IN THE MATTER OF: The Labour Relations Act

AND IN THE MATTER OF A CERTAIN ARBITRATION PROCEEDING

BETWEEN:

BRANDON TEACHERS' ASSOCIATION
(hereinafter referred to as the "Association")

ASSOCIATION,

- and -

BRANDON SCHOOL DIVISON
(hereinafter referred to as the "Division")

DIVISION.

Re: Thompson-Zelmer et al

Valerie Matthews-Lemieux, for the Association
David Swayze, for the Division

DISSENT

I have read the Award of the Chairman in this matter and with respect I cannot agree.

It is the job of this Arbitration Panel to interpret the Collective Agreement reasonably.

It is obviously possible for an Employer to agree to give a biological mother seventeen (17) weeks of financial benefits whilst on maternity leave, give a biological father ten (10) weeks of those benefits, and give an adoptive parent ten (10) weeks of those benefits, without discriminating against the biological mother. It is common ground amongst the parties that an agreement to give an adoptive parent ten (10) weeks of financial benefits while on leave and a biological mother seventeen (17) weeks of financial benefits while on maternity leave is not discriminatory against the biological mother. They mutually entered an Agreement to do so.

The Association and Grievors only argue that discrimination has taken place against the biological mother/Grievors since the Employer has commenced to pay financial benefits to the biological father while on parental leave in an amount equal to the benefits paid to the adoptive parent while on leave, due solely to the impact of the Werier Award. However that Agreement was not presented to us at as a written Agreement forming part of the Collective Agreement.

It is not reasonable to conclude that the Collective Agreement is worded in such a way as to discriminate against the biological mothers due to the treatment of the biological fathers when no such wording exists in the Collective Agreement. I repeat it is possible to craft a Collective Agreement whereby the biological mothers get seventeen (17) weeks of benefits (as they do here) and the biological father gets ten (10) weeks of benefits (as they now do here) without a resulting discrimination against the biological mother.

The numerous cases to which we were referred which determined that Parliament could not treat a biological father in a manner superior to its treatment of a biological mother are irrelevant.

I repeat that it was our job to interpret the Collective Agreement and the words that require interpreting are not in the Collective Agreement. We should have presumed that the parties intended to act legally (especially when the actions were as a result of the proposals and insistence of the Association representing the Grievor). It is obviously legal and non-discriminatory against biological mothers to agree to give them a higher benefit than adoptive parents receive.

By way of brief history, it was made known to us that in the interest arbitration concerning the St. Vital School Division and the St. Vital Teachers' Association, the St. Vital Teachers' Association of the Manitoba Teachers' Society proposed the adoptive leave top-up, which had not previously existed in the Province, and argued that it would not be discriminatory to biological mothers or fathers. Arbitrator Arne Peltz accepted this argument made by the Teachers' Society and ruled that the adoptive leave top-up could be inserted into Collective Agreements without violating the Human Rights Code.

Next, Manitoba Teachers' Society through its Associate Member the Louis Riel Teachers' Association grieved on behalf of Mr. Chapman against the Louis Riel School Division that an adoptive leave top-up in fact discriminated against Chapman as the biological father by not granting him the same benefit. That argument was successful before Arbitrator Werier. Next the Manitoba Teachers' Society together with another of its members, the Brandon Teachers' Association argued successfully that due to the impact of the Werier Award, the Brandon School Division would have to top-up the financial benefits received by the biological fathers while on leave to the same extent as it topped-up the benefit received by the adoptive parents while on leave.

I have absolutely no doubt that in proposing the adoptive leave top-up for inclusion in the Collective Agreement with the Brandon School Division, the Manitoba Teachers' Society at no time advised the Division that if the top-up was granted, a claim would be made for parental leave top-up and then for additional maternity leave top-up all based on the simple existence of an adoptive leave benefit.

On these facts, given regard to the equities of the issue, I would have refused to grant a remedy against the Division even if the Association's argument on behalf of the Grievor was successful.

However I return to the issue that the grievance should not have been successful in the first place.

Accepting, as we must, that a properly crafted Collective Agreement could give biological mothers greater benefits then biological fathers; given the absence of wording in the Collective Agreement at all, it cannot be reasonable to have concluded that the parties entered into a Collective Agreement giving the biological mothers seventeen (17) weeks of financial benefits while on leave for a purpose entirely different from the purpose in giving biological fathers ten (10) weeks of top-up while on parental leave. I repeat there is no wording in the Collective Agreement on which to make that interpretation.

Finally, I cannot accept the majority's reasoning on the argument advanced by the Division with respect to undue hardship.

Undue hardship is a statutory protection intended to be available to public bodies, including those which have the authority to tax. The School Division argues and proves that adding a cost of, for example $50.00 for taxed household per annum, would present the Division with the dilemma of either cutting

programs or raising taxes above the tax rates being imposed by neighbouring Divisions. One hundred and fifty three thousand dollars ($153,000.00) is not a trifling sum for the residential property owners in a City the size of Brandon. Obviously the continued viability of a statutory body corporate such as the Brandon School Division should not be the test for undue hardship. If that was the test intended by the legislature, there would no point in affording the undue hardship defence to public bodies as was clearly intended by the legislature.

Considering that other School Divisions have agreed to this expenditure voluntarily in bargaining is irrelevant. We would have to be considering the entirety of the give and take of Collective Bargaining for that to be instructive. The issue here is the fairness to the taxpayers of imposing the additional burden on a non-consensual basis.

I would have dismissed the Grievance.

Alternatively I would have held that no financial remedy should be granted or that the Brandon Teachers' Association should share equally in paying any damages awarded.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Winnipeg in the Province of Manitoba this 29th day of March, 2010.

G.D. Parkinson, Board Member