IN THE COURT OF APPEAL OF MANITOBA

Coram: Philp, Twaddle and Kroft JJ.A.

Citation: Assiniboine South Teachers' Association v.
Assiniboine South School Division No. 3, 2000 MBCA 9

Date: 20000616
Docket: AI99-30-04139

BETWEEN:

THE ASSINIBOINE SOUTH TEACHERS ' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY
(Applicant) Respondent

- and -

THE ASSINIBOINE SOUTH SCHOOL DIVISION NO. 3
(Respondent) Appellant

TWADDLE J.A.

R. A. Simpson for the Appellant
M. Myers, Q.C. for the Respondent

Appeal heard: October 7, 1999
Judgment delivered: June 16, 2000

This is an appeal from an order quashing the award of a labour arbitration board. The questions are whether the motions judge erred in finding jurisdictional error and, if so, whether the award should nonetheless be quashed on an application of the proper standard of review.

Background

A long-time employee of the Division was engaged in the teaching of language arts and social studies to students in Grades 7 and 8. From time to time, she claimed, she was faced with bigotry on the part of some students. In particular, she had observed prejudice against, and intolerance of, homosexuals. This she wished to counter by disclosing that she herself was a lesbian, thereby forcing students, she thought, to confront the truth that homosexuals were not individuals deserving of discrimination.

After speaking to the school principal about her wish to disclose her sexual orientation to students, in what she thought would be appropriate circumstances, she took the matter up with the assistant superintendent of the Division. After considering the matter, he wrote to her in these terms:

> This letter is in response to our recent discussions respecting the appropriateness of the disclosure of a teaching staff member's sexual orientation.

It is the Division's expectation that the professional staff will be objective in their teaching, and will draw an appropriate line between the discussion of general information and the disclosure of intimate details of their personal life. Specifically, the Division believes that it is inappropriate for a teacher, in the course of the objective presentation of any instructional material, to declare their own sexual orientation, be they heterosexual or homosexual. To do so, would cross the boundary previously described.

I must also point out that an individual's sexual orientation and the intimate details of their life are of no interest to the Division, and not a factor in hiring or assigning staff. Objectivity and appropriate commentary to students are a professional obligation and therefore are a significant expectation of the Division.

I trust this will provide you with some guidance in this matter.

Dissatisfied with this response, the teacher and the Association filed grievances in more or less identical terms. The Association's grievance read as follows:

THE ASSINIBOINE SOUTH TEACHERS' ASSOCIATION NO. 3 OF THE MANITOBA TEACHERS' SOCIETY (hereinafter referred to as "the Association") submits that the ASSINIBOINE SOUTH SCHOOL DIVISION NO. 3 (hereinafter referred to as "the Division") has misinterpreted and/or misapplied and/or violated the provisions of the Collective Agreement between the Division and the Association. By letter dated June 1, 1995, the Assistant Superintendent, Mr. H. Holtman, informed GALE M'LOT that it was the Division policy that it was inappropriate for a teacher in the course of teaching students, to discuss intimate details of the teacher's personal life.

The Association submits that this is an unreasonable policy resulting in violations of her academic freedom, Section 14(1) of the Human Rights Code of Manitoba H175, Section 2(b) and Section 15(1) of the Canadian Charter of Rights and Freedoms.

The Association requests that the Division:
(a) acknowledge that it has misinterpreted and/or misapplied and/or violated the provisions of the Collective Agreement;

(b) acknowledge that its' *[sic]* policy as set out in Mr. Holtman's letter dated June 1, 1995 is unreasonable resulting in violations of GALE M'LOT's academic freedom, Section 14(1) of the Human Rights Code of Manitoba H175, Section 2(b) and Section 15(1) of the Canadian Charter of Rights and

Freedoms;

(c) rescind the policy set out in Mr. Holtman's letter dated June 1, 1995.

