

ARBITRATION BULLETIN

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ARBITRABILITY WIDENED

Can a teacher tell her students she's a lesbian?

When a School Division forbade a junior high school teacher to disclose to her students that she was a lesbian, the teacher filed a grievance. In our September/October 1997 issue, we reported the ruling of a board of arbitration that it lacked jurisdiction to hear the grievance. Now, the Manitoba Court of Queen's Bench has held that the board of arbitration erred in declining jurisdiction.

THE FACTS

For more than 20 years, Gale M'Lot taught Grade Eight in the Assiniboine South School Division of Manitoba. She taught Language Arts and Social Studies at Westdale Junior High, where she was considered a successful teacher. M'Lot believed that her ability to teach tolerance and resistance to stereotyping would be improved if she disclosed to her students that she was a lesbian. Before revealing her orientation, she consulted with the school principal, who in turn consulted with the Assistant Superintendent of the Division. The Assistant Superintendent decided that M'Lot's disclosure that she was a lesbian would be inappropriate and ordered M'Lot not to make the disclosure to her students.

The Assiniboine South Teachers' Association filed a grievance on behalf of M'Lot, claiming that the nondisclosure order was an unreasonable policy which violated M'Lot's academic freedom and her rights under the Manitoba *Human Rights Code* and the *Canadian Charter of Rights and Freedoms*. The School Division objected that the complaint was not subject to the grievance procedure as there was no provision under which such a grievance could be launched.

A board of arbitration upheld the School Division's rejection of the grievance on the basis that the nondisclosure order concerned the setting of "core curriculum", and the School Division had absolute discretion over such fundamental aspects of the curriculum. The board concluded that the matter was not arbitrable and that it had no jurisdiction to hear the grievance. Moreover, in the board's view, it could not address any possible violation of the *Human Rights Code* or the *Charter*. Unlike B.C., Nova Scotia and Ontario, Manitoba does not grant arbitrators the explicit statutory authority to apply human rights legislation. For a full report of the arbitration board's reasoning, see *Education Employment Law News*, September/October 1997.

The Teachers' Association applied to the Manitoba Court of Queen's Bench for judicial review, seeking an order quashing the arbitration award.

AT A GLANCE

THE ISSUES

Does a board of arbitration have jurisdiction to consider the reasonableness of policies unilaterally promulgated by a school board and not referred to in the collective agreement?

DECISION

Yes, where discipline would likely result from a breach.

REASONS

The employer's nondisclosure policy could be grieved even though the collective agreement did not explicitly or implicitly provide for it. This was the case because an arbitration procedure existed to deal with discipline imposed without just cause, and the "obey now, grieve later" rule applied so that the employee need not have violated the policy in order to initiate the grievance. Had the board of arbitration considered the "obey now, grieve later" rule and found the dispute arbitrable under the discipline provisions, it would have also considered whether the policy was reasonable. By not considering these factors, the board committed a jurisdictional error.

SIGNIFICANCE

If a collective agreement provides for a grievance procedure relating to the imposition of discipline without just cause, so that the "obey now, grieve later" rule applies, the establishment of a management policy can give rise to a grievance. As long as the collective agreement creates a reasonable expectation of fairness, the policy can be reviewed on the basis of the *KELP* standard of reasonableness. With the combination of these two elements, an employee can effectively grieve unilaterally imposed management policies.

ASSINIBOINE SOUTH TEACHERS' ASSOCIATION OF THE
MANITOBA TEACHERS SOCIETY v. ASSINIBOINE SOUTH
SCHOOL DIVISION NO. 3

THE LEGISLATION AND THE AGREEMENT

Section 131.3(1) of the Manitoba *Public Schools Act* requires that every collective agreement contain a provision for arbitration of all disputes "concerning its contents, meaning, application or violation."

