Date: 20200615
Docket: CI 18-01-18093
(Winnipeg Centre)
Indexed as: The Portage la Prairie Teachers' Association v.
The Portage la Prairie School Division
Cited as: 2020 MBQB 93

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

THE PORTAGE LA PRAIRIE TEACHERS' ASSOCATION	) Counsel:
applicant,	) GARTH SMORANG, Q.C.) KRISTEN WORBANSKI) for the applicant
- and -	)
THE PORTAGE LA PRAIRIE SCHOOL DIVISION	) DAVID SIMPSON) CELIA FERGUSSON) for the respondent
respondent.	)
	) JUDGMENT DELIVERED:) June 15, 2020

GRAMMOND J.

INTRODUCTION

[1] The applicant seeks an order quashing the award (the "Award") of an arbitration panel (the "Panel"), determining that a directive (the "Directive") imposed by the respondent (the "Division") upon its teacher employees is fair, and therefore reasonable.

BACKGROUND INFORMATION

[2] The Directive requires teachers to remain in school, and available, until 4:00 p.m. each day, regardless of whether they have assigned duties after the instructional day, which ends at or after 3:20 p.m. Assigned duties may include bus or hallway supervision, assigned on a rotational basis. When a teacher has no assigned duties after the instructional day, the Division has suggested various uses of their time until 4:00 p.m., including attending meetings, preparing for the next day, or engaging in professional development.

[3] The Panel concluded that the Directive was fair and reasonable because:

(a) it has been in place for 40 years without objection until the events that led to this case;

(b) it was commonly understood prior to the grievance that teachers would abide by the Directive;

(c) it can be inferred from the long history of the Directive that there is "likely an expectation" within the community that teachers will be available to care for students who may remain at school after hours, or to meet with parents who may arrive before 4:00 p.m.;

(d) it can be inferred that Portage la Prairie and the Division are unique, because of the rural location of the Division, the characteristics of its student population, the importance of the availability of teachers after hours, the flexibility that the Division requires, and the community's expectations;

(e) it is important in the Division's unique circumstances that all teachers be present every day until 4:00 p.m.;

(f) the Directive applies to all teachers equally;

(g) the Directive is not enforced "tyrannically", in that exemptions can be requested and are generally granted;

(h) the Directive is not an unduly onerous or unfair additional burden on teachers' workloads from a quantitative perspective, particularly given that they may use the time flexibly; and

(i) the workday of teachers is not defined by the instructional day.

STANDARD OF REVIEW

[4] After the presentation of oral argument in this court, both parties provided written submissions with respect to the decision in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65. The Manitoba Court of Appeal has stated that the court in ***Vavilov*** "... reinforced that reasonableness is the presumptive standard to be applied by a court reviewing the merits of an administrative law decision".[1] The parties agree, as do I, that there is no reason to derogate from that presumption in this case.

[5] I note the following additional principles set out in ***Vavilov***:

a) a reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to

[1] Manitoba (Hydro-Electric Board) v. Manitoba (Public Utilities Board) et al, 2020 MBCA 60 at para. 24

safeguard the legality, rationality and fairness of the administrative process. It remains, however, a robust form of review;

b) the reviewing court must consider an award in light of its underlying rationale. The focus is on the award and the justification for it, not on the conclusion that the court would have reached;

c) once the decision maker's reasoning is understood, the court can assess whether the decision as a whole is reasonable and based upon an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker. If it is, the reviewing court must defer to the decision;

d) to determine whether the decision is reasonable, the reviewing court must ask whether it bears the hallmarks of reasonableness: justification, transparency and intelligibility;

e) the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning;

f) a decision must be justified in relation to the constellation of law and facts that are relevant to the decision, including the common law, evidence, facts, past practices, and potential impact of the decision;

g) a reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker" (at para. 125); and

h) the burden is on the party challenging the Award, in this case the applicant, to show that it is unreasonable.

RELEVANT LEGAL PRINCIPLES

[6] The parties acknowledged that neither the collective agreement nor legislation governs the validity of the Directive.

[7] In ***Winnipeg Teachers' Association v. Winnipeg School Division No. 1***, [1976] 2 S.C.R. 695, 1975 CanLII 181 (SCC), the court considered noon-hour supervision of students by teachers. The court stated at pp. 704-705:

> I am satisfied that there is nothing in the collective agreement, nor in any of the documents or legislation ... that expressly puts upon the teachers a duty of noon-hour supervision. That, however, is not the end of the matter ... if services were voluntarily performed, they cannot on that ground alone become terms of a teacher's contract of employment by implication of fact. ...
>
> It is, however, a different matter if services, originally voluntary, become, by course of conduct and of renewal of relationships over a period of time, recognized as part of the obligation of service upon which the relationship has developed. ...
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> ... Contract relations of the kind in existence here must surely be governed by standard of reasonableness in assessing the degree to which an employer ... may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed.

