COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation,* 2013 BCCA 405

Date: 20130920
Docket: CA040450

Between:

British Columbia Public School Employers' Association and Board of Education of School District No. 36 (Surrey)

Appellants

And

British Columbia Teachers' Federation and Surrey Teachers' Association

Respondents

2013 BCCA 405 (CanLII)

Before: The Honourable Mr. Justice Hall
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett

On appeal from: An award of an arbitrator sitting as an arbitration board under the *Labour Relations Code*, R.S.B.C. 1996, c. 244, dated November 9, 2012, (*British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Supplemental Employment Benefits Grievance),* No. A-106/12).

Counsel for the Appellants: D.M. Sartison, Q.C. and J.R. Devins

Counsel for the Respondents: R. Trask

Place and Date of Hearing: Vancouver, British Columbia
June 18, 2013

Place and Date of Judgment: Vancouver, British Columbia
September 20, 2013

Written Reasons by:
The Honourable Mr. Justice Hall

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett

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Summary

The respondent union had filed a grievance alleging unequal treatment of birth mothers. It was argued that birth mothers were treated in an unequal fashion vis-à-vis birth fathers and adoptive parents concerning Supplementary Employment Benefits ("SEB") paid to these categories of persons by the employer during birth and parental leave periods. An arbitrator accepted the validity of the grievance and ordered the parties then engaged in a new round of bargaining to work towards remedying the unequal treatment of birth mothers. On appeal, the appellant employer argued that the Court had jurisdiction on the appeal as the appeal raised an issue of general law. The respondent union argued that the essence of the appeal concerned interpretation of a collective agreement, a matter dealing with labour relations.
Held: Appeal allowed. This case involved a decision about principles of human rights legislation and was a matter of general law. This Court has appellate jurisdiction. The arbitrator erred in his interpretation of human rights principles applicable to this case. There was no unequal treatment of birth mothers concerning SEB. The grievance should stand dismissed.

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This is an appeal from the award of an arbitrator handed down on November 9, 2012.

[2] The appellant, British Columbia Public School Employers' Association ("BCPSEA"), is the accredited bargaining agent for all public school boards, including the appellant Board of Education of School District No. 36 (Surrey) (the "School Board"). I shall refer to these entities as the employer. The respondent, British Columbia Teachers' Federation (the "BCTF"), is the certified bargaining agent representing all teachers employed by public school boards. The respondent, Surrey Teachers' Association ("STA"), is the local of the BCTF in Surrey. I will refer to these respondents collectively as the union.

[3] The *Employment Standards Act*, R.S.B.C. 1996, c. 113, provides for maternity (or pregnancy) leave and parental leave for persons in the teaching profession. The *Employment Insurance Act*, S.C. 1996, c. 23, provides for Employment Insurance ("EI") maternity (or pregnancy) leave benefits and parental leave benefits. Maternity leave benefits (15 weeks) are available to birth mothers.

Parental leave benefits are available to birth mothers, birth fathers, and adoptive parents (parents may divide a total of 35 weeks between them). Employers may 'top up' the remuneration of employees receiving EI benefits related to either type of leave to a maximum of 100% of their earnings via supplemental employment benefits ("SEB"). This case involves a dispute over SEB.

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[4] On February 14, 2011, the union filed a grievance alleging discriminatory treatment by the employer Surrey School Board. It was alleged that the failure of the School Board to separately provide SEB to birth mothers in relation to both EI maternity benefits (15 weeks) and parental leave benefits (35 weeks) was discriminatory conduct contrary to the *Human Rights Code*, R.S.B.C. 1996, c. 210, and s. 15 of the *Charter of Rights and Freedoms*. The matter was referred to arbitration on April 8, 2011 and was adjudicated by Arbitrator J.B. Hall. He upheld the grievance. Since the parties were then engaged in a new round of collective bargaining, he reserved the question of remedy.

