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On judicial review from the award of the majority of an arbitration board dated June 9, 2005.

Date: 20060221
Docket: CI 05-01-42715
(Winnipeg Centre)
Indexed as: Flin Flon School Division v. The Flin Flon Teachers' Association of the Manitoba Teachers' Society
Cited as: 2006 MBQB 49

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:

FLIN FLON SCHOOL DIVISION,
Applicant,

- and -

THE FLIN FLON TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY,
Respondent.

APPEARANCES:

For the Applicant:
Robert A. Simpson
Malinda A.Y.Y. Yuen

For the Respondent:
Valerie Matthews Lemieux

Judgment delivered:
February 21, 2006

SCURFIELD J.

INTRODUCTION

[1] This is an application for a judicial review of an arbitration award. The arbitration followed a grievance that was filed by the Flin Flon Teachers' Association of the Manitoba Teachers' Society ("the Association"). The grievance flowed from the denial of maternity leave

and top-up benefits to a contract teacher. The key question was whether or not the teacher had been employed by the Flin Flon School Division ("the Division") for "at least seven consecutive months" as of the date when she wanted to start her maternity leave. The majority of the arbitration board ("the majority") found that the teacher was eligible for the benefits. The Division says that this finding was based on an unreasonable interpretation of the collective agreement and of s. 53 of **The Employment Standards Code**, C.C.S.M. c. E110, which is incorporated into the collective agreement.

FACTUAL BACKGROUND

[2] The facts are simple. The grievor ("the teacher") was employed as a term teacher with the Division. She was employed pursuant to a form of contract prescribed by **The Public Schools Act** that is commonly known as a Form 2A contract. Permanent teachers, that is, those with an indefinite contract, sign what is referred to as Form 2 contracts.

[3] All Form 2A contracts contain common language. In particular, they include a clause which specifies the commencement and termination of employment for each respective contract.

[4] The teacher was employed by the Division to replace different teachers. She signed a series of Form 2A contracts to teach during the following dates:

- April 2, 2001 until June 29, 2001;
- August 27, 2001 until June 28, 2002;
- August 27, 2001 until June 11, 2002;
- August 26, 2002 until June 30, 2003; and
- September 2, 2003 until June 30, 2004.

The first contract and the contract commencing August 26, 2002 were full-time positions. The others were half-time positions.

[5] An example of the contract wording as to term, extracted from the 2002-2003 contract, is as follows:

> 1. The school board hereby employs the teacher, and the teacher hereby accepts employment as a temporary teacher with the school board, such employment to commence on the 26th day of August, 2002, to be terminated in the manner hereinafter provided.
>
> . . . . .
>
> 5. This agreement shall be deemed to be in force from the date of commencement of employment, as set out in clause 1, until terminated when one of the following, whichever comes first, applies:
>
> (a) Until the end of the work day on the 30th of June, 2003; ...

[6] Similarly, the 2003-2004 contract specifies that employment was to commence on the 2nd day of September, 2003, to be terminated no later than the 30th day of June, 2004.

[7] Typically, the teacher entered into these successive contracts in June of the year preceding the commencement of the next contract.

[8] The teacher applied for maternity leave benefits on August 5, 2003. The leave was to commence on September 15, 2003 and end on January 5, 2004.

[9] The collective agreement between the Division and the Association that was in place at the material time provides:

> **4:04 Maternity, Adoptive Leave**
>
> Leaves for Maternity or Adoptive purposes shall be in accordance with Employment Standards Code of the Province of Manitoba.

[10] Section 53 of **The Employment Standards Code** governs the availability of maternity leave and provides as follows:

> **Eligibility for maternity leave**
>
> 53 A pregnant employee who has been employed by the same employer for at least seven consecutive months is eligible for maternity leave.

[11] An employee who is eligible for maternity leave benefits is entitled to have those benefits "topped up" by the Division pursuant to the collective agreement.

