1984 CarswellOnt 823, 3 O.A.C. 312

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F.P.S.A.T. v. Ontario (Provincial Schools Authority)

The Federation of Provincial Schools Authority Teachers Applicant v. The Provincial Schools Authority Respondent

Ontario Divisional Court

Osler, Krever and Sirois JJ.

Subject: Public; Labour and Employment

***Osler J.*:**

1 In Ontario there are a number of institutions of a specialized sort in which teachers are employed, other than those normally thought of as schools. Many of these are operated by the Ministry of Correctional Services, the Ministry of Education, or the Ministry of Health. Pursuant to the *Provincial Schools Negotiations Act*, R.S.O. 1980, c.403, the Federation of Provincial Schools Authority Teachers was formed to enable teachers in schools operated by the Government of Ontario, under those Ministries, to form one bargaining unit, and a collective agreement was entered into with the Provincial Schools Authority, an entity created by that statute.

2 Section 5 of the statute provides that:

> 5. Where the teachers propose to negotiate an agreement, they shall, for such purpose, form one employee organization, which shall represent them for the purposes of this Act.

3 One of the schools staffed by teachers who are members of the Federation, and included in the bargaining unit covered by the collective agreement, is the Maplehurst Educational Centre, operated at Milton, Ontario, by the Ministry of Correctional Services. Some 17 teachers are there employed and they are concerned with the education and training of inmates sentenced to not more than two years less a day with the object of enabling those who wish to do so to qualify for and to earn High School credits.

4 The Centre operates on a twelve-month basis, the reason of course being that the commencement of eligibility of any inmate has more to do with the time of his sentencing and hence his admission than does the practice of regular schools of operating for approximately ten months in the year.

5 The collective agreement covers not only the Maplehurst teachers but also teachers in schools for the deaf,

schools for the blind, emotionally disturbed programs, handicapped and mentally retarded groups, training school programs, and adult programs. The Ministry of Correctional Services operates the training school and adult programs while the others are operated by the Ministry of Education or the Ministry of Health.

6 Teachers in these schools are employed under permanent teachers' certificates and permanent teachers' contracts similar to other public school teachers in the Province of Ontario, and their contracts are in a standard form prescribed under the *Education Act*, R.S.O. 1980, c.129.

7 From the commencement of collective bargaining, teachers at Maplehurst contracted to work a ten or an eleven-month year, and these arrangements were voluntarily arrived at between the teachers at the Centre and the principal.

8 In July of 1981, the Ministry of Correctional Services, as part of a cost-cutting program, decided to eliminate the eleven-month contract and revert to a regular ten-month contract. The school, however, was to continue to operate throughout the year, with the exception of the usual holidays and weekends. The principal was instructed to prepare a schedule allowing 32 days vacation for each teacher, but keeping a certain minimum number of teachers at work throughout the year. All teachers might thus be required to work from time to time during July and August, without the payment of the additional month's salary that those who had previously arranged to work in one or both of those months had received. On December 3, 1981, a grievance was filed by a number of the Maplehurst teachers to the effect that the new schedule issued on that day was not consistent with the regular form of contract and, in due course, the grievance was amended to include an allegation that Article 7.3 of the collective agreement had been violated.

9 Article 7.3 is in the following terms:

> **Assignment Beyond Ten Months**
>
> While the Authority May request a teacher to assume teaching duties beyond the regular ten (10) month teaching year, no teacher shall be required to accept the assignment and such duties will only be performed at the mutual consent of the teacher and the authority.

10 The grievance was denied and in due course it came before an arbitration board for decision.

11 As it was put by the Chairman of the Board, Walter Little, Esq., the issue was simply stated in these terms:

> Can the grievors be required to teach during July and August without their individual consent and that of the Federation?

In due course the Chairman decided that they could, the nominee of the Authority agreed with the Chairman and gave his reasons for doing so, and the nominee of the Federation dissented, giving his reasons.

12 The matter came before us by way of an application for judicial review and an order to quash or set aside the

award on a number of grounds.

13 Mr. Hager, for the teachers' Federation, first submitted that the Board improperly heard much extrinsic evidence when there was no patent ambiguity to justify admission of or reliance on such evidence. When the decision of the Court of Appeal in *Noranda Metal Industries Ltd. Fergus Division v. Local Union 2345, International Brotherhood of Electrical Workers and R.J. Roberts*, 44 O.R. (2d) 529, was drawn to his attention, he abandoned that submission. The majority decision of the Divisional Court in that case was delivered by Sutherland J., reported at (1982), 40 O.R. (2d) 502, and on the relevant point was to the effect that extrinsic evidence could not be looked at in the case of a latent ambiguity for the sake of developing the fact that there was an ambiguity. In so ruling, he relied heavily upon the judgment of Jessup J.A., in *Regina v. Barber et al.* (1968), 2 O.R. 245, but, as Dubin J.A. stated at page 19 of his reasons in *Noranda*,

> I do not read the judgment as holding that extrinsic evidence could not be resorted to if such evidence could be of assistance to an arbitrator in determining the true intent of the partie. ...It is apparent that the present section 44(8)(c) is intended to permit an arbitrator to rely on relevant evidence even where such evidence is not admissible in a court of law.
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> [The reference is to the *Labour Relations Act*.]