[5] As set out in the Agreed Statement of Facts, the provisions of the relevant collective agreement were as follows:

> i. The Board shall enter into and register a Supplemental Employment Benefit Plan under the terms of the *Employment Insurance Act* (1996) and, pursuant to the Plan,
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> ii. The Board shall pay a pregnant employee who takes pregnancy leave pursuant to the pregnancy leave provisions of the *Employment Standards Act* (as amended in 1996) of B.C. (or to a parent who qualifies for Employment Insurance benefits for birth or adoption) 95% of the employee's current salary for the first two (2) weeks of the leave, THEREAFTER,
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> iii. For a further fifteen (15) weeks, the Board shall pay the employee the difference between 70% of the employee's current salary and the amount of E.I. benefits received by the employee.

Pursuant to these provisions, birth mothers, birth fathers and adoptive parents receive 95% of the amount of their salary for a two-week unpaid waiting period for EI benefits and 70% of the difference between EI benefits and their salary for an additional 15 weeks. This constitutes the SEB.

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[6] At an earlier time in the 1988-90 period, the then collective agreement provided SEB only to birth mothers and only for the two-week waiting period. That changed in the 1990-92 agreement when the SEB period was extended for a further 15-week period but at a lower level than the amount in the latest agreement. As of the time of the 1996-1998 agreement, the relevant clauses were the ones set out above and these endured through later agreements. The initial effect of this was to extend SEB to adoptive parents. This was in conformity to a change that had occurred by amendment to the Employment Insurance legislation.

[7] In bargaining, the union had pressed for separate dedicated SEB for both maternal and parental leave but the employer had resisted this. The employer considered that the agreed entitlement to SEB accrued only to birth mothers and adoptive parents under the 1996-98 collective agreement. However, after a birth father applied for SEB and was refused, the union filed a grievance on his behalf and the matter came before Arbitrator D.R. Munroe, Q.C. His decision is indexed as [1999] B.C.C.A.A.A. No. 183.

[8] Arbitrator Munroe considered the language of the agreement and the bargaining history and held that "the School Board's interpretation and application of the collective agreement is the more probable." However, he went on to then consider an alternative position argued by the union on human rights grounds under the *Human Rights Code*. He expressed his conclusion in favour of the union position thus:

> 31 I think the dominant purpose of "family status" being a prohibited ground for discrimination is to avoid discrimination against a person because the person is in a parent-child relationship. So, for example, it would be unlawful to discriminate against a person because the person has children, or because the person is a single parent. I do not think it steps outside that purposive view to say that the "family status" protection in the Code includes protection against discrimination due to one's status as a father in the parent-child relationship arising from childbirth rather than by adoption. That is to say, it is unlawful to discriminate against a person regarding a term or condition of employment according to whether the person is a birth father or an adoptive father.

> 32 Apart from cost, I was not given a reason why an adoptive father should be entitled to the Supplemental Employment Benefit, but not a birth father. At the hearing, the School Board expressed frustration at having accommodated the Union in the 1990-92 collective bargaining by agreeing that adoptive parents as well as birth mothers would be eligible for the benefit, only to now find the earlier accommodation being used as a springboard for an allegation of discrimination against birth fathers. While I understand the School Board's frustration, I can only comment that remedial human rights legislation often results in precisely the kind of non-negotiated benefit eligibility which is here being asserted by the Union on the grievor's behalf.

[9] The effect of this award by Mr. Munroe was to extend entitlement to SEB to birth fathers in addition to birth mothers and adoptive parents. In the first half of 2011, the union, on behalf of the STA, initiated a grievance alleging that the applicable collective agreement and the practice of the employer discriminated against birth mothers by a discriminatory application of the SEB concerning parental leave provisions. This was apparently triggered by a decision of an arbitrator concerning a collective agreement in force in the Victoria district. This question of equality of treatment of birth mothers was the issue in the case that came before Arbitrator Hall.

[10] Arbitrator Hall noted that the crux of the position of the appellants, the employer, was that the relevant article in the agreement contained a singular top-up SEB for birth or adoption available to all three categories of potential recipients and that the benefit could be accessed either at the time of payment of maternity leave benefits or parental leave benefits. Apparently virtually all birth mothers elected to take the SEB at the time of maternity leave. In the Victoria case, there was said to be a dedicated top-up to EI maternity benefits, a type of provision that had not been agreed by the employer in the present case. As I noted earlier, the union had sought this in bargaining but the initiative was successfully resisted by the employer. The learned arbitrator said this at para. 20 of his reasons, indexed as [2012] B.C.C.A.A.A. No. 138:

> In relation to remedy, the Employer submits plan benefits can be extended to birth mothers consistent with the existing Collective Agreement terms. It suggests the outcome sought by the Union would require a "reading

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> in" (namely, benefits will be paid to "… a pregnant employee who takes pregnancy leave … (and/or to a parent who qualifies …"), and would require an arbitrator to write in the separate and dedicated benefit scheme that the Employer rejected during the 1992-1993 negotiations.

