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Application for Judicial Review of the decision of an arbitration board dated July 31, 2007 under **The Public Schools Act**.

Date: 20080707
Docket: CI 07-01-53329
(Winnipeg Centre)

Indexed as: Rolling River School Division v. The Rolling River Teachers' Association of the Manitoba Teachers' Society and Brenda Nicholson
Cited as: 2008 MBQB 192

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

ROLLING RIVER SCHOOL DIVISION,

Applicant,

- and -

THE ROLLING RIVER TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY and BRENDA NICHOLSON,

Respondents.

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)
) Robert A. Simpson /
) Curran McNicol
) for the Applicant

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)
) Garth Smorang, Q.C. /
) Trevor Ray
) for the Respondents

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)
) Judgment delivered:
) July 7, 2008

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NURGITZ, J.

[1] This is an application for Judicial Review of the decision of an arbitration board convened pursuant to the provisions of **The Public Schools Act**, C.C.S.M. c. P250 (the "PSA") to determine whether cause existed to terminate the employment of a teacher, Brenda Nicholson ("Nicholson").

[2] Counsel argued the issue of the standard of review to be applied to the award of an arbitration board. As well, argument was presented as to whether the Board considered the reasons given by the School Division for terminating the employment agreement as required by s. 92(4)(d) of the PSA. Lastly the question arose as to whether the Board erred in interpreting the word "cause" as that was used in s. 92(4)(d) of the PSA.

[3] The facts leading up to the arbitration board hearing are the following:

- (a) May 2, 2006 the respondent Nicholson was advised that Rolling River School Division ("Rolling River") had serious concerns about her performance in the past number of years despite division administration providing her with many resources to assist her in an effort to succeed as a teacher. Nicholson was advised that her performance as a resource teacher and as a remedial teacher had not met the Division's basic expectations and consequently her employment was terminated by Rolling River.
- (b) In response to an inquiry by Nicholson's professional society, Nicholson and her representatives were advised that the reasons for her termination were clearly outlined in the Superintendent Neil Whitley's April 18th report to the Board. Superintendent Whitley provided a detailed report to the Board outlining difficulties that Brenda Nicholson had encountered:

In spite of coaching, the evaluation process and the significant supports put into place, no appreciable improvement is evident in delivery of

instruction and student's skill development. What was noted in September for areas of improvement, continue to be areas requiring improvement in April.

As recently as April 6, 2006, Brenda Nicholson continued to be confrontational, argumentative, and unwilling to accept direction from her immediate supervisor, Kathleen Slashinsky. Therefore, I am recommending that Brenda Nicholson's employment with Rolling River School Division be terminated.

It is my opinion that Brenda Nicholson has not demonstrated the skill necessary for competency in teaching. As the Superintendent of Schools, I have a duty of care to the students in my jurisdiction. Therefore, based on my observations, and the recommendations of Kathleen Slashinsky, I am recommending to the Board that Brenda Nicholson's contract with the Rolling River School Division be terminated by written notice.

[4] Following the May 2, 2006 letter advising of termination, correspondence between the parties continued for a variety of matters such as a request by Manitoba Teachers' Society to provide reasons for termination...followed by a letter from counsel for Nicholson advising that he wished the matter submitted to an arbitration board in accordance with s. 92(4)(a) of the PSA. Ultimately the Board of Arbitration (the "Board") made up a Blair Graham, Q.C., Chairperson, Carole Wylie, a nominee of Nicholson and Gerald Parkinson, the nominee of Rolling River. Following nine days of hearings the Board issued an award on July 31, 2007. The majority of the Board directed the employment agreement continue in force and effect, a dissenting decision was delivered by Gerald Parkinson on August 17, 2007.

[5] Following the filing of a notice of appeal, a consent order was issued by Madam Justice Spivak on December 6, 2007 whereby she ordered that leave be granted to Rolling River to appeal the award of the Board on certain questions of law.

- [6] The questions raised on this appeal are the following:
- (a) The standard of review to be applied to an award made by an arbitration board;
 - (b) The question of whether the board considered the reason given by the School Division for terminating the employment agreement as would be required by s. 92(4)(d) of the PSA;
 - (c) Was there a proper interpretation of the word "cause" as that word is used in s. 92(4)(d) of the PSA.

[7] Since the filing of the briefs of both the applicant and the respondents, the Supreme Court of Canada has spoken on the question of standard of review in the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL). Counsel have had the opportunity to argue their views of the *Dunsmuir* decision and its effect on the case at bar.

[8] In the majority decision of the Supreme Court in the *Dunsmuir* case the standard of judicial review is dealt with in a very clear and concise manner:

B. Reconsidering the Standards of Judicial Review

The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review correctness and reasonableness.

[9] The court went on to deal with the question of reasonableness as follows:

Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[10] The decision goes on to comment about standards of correctness as follows:

As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[11] Both applicant and the respondents argued the question as to whether the Board committed an error in the interpretation of the word "cause" as that word is used in s. 92(4)(d) of the PSA. The applicant argues that the Board had only to take into consideration whether there was a *bona fide* reason for terminating. The Manitoba Court of Appeal decision in ***Kopchuk v. St. Boniface School Division No. 4***, [1972] M.J. No. 51 (QL) wherein Dickson J.A. (as he then was) noted that s. 365(5) of the PSA containing the words "proper and sufficient cause" were used as the grounds upon which a teacher could be dismissed. Mr.

