File: 166-2-26199

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ROSS ROBERT BOUTILIER

Grievor

and

TREASURY BOARD
(Natural Resources)

Employer

Before: Yvon Tarte, Chairperson

For the Grievor: Yvette Michaud, Professional Institute of the Public Service of Canada

For the Employer: Harvey Newman, Counsel

Heard at Halifax, Nova Scotia,
29 April 1997.

This case involves the interpretation of certain leave provisions of the Physical Sciences Group (all employees) collective agreement entered into between the Treasury Board and the Professional Institute of the Public Service (code 222/91, exhibit G-1). The grievor has asked for leave under paragraph 20.09(b)(iv) or article 20.13 of the collective agreement which read as follows:

> *20.09 Leave With Pay for Family-Related Responsibilities*
>
> *(b) The Employer shall grant leave with pay under the following circumstances:*
>
> *(iv) five (5) days' Marriage leave for the purpose of getting married provided that the employee gives the Employer at least five (5) days' notice.*
>
> *20.13 Leave With or Without Pay for Other Reasons*
>
> *At its discretion, the Employer may grant leave with or without pay for the purposes other than those specified in this Agreement.*

The collective agreement also contains a "no discrimination" clause which reads:

> *31.01 There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practiced with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, official language or membership or activity in the union.*

The marriage leave in this case was sought by Mr. Boutilier to allow him to participate in a same sex union celebration. The parties filed an Agreed Statement of Facts which sets out certain relevant information:

> 1. *Mr. Boutilier has been an employee (Physical Scientist - PC) of the Department of Natural Resources Canada (formerly Energy, Mines and Resources) in Halifax, Nova Scotia for over ten (10) years.*
>
> 2. *In May 1994, the Grievor made a verbal request for marriage leave for July 11 to 15. He subsequently made a written request to the Head of Regional Reconnaissance, J. Verhoef, on July 8, 1994. See Annex A attached.*

3. *J. Verhoef replied to the Grievor on August 4, 1994. See Annex B. attached.*

4. *Mr. Boutilier and Brian Mombourquette had a ceremony on July 9, 1994. The ceremony was presided by Reverend Darlene Young of the Universal Fellowship of Metropolitan Community Churches (UFMCC) - a Christian Church - the parties received a Certificate of Holy Union. (See attached Certificate C).*

5. *No license or certificate of marriage was issued or registered according to the Laws of Nova Scotia, nor were bans read.*

6. *Prior to the ceremony, Ross Boutilier and his partner obtained the following:*

- *living will - medical power of attorney*
- *general power of attorney due to incapacity*
- *will Annexes D & E*

7. *Ross Boutilier was denied leave pursuant to both section 20.09(b)(iv) and section 20.13.*

8. *Ross Boutilier presented a grievance on August 18. See Annex F.*

9. *On October 12, 1994, the Grievor's grievance was denied. See Annex G.*

The annexes referred to in the Agreed Statement of Facts are not reproduced in their entirety at this point although references to some of these documents may be made at different times in this decision.

Mr. Boutilier further testified that he and his partner had done everything possible to establish publicly their partnership. The grievor indicated that he and his partner had done everything that was possible in law to cement their union and ensure that their commitment resembled that of a married couple.

To that end, they invited friends and family to participate in the celebration of their union. During the ceremony, they exchanged vows undertaking to live openly as a couple. Mr. Boutilier and his friend asked to be referred to as partners.

Prior to the commitment ceremony, the grievor and Mr. Mombourquette participated in religious preparations leading to their union. These preparatory interviews were conducted by Reverend Darlene Young of the Universal Fellowship of Metropolitan Community Churches.

Mr. Boutilier recognized that it was impossible for him to obtain a marriage licence in Nova Scotia. In order to ensure the greatest possible legal protection for their union, the grievor and his friend exchanged powers of attorney and made wills as any couple would. These documents, which were intended to affirm their commitment and declare the seriousness of their engagement, were presented to their guests at the ceremony held on July 9, 1994.