[8] The Panel found, and the parties agree, that the Directive relates to the enterprise of education, and was in furtherance of the principal duties of a teacher. The only issue that I must consider, therefore, is whether the Panel's determination that the Directive is fair to teachers is reasonable.

[9] ***Winnipeg*** was followed in ***Snow Lake School District 2309 v. M.T.S., Snow Lake Local Assn. 45-4*** (1987), 46 Man. R. (2d) 207, 1987 CarswellMan 196 (MBCA), where noon-hour supervision of students was again at issue. The court stated:

> 14 ... In determining what is reasonable in the circumstances, no doubt an arbitration board may take into account matters such as the history of teaching in this province, the practices that have grown up not only in this school but elsewhere in the province, ... and so on.
>
> ...
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> 20 One test of whether an arrangement is reasonable or not is to see if the parties have agreed upon it, for what is agreed will usually be accepted as reasonable. However, if agreement is not possible, then the school division has the right to impose by assignment the duty of supervision during the noon intermission provided that it does so in a reasonable way.

[10] In ***School Division No. 9 and River East Teachers' Assn. No. 9, Re***, 1996 CarswellMan 726, [1996] M.G.A.D. No. 101, the panel stated:

> 29 We conclude, therefore, that teachers do have, if not expressed, then implied contractual duties to perform work assigned to them outside of the School Day. However, any such assignments must be fair and reasonable, and relate to the enterprise or function of education. In determining what assignments qualify in the circumstances, as O'Sullivan, J.A., stated in *Snow Lake*, such matters as the history of teaching in this province and the practices that have grown up, not only in the schools in these three Divisions, but also elsewhere in the province, should be considered.
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> ...
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> 52 Absent specific obligations and duties expressly provided by contract or statute, we are only prepared to hold that there are implied obligations on teachers to participate in some activities beyond the normal School Day, but always in the context of reasonableness and fairness, and in relation to the enterprise or function of education.

<u>Submissions of the Applicant</u>

[11] The applicant argued that the Panel erred by:

a) considering the long history of employees abiding by the Directive, without having agreed to it, as evidence of fairness;

b) in the alternative, placing undue weight upon the history of the Directive, such that it was the determining factor in the Award, without due regard to other factors that supported overturning the Directive;

c) considering community expectations as a factor in determining the fairness of the Directive and concluding, without evidence, that the community expects teachers in the Division to be available until 4:00 p.m.;

d) concluding, without evidence, that the circumstances of the Division are unique within Manitoba;

e) attaching no weight to the evidence that there is no similar directive anywhere else in Manitoba, as a factor in determining the fairness of the Directive; and

f) concluding that the Directive, a blanket mandate applicable to all teachers, grades and schools within the Division, was not arbitrary, and was fair and reasonable.

[12] More specifically, the applicant argued that "the Award hinges on the logical fallacy of appeal to tradition or history". In particular, the Panel found the Directive to be fair because it was long-standing, which was not a reasoned justification for the Directive. The applicant also contended that the Panel's reasoning was circular, because the question to be determined was whether the long-standing Directive was reasonable, and the Panel inferred reasonableness from the fact that the Directive was long-standing.

[13] The applicant argued that other factors could have supported the reasonableness of the Directive, such as an agreement to its terms, or the Directive being "taken up" by the teachers, but there were no such findings. Similarly, there was no evidence that the Directive was implemented to address a particular problem, or that teaching duties were performed after the instructional day, before 4:00 p.m.

[14] The applicant also submitted that the Decision is not justified in light of the applicable legal and factual constraints, because the Panel departed from established authorities, which it failed to justify. The Panel relied upon ***Snow Lake*** out of context, because the Directive was not a practice that "grew up" as referenced in that decision. Rather, the Division imposed the Directive unilaterally. None of the authorities involved a history of compliance with a unilaterally imposed directive. In addition, at law, an otherwise unreasonable directive does not become reasonable because it was not challenged over time.

[15] In conclusion, the applicant argued that these flaws, individually and cumulatively, are not superficial or peripheral to the Award, and that the Panel failed to justify its conclusion based upon a reasonable chain of analysis. Accordingly, the Award does not exhibit the requisite degree of justification, and it is unreasonable.

Submissions of the Division

[16] The Division argued that the Panel did not uphold the Directive only because of its history. Rather, there were other factors that it considered, and that supported the Award. The Panel considered whether the Directive was reasonable, not whether a long-standing practice was reasonable.