The Arbitration

The collective agreement between the parties provided for the reference to arbitration of unresolved grievances concerning its contents, meaning, application or violation. Although the agreement did not provide expressly for the board's award to be a final settlement of such a grievance, a provision to that effect must necessarily be implied in the absence of any other means of reaching final settlement. This implication arises by virtue of s. 131.3(1) of *The Public Schools* Act, R.S.M. 1987, c. P250, which states:

> **Compulsory provision**
>
> 131.3(1) Every collective agreement entered into shall contain a provision for final settlement, without stoppage of work, by negotiation, conciliation and arbitration, or any of those means, of all disputes between the parties to, or persons bound by, the agreement including the teachers on whose behalf it was entered into, concerning its contents, meaning, application or violation.

The unresolved grievance was thus referred to a board of arbitration created by the parties pursuant to their agreement. At the arbitration hearing, the Division argued that the grievance was not arbitrable as it did not concern the contents of the agreement, its meaning, application or violation. The Association, on the other hand, argued that the grievance was arbitrable under the "obey now, grieve later" rule. The Division's letter, it argued, imposed a workplace rule which, if breached, could lead to discipline being imposed. The reasonableness of that rule should therefore be determined before a breach occurred.

The board by its majority award ruled that the grievance was not arbitrable. The majority decided that the determination of whether disclosure of a teacher's sexual orientation should be made was a management right, as opposed to a company rule which could be tested by the board for reasonableness under the principle established in *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.* (1965), 16 L.A.C. 73 (Ont.) (J.B. Robinson, C.C.J.) (hereinafter "KVP").

The Motion to Quash

The Association successfully applied to the Queen's Bench for an order quashing the award. In his reasons for making the order, the motions judge made a number of statements. He said (1998), 128 Man.R. (2d) 231 at pare. 20:

> The Board appears, by its reasons, to have concentrated on the question of whether the prohibition against disclosure of the Grievor's sexual orientation was a management right unfettered by any provision of the collective agreement. In support of the decision that it was, the Board found that disclosure would significantly affect the subject matter being taught, in such manner as to interfere with the Division's right to set curriculum. The Board rejected the argument of the Society that the disclosure sought was no more than a teaching tool or method for more effectively advancing the educational purposes of the Division. All this was an assessment clearly within the authority of the Board to exercise. Whether the court agrees with the reasoning or not, the Board here was addressing the right question, namely, to decide the scope of the collective agreement. Unless the manner of reaching its decision was patently unreasonable, and I do not believe it was, the majority decision normally would stand.

And at para. 24:

> Despite the above observations, however, I have concluded the Board erred by failing to address an essential factor that, depending on its own findings, could have led the Board to accept the grievance as arbitrable. In other words I believe the Board neglected to give consideration to a relevant aspect that impacted on the issue of the scope of the agreement.

And at para. 37:

> The decision as to whether or not circumstances exist for the application of the obey now and grieve later rule is up to the arbitration board, within its general responsibility to determine the limits of the collective agreement. A first requirement is that the Board find the appropriate authority in the agreement giving an employee the right to grieve in the event of the imposition of discipline. Then the Board must determine if it is realistic to assume discipline will follow disobedience, and here, undoubtedly, the above mentioned observations of Mr. Justice Tarnopolsky [in *Metropolitan Toronto (Municipality) v. C.U.P.E., Loc. 43* (1990), 69 D.L.R. (4) 268 (Ont. C.A.)] will be helpful. The Board should also be satisfied that a grievance likely would result if discipline were imposed. If all these considerations are addressed the Board's decision should not be interfered with by a court unless its decision was patently unreasonable.

And finally at para. 39:

> ... I have come to the conclusion the Board here committed jurisdictional error in filing *[sic]* to address the impact of the disciplinary provisions in the collective agreement. This resulted in a refusal to exercise jurisdiction.

