible language be read into the agreement which language would state:

Members of the Association shall not be required to teach on any day for which they can show a bona fide reason to observe a religious holy day, and they shall be paid during such leave of absence.

4) THAT constitutionally permissible language be read into the policies of Winnipeg School Division No. 1, Adult ESL Teachers, Assiniboine South and Fort Garry which language would state:

Members of the Association shall not be required to teach on any day for which they can show a bona fide reason to observe a religious holy day, and they shall be paid during such leave of absence.

## BACKGROUND

[9] The applicants are followers of Judaism and observe the religious holy days of Rosh Hoshana and Yom Kippur. They seek three days of paid leave each year, two days to observe Rosh Hoshana and one day to observe Yom Kippur. It is understood that if the holy days of Rosh Hoshana and/or Yom Kippur fall on weekends or other holidays, the applicants would not require leave.

[10] That is the real issue. The applicants seek three days of paid leave each year to observe Rosh Hoshana and Yom Kippur. All of the relief claimed is to this end.

[11] The basis of the challenge to the Public Schools Act and the Regulation is that the school calendar and the school vacations do not allow for religious holy days. The standard form teaching contracts and the collective agreements with Assiniboine South School Division No. 3 and Fort Garry School Division No. 5 do not include reference to religious holy days.

[12] While the collective agreements with Winnipeg School Division No. 1 and Seven Oaks School Division No. 10 do provide for religious leave, the challenge is that the agreements do not sufficiently or reasonably accommodate the applicants.

[13] The collective agreement with Winnipeg School Division No. 1 provides in clause 19.08 for religious holy leave. The collective agreement relating to religious holy leave may not apply to teachers in the Adult English as a Second Language Program (ESL). Those teachers, Linda Feuer et al, may seek relief by filing a complaint in accordance with the Human Rights Code.

[14] The collective agreement with Seven Oaks School Division No. 10 provides for religious leave in clause 6.07.

[15] Arising from the collective agreement with Assiniboine South School Division No. 3, the division and the association have agreed to a policy for professional staff absences for religious holy days. The challenge is that the policy does not sufficiently or reasonably accommodate the applicants.

[16] Arising from the collective agreement with Fort Garry School Division No. 5, the division and the association have agreed to a policy for religious leave for teachers. The challenge is that the policy does not sufficiently or reasonably accommodate the applicants.

**FORUM**

[17] The respondent School Divisions submit that the applicants are in the wrong forum. The subject matter of the issues between the applicants and their respective divisions are governed by the collective agreements between the respective divisions and the Teachers Associations. There are mandatory arbitration clauses in all of the collective agreements which effectively remove the jurisdiction of this court in these matters.

[18] The respondent Province of Manitoba submits that any request for relief pursuant to sections 9, 12, 14 and 56 of the Human Rights Code should be processed in accordance with the provisions of the Human Rights Code which provides a comprehensive scheme for defining, applying and enforcing the fundamental public policy concerns encompassed in the Code.

[19] Where there is a mandatory arbitration clause in the collective agreement, the court does not have concurrent jurisdiction. If a dispute arises, the mandatory arbitration clause will take jurisdiction away from the court. In Weber v. Ontario Hydro (1995), 2 S.C.R. 929 at p.952, McLachlin, J. referred with approval to an earlier Supreme Court decision in St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union. Local 219 [1986] 1 S.C.R. 704 where Estey, J. concluded:

That to allow concurrent actions in the courts would be to undermine the purpose of the legislation (relating to mandatory arbitration clauses) (at pp.7 1819):

The collective agreement establishes the broad parameters of the relationship between the employer and his employees. This relationship is properly regulated through arbitration and it would, in general, subvert both the relationship and the statutory scheme under which it arises to hold that matters addressed and governed by the collective agreement may nevertheless be the subject of actions in the courts at common law . . . The more modem approach is to consider that labour relations legislation

provides a code governing all aspects of labour relations, and that it would offend the legislative scheme to permit the parties to a collective agreement, or the employees on whose behalf it was negotiated, to have recourse to the ordinary courts which are in the circumstances a duplicative forum to which the legislature has not assigned these tasks.

[20] In determining whether a matter should be left to the arbitration process or whether the court should assert jurisdiction, the Supreme Court held, per McLachlin, J., at p.953:

What is left is an attitude of judicial deference to the arbitration process . . . It is based on the idea that if the courts are available to the parties as an alternative forum, violence is done to a comprehensive statutory scheme designed to govern all aspects of the relationship of the parties in a labour relations setting. Arbitration . . . is an integral part of that scheme, and is clearly the forum preferred by the legislature for resolution of disputes arising under collective agreements. From the foregoing authorities, it might be said, therefore, that the law has so evolved that it is appropriate to hold that the grievance and arbitration procedures provided for by the Act and embodied by legislative prescription in the terms of a collective agreement provide the exclusive recourse open to parties to the collective agreement for its enforcement.

Underlying both the Court of Appeal and Supreme Court of Canada decisions in *St. Anne Nackawic is* the insistence that the analysis of whether a matter falls within the exclusive arbitration clause must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed. The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one 'arising under [the] collective agreement'. Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal and the courts cannot try it.

[21] In New Brunswick v. O'Leary, [1995] 2 S.C.R.967 another judgment of the Supreme Court of Canada, McLachlin, J. stated at p.970:

as noted in *Weber*, a dispute will be held to arise out of the collective agreement if it falls under the agreement either expressly or inferentially.

Again, it must be underscored that it is the essential character of the difference between the parties, not the legal framework in which the dispute is cast, which will be determinative of the appropriate forum for settlement of the issue.

[22] The applicants submit that the Public Schools Act. the Regulation, the standard teaching contracts and the collective agreements require additional "constitutionally permissible language" to rectify the failure to provide for sufficient or reasonable religious holy leave.

[23] The power to "read in" is not necessary to give effective relief to the applicants. A Board of Arbitration may grant all of the effective relief sought by the applicants.

[24] The issue is the sufficiency and reasonableness of the religious leave granted to the applicants. Other than the action commenced by Linda Feuer et al, the disputes arise under the collective agreements. The jurisdiction to resolve those disputes lies exclusively with Boards of Arbitration appointed pursuant to the collective agreements.

[25] As to the relief sought pursuant to the Human Rights Code, the law remains as stated by the Supreme Court of Canada in Seneca College v. Bhadauria (1981), 2 C.H.R.R. 468 at p.472 where Chief Justice Laskin stated:

I would hold that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code. The Code itself has laid out the procedures for vindication of the public policy, procedures which the plaintiff/respondent did not see fit to use. (emphasis added)

[26] Accordingly, complaints under the Human Rights Code should be processed in accordance with the provisions of the Human Rights Code. In particular, the application commenced by Linda Feuer et al, may be the subject of a complaint under the Human Rights Code and may be processed in accordance with the provisions of the Human Rights Code.

[27] With regard to the other four applications, there should not be concurrent hearings under the collective agreements and the Human Rights Code. For the reasons expressed by the Supreme Court of Canada in Weber v. Ontario Hydro, supra, and New Brunswick v. O'Leary, supra, a Board of Arbitration appointed pursuant to a collective agreement is the proper forum to deal with the issue of religious leave.

[28] The application challenging the constitutional validity of the provisions of the Public Schools Act and Manitoba Regulation 101/95 must be heard by the court. By consent, this application was adjourned without date.

COSTS

[29] The respondents are entitled to their costs.