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[11] Arbitrator Hall considered the previous decisions of Arbitrator Munroe and the arbitrator in the Victoria case as well as human rights jurisprudence. He expressed his conclusion in favour of upholding the grievance as follows, at para. 34:

> I have no hesitation accepting the Union's submission that the affected teachers in this case are birth mothers, and that "pregnant women have been a disadvantaged group": [*Tomasson v. Attorney General of Canada* (2007), 284 D.L.R. (4th) 440 (Fed. C.A.)], at para. 125. Birth mothers experience differential treatment if they are denied parental leave SEB plan benefits available to other parents in the bargaining unit. Alternatively, they experience differential treatment if they must forego pregnancy leave SEB plan benefits in order to claim on the same basis as other parents. I likewise accept the Union's submission that the scenario presented by the Employer's interpretation of the Collective Agreement creates a disadvantage for birth mothers by perpetuating prejudice or stereotyping. The courts have found that 15 weeks is a reasonable period of time for recovery from pregnancy related health issues: see *Tomasson*, at paras. 117-119 and 123. The three examples in the Agreed Facts here demonstrate the reality that some women may take considerably longer to recover; that is, the period may extend well beyond their pregnancy leave. Until they have recovered, birth mothers will not be in the same position as birth fathers and adoptive parents to care for and bond with their children. I find this amounts to substantive discrimination in the sense set out in [*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497] and in *R. v. Kapp*, [2008] 2 SCR 483, and infringes their human dignity.

[12] However, having found a discriminatory practice, he declined to order an immediate remedy because the parties were then engaged in a new collective bargaining process. He directed that the issue ought to be remitted to the parties for resolution "with an arbitral retention of jurisdiction if they are unable to agree" (para. 65). The union somewhat reluctantly accepts this direction (it would have preferred an immediate remedy).

[13] The employer submits that given the findings of Arbitrator Hall, it is unrealistic to expect that the parties will be able to reach agreement and will inevitably wind up before the arbitrator to have an imposed remedy. This is what was said to have

occurred in the Victoria case. The employer in this case seeks an order from this Court setting aside the finding of discrimination and dismissing the grievance or alternately an alteration in any potential remedy to ensure cost neutrality.

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[14] On this appeal, the parties are divided on a jurisdictional issue. It is submitted by the appellants that an appeal properly lies to this Court under s. 100 of the *Labour Relations Code*, R.S.B.C. 1996, c. 244. The respondents submit that the nature of the issues in this litigation mandate that any appeal ought to be to the Labour Relations Board under s. 99 of the *Labour Relations Code*. These provisions are as follows:

> 99 (1) On application by a party affected by the decision or award of an arbitration board, the board may set aside the award, remit the matters referred to it back to the arbitration board, stay the proceedings before the arbitration board or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground that
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> (a) a party to the arbitration has been or is likely to be denied a fair hearing, or
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> (b) the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Code or another Act dealing with labour relations.
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> (2) An application to the board under subsection (1) must be made in accordance with the regulations.
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> 100 On application by a party affected by a decision or award of an arbitration board, the Court of Appeal may review the decision or award if the basis of the decision or award is a matter or issue of the general law not included in section 99 (1).

[15] This Court has appellate jurisdiction in cases where the basis of an award is a matter or issue of general law. If the matter concerns applications of labour law principles or interpretation of a collective agreement, the proper appellate forum is the Labour Relations Board.

[16] The question of the respective appellate jurisdictions has been the subject of much judicial consideration over the years. A case from nearly 30 years ago, *Kinsmen Retirement Centre Assn. v. Hospital Employees' Union, Local 180* (1985),

63 B.C.L.R. 292 (C.A.), considered the issue and the matter was again passed on by this Court in the cases of *Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58, and *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2013 BCCA 179.