The grievor testified that even though his immediate supervisors had been supportive of his request for marriage or special leave, the leave requested had in fact been denied. Mr. Boutilier therefore had no alternative but to take annual leave to enjoy his post-celebration holiday. In cross-examination Mr. Boutilier expressed the view that his union with Mr. Mombourquette was a form of spiritual marriage in the nature of a life-long commitment.

Reverend Darlene Young stated that the only significant difference between a commitment ceremony in her church and a traditional marriage lies in the fact that the ceremony conducted by her church does not include the signing of a marriage licence issued by the province. Reverend Young also indicated that the Universal Fellowship of Metropolitan Community Churches provides counseling on the break up of same sex unions and may, at the request of the participants, provide certificates of dissolution.

Arguments

For the grievor:

Ms. Michaud presented the following written argument (reproduced textually):

> *The issue this Tribunal has to decide is whether Mr. Boutilier is entitled to marriage leave pursuant to Section 20.09 of the collective agreement between the Professional Institute of the Public Service and Treasury Board. Mr. Boutilier's marriage was to a same - sex partner. The employer denied his request for marriage leave saying that what took place between Ross*

Boutilier and his partner was not marriage as contemplated in the collective agreement. The employer denied Mr. Boutilier's request for leave solely because of the interpretation the employer has put on the definition of marriage. The second issue, which flows from the employer's interpretation of the word marriage, is whether that interpretation is contrary to the Canadian Human Rights Act. Does denying marriage leave to Mr. Boutilier in the present circumstances constitute discrimination based on sexual orientation? The definition of marriage suggested by the employer applies only to a heterosexual employee.

This grievance deals with the interpretation and application of the leave entitlement provision of the collective agreement. Section 20.09 must be read and interpreted with other provisions of the agreement and in light of the law of the land. The human rights issue in this case is that the employee benefit in question i.e. marriage leave would be available to a heterosexual employee. This case makes us look at the prohibition on discrimination based on sexual orientation in light of the judicial pronouncements since the Hewens case.

The applicable section of the contract between the Professional Institute of the Public Service and Treasury Board (PC contract) are :

Section 20.09 which states that the employer shall grant leave with pay under the following circumstances:

> *(iv) five (5) day's marriage leave for the purpose of getting married provided that the employee gives the Employer at least five (5) days notice.*

> *(c) The total leave with pay which may be granted under sub - clauses (b)(i), (ii), (iii) and (iv) shall not exceed five (5) days in a fiscal year*

Clause 31.01 of the same PC Agreement states:

> *There shall be no discrimination, interference, restriction, coercion, harassment, intimidation, or any disciplinary action exercised or practised with respect to an employee by reason of age, race, creed, colour, national origin, religious affiliation, sex, official language or membership or activity in the union.*

Article 5 of the same contract, entitled Rights of Employees reads as follows :

> *Nothing in this Agreement shall be construed as an abridgment or restriction of any employee's constitutional rights or of any right expressly conferred in an Act of Parliament of Canada.*

The corrective action requested, namely the interpretation and the application of Article 20, is clearly within the jurisdiction of this tribunal.

1. Facts - Ross Boutilier did everything he possibly could to commit himself to his partner. He planned his wedding, chose a date, spoke to his Minister, invited his family, invited his fellow workers, invited his friends, planned a reception and planned a honeymoon. Legal documents were prepared and have been introduced : Certificate of Holy Union, living will, medical power of attorney, general power of attorney due to incapacity, mutual wills. All documents were presented to the guests as part of the ceremony during the marriage celebration. We are not asking this Tribunal to declare that Ross Boutilier is married pursuant to the laws of the province nor are we asking this Tribunal to declare that the marriage laws of the province of Nova Scotia are discriminatory. We are asking that the Union of Ross Boutilier and Brian Mombourquette be recognized as a marriage for the purpose of the collective agreement. The ceremony was celebrated by a Minister of the Universal Fellowship of Metropolitan Community Churches (UFMCC) - a legally recognized Christian Church - for which the parties received a Certificate of Holy Union which states that the parties "were joined together in the Rite of Holy Union according to the Scriptural practice of the Church of Jesus, the Christ".