[12] The teacher's request for maternity leave was denied. However, the Division granted an unpaid leave of absence from September 15, 2003 to January 2, 2004, inclusive. The Association grieved the Division's decision not to grant maternity leave. An arbitration board was convened to hear the grievance. The majority rendered a decision on June 9, 2005 wherein they allowed the grievance. They declared that the Division had breached the collective agreement by denying the teacher's request for maternity leave benefits. A dissent was rendered by the nominee of the Division.

THE ARBITRATION AWARD

[13] The majority upheld the grievance. Their reasons for doing so can be identified in the following passages at pp. 20 and 22 of their award:

> 1. The reality or substance of her employment with the Division was that she provided her services to the Division from April 2001, to the date of her requested maternity leave, namely September 15, 2003, a period well in excess of seven months. She provided those services continuously, except for those periods when the schools in the Division were not operating and had always contracted to provide services in the following school year prior to the expiration of her contract for the then current year.

> 2. Pursuant to the provisions of the Collective Agreement, eligibility for maternity leave is determined with reference to the eligibility requirements set forth in *The Employment Standards Code*. Those provisions are to be construed liberally, not restrictively. To do otherwise will lead to differential treatment between teachers employed pursuant to a series of successive Form 2A contracts, depending on when, during the school year, their respective leaves are to commence.
>
> . . . . .
>
> I was also very troubled by the differential treatment that would arise, if the Division's arguments were accepted, between teachers employed pursuant to a series of successive Form 2A contracts depending on the commencement date of their respective leaves. Those leave dates would largely be determined by the birthdates of the respective teachers' babies.

[14] Simply put, the majority found that the teacher was continuously employed for more than seven months prior to the date of her requested maternity leave. They then concluded that the interpretation of the collective agreement urged by the Division was unreasonable because it would lead to different benefits being available to employees within the same class. Teachers with the same substantive level of service would have their eligibility for maternity leave benefits determined by the arbitrary date of when they were expected to deliver their child. This, they reasoned, could not have been what this public employer intended.

ISSUES

[15] The issues are as follows:

(1) What is the appropriate standard of review?

(2) Does the decision of the majority survive the application of the appropriate standard of review?

Issue No. 1: What is the appropriate standard of review?

[16] The Division argues for correctness. The Association says that I am bound to apply the standard of patent unreasonableness.

[17] I recently performed an analysis of the appropriate standard of review in a labour arbitration context in ***National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) v. Bristol Aerospace Ltd.***, 2005 MBQB 183, [2005] M.J. No. 306 (Q.B.) (QL). For convenience, I will repeat that analysis in a manner that is adapted to the present fact situation. To some extent, my earlier analysis has also been altered by recent authorities that were presented during this application.

[18] The Supreme Court of Canada has mandated what it describes as a pragmatic and functional approach to the identification of the appropriate standard of judicial review for all administrative decisions. See ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20, [2003]

1 S.C.R. 247; ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19, [2003] 1 S.C.R. 226; and ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1998] 1 S.C.R. 982, [1998] S.C.J. No. 46 (QL). As a product of that analysis, it identified three different standards of review: correctness, reasonableness *simpliciter*, and patent unreasonableness.

[19] Determination of the appropriate standard of review involves the application and balancing of the pragmatic and functional approach in relation to four contextual factors. No single factor is dominant. Those factors are:

(1) the expertise of the tribunal relative to that of the reviewing court on the issue in question;

(2) the purposes of the legislation as a whole and the provision in particular;

(3) the presence or absence of a privative clause or statutory right of appeal; and

(4) the nature of the question — law, fact, or mixed law and fact.

[20] The purpose of **The Labour Relations Act**, C.C.S.M. c. L10, is to create a system that resolves labour disputes simply and finally. Labour arbitrators are widely accepted as adjudicators who bring valuable experience to their functions.