Article XI of the teachers' collective agreement contained the following, discipline provisions:

- XI The imposition of discipline without just cause by the Division or any agent thereof in the form of written warning(s) and/or suspension (s) with or without pay shall be subject to the following provisions:
- (a) Where the Division or person(s) acting on behalf of the Division so disciplines any person covered by this Collective Agreement and where the affected person is not satisfied that the discipline is for just cause, the Division's action shall be deemed to be a difference between the parties to or persons bound by this Collective Agreement under Article XIII Settlement of Differences during currency of Agreement.
 - (b) When such a difference is referred to a Board of Arbitration under Article XI11, the Board of Arbitration shall have the power to:
 - (i) uphold the discipline
 - (ii) rescind the discipline
 - (iii) vary or modify the discipline
 - (iv) order the Board to pay all or part of any loss of pay and/or benefits in respect of the discipline
 - (v) do one or more of the things set out in sub-clause (i), (ii), (iii), and (iv) above.

While the board of arbitration did not refer to these provisions in its decision, they became central in the judicial review application.

THE ARGUMENTS

The School Division argued that the board of arbitration was correct in finding that it had no jurisdiction to hear the grievance.

The Association, on the other hand, contended that the matter could be grieved for several reasons. First, the board should take a broad view of its power to arbitrate since labour relations would be impaired if disputes were not subject to arbitration.

Second, management policies must be reasonable to be enforceable: *Re Lumber & Sawmill Workers' Union, Local 2537 and KVP Co. Ltd.* (1965), 16 L.A.C. 73.

Third, Manitoba's *Human Rights Code* requires all contracts (including collective agreements) to contain a clause that the *Code* will not be violated. Any violations are, therefore, arbitrable. Finally, the Association submitted, the nondisclosure policy violated M'Lot's freedom of expression under the *Charter* and this violation was arbitrable.

THE DECISION

Judge Scott Wright of the Manitoba Court of Queen's Bench granted the application for judicial review, concluding that the board had erred when it decided that it did not have jurisdiction to hear the grievance. Specifically, the board failed to consider the discipline provisions of the collective agreement and the application of the "obey now, grieve later" rule.

Grievance must be linked to collective agreement

First, Judge Wright ruled that the board had the power to decide what matters fell within its jurisdiction. He noted that the collective agreement provided for a grievance procedure including arbitration where a violation of the agreement was alleged or a difference arose related to its meaning or application, pursuant to s. 131.3(1) of the *Public Schools Act*. The board could, therefore, decide the limits of the agreement and, by implication, the limits of its own jurisdiction.

In reviewing the board's decision, Judge Wright endorsed most of the board's conclusions. He noted that, unless the subject matter of the grievance was covered explicitly or implicitly by the collective agreement, the collective agreement could not provide a basis for the grievance:

"The purpose of an arbitration under a collective agreement is to give effect to the provisions of the agreement. It follows that the subject of the arbitration must relate to or connect with matters covered by the agreement; that is, that the parties intended it to be subject to the grievance procedure. It is the job of the Board to examine the content of the collective agreement and determine whether explicitly or implicitly that conclusion can be reached from its terms. That is a threshold question that must be resolved before the arbitration procedure can be employed to adjudicate the dispute."

Judge Wright held that the notion, advanced by the Association, that any dispute must be arbitrable in order to preserve harmonious labour relations was "too broad," and that something was required to link the contents of the collective agreement to the grievance. The judge also agreed with the board that a management policy need not be reasonable to be enforceable unless there is a linkage between the policy and the matters covered in the collective agreement.

Judge Wright also held that the provisions of the Manitoba *Human Rights Code* could be used only to assist in the interpretation of the provisions of the collective agreement. Without an arbitrable issue under the agreement, the *Code* was of no assistance to the Association. Similarly, the judge held that, without a violation of an express or implied term of the collective agreement, the board had no jurisdiction to deal with any *Charter* violation. The board had no original inherent jurisdiction to decide *Charter* issues.

Discipline provisions constituted link

However, Judge Wright held, the board had not considered Article XI of the collective agreement, dealing with discipline. He reasoned that, if M'Lot had disobeyed the nondisclosure order, she would have been disciplined, and a grievance based on an absence of just cause for such discipline would have been arbitrable.

The judge observed that, while M'Lot had not violated the nondisclosure order, her grievance may have been arbitrable in any event under the "obey now, grieve later" rule. Judge.