[17] The Division contended that the Panel did not depart from either established authority or its own past decisions, because there was no directly applicable jurisprudence from which to depart. The Panel considered the existing authorities, including ***Snow Lake***, which do not prohibit history as a factor to consider in determining reasonableness.

[18] In addition, the Division submitted that the Panel heard evidence regarding its circumstances, and community expectations. That evidence was unchallenged, and the Panel was entitled to rely upon it. The applicant has now attempted to re-argue the evidence, which should not be done on a judicial review application.

[19] In conclusion, the Division argued that the Award is based upon an internally coherent and rational chain of analysis, and is justified in relation to the relevant facts and law, so the applicant has failed to meet its onus.

ANALYSIS

[20] I will comment first upon the Panel's consideration of the history of the Directive. There is no exhaustive list of factors to consider when assessing what is fair and reasonable in a given case. Different factors may be considered depending upon the context, the facts, and the issues to be decided.

[21] The Panel stated (at pp. 53 and 64 of the Award), citing ***Snow Lake***, that:

> In Manitoba, a practice's history has not been treated as a sufficient basis to impose the practice as an implied contractual term. The history of a practice may, however, be considered as a factor in the determination of the practice's reasonableness.
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> ...

> ... the 4 PM Directive has been in place for 40 years without objection (until the events that led to this Grievance). The long history of the practice within this Division without objection can be considered evidence of its fairness to the teachers. We have done so.

[22] In other words, the Panel stated that while history is one factor to consider in assessing reasonableness, it is not the only factor.

[23] I will comment also upon the Panel's interpretation of ***Snow Lake***. The court in ***Snow Lake*** stated at para. 14, that "... the history of teaching in this province, the practices that have grown up not only in this school" [emphasis added] can be considered on a fairness assessment. In other words, the court in ***Snow Lake*** contemplated a review of both the practices in the school at issue and in Manitoba generally. This approach is logical, because both factors might assist in the determination of whether a certain practice is fair. Moreover, consideration of the history in a specific school or division is simply a narrower form of a review of the province as a whole. Frankly, it would be illogical to consider the wider provincial history, but exclude the past conduct of the litigants.

[24] The court in ***Snow Lake*** also said that one test of whether an arrangement is reasonable is to see if the parties have agreed upon it, and that where there is no agreement, a school division can impose a practice upon teachers, if it is done in a reasonable way. Here, as the Panel acknowledged, the Directive was not expressly agreed upon. It did not make sense for the Panel to consider whether the Division imposed the Directive in a reasonable way, because it has been in place for several decades. The issue is and has always been whether the Directive is fair today, not whether it was fair when it was implemented many years ago.

[25] Having found no agreement, the Panel considered the parties' conduct, and found that "... it was commonly understood until the events that led to this grievance being filed that the teachers would abide by [the Directive]". The parties' conduct was relevant, even in the absence of an agreement between them, and the Panel was right to consider the Directive in context, not in a vacuum. For these reasons I reject the applicant's argument that the Panel's reasoning was circular.

[26] While I do not accept that the Panel misinterpreted or misapplied ***Snow Lake***, I agree that while ***Winnipeg***, ***Snow Lake***, and ***School Division No. 9*** are instructive, none is precisely on point with this case. That is so because in each of those cases, there was an issue as to whether teachers performed certain tasks voluntarily. Here, the Directive was mandatory. In addition, each of those cases involved some form of rotation system, as opposed to a blanket directive that applied to all teachers, every day.

[27] I agree with the applicant that teachers were required to comply with the Directive, and should not be punished for having done so. Speaking generally, however, when an employer imposes a directive upon employees with which they do not agree, two factual questions may arise. One question is whether the employees will comply with the directive, and the other is whether they will take formal steps to challenge the directive. In this case, it is not a matter of penalizing teachers for their compliance with the Directive, but of considering their behaviour over the years as a factor in assessing fairness, and in particular the lack of a challenge to the Directive

until recently. In other words, if the Directive was unfair, a grievance would have been advanced much sooner.

[28] I note also that considering the long-standing nature of the Directive as a factor in assessing fairness is distinct from a finding that teachers agreed to the Directive through their conduct over the years, and the Panel drew no such conclusion. In addition, and as the Panel noted, the applicant can raise the Directive in collective bargaining, and proceed to an interest arbitration if necessary.

[29] I am mindful of the applicant's submission that it was unaware that it could challenge the Directive until 2016. Apparently, at that time the Division reasserted the Directive's terms and confirmed the obligation of teachers to follow it. I do not understand fully why the applicant was ever unaware of its right to challenge the Directive, but that is irrelevant because the applicant did not rely upon those facts in support of this application.