[21] Consequently, labour arbitrators are normally afforded a high degree of deference. That is particularly so when, as in the present fact situation, the arbitration is governed by a statutory privative clause as set out in s. 128 of **The Labour Relations Act**, which reads, in part:

> **Decisions final and binding**
> **128(1)** Except as provided in subsection (2), every decision of an arbitrator or arbitration board on a matter submitted to arbitration is final and binding on the parties and shall not be questioned or reviewed in any court, and no order shall be made or process entered or proceedings taken in any court to set aside or quash the decision, or to declare that the decision is invalid or void or a nullity, or to declare that any act or omission of the arbitrator or arbitration board renders the decision invalid or has the effect of invalidating the decision or affects the validity of the decision.
>
> **Judicial review of final decision**
> **128(2)** Subject to subsection (3), a final decision of an arbitrator or arbitration board may be reviewed by a court of competent jurisdiction solely by reason that
>
> (a) the arbitrator or arbitration board failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise the jurisdiction of the arbitrator or arbitration board; or
>
> (b) the decision was obtained by fraud or was based on perjured evidence.

> **Time limitation**
> **128(3)** An application to a court under clause (2)(a) shall not be made after 30 days have elapsed since the decision of the arbitrator or arbitration board was served on the parties to the arbitration, but an application under clause (2)(b) may be made at any time.

[22] In ***Voice Construction Ltd. v. Construction & General Workers' Union, Local 92***, 2004 SCC 23, [2004] 1 S.C.R. 609, the majority of the court confirmed the importance of identifying the extent to which the Legislature intended decisions of arbitration boards to be judicially reviewed. In that regard, the privative clause in the Alberta **Labour Relations Code**, S.A. 1988, c. L-1.2, can be distinguished from that of Manitoba. Unlike Manitoba, the Alberta **Code** statutorily recognizes the common law right of judicial review. However, the section essentially functions as a time limitation on that right as opposed to expanding it. No additional rights of review or appeal are created. While other differences exist, the most significant distinction is that in Manitoba, arbitration awards are characterized as "final and binding" whereas in Alberta, they are simply referred to as "binding". Arguably, the Manitoba phrase "final and binding" favours the application of a higher level of deference in any judicial review: see also ***Moore North America (a division of Moore Corp.) v. Communications, Energy and Paperworkers Union of Canada – Local 341***, 2005 MBQB 173, [2005] M.J. No. 292 (Q.B.) (QL), and

CAW-Canada, supra. However, despite the language differences, both statutes can fairly be characterized as demonstrating the intention to substantially limit appeals or judicial reviews of arbitration awards. Thus, the difference between "final and binding" and "binding" is, at most, one of degree. In any event, this single factor is not determinative: ***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)***, 2006 SCC 4.

[23] The decisions in ***Pushpanathan, supra***, ***Law Society of New Brunswick, supra***, and ***Dr. Q, supra*** led the Manitoba Court of Appeal in ***Manitoba Nurses' Union, Selkirk Nurses Local 16 v. Selkirk and District General Hospital***, 2003 MBCA 150, (2003), 180 Man. R. (2d) 201, to conclude that the proper standard of review of that labour arbitration award was patent unreasonableness. The Division argues that more recent Supreme Court of Canada decisions have softened that standard.

[24] Have the decisions of the Supreme Court of Canada in ***Voice, supra*** and in ***Alberta Union of Provincial Employees v. Lethbridge Community College***, 2004 SCC 28, [2004] 1 S.C.R. 727, altered the standard of review to be applied to labour arbitration awards in Manitoba?

[25] In ***Voice***, the court applied the standard of reasonableness *simpliciter* to the review of an interpretation of a collective agreement by an arbitrator. The majority of the court said, at pp. 621-22 (paras. 29 and 30):

> The nature of the problem at issue is a question of law — the interpretation of the terms of the collective agreement. ...
>
> Generally speaking, questions of law are subjected to a more searching review than are other questions, and frequently require the standard of correctness. Nevertheless, the interpretation of collective agreements, as noted in para. 27, is at the core of an arbitrator's expertise and this, in turn, points to some deference.
>
> Taking into account all these factors, the arbitrator's decision in this appeal is entitled to a measure of deference, the appropriate standard of which is reasonableness.