Both Mr. Boutilier and his spouse are practising members of the UFMCC. The marriage of Mr. Boutilier is a question of facts on which this Tribunal can adjudicate.

The capacity to marry is a matter within the exclusive legislative authority of the Parliament of Canada but the solemnization and registration of marriage fall under provincial statute - the Solemnization of Marriage Act in Nova Scotia..

Nonetheless, marriage existed in Christian Society long before the State started to regulate it. State control of marriage has only existed since Henry VIII spun off from the Roman Catholic Church in search of a divorce in the early 1530's. Until then marriage was the affair of the Church. Marriage

and baptism were totally the affairs of the Church for most of the history of Western civilization. There are still Canadians who use Baptism certificates as proof of birth. Why can a marriage performed in a legally recognized Canadian Church not be recognized as a marriage for the purpose of a collective agreement? Marriage is a public recognition of a couple's relationship that involves sex, sometimes child rearing and economic cooperation. What makes marriage different from cohabitation? It is the public recognition, we submit. The question is often raised; what is there to prevent Mr. Boutilier from getting married again next week? The answer is, many things. The wills and the power of attorney put important limits on his ability to do so. Mr. Boutilier has the same societal restrictions about remarriage as heterosexual couples have after a marriage ceremony with family, fellow workers, friends and guests present. How often can one invite friends to his marriage? How often can one ask his employer for marriage leave without it being questionned? A marriage or a commitment ceremony with family and friends present is a major undertaking which one does not repeat every week. Marriage involves a lot more than a ceremony, it involves a spiritual economical and emotional commitment. The employer <u>has</u> one way to limit the usage of marriage leave. According to Article 20 marriage leave can be had only once a year. It is common knowledge that heterosexuals marry more than once, yet nothing in the contract prevents them from getting the leave benefit every year.

Obviously there have not been any abuses in employees using marriage leave or else it would be more restricted. It would be unacceptable to suggest that homosexual employees would abuse it more than heterosexual.

Heterosexuals need a divorce prior to re-marriage. Mr. Boutilier cannot get a divorce because he cannot secure a civil marriage but he must bring to an end his legal commitments prior to remarrying. He needs to have all the legal documents which we have seen, cancelled. He could not re-marry without bringing the present marriage to an end. Getting a divorce ends up being not much more than redtape in certain circumstances. The marriage/relationship could have come to an end years before.

How is the present marriage leave clause being used? Employees have to apply for leave five days ahead of time. Upon their return from leave, there is no obligation to present proof of marriage. This is so, because in most cases the employer knows his employee and is satisfied that the leave is being used properly. In the present case, Mr. Verhoef and his supervisor would have approved the

leave. A number of fellow workers attended the marriage ceremony. All who attended and fellow employees who did not, are aware that Ross Boutilier and Brian Mombourquette are married.

Marriage leave is granted to couples who have been in a common - law relationship for years at the time they choose to get married. That is when they choose to make a public commitment.

2. The PC Collective Agreement contains a no-discrimination clause (Clause 31.01) which does not include sexual orientation. Sexual orientation should be read into this clause and into this contract for many reasons. Firstly, it should be read as being included into Clause 31.01 either because of Article 5 of the contract itself or because, the CHRA with its prohibition against discrimination on the basis of sexual orientation, applies. Sexual orientation is a prohibited ground of discrimination under the CHRA. This has been settled in law since the decision of the Ontario Court of Appeal in Haig and Birch v. Canada 1992, 9 O.R. (3d) 495 (C.A.),. (Haig) and the decision of the Supreme Court of Canada in Egan et al v. Canada (1995), 124 D.L.R. 609 (S.C.C.), (Egan).