The Appeal

In this appeal from the order quashing the award, the Division contends that the motions judge erred

(i) in treating the board's supposed failure to consider the impact of

the disciplinary provisions of the collective agreement as a jurisdictional error subject to review on a standard of correctness;

(ii) in treating the board's failure to make express reference to the disciplinary provisions as a failure to consider them; and

(iii) in failing to confirm the award as one which was not patently unreasonable.

The validity of these contentions is the only issue before us. The alleged violations of *The Human Rights Code* of Manitoba, S.M. 1987-88, c. H175 and of the *Canadian Charter of Rights and Freedoms* were not pursued in this Court.

Analysis

In *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, Cory and McLachlin JJ. (the latter as she then was) delivered the majority judgment in which they referred to the effect of a statutory clause mandating a reference of labour grievances to arbitration "for final settlement." They said at para. 59:

> ... In *United Brotherhood of Carpenters anti Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, Sopinka J. considered a statute pertaining to a board of arbitration which contained a similar statutory provision. It was to the effect that issues arising from the interpretation of a collective bargaining agreement were to be submitted to arbitration "for final settlement." It was held that judicial deference to the decision of the arbitration board was warranted. The sage observation was made that an unlimited scope of judicial review would thwart the goal of mandatory arbitration to provide an efficient and cost effective manner of resolving disputes in this field ....

In the present case, neither the statutory language nor that of the collective agreement is exactly the same as that in *United Brotherhood*, but it is close enough, in my view, to require that the board's decision be afforded the same degree of curial deference.

The bases for curial review of a decision afforded such deference were considered in *Dayco (Canada) Ltd. v. CAW-Canada, [1993]* 2 S.C.R. 230. Delivering concurring reasons, which have the merit of succinctness, Cory J. said at p. 307:

> In broad terms the review can be founded on any one of the following bases: (1) if, during the course of its proceedings, the tribunal has failed to provide

procedural fairness the court may intervene;

(2) if the tribunal exceeded the bounds of the jurisdiction conferred upon it by its enabling legislation intervention by the court will be appropriate;

(3) if the tribunal acted within the purview of its enabling legislation but rendered a decision that is patently unreasonable the court may intervene.

As was so in *Dayco,* no question of procedural unfairness arises here. We are left to consider whether the board exceeded the bounds of its jurisdiction and, if not, whether its decision was patently unreasonable.

At one time, no doubt, courts were proven to treat a failure to take a relevant consideration into account as a jurisdictional error. Gradually, however, this willingness to interfere with a labour arbitration board's decision was replaced by deference. The turning point may be seen in the judgment of Dickson J. (as he then was) for the Court in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corporation,* [1979] 2 S.C.R. 227 where he said at p. 233:

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

Whatever errors may once have been labeled "jurisdictional," and thus subject on review to a standard of correctness, the only errors which are now subject to this standard are those made in assuming jurisdiction. LaForest J. for the majority in *Dayco,* put it this way at p. 249:

> In my view the arbitrator was not acting within his jurisdiction *stricto sensu.* Rather he was deciding upon jurisdiction.
>
> [emphasis by LaForest J.]

In *Dayco,* the issue was whether the entitlement of former employees to pensions, granted by expired collective agreements, could be determined by arbitration under the most recent collective agreement, also expired. The Supreme Court held that the arbitrator had jurisdiction to answer the question, but that the answer was reviewable on a standard of correctness, thus because he was deciding upon his jurisdiction and not acting within it.

Once an arbitration board has embarked on an inquiry within the jurisdiction conferred on it, however, errors which might once have been called "jurisdictional" are only reviewable on a standard of patent unreasonableness. That is clear from two further passages from the reasons of LaForest J. in *Dayco* and from the joint reasons of Cory and McLachlin JJ. in *Canada Safeway Ltd. v. RWDSU, supra.*

> In *Dayco,* LaForest J. said at p. 250:
>
> The Court was not asked to review the arbitrator's interpretation of the agreement at hand. Had that issue properly been before this Court, I have no doubt that the scope of our review of that aspect of the arbitration award would have been a narrow one - we would have embarked on a patent unreasonability enquiry.