[26] Similarly, in ***Lethbridge, supra***, the court applied the standard of reasonableness *simpliciter* to the interpretation of related legislation by the labour arbitration board. In that case, the court said, at paras. 17 and 18:

> The relative expertise of the board also militates in favour of some deference. Arbitrators function as labour relations gatekeepers, and the core of their expertise lies in the interpretation and application of collective agreements in light of the governing labour legislation. In this case, the arbitration board was called upon to interpret the Code, legislation intimately connected with its mandate; see ***Canadian Broadcasting Corp. v. Canada (Labour Relations Board)***, [1995] 1 S.C.R. 157, at para. 48, and ***Toronto (City) Board of Education v. O.S.S.T.F., District 15***, [1997] 1 S.C.R. 487, at para. 39. Moreover, where the provisions at issue have been incorporated into the collective agreement, as in these circumstances, deference to the board is further justified. ...

> The analysis under the third factor of the pragmatic and functional approach must canvass the purpose of the statutory scheme as a whole and of the provisions implicated in the review; ... The jurisdictional aspect of the provision attracts less deference, as administrative bodies are entirely statutory and thus must be correct in assessing the scope of their mandate; ... Its remedial nature, however, militates broadly in favour of greater deference, as expressed by this Court in ***Heustis v. New Brunswick Electric Power Commission***, [1979] 2 S.C.R. 768. On balance, an approach more deferential than exacting is suggested.

[27] Clearly, in ***Voice*** and ***Lethbridge***, despite the absence of a more complete privative clause, the court refused to apply the standard of correctness to an arbitrator's interpretation of the language of a collective agreement or related legislation.

[28] Equally in ***Voice***, the court did not use the standard of patent unreasonableness when applying such interpretations to the facts that underpin the award. Arguably, the refusal to apply the standard of patent unreasonableness in ***Voice*** is a response to LeBel J.'s "cri de coeur" in ***Toronto (City) v. C.U.P.E., Local 79***, 2003 SCC 63, [2003] 3 S.C.R. 77 (repeated in his separate judgment in ***Voice***). Simply put, in a compelling manner, he mourns the absence of a practical distinction between a decision that is described as palpably unreasonable and one that is said to be simply unreasonable.

[29] ***Voice*** and ***Lethbridge*** did not openly terminate the use of two standards of deference. However, ***Voice*** did say, at p. 618 (para. 18),

"By its nature, the application of patent unreasonableness will be rare." In practice, they demonstrated a reluctance to apply the standard of patent unreasonableness to all but the most factual decisions. The choice of reasonableness as the appropriate standard for both the interpretation of legislation and the application of that interpretation to the facts leads logically to the conclusion that they are leaning toward a compression of the three standards. At minimum, these decisions have had a significant impact on the claim to a more or less deferential standard of review in the context of labour arbitrations.

[30] In practice, the compression of the two most deferential standards will rarely, if ever, make any difference to the result. That is because the Supreme Court of Canada continues to define reasonableness in a manner that affords substantial deference to the arbitrator. Iacobucci J.'s definition of reasonableness in ***Law Society of New Brunswick***, at p. 270 (para. 55), continues to prevail:

> ... only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.

And further, at para. 55:

> ... This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.

[31] When this level of deference is accorded to the standard of reasonableness, there appears to be little room for a yet lower standard. From a practical perspective, a decision that is not supported by any line of reasoning or by a rational explanation approaches, if not consumes, the standard of patent unreasonableness.

[32] That seems to be the conclusion that Wittmann J.A. reached when writing for the majority of the Alberta Court of Appeal in ***United Nurses of Alberta, Local 33 v. Capital Health Authority***, 2004 ABCA 401, [2004] A.J. No. 1471 (QL):

> ¶ 26 ... The reasons in ***Voice Construction*** suggest that the standard of patent unreasonableness occupies a small segment at the end of the spectrum of standards as previously described by the Supreme Court of Canada in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748.
>
> . . . . .
>
> ¶ 28 It follows that, despite frequent application of patent unreasonableness as the standard applied to arbitrators' decisions in the past, the analysis in both ***Voice Construction*** and ***Lethbridge Community College*** gave rise to a finding that the correct standard of review was reasonableness.