14 Dubin J.A., at page 15, relied upon the judgment of Gale C.J.O. in *Leitch Gold Mines Ltd. et al v. Texas Gulf Sulphur Co. (Inc.) et al*, [1969] 1 O.R. 469 at p.524, for the proposition, as stated by Dubin, J.A., that an arbitrator may be "entitled to resort to extrinsic evidence to determine whether there was any latent ambiguity, or in applying it to the facts."

15 Counsel for the applicant before us then submitted that the interpretation given to paragraph 7.3 of the agreement, by the majority, was an unreasonable one which the language could not bear and accordingly it should be struck down. This was the real question before us and the one upon which, in my view, our decision must turn.

16 Counsel before the Board, and before us, submitted that the words "the regular ten (10) month teaching year" could only refer to the compulsory "school year" from September to June, provided by Regulation 546/73 under the *Education Act* of Ontario. That Act, by section 1(1) para. 54 describes "school year" as "the period prescribed as such by, or approved as such under, the Regulations."

17 The relevant Regulation is Reg.273 which provides, in paragraph 2(1) that:

> Subject to section 4, the school year shall commence on the day following Labour Day and end on the 30th day of June but, when the 30th day of June is a Monday or Tuesday, the school year shall end on the preceding Friday.
>
> (2) Subject to section 4 a school year shall include at least 185 instructional days and the remaining school days shall be professional activity days.

18 Section 4 of that Regulation provides that:

> (1) For one or more schools under each jurisdiction, a board may designate a school year and school holidays that are different from those prescribed in section 2 ....

19 The applicant, stressing the word "regular" in Article 7.3 of the agreement, urged strongly that the ten-month teaching year must coincide with the period from Labour Day to June 30 as defined in paragraph 2(1) of the Regulation, and pointed out that, by paragraph 4, the Authority, which is equated with a board, could have designated a school year different from that prescribed, but had not done so.

20 Counsel for the respondent submitted that Article 7.3 was clear and unequivocal and that the "regular ten (10) month teaching year" could only mean, in the situation as it existed at Maplehurst, the ten months of teaching, presumably by any given teacher, within the framework of a twelve-month calendar year.

21 The Chairman of the Board, with whom the Authority's representative agreed in separate reasons, concluded that he had:

> ...no hesitation in concluding that the only reasonable interpretation of 7.3 is that "the regular ten (10) month teaching year" means the ten-month period of approximately 194 days during the welve-month year.

22 In reaching that conclusion, the Chairman relied on the fact that only parts of the *Education Act* are incorporated in or apply to the *Provincial Schools Negotiations Act*, that the "school year" definition was contained in a regulation made under powers given to the Minister by section 10(6), which was not so incorporated, and that to interpret the section as providing that teaching could only be done during July and August on a voluntary basis would be to put it within the power of the teachers to unilaterally close down the teaching program each summer.

23 In our view, the reasoning of the Chairman is flawed in certain respects. Section 4 of the *Provincial Schools Negotiations Act* is important and reads as follows:

> (1) Subject to subsection (2), the Authority (Provincial Schools Authority) is responsible for all matters relating to the employment of teachers, and for such purpose has all the powers and is subject to the duties and liabilities of a board under the *Eduation Act*.
>
> (2) All matters relating to administration in respect of teachers who teach in a school operated by a Ministry referred to in clause 1(f) [which includes a school operated by the Ministry of Correctional Services] are the responsibility of the deputy minister of the Ministry, and each such Ministry that operates a school shall provide the salaries and benefits of the teachers of such school in accordance with the contracts of employment of such teachers
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> [Words within brackets mine.]

24 If the Authority thus has all powers and is subject to the duties and liabilities of a board under the *Education Act*, it has the power, under Regulation 273, section 4(1), to designate a school year different from that prescribed in section 2 (Labour Day to June 30). Not having done so, it is logical to assume that the parties who negotiated this agreement, covering as we have seen all schools operated by all three of the Ministries mentioned, intended, by the use of the word "regular" in referring to the ten-month teaching year in Article 7.3, to refer to the Labour Day to June 30 period commonly followed by schools and defined in paragraph 2(1) of Regulation 273.

25 To say, as the Chairman did, that the phrase means "the ten-month period of approximately 194 days during the twelve-month year" is to ignore completely the word "regular" and is equivalent to saying that "the regular ten (10) month teaching year" means any period of ten months whatsoever which contains 194 teaching days.

26 Had it been intended to provide simply that no teacher should be required to teach for more than 194 days in the course of a year, it would have been an easy matter to say so. By providing instead that the Authority could only request a teacher to assume teaching duties beyond the regular ten-month teaching year the parties must have intended that there should be a regular or standard year, not that there might be as many years as there were teachers.

27 Finally, the argument that the teachers' interpretation would permit them to close down the school is, in our opinion, not given added weight by a review of the history of the parties because the only evidence before the Board, not in any way contradicted, was that summer schedules had invariably and amicably been agreed to in personal arrangements negotiated by the principal and each teacher. There was no evidence whatever that the facilities of the school had not been fully available to inmates who desired them during the summer months.

28 Faced with the decision of a Chairman of ability and vast experience in this field, we have been reluctant to reach the conclusion now arrived at. Nevertheless, in our view, Article 7.3, designed as it was to cover a number and variety of schools, cannot reasonably be interpreted as it has been by the majority of the Board. No exception to the general meaning of that Article was made to cover any peculiar requirements of the Maplehurst School, and we are of the view that the grievance should have been allowed. This application therefore succeeds and the decision will be quashed.

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