The Ontario Court of Appeal found in Haig that sexual orientation was an analogous ground of discrimination under s. 15(1) of the Canadian Charter of Rights and Freedom (the Charter), and elected to read in sexual orientation as a prohibited ground and declared that the CHR Act be interpreted, applied and administered as though it contains sexual orientation in s. 3. Parliament has since amended s. 3 of the CHRA to expressly include sexual orientation as a prohibited ground of discrimination.

That the Canadian Human Rights Act and the Charter must be respected while interpreting collective agreements has been reiterated in numerous decisions. In her decision, Lorenzen v. Treasury Board (Environment Canada) - PSSRB 166 - 2 - 23963 and 166 - 2 - 24000 (Galipeau) June 1993, Ms. Galipeau commented on that aspect:

> *The Canadian Human Rights Act is a federal Act. It is binding on the federal tribunals. (...) In addition, it is clearly stated at article 66(1) of the Canadian Human Rights Act that this act is binding on "Her Majesty in the right of Canada" which, as I have just stated, is one of the parties to the collective agreement at issue.*

3. How can we differentiate the Hewens case (File 166-2-22732)? Two years ago, David M. Hewens was denied "marriage leave" in a decision of Deputy Chairman P. Chodos. We submit that since the Hewens decision, there has been a number of decisions which would allow you to come to a different decision, In the Hewens case, the Grievor was asking the Tribunal to consider the ceremony in question a marriage. The tribunal applied the traditional meaning of marriage although there is no definition of marriage in the collective agreement. We are asking this Tribunal to interpret the word marriage according to the CHRA. For marriage to be interpreted according to the CHRA, marriage and marriage leave have to be available to all employees. Marriage leave has to apply to the only marriage possible between the Grievor and his partner, namely, a religious and public ceremony where, in the presence of their family and their friends, Ross Boutilier and his partner proclaimed their love and their commitment to each other. Isn't this what marriage is all about? Isn't this why the marriage leave exists? It would be difficult to find out exactly why the marriage leave was introduced in the collective agreement in the first place but we can speculate that it was to encourage stable relationships and to allow couples time to start a new relationship on the right foot. The marriage leave is the employer's way of celebrating the marriage, the public commitment and to permit a honeymoon. This is exactly what Mr. Boutilier has done: held a public ceremony, entered into a stable relationship.

4. The Lorenzen case Files number 166-2-23963 and 166-2-2400, was a grievance over the denial of family related leave and of bereavement leave as violating the collective agreement. In that case it was argued, as it is in the instant case, that the defining characteristic of the Grievor's inability to receive the leave is his sexual orientation. The effect of the employer's interpretation of the article in question is to deny the benefit to all same-sex couples who have at least one thing in common: sexual orientation. The under inclusion may be a way of permitting discrimination.

5. In the Yarrow case, Dr. Stephen Yarrow presented a grievance concerning the employer's refusal to grant his request for bereavement leave. He was aggrieved by the employer's definition of spouse, and its application of their definition. He claimed that the definition contravened the CHRA and the Charter of Rights and Freedom.

In that case, Mr. Newman for the Employer, objected to the jurisdiction of this Board to hear this case. In particular, he was objecting to the consideration of the Charter of Rights and Freedom. He was alleging that the adjudicator was

without jurisdiction to hear Yarrow's grievance by reason of section 91(1) of the PSSRA and due to the fact that the Canadian Human Rights Act provided redress. Mr. Newman had also asked that the Yarrow case be postponed pending the outcome of the Akerstrom and Moore complaints before the Canadian Human Rights Tribunal. Both the Yarrow case and the Akerstrom and Moore case stand to support the interpretation which we are requesting: that this Tribunal has jurisdiction to hear this case and that it must interpret the collective agreement while respecting the CHRA. In the Determination on the Merits, Deputy Chairperson, Muriel Korngold Wexler, stated that denying Mr. yarrow's request for bereavement leave solely because the definition of common-law spouse was discrimination based on sexual orientation. At page 61, she says: "The distinction between the relationship of the grievor with Mr. Murray and others where the two partners are of the opposite sex, is a personal characteristic, namely, sexual orientation". At page 63, last paragraph, she concludes: the proper function of this Board, and I, as an adjudicator, is to apply the law of the land to the relevant provisions of the Master Agreement. I have to determine whether the definition of common-law spouse is in accordance with the CHRA and the jurisprudence. A review of the above leads to the conclusion that this definition is contrary to the jurisprudence, the CHRA and Article 44 of the Master Agreement. Such a definition must, therefore be applied as though the discriminatory provision is not there and to do so is not a violation of subsection 96(2) of the PSSRA but the application and the recognition of the law of the land".