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[17] At the time of the *Kinsmen* decision, the numbering of the respective sections, in what was then the *Labour Code*, R.S.B.C. 1979, c. 212, was different but the language was substantially the same as the present ss. 99 and 100 of the *Labour Relations Code*. In that case, at 297-298, Mr. Justice Lambert said this concerning jurisdiction:

> … the jurisdiction of this court depends on the "basis of the decision or award", and not on bringing every link in the chain of reasoning leading to the decision or award within the description: "a matter or issue of the general law". As was pointed out by Farris C.J.B.C. and Taggart J.A. in the *A.I.M. Steel* case [[1976] B.C.J. No. 6 (C.A.)], the "basis" must mean the "main constituent" and not every constituent. In a similar way, the jurisdiction of the Labour Relations Board depends on whether the arbitration decision or award is inconsistent with the principles of the Code or a labour relations statute. It is the real substance and determinative constituent of the decision or award on which the Labour Relations Board's review jurisdiction rests.

What I take from this passage is that in considering this sort of question the Court should have regard to what is the essence or core of the case.

[18] In the case of *Kemess*, Chief Justice Finch said this concerning the proper approach to the question of jurisdiction:

> [17] Section 100 of the *Labour Relations Code* confers jurisdiction on this Court to review an arbitrator's award if the true basis of the award is a matter of general law not included in s. 99. The judgment in *Health Employers Assn. of B.C. v. B.C. Nurses' Union*, 2005 BCCA 343 summarized the proper approach as follows:
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>> [49] I would summarize what I understand to be the correct analytical approach to the application of ss. 99 and 100, based on a purposive interpretation of those sections, and the jurisprudence which has previously addressed the problem:
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>> 1. Identify the real basis of the award;
>> 2. Determine whether the basis of the award is a matter of general law;

> 3. If the basis of the award is a matter of general law, determine whether it raises a question or questions concerning the principles of labour relations, whether expressed in the *Labour Relations Code* or another statute.
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> [50] If the answer to the third question is affirmative, then review of the award lies within the jurisdiction of the Labour Relations Board. If it is negative, review lies within the jurisdiction of this Court.

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[19] The Chief Justice went on to quote with approval this passage from the judgment of Mr. Justice Mackenzie in *Health Employers' Assn. of British Columbia v. British Columbia Nurses' Union*, 2003 BCCA 608 at para. 153:

> If an issue involving the nature and scope of a duty under the *Human Rights Code* is the real basis or real substance of the award, that is an issue of the general law not included in s. 99(1).

[20] I would note that Arbitrator Hall in his analysis extensively discussed questions of discrimination and equality of treatment as analyzed in decisions such as *Tomasson v. Canada (Attorney General)*, 2007 FCA 265, *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, and *Kemess*. At para. 43 he reached the conclusion that birth mothers are a protected group under the *Human Rights Code*:

> More specifically, I find birth mothers are a protected group under the *Human Rights Code* (see *Brooks v. Canada Safeway Ltd.*, [1989] 1 SCR 1219); they experience adverse treatment under the Employer's application of the Collective Agreement; and the protected ground is a factor in the adverse treatment -- indeed, birth mothers are the only group excluded from parental leave SEB plan benefits given my interpretation of the Collective Agreement.

[21] The grievance advanced here involved an assertion of discrimination. If the grievance was to have any efficacy, it was going to be necessary for the arbitrator to find unequal treatment and thus discrimination concerning the treatment of birth mothers. If there was no unequal treatment found, of necessity the grievance would be dismissed. To paraphrase the comments of Mackenzie J.A. in the quotation *supra* from *Health Employers' Assn.* adverted to in *Kemess*, the real basis of the award of Arbitrator Hall was an issue involving the nature and scope of a duty under

the *Human Rights Code*. That is an issue of general law not included in s. 99(1) of the *Labour Relations Code*. Thus, in my opinion, an appeal lies to this Court.

[22] Since the arbitrator was required to determine whether the collective agreement and its application was in conformity with the provisions of the *Human Rights Code* (and the *Charter*), the applicable standard of review is correctness – *Kemess* at para. 26.