Wright quoted at length from the reasons of the Ontario Court of Appeal in *Metropolitan Toronto (Municipality) v C.U.P.E., Loc. 43 (1990)*, 69 D.L.R. (4th) 268 (known as the "lights and sirens" case). In that case, Justice Tarnopolsky stated:

"The majority of the Board justified its use of the 'obey now, grieve later' rule, by saying that it would be 'hypocritical, and transparently so, to deny employees the promise of the rule having composed them to its command'. In other words, if the purpose of the rule is to avoid insubordination and anarchy in the workplace, the obvious tradeoff is that employees in a unionized environment will have the right to grieve rules, the breach

of which would likely have led to discipline, even as they continue to obey them. . . .

[I]t seems clear that under an 'obey now, grieve later' rule, an arbitrator is practically *required* to take jurisdiction to hear a grievance against a directive, at least in a case where a breach is likely to constitute insubordination and subject the employees to disciplinary action."

Judge Wright held that, before applying the "obey now, grieve later" rule, an arbitration board must first find that the collective agreement provided for arbitration of grievances arising from discipline, and that discipline and a subsequent grievance would likely have resulted from a breach of the rule or policy in question:

"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 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."

The existence of the "obey now, grieve later" rule had the potential to bring M'Lot's grievance within the scope of the collective agreement's discipline provisions, and thus to provide the linkage between the agreement and the grievance which had previously been lacking. Had the board considered the "obey now, grieve later" rule and found the dispute arbitrable under the discipline provisions, the judge held, it also would have considered whether the nondisclosure rule was reasonable. In this context, Judge Wright ruled. the reasoning in *KVP*, which requires that policies that are wholly within management's prerogative must nevertheless be reasonable, might also apply. In *KVP*, the authority to assess reasonableness came from the power created by the collective agreement to decide if the discipline was imposed for just cause.

Judge Wright discussed the application of the *KVP* decision at some length. In his view the law had not been extended so far as to provide that unilateral decisions of management are subject to arbitration regarding their reasonableness merely because there is a collective agreement between the parties. The law remains that the collective agreement must have intended the matter to be heard at arbitration. In this regard, it was for the arbitration board to determine if the necessary connection could be made:

"After reviewing the many arbitration decisions and some court cases... referred to me by counsel, I am satisfied that the law has not been extended to the point where unilateral decisions of management, even if related only to rules or policies, are, *per se*, subject to grievance or arbitration as to their reasonableness simply because a collective agreement is in force. Rather, the law still requires a finding that the collective agreement expressly, or at least implicitly, intended that result"

Wright held that the board failed to consider either the "obey now, grieve later" rule or the principle in *KVP*, although it was obliged to do so. As a result, the board had committed a jurisdictional error when it refused to exercise its jurisdiction over the subject of the grievance. He quashed the order of the board and ordered that the board be reconvened or another board be convened to consider the matter.

ANALYSIS

The combination of the "obey now, grieve later" rule and the fairness rule in *KVP* provides a potent tool for employees who are subjected to management policies which are not clearly provided for in the collective agreement. This tool will be most useful where an issue arises which arguably should have been addressed in the negotiation of the collective agreement, but which has not been explicitly included.

M'Lot's wish to disclose her sexual orientation as part of her educational activities is a good example of the kind of issue which can unexpectedly arise to challenge the limits of management prerogative.

While it is arguable that such unanticipated matters ought not to be dealt with because they were not addressed in the process which produced the collective agreement, this may be an overly formal approach to labour relations. Some mechanism must exist to ensure an elementary standard of fairness in management policies and rules.

If a collective agreement provides for a grievance procedure relating to the imposition of discipline without just cause, so that

the "obey now, grieve later" rule applies, the establishment of a management policy can give rise to a grievance. As long as the collective agreement creates a reasonable expectation of fairness, the policy can be reviewed on the basis of the *KVP* standard of reasonableness. With the combination of these two elements, an employee can effectively grieve unilaterally imposed management policies.

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OF THE MANITOBA TEACHERS' SOCIETY
v. ASSINIBOINE SOUTH SCHOOL DIVISION NO. 3

Manitoba Court of Queen's Bench Judge Scott Wright
Mel Myers, Association Counsel
Robert Simpson, Employer Counsel
July 16, 1998 (16 pages)

Further updates will be forthcoming.