[33] A similar observation was made by the Saskatchewan Court of Appeal in ***Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454***, 2005 SKCA 30, (2005), 257

Sask. R. 199 (C.A.), leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 173 (QL).

[34] However, that was not the view of the Ontario Court of Appeal in ***Lakeport Beverages v. Teamsters, Local 938*** (2005), 258 D.L.R. (4th) 10, [2005] O.J. No. 3488 (QL). In ***Lakeport, supra***, Laskin J.A. concluded that ***Voice*** and ***Lethbridge*** did not diminish the use of patent unreasonableness as the standard of review for labour arbitration awards in Ontario. He distinguished the decisions in ***Voice*** and ***Lethbridge*** by comparing the respective privative clauses of the **Labour Relations Act** in Ontario (and therefore Manitoba which are similar) and the corresponding legislation in Alberta. He concluded that the privative clause in Alberta is weaker and thus justified a less deferential standard of review.

[35] However, with respect, this distinction is driven as much by a policy preference as by an analysis of ***Voice***. Laskin J.A. says that the standard of patent unreasonableness has served the labour community well for many years. That may be, but the general comments in ***Voice*** were not expressly limited to Alberta. Moreover, with respect, the distinction, based simply on the respective legislated privative clauses, is fine. In an exercise designed to determine legislative intent, one

would ordinarily conclude that when the Legislature says that a decision is final, it intends the decision to be binding.

[36] How does a trial judge reconcile these different approaches? From a practical perspective, the appropriate standard of review in Manitoba continues to be that of patent unreasonableness where the award is driven by findings of credibility or resolves an issue that is primarily factual. In this manner, the decision in ***Manitoba Nurses' Union, Selkirk Nurses Local 16, supra***, may be distinguishable from the case at bar. There, the court observed that the case was "at best one of mixed fact and law" [my underlining]. By so saying, the court emphasized that the decision was primarily factual. However, that decision was also delivered before the Supreme Court of Canada released ***Voice*** and ***Lethbridge***.

[37] Some elements of an arbitration award will attract different standards of review from others. Correctness is probably the appropriate standard when reviewing the statute that confers jurisdiction on the board: ***ATCO, supra***. Patent unreasonableness may then be applied to its purely factual findings. Clearly, the nature of the question to be determined is an important factor.

[38] In the present case, the primary issue is the interpretation of a statutory provision that has been imported into the collective

agreement. My analysis leads me to conclude that the logical contest in standards is between correctness and reasonableness *simpliciter*. In this contest, the path is dictated by the recent decisions of the Supreme Court of Canada in ***Voice*** and ***Lethbridge***.

[39] ***Voice***, ***Lethbridge*** and ***ATCO*** lead logically to the conclusion that the standard of correctness should not be applied to judicial reviews of labour arbitration awards that involve the interpretation of collective agreements or related legislation. It should be applied when the board is interpreting legislation that defines their jurisdiction. Moreover, the standard of patent unreasonableness should rarely, if ever, be used when reviewing an award that flows from the application of the board's interpretation of the collective agreement or related legislation to facts that are not challenged or not challenged successfully during the review. The most deferential standard may still be applicable when factual findings of the arbitrator are being challenged directly.

[40] In any event, the award that I am asked to review is not primarily factual. No credibility findings were made. No fact-findings were challenged. The arbitration board was presented with an agreed book of documents. The documents were not themselves contested. The arbitration board was required to interpret the collective

agreement and the relevant section of **The Employment Standards Code** that was incorporated into the collective agreement. It then applied its interpretation to what were essentially agreed facts. However, it did so in the context of the specialized legislation and the organized labour relationship that exists between the parties. That environment, the privative clause, and the nature of the problem attract deference.