[23] The respondent union submits that Arbitrator Hall was correct in finding that "the exclusion of birth mothers from parental leave SEB plan benefits violates Section 15(1) of the *Charter* and Section 13(1) of the *Human Rights Code*". The appellant employer submits that the finding of discriminatory treatment by the Arbitrator and his conclusion that birth mothers should be entitled to receive additional SEB is supported neither by the language of the collective agreement nor by applicable jurisprudence.

[24] I think it could fairly be said that the underlying purpose of providing for birth or parental leave in legislation and the collective agreement is to further the interests of the child who is newly arrived in a family unit. Obviously anything that fosters the emotional and physical needs of infants and children of tender years tends to a healthier society. It is often observed that the roots of antisocial behaviour by adults can be traced to deficiencies of childhood care. Time afforded to parents for care for newborns and adopted children fosters a vital societal interest. The legislative history and evolution of the terms of the successive collective agreements manifest an appreciation of this vital interest.

[25] The question before the arbitrator was whether the terms of the collective agreement should be found to be discriminatory concerning benefits available to birth mothers. I noted above that Arbitrator Munroe had, some 15 years ago, found the exclusion of birth fathers from access to parental leave SEB was not in accord with human rights principles. Is that sort of reasoning applicable to the situation in the instant case? The employer says no, the union says yes. Citing *Brooks v.*

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Canada Safeway Ltd., [1989] 1 S.C.R. 1219, the respondent union submits that the instant situation is a case of "underinclusion". It says the conclusion of Arbitrator Hall to this effect ought to be sustained.

[26] While the jurisprudence notes distinctions between leave afforded to birth mothers and leave afforded to birth fathers and adoptive parents, it seems to me that the general purpose underlying such provisions is a unitary one, namely the fostering of the health of parents and children to serve an important societal interest. Since in my opinion these respective leaves have a common underlying purpose, I fail to see any significant divergence of interests between persons taking advantage of maternity leave and parental leave SEB provisions. I see the leaves as a holistic approach to the advancement of a healthy environment for the young and their caregivers. Mothers on maternity leave as well as persons who can access parental leave are, under the collective agreement, entitled to 15 weeks of SEB as well as payment for a two-week waiting period before statutory benefits become available.

[27] The arbitrator found some distinction between maternity leave and parental leave. However, in my analysis of this case, I do not see any great materiality in such distinction. Both forms of leave relate to the occasion of an addition of a new member to a family unit. Both types of leave conduce to the societal purpose of the enhancement of family health and stability. It is not obvious to me that there is anything particularly discriminatory occasioned by providing fifteen weeks of SEB to birth mothers, birth fathers and adoptive parents. On the face of it, this seems to me to be equal as opposed to unequal treatment.

[28] In the course of his reasons, Arbitrator Hall referred to the reasoning of Arbitrator Munroe in the case involving birth fathers. In that case, birth fathers were wholly excluded from any ability to access SEB benefits. The discriminatory treatment was there very obvious. At paras. 29-30 of his reasons, Arbitrator Hall appeared to place some reliance on the findings in that case as having relevance to the present case. I consider he erred in placing any reliance on that case as that situation was completely different and distinguishable from the case at bar.

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[29] Here, all three categories of those entitled to leave and statutory leave benefits associated with birth or adoption are entitled under the terms of the collective agreement to receive payment for the two-week exclusionary or waiting period and 15 weeks' SEB as salary top up at a defined level. I fail to see either exclusion (as in the birth father case) or underinclusion as was the situation in a case like *Brooks*. In my respectful opinion, the learned arbitrator erred when he found that birth mothers were subject to unequal treatment. Absent a sustainable finding of unequal treatment, there is no basis for the conclusion of the arbitrator that birth mothers are being treated in a discriminatory way contrary to the *Human Rights Code*.

[30] In light of these conclusions, I consider that the primary relief sought in this appeal by the appellants ought to be granted. I would allow this appeal and order that the arbitration award be set aside and the grievance dismissed. This disposition makes it unnecessary to consider the other issues argued by the parties on the appeal concerning possible remedies.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Bennett"

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