[30] I will now consider the weight placed by the Panel upon the history of the Directive. The Panel stressed that the Award was based, in large part, upon this factor. At p. 71 of the Award, the Panel stated:

> ... The 40 years of practice described above was ultimately the determining factor in concluding that the 4PM Directive is reasonable. In the absence of that lengthy practice, the Board would likely <u>not</u> have concluded that the 4PM Directive was 'seen to be fair to the employee' and would have upheld the Grievance.
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> [emphasis in original]

[31] Although the Panel attached significant weight to history of the Directive, I do not accept, on the face of the Award, that it dismissed the grievance based <u>only</u> upon

history. Rather, I am satisfied that the Panel denied the grievance for all of the reasons listed at paragraph 3 above.

[32] In addition, the weighing of evidence and evaluating of contextual factors were the Panel's tasks. It is not for me to interfere in the Award unless it is necessary to do so, and in my view the Award is justified. Put simply, while the history of the Directive in this case was a weighty factor, the Panel did not attach excessive weight to it in dismissing the grievance.

[33] With respect to community expectations, the Panel stated that: "... it has long been accepted that the teachers must remain at school until 4:00 pm", there is "likely an expectation within the community" that teachers do so, and that "community expectation may exist."

[34] I accept that community expectations are a relevant consideration in determining fairness,[2] and in addition, as stated in ***Manitoba Public Insurance v. Manitoba Government Employees' Union***, 1999 CarswellMan 1179, 55 C.L.A.S. 96 at p. 62[3]:

> It is the job of the tribunal itself to exercise its own judgment as to what a fair-minded and well-informed member of the public or relevant constituency may think about it.

[35] In my view, the Panel's inference on this point was not unreasonable, because it follows from the long-standing history of the Directive that the community probably expected would continue.

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[2] *Ottawa-Carleton District School Board and E.T.F.O., Ottawa-Carleton Teachers', Re*, 2004 CarswellOnt 10359 at para. 50

[3] Citing *British Columbia (Workers' Compensation Board) v. C.E.U.* (1997), 64 L.A.C. (4th) 401 (B.C. Arb.) at p. 414

[36] With respect to the uniqueness of the Directive, the Panel stated that at pp. 65 and 71 of the Award that:

> ... while the [Directive] may be unique to the Division and therefore distinct from the obligations which other teachers in the province may be under, the particular circumstances of Portage la Prairie and the Division are unique. ...
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> ...
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> ... [it] wishes to stress that its finding in this case is restricted to the unique factual matrix that exists in the Division.

[37] In drawing this conclusion, the Panel relied upon evidence that the Division is in a high poverty rural area, with a high volume of students including many transient students. In addition, not all of the teachers are present and available to supervise students at all times.

[38] I do not understand fully why the Panel concluded, on the basis of this evidence, that the Division is unique in Manitoba, but I do not have before me the full record of proceedings before the Panel. I note that while there may be other school divisions in Manitoba with similar characteristics, those divisions were not the focus of the proceeding before the Panel. Accordingly, if the Panel was satisfied that the Division is unique, I am not prepared to interfere with that finding.

[39] The Panel also considered the fact that there is no similar directive in any other Manitoba school division, but it drew no conclusions from that evidence.

[40] I accept that the Division advanced evidence of why the Directive is in place, and that it does not exist elsewhere, which was unchallenged, and accepted by the Panel. No evidence was called, however, as to why the Directive does not exist elsewhere, which a different question than why it exists in the Division. For those reasons, the

Panel should not have drawn any conclusions as to why there is no similar directive in other school divisions in Manitoba, and I will not interfere with its conclusion on this point.

[41] The Panel also concluded that the Directive is not arbitrary. That conclusion is justifiable because the Directive applies to everyone, it is not enforced "tyrannically", and it allows teachers flexibility in using their time before 4:00 p.m. It is apparent that the Panel "struggled" with the blanket nature of the Directive (it would have preferred a rotational system), but it satisfied itself that the Directive was fair and reasonable because of the unique circumstances in the Division. The Panel was entitled to come to this conclusion on the evidence before it.

[42] In conclusion, while the Award is not perfect, it does not contain flaws that are central or significant to its merits. I am also mindful of the long-established principle that significant deference is owed to the decisions of labour arbitration panels relative to matters within their area of expertise.

[43] I have concluded that the Award follows the Panel's analysis. I am satisfied that the Award is reasonable, because it is justified, transparent and intelligible.

[44] I will add that I understand why the applicant challenged the Directive. Speaking generally, requiring teachers to remain at school until a specific time each day may be incongruous with both their professional status and the reality that they often work outside of the instructional day in any event. From a practical perspective, teachers can and should manage their own time appropriately. Having said that, the merits of the Directive were not before me on this application.

CONCLUSION

[45] The Award is upheld, and the application is dismissed.

[46] If the parties cannot agree on costs, counsel can make written submissions.

J.