[41] Consequently, after reviewing all of the contextual factors and analyzing the previous decisions, I am satisfied that the standard of review to be applied to all aspects of this review is that of reasonableness.

Issue No. 2: Does the decision of the majority survive the application of the appropriate standard of review?

[42] Is the award reasonable? For an award to be reasonable, it must be supported by a line of analysis that could reasonably lead the arbitration board to its conclusion. It is not necessary for the reviewing court to find that the conclusion is compelling or correct. The decision will survive review so long as it is the product of one rational line of analysis.

[43] I begin by acknowledging that the argument advanced by the Division is clear and rational.

[44] The Division argues that an arbitration board is obliged to interpret and implement the agreement between the parties. In order to do that, it must attempt to identify the intention of the parties. To do that, it must read the collective agreement as a whole. When the language of the collective agreement is clear, an arbitrator is not entitled to substitute a term or alter a term in order to achieve a result that the arbitrator believes to be more just. In particular, the acquisition or distribution of benefits should be left to negotiations between the parties.

[45] Was the teacher eligible for maternity leave and for a top-up to her maternity leave benefits? The Division says that the teacher simply did not meet the eligibility criterion that was agreed upon. Not all persons are eligible for benefits. The language of **The Employment Standards Code** is clear and unambiguous. Seven consecutive months of employment are required in order to qualify for maternity leave and the top-up benefits provided to employees pursuant to article 4:04 of the collective agreement.

[46] Simply put, the Division says that the teacher did not work during the months of July and August. Her contract of employment is clear. It says on its face that it is a temporary contract that terminates at the latest by June 30, 2003. Her next contract is equally

clear. It says that it does not commence until September 2, 2003. The teacher requested maternity leave commencing September 15, 2003. In these fact circumstances, the Division says that the teacher cannot be found to have worked for seven consecutive months. It is a matter of simple arithmetic.

[47] As to the allegation of unfairness or absurdity, the Division responds by saying that there is a distinction between term employees and indefinite employees. It is not unreasonable to deny or restrict benefits for term employees. Form 2A contracts are distinct from the Form 2 contracts under which indefinite teachers operate. That distinction must be recognized. Moreover, eligibility requirements by definition exclude people from benefits in an arbitrary fashion. In any event, it would be wrong to assume that the Division intended to convey the full range of maternity benefits to term teachers simply because they have been hired for successive terms. If that were the intention of the parties, it would have been stated in clear language. The Division summarized its argument by saying that an arbitration board does not have the jurisdiction to infer an intention to confer benefits that is inconsistent with the plain language of the Form 2A contract.

[48] I am satisfied that this conventional analysis is reasonable. Indeed, if I were not bound to give deference to the majority, I might even have found it to be compelling. However, that finding does not end the review. My duty is to give genuine deference to the award of the majority. The decision must stand if there is another rational line of reasoning that supports the arbitration award.

[49] Clearly, the majority adopted an expansive definition of the phrase "at least seven consecutive months [of employment]". The question is, was there a rational basis for doing so?

[50] I begin by observing that the majority acknowledged that the teacher had not worked during July and August 2003. However, they distinguished the fact that she was not actually working from the status of continuous employment. Continuous employment was considered sufficient to satisfy the eligibility requirement of seven consecutive months.

[51] The majority began their analysis by finding that by importing s. 53 of **The Employment Standards Code** into the collective agreement, the parties are deemed to have concurrently imported a large and liberal interpretation of that legislation. **The Employment Standards Code** can be fairly characterized as benefits-conferring minimum standards labour legislation. In ***Rizzo & Rizzo Shoes Ltd.***

(Re), [1998] 1 S.C.R. 27 at para. 36, [1998] S.C.J. No. 2 (QL), the Supreme Court of Canada stated:

> Finally, with regard to the scheme of the legislation, since the ***ESA*** is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant ....