And at p. 251:

> It is clear that an arbitrator has jurisdiction *stricto sensu* to interpret the provisions of a collective agreement in the course of determining the arbitrability of matters under that agreement. In that case the arbitrator is acting within his or her "home territory," and any judicial review of that interpretation must only be to a standard of patent unreasonableness.

In *Canada Safeway Ltd.,* Cory and McLachlin JJ. said at pare. 58:

> Where labour relations tribunals are called upon to interpret or apply a collective agreement under the umbrella of a privative clause, a reviewing court can only intervene in the case of a patently unreasonable error. [Citations omitted.] This high degree of curial deference is essential to maintain the integrity of the system which has grown to be so efficient and effective in the resolution of disputes arising in the sensitive field of labour relations. The nature of labour disputes requires their speedy resolution by expert tribunals. The protective clause found in the *Trade Union Act is* the legislative recognition of the fundamental need for deference to the boards' decisions.

They went on to say at para. 60:

> [I]n the case at bar, the Board was acting within its exclusive jurisdiction to interpret and apply the collective agreement when it considered whether the layoff provisions were applicable.... It follows that there can be no doubt that the appropriate standard of review in this case is one of patent unreasonableness.

Even when courts were less deferential than they are today, the omission of reference to a relevant matter was not always seen as fatal. Thus, in *Woolaston v. Minister of Manpower and Immigration, [1973]* S.C.R. 102, Laskin J. (as he then was) said at p. 108:

> I am unable to conclude that the Board ignored that evidence and thereby committed an error of law to be redressed in this Court. The fact that it is not mentioned in the Board's reasons is not fatal to its decision.

And in *Service Employees' International Union, Local No. 333 v. Nipawin District Stag Nurses Association et al., [1975*] 1 S.C.R. 382, Dickson J. (as he then was) said at p. 391:

> A tribunal is not required to make an explicit written finding on each constituent element, however subordinate, leading to its final conclusion.

The motions judge in the present case, in my respectful view, fell into the trap of branding as jurisdictional that which was, at best, doubtfully so and erred in applying a standard of correctness. The question being considered by the board, namely whether the grievance was one within the scope of the collective agreement, was one within its jurisdiction. The board was acting within its "home territory" and a review of its decision should have been undertaken on a standard of patent unreasonableness.

Not only did the motions judge err in applying a standard of correctness, but he also erred, in my opinion, when he found that the board failed "to address the impact of the disciplinary provisions." In the first place, the mere fact that the board did not refer expressly to those provisions does not mean that the board did not consider them. And in the second place, once the board decided that the Division's letter did not impose a workplace rule of the kind imposed in KVP, *supra,* there was no need to consider whether the rule could be grieved before breach under the disciplinary provisions. Use can only be made of the disciplinary provisions, as was done in *Metropolitan Toronto (Municipality) and C.U.P.E., Loc. 43, supra*, (hereinafter "the lights and sirens case"), where a KVP-type rule has been imposed.

As the board's award was, in my view, made within its jurisdiction, the question now is whether the award was patently unreasonable. No doubt the board's reasons must be taken into account in answering that question, but it is not those reasons which are being reviewed. The award can be set aside only if it is patently unreasonable.

This corresponds to the practice in the case of an appeal from a court order or judgment. The order or judgment will be confirmed if found to be correct even if originally granted for wrong reasons. The appeal is from the order or judgment, not the reasons. It would be strange indeed if a different rule applied to arbitration awards. Then an award might be set aside on account of patently unreasonable reasons even if the award could pass a test of correctness. The matter would then have to be referred to another board resulting in further delay. This is contrary to the policy of labour law which requires that labour grievances be resolved as quickly as possible.

These observations are necessary as I find some of the board majority's comments (such as the comment that "the Division's policy of non-disclosure must be viewed as the setting of a core component of the curriculum") to be nonsensical. The comments which may be so described were not, however, essential to the decision that the grievance was inarbitrable. To be arbitrable, the policy objected to would have to have involved a misinterpretation, misapplication or violation of the collective agreement. The motions judge did not find the majority's decision that the policy involved none of those things to be patently unreasonable. Nor do I.