Justice Dickson comments that the word "cause" does not stand alone as it does in other sections of the Act. The judgment goes onto say:

In our opinion the word "cause" in Section 281(3)(d) simply means grounds which are good or proper or adequate.

[12] The applicants in pointing to the error of the Board in the interpretation of the word "cause" refer to a portion of the award:

I have also specifically considered the *Re Edith Cavell Private Hospital v. Hospital Employee's Union Local 180* (1982) 6 L.A.C. (3rd) 229 and *Re Island Farm Dairies and Teamsters Local 464* (1996) 52 L.A.C. (4th) cases, the first of which was a non-culpable termination case, and the second a non-culpable demotion case. Those cases set forth a series of requirements which employers must fulfill before being able to terminate or demote employees solely on the basis of substandard performance. Neither of those cases dealt with teachers, or school divisions, or the statutory provisions applicable in this case.

Nonetheless, I have reflected on the requirements set forth in *Edith Cavell* and *Island Farm Dairies*. I am not prepared to find that all of the requirements referred to in those cases ought to apply in the context of agreements between teachers and school Divisions in Manitoba. I also note in passing that many of the conditions referred to in those cases were fulfilled by the Division in this case. However, those two cases do reinforce the proposition that an employer has a relatively high threshold to meet when taking steps that will adversely affect an employee's status on the basis of substandard performance.

The Division has not met the requisite threshold in this case.

[13] The applicants argue that it was only for the Board to have considered whether Rolling River had a bona fide reason for terminating the employment agreement. The applicants are clear in arguing that the Board's function was to determine whether cause, as defined in *Kopchuk*, existed and not to impose its opinion as to what the role of Rolling River was with its employee.

[14] The applicant urges this court to find that the Board committed an error in law and accordingly asks that the award of the Board be set aside and substitute

a decision based on the cause that existed for terminating Brenda Nicholson's employment.

[15] In his dissenting opinion, Gerald Parkinson dealt with the reason or reasons given in dismissing Brenda Nicholson in the following manner:

The reason given for termination by the Board of Trustee stated the reason for termination was "your performance both as a Resource Teacher and more recently as a Remedial Teacher has not met the Division's basic expectation of our teachers which the Board believes has a detrimental effect on your students education".

The majority of this Board of Arbitration has incorrectly directed its mind to determining that the Division has not proven a lack of competency on the part of Nicholson.

However there is no question that the Division did prove an inadequate performance on the part of Nicholson. Whether that inadequate performance was due to incompetency or some other reason was not for this Board to decide.

Had the Board turned its mind to the correct question, that is the reason given, they would have correctly concluded, in accordance with the uncontradicted evidence, that the performance of Nicholson had not met the Division's basic expectations of their teachers and it had to date, a detrimental effect on the student's education.

...

The reason for the employment of teachers, the organization of Divisions, the massive tax payer contribution, the commitment of Administrative Trustees, teachers, local government authorities and residents is entirely in order to have a positive effect on students in their education. The detrimental effect on students' education was the concern given by the Board of Trustees as their reason for terminating Ms. Nicholson's employment. That reason has not been considered in any way shape or form by the majority of the Arbitrators in this matter.

[16] The majority of the Board in their award said:

In such circumstances, it was entirely appropriate for the Division to question whether it was an effective use of its human resources to continue to devote that level of support to Nicholson as a resource teacher, given the conclusion of the administrators that her progress as a

resource teacher was slow, and her performance unsatisfactory in some important respects.

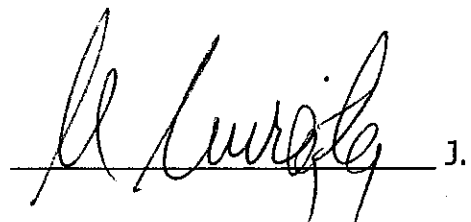
Given all the foregoing considerations, I have concluded that Whitley's decision, taken after consulting with Slashinsky, Bachewich and Parrott, to remove Nicholson from resource teaching and to provide her with another assignment for the 2005/2006 school year was logical and sensible. The decision was made in good faith, after a considered assessment of Nicholson's strengths and weaknesses as a resource teacher.

It should be emphasized that this conclusion is not equivalent to a finding that Nicholson was an incompetent resource teacher, nor that she could never become a competent resource teacher...

[17] As pointed out by the applicant in its brief that there was a distinction to be made between unsatisfactory performance and lack of competency. Lack of competency was not the reason given by the applicant for terminating Nicholson's employment. This appears to be an error on the part of the Board. The Board did not consider the issue that was clearly to be decided and thereby lost jurisdiction and as the applicant argues this alone warrants court intervention.

[18] The applicant further argues that in reviewing the majority award the Board further erred in the interpretation of "cause" as set out in the *Kopchuk* decision. Having concluded that the Board has committed substantial errors, it is the decision of this court to set aside the arbitration award and to substitute an order that the division had cause for terminating Brenda Nicholson's employment.

[19] The applicant will have its costs.

 J.