[52] In ***Rizzo, supra***, the court refused to interpret language literally because it produced a result that was inconsistent with the benefit-conferring goals and objects of the legislation. In so doing, it reversed the Ontario Court of Appeal who had relied on the literal interpretation of the statute. The Supreme Court of Canada recognized that a literal reading of the plain words of the statute did not fit comfortably into the interpretation of the trial judge, but it preferred his purposive approach.

[53] In ***Rizzo***, the court supported its analysis by citing s. 10 of the **Interpretation Act**, R.S.O. 1980, c. 219 (now R.S.O. 1990, c. I.11), which provides:

> **10.** Every Act shall be deemed to be remedial, ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Section 6 of **The Interpretation Act**, C.C.S.M. c. I80, of Manitoba contains a similar provision.

[54] The court also cited ***Machtinger v. HOJ Industries Ltd.***, [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 (QL), with approval. At p. 1003 of that decision, the court said, "... [A]n interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not."

[55] The purposive approach to literal language was applied in the ***Lethbridge*** decision. Once again, the court confirmed the right of an arbitration board to adopt an expanded definition of its jurisdiction that did not appear to conform to the literal wording of the statute. The award was justified by an active application of the purposive approach to remedial legislation.

[56] In ***R. v. McIntosh***, [1995] 1 S.C.R. 686, [1995] S.C.J. No. 16 (QL), the Supreme Court of Canada once said that the use of clear and unequivocal legislative language must be enforced however harsh or absurd or contrary to common sense the result may be. However, since that decision, the Supreme Court of Canada has confirmed that a more liberal approach to language is justified by fulfilling the goals of remedial legislation.

[57] Recently, in ***ATCO***, the majority of the court said:

> 48 This Court has stated on numerous occasions that the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The Court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading....

It is in this context that the interpretation of the collective agreement by the majority must be reviewed.

[58] Thus, the focus of my inquiry must be as to whether or not the language imported from s. 53 of **The Employment Standards Code** can sustain a definition that expands the notion of consecutive employment.

[59] There is no doubt that the teacher was not actually working in July and August. However, schools in Manitoba do not normally operate during July and August. Moreover, teachers with an indefinite Form 2 contract do not work in July and August. Yet, no one doubts that Form 2 contract teachers remain consecutively employed. Consequently, the majority reasoned that where the teacher had a contract of employment in place both before and after the summer months over a period of several years in a manner that was similar to indefinite teachers, the teacher was employed in a continuous manner. In essence, the majority found on these facts that this particular teacher was no longer genuinely a term employee.

[60] The courts have refused to permit the literal wording of an employment contract to define the employment relationship in other contexts. For example, from a tax or workers compensation perspective, the mere contractual description of the relationship as that of independent contractor is not conclusive: ***Poulin v. Canada (Minister of National Revenue – M.N.R.)***, 2003 FCA 50, [2003] F.C.J. No. 141 (C.A.) (QL), and ***Wiebe Door Services Ltd. v. M.N.R.***, [1986] 3 F.C. 553 (C.A.).

[61] Some support for this finding can also be found in the decision of the Federal Court of Appeal in ***Oliver v. Canada (Attorney General)***, 2003 FCA 98, [2003] F.C.J. No. 316 (QL). ***Oliver, supra*** supports the notion that continuous employment may exist even where teachers have term contracts that appear to create an interruption of employment. Although the earlier decision in ***Ying v. Canada (Attorney General)***, [1998] F.C.J. No. 1615 (C.A.) (QL), a Manitoba-based decision, comes to a contrary conclusion, the court in ***Oliver*** distinguished ***Ying, supra*** as being against the weight of authority.

[62] Both ***Oliver*** and ***Ying*** involve applications for employment insurance by teachers who are employed by virtue of term contracts. Clearly, the purpose of the employment insurance legislation is

different from the legislation I am reviewing. Nevertheless, in ***Oliver***, after observing that the intention of Parliament is to pay employment insurance benefits to those individuals who, through no fault of their own, are truly unemployed and who are seriously engaged in an earnest effort to find work, the court ignored the literal effect of the term contracts.