In its argument to the contrary, the Association relied exclusively on the submission that the imposition of an unreasonable workplace rule may be grieved before its breach as an anticipatory violation of the collective agreement. This submission is based on the Association's interpretation of the decisions in KVP and the lights and sirens case.

KVP was a case in which an employee had been discharged after his wages had been garnished for a third time. The employee grieved his discharge while the employer relied on a workplace rule imposed by it providing for discharge if an employee's wages were garnished for a third time. The arbitration board, noting that the collective agreement entitled the employer to discharge an employee only for just cause, held that, in deciding whether there was just cause, it could determine the reasonableness of the workplace rule.

The lights and sirens case extended the KVP approach to cover a test of the reasonableness of a rule before its breach. The employer in that case had unilaterally imposed a rule requiring operators of emergency vehicles to activate their lights and sirens whenever road bound on a call. The Ontario Court of Appeal held that the rule could be tested for reasonableness before anyone was disciplined for its breach.

The principle of testing a rule for reasonableness before its breach is a sound one. It must be recognized, however, that the principle can only be applied where there is a unilaterally imposed workplace rule capable of being judged for reasonableness regardless of the circumstances of its breach. A categorical order to activate lights and sirens whenever an emergency vehicle is on a call is clearly such a rule. The order was so absolute that there was no need to wait until the circumstances of a breach were known to test the rules for reasonableness. It was also clear in that case that the employer intended to enforce the rule regardless of those circumstances.

Compared to the workplace rule in KVP and the other arbitration cases which followed it - and indeed the rule in the lights and sirens case - the policy statement here is very broad and covers all manner of circumstances in which disclosure of a teacher's sexual orientation might occur. It may be reasonable, of course, to prohibit disclosure in some of those circumstances while not in others. Thus it might be reasonable to prohibit a teacher from discussing intimate details of his or her sex life or even from disclosing the teacher's sexual orientation - as a means of encouraging students to choose the teacher's

lifestyle, but unreasonable to prohibit a teacher from using the fact of his or her homosexuality as a means of combating intolerance of homosexuals. The problem presented by the grievance in the form it took is that it only permitted a judgment on the reasonableness of the policy as a whole regardless of the circumstances in which a breach might occur. It is not sensible, in my view, to make such a judgment.

Quite apart from the problem of over breadth, the policy statement is open to more than one interpretation. This is true to such an extent that the Association's restatement of the policy in its grievance differs from the policy itself. How can an uncertain policy be judged for reasonableness until the circumstances of its proposed enforcement are known?

There is yet a further reason to question the arbitrability of the policy statement for reasonableness. Bearing in mind that the Division's statement of its policy was not self-initiated, but was a response to a teacher's inquiry, and that such language as "the Division's expectation" and "the Division believes it inappropriate" is not mandatory, there is some doubt that discipline would follow breach in all circumstances.

It is perhaps unfortunate that the Association and the teacher chose to grieve the Division's policy as a whole and not to limit the grievance to the teacher's complaint that she had been denied permission to use the fact of her homosexuality as a means of combating homophobia in the same way as a teacher from a minority race might use his or her origins as a means of combating racism. Without suggesting that the more limited grievance would have been arbitrable, it certainly would more likely have been so as the answer would not have depended on unknown circumstances.

Despite my view that the board's reasons for finding the grievance inarbitrable were, in part, non-sensical, I am of the view that not only was the award not patently unreasonable, but it was correct for the reasons I have given. The award ruling the grievance to be inarbitrable should therefore stand.

Disposition

In the result, I would set aside the order quashing the award and restore the award finding the grievance to be inarbitrable. I would order the Association to pay the Division its costs in both this Court and the Court of Queen's Bench.

Twaddle J.A.