6. The word marriage has many meanings, from the union of people to the union of metals. There is no reason why the word marriage in the collective agreement has to mean the obtention of a certificate from the state, a civil marriage. Tribunals are constantly asked to extend the meaning of words which have a different traditional meaning, for example, the word spouse has been extended to mean common-law spouse in many contexts only since the 1970's. Being a common-law spouse, although it gives a person most of the benefits of a legal spouse, does not make the person married according to the provincial or civil laws. This also applies to the words family and family-related. Those words (and we suggest the word marriage) can have a legal/common meaning and a different meaning for the purpose of a collective agreement. As a result of the Yarrow case, in c.a., the word common-law spouse now includes same-sex spouse. Where the word common-law spouse is used in a collective agreement it is preceeded with the words "For the purpose of this agreement, common-law means " and is followed by a definition. There is nothing to prevent

the meaning of marriage, for the purpose of this contract to mean, "declaring a spousal union in a public ceremony, whether civil, secular or religious." Marriage would be a question of facts. The Yarrow case was exactly about the proper interpretation to be given to the words common-law spouse in light of the CHRA. In her reason for judgment in the Lorenzen case, Marguerite-Marie Galipeau questioned the meaning of the word spouse, at page 17, and concluded that in the absence of criteria specifying its meaning, the term spouse could bear more than one meaning.

> *"Had the parties intended that the term spouse be restricted to persons of the opposite sex who are legally married, they could have said so. Therefore I conclude that the term spouse is broader and that, although it includes spouses of the opposite sex who are legally married, it can also include other situations. For example, it could include persons of the opposite sex who have become spouses through a religious ceremony but who have not gone through the process of marrying according to the law in the province in which they reside.*

And how, you ask me, will we know if the ceremony has been such as to be recognized as a marriage for the purpose of the contract? This will have to be ascertained by the facts in each situation. It probably would not be sufficient for a couple to say that they have declared themselves married while spending time alone together. Marriage continues to require a public ceremony with witnesses or a religious ceremony with documents/certificate. It is a public commitment ceremony.

How much will this cost the employer? An insignificant amount. The questions of costs was raised in the Moore and Akerstrom case. In that case a Mr. Ambridge testifying for the Treasury Board informed the Tribunal that, although some inquiries had been made of other jurisdiction within Canada to obtain information about cost and take-up rates, no hard data was available. Mr. Ambridge agreed that the cost increases of extending benefits to same - sex spouses would be quite modest in comparison to some of the other increases experienced by the Plans over the years. ... see pages 10 and 14.

Very few gays and lesbians have asked for marriage leave in the last five years. We have noted the Hewens case in 1992. PSAC tells me that they have one outstanding case dealing with same-sex marriage leave.

7. Why are we saying that the denial of marriage leave constitutes discrimination based on sexual orientation? Would not a heterosexual couple who does not get married in a civil ceremony, i.e. not obtain a provincial license, be denied this leave? We suggest that if a heterosexual employee did what Mr. Boutilier did (that is, announced his forthcoming marriage, asked for marriage leave, invited his fellow-workers, his family, married in his Church, obtained all the legal protection which was available to him, etc.), he would have been granted five days leave pursuant to the collective agreement. There is nothing in the contract to indicate that the marriage leave is for people to be married according to the laws of the province. It is an employee benefit to recognize a public commitment.

8. My learned friend will refer to the Ontario Divisional court case of Layland v. Ontario (Minister of Consumer and Commercial Relations) as standing for the principle that it is not discrimination to refuse to grant a marriage licence to a same-sex couple. We submit this case can be distinguished since this is not the remedy which we are seeking. This is a decision of the Trial Division of the Ontario Divisional Court. It is from a totally different jurisdiction. One of the three justices on the case decides that the common law did not prohibit same-sex marriage.

9. We are not asking the Tribunal to amend a collective agreement only to interpret it in the light the CHRA and the recent jurisprudence. It is now crystal clear that the law is, that denial of the extension of employment benefits to gays and lesbians which would otherwise be extended to heterosexuals is discrimination on the prohibited ground of sexual orientation. In the Moore and Akerstrom case, the Canadian Human Rights Tribunal referred to employee benefits as - part of the remuneration package of employees - designed to attract, compensate and keep employees. These are earned benefits that should be available to all.

The Moore and Akerstrom case reiterates the purpose of the CHRA. At page 34, the Tribunal states:

> *The Canadian Human Rights Act sets out in section 2 the purpose Parliament had in mind in passing this quasi-constitutional legislation into law. It identifies the following central principle:*
>
> > *...that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and*

> *obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices...*

At page 35. the Tribunal goes on to say:

> *If we can draw a distinction between traditional family structures and traditional family values, it becomes evident that we are looking at couples who by virtue of their sexual orientation cannot form a traditional family structure in terms of gender composition but nevertheless wish to affirm and uphold traditional family values by forming a loving, nurturing union in which they share all aspects of their lives and assume responsibility for each others well-being.*
>
> *If they are to be afforded the equal opportunity as contemplated in s. 2 of the Act to assume this responsibility, then changes must be made to remove the existing obstacles...*

In paragraph c) of the Moore and Akerstrom case at page 37, the tribunal ordered that the employers cease and desist in the application of any definition of spouse which has the effect of denying the provision of employment benefits to same sex common law spouses. The Employers were also directed to interpret any definition of spouse or any other provisions of the following documents namely the Foreign Services Directives, The Collective Agreements, National Joint Council policies, the Public Service Health Care Plan and Dental Care Plan to be in compliance with the CHRA and Charter so as to include same sex common law couples.

The Tribunal ordered that the definition of spouse be interpreted to comply with the CHRA and the Charter. This could easily be accomplished by interpreting the definition of spouse or common law spouse as found in the documents as if the words "of the opposite sex" were not included in the definition.

The Moore and Akerstorm decision also ordered that, within sixty days of the issuance of the decision, Treasury Board in consultation with and in cooperation with the Commission, prepare:

> *(1) an inventory of all legislation, regulations, directives, etc. which either contain definitions of common-law spouse which discriminate against same-sex common-law couples or in some other way operate, when applied, to continue the discriminatory practice*

> *based upon sexual orientation in the provision of the employment-related benefits and present such inventory in writing to the tribunal within the sixty-day period...*
>
> *(2) a proposal for the elimination of all such discrimination provisions to be presented to the Tribunal within the sixty-day period.*

The proposals which PSAC, PIPSC and PAFSO have prepared in response to their obligation to negotiate a collective agreement free of discrimination include leave for spousal commitment be it secular, civil or religious.

10. It would be noted that the Professional Institute has made considerable efforts over the years in negotiations with the employer and through the grievance process, to seek changes which would have eliminated all discrimination against gays and lesbians. The language proposed in the on-going rounds of negotiations include a marriage leave provision which would grant leave for the purposes of declaring spousal union in a public ceremony, whether civil, secular or religious. The rational for this proposed language is that a neutral approach to the celebration of spousal union becomes necessary given that the existing marriage leave provision is discriminatory (in the sense that gay and lesbian couples cannot secure civil marriage and are thus precluded from enjoying the contractual leave entitlement.

This language is part of the package presented by PIPSC to Treasury Board on April 22, 1997. That package flows from paragraph 6 of the Memorandum of Agreement dated March 19/20 wherein the parties "agree to consult on technical amendments to reflect the Public Service Reform Act, 1993 and any other mutually agreed technical issue".

Prominent among the additional subject matter on which we seek to reach agreement are issues related to the extension of collective agreement benefits to spouses in same sex relationships. We submit that it is only a matter of time before the marriage leave clause will be amended.

11. The employer has had an opportunity to grant leave to Mr. Boutilier who had asked for it under clause 20.13 on analogous grounds. The Employer could have granted this discretionary leave. This would have been acceptable to Mr. Boutilier. In his August 4, 1994 response Mr. Verhoef wrote "we cannot divert to a general clause when an employee does not qualify for leave under an existing clause." We submit that this is exactly the purpose of clause 20.13 - ***to grant leave for purposes other than those specified in the***

> ***collective agreement***. *It provides leeway to the employer to be a considerate employer. The language of clause 20.13 is very clear. If the employer maintains that the purpose of clause 20.09(b)(iv) is to provide leave for heterosexual marriages then the gay marriage of Mr. Boutilier necessarily falls under the purview of 20.13 leave for* ***purposes other than those specified*** *in the collective agreement. These purposes are distinct.*
>
> *In conclusion, we submit that the definition of marriage proposed by the employer has the effect of denying the provision of an employment benefit to homosexual employees contrary to the CHRA. Our request is similar to the request in the Yarrow case which was to interpret the definition of the word spouse so as to apply to same-sex couples. We are asking that the definition of marriage be applied to eliminate its discriminatory effect on gays and lesbians. This is even a simple request: no words have to be deleted.*
>
> *We have little doubt that this leave will be available to employees within one year. As usual we trust that this Tribunal will serve to lead the way by applying all sections of the collective agreement in a manner free of discrimination. Marriage is an important goal for many gays and lesbians for one thing they seek: public acceptance of who they are. It is part of their struggle for equality. Your decision could be one more step in eliminating discrimination against gays and lesbians.*

For the employer:

Mr. Newman stated at the outset of his argument that the employer recognized the grievor had given the employer the requisite five days' notice pursuant to paragraph 20.09(b)(iv) of the collective agreement. The matter was therefore to be dealt with on the merits.

This grievance raises the question whether Mr. Boutilier is entitled to marriage or special leave to attend a ceremony and to take a holiday following that ceremony. In his request for leave (Annex A - Agreed Statement of Facts) the grievor asked for annual leave in the alternative. Since the employer granted annual leave, the grievance should be denied on that basis alone.

On the question of marriage leave, much has been made of recent jurisprudence equating same sex relationships with common-law relationships (see Lorenzen, Board files 166-2-3963 and 166-2-2400 and Yarrow, Board file 166-2-25034).

The issues discussed in these cases should not be confused with the granting of marriage leave to partners of the same sex. The Lorenzen and Yarrow jurisprudence merely seeks to extend to same sex partners benefits which had previously been granted to common law couples.

The situation related to marriage is different. The parties have agreed in their collective agreement (exhibit G-1) that a specific benefit should be available upon marriage. In our society, not everybody can get married. The law imposes limits on who can marry; those limits may relate to age, marital status, degree of relationship and sex.

The grievor seeks a redefinition of the term marriage to provide greater rights for same sex partners who are not able to engage in a lawful marriage. In effect, the grievor is asking that same sex unions be recognized as marriages in this country.

In order to allow this grievance one would have to do violence to the ordinary meaning of the word marriage. The word marriage as it is used in the collective agreement obviously refers to a legal marriage. When the law recognizes same sex unions as marriages, then the benefits of the collective agreement relating to marriages will flow.

The employer is not trying to diminish the seriousness or importance of the grievor's commitment ceremony. The employer is merely questioning the right of an adjudicator to order it to pay for a vacation taken in conjunction with a