[63] Létourneau J.A., in ***Oliver***, concluded that the umpire was right to conclude that:

> ¶ 23 ... [A]ll those who had their contracts renewed before their probationary contracts expired were not unemployed. There was continuity of employment. As for those whose contracts were renewed shortly thereafter, the Umpire properly applied the reasoning in ***Partridge*** [***Canada (Attorney General) v. Partridge*** (1999), 245 N.R. 163 (F.C.A.)]: there was no real gap in employment because the claimants, who were completing a school year, were hired for a new school year which obviously overlaps with or immediately follows the previous one.

[64] Rothstein J.A. concurred. He, too, was influenced by the fact that in substance the teaching year covers 10 months. He stated:

> ¶ 30 The jurisprudence of this Court has consistently held that, in cases where teachers' contracts terminate at the end of June and they are rehired for the following school year, they are not entitled to employment insurance for the months of July and August.

He cited a line of authorities from the Federal Court that support this proposition.

[65] Rothstein J.A. concluded by saying:

> ¶ 31 In the present case, the applicants are paid exactly the same amount as equivalent permanent teachers. Yet they also claim to be entitled to employment insurance benefits for the months of July and August. They were all rehired before or shortly after the end of June for the subsequent school year. The dominant jurisprudence of this Court would deny their claims to employment insurance benefits.

[66] Clearly, the focus of the court in ***Oliver*** was to determine the substance of the employment relationship between the parties. The timing of their paycheque or their eligibility for benefits during the summer months was not viewed as a significant factor. The court ignored the formal termination of the term contracts. It looked beyond the literal words of the contract to the substance of the relationship in order to determine whether the employment was continuous or not. Significantly, the court focused on a factual finding that the teacher had a commitment to a successive job. In that regard, the facts before this arbitration board were similar.

[67] The majority finding of consecutive employment is also supported by the assumption that a public employer would not ordinarily intend to provide unequal access to benefits for employees within the same class. The majority was particularly troubled by the interpretation of the language urged by the Division. That interpretation would lead to benefits that depended upon the arbitrary

date of conception or "due date" of the teacher. The majority reasoned that the parties could not have intended that consecutive term teachers with a similar service record would qualify for benefits if they gave birth in May but not if they did so in January. Thus, by making a factual finding that led to an expanded definition of "continuous employment", they interpreted the eligibility requirement in a manner that is more balanced and equitable.

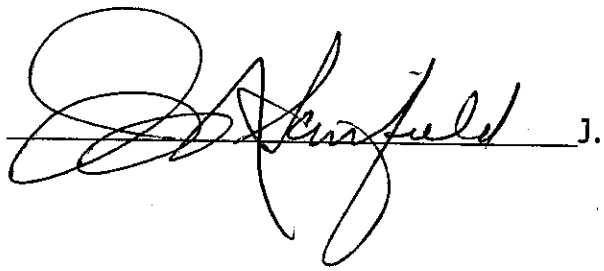
[68] The arbitration award was based on a liberal and purposive interpretation of the status of consecutive employment. The award is consistent with the approach the courts have taken to the application of minimum standards legislation. Although they ignore the literal effect of the language in the term contract, the majority remained focused on the substantive nature of the employment relationship. There is some precedent for this approach. Ultimately, their liberal and purposive interpretation of the agreement between the parties is consistent with the usual goal of providing equal benefits to the same class of employees.

CONCLUSION

[69] Despite the conventional attraction of the argument advanced by the Division and the dissenting arbitrator, I am not prepared to conclude that there is no line of analysis that could reasonably have

led the majority to the decision that they made. Genuine deference means that it is not necessary for me to find that their rationale is compelling before I can conclude that a tenable explanation has been offered for the decision.

[70] Taken as a whole, this award satisfies the deferential standard of reasonableness. I, therefore, decline to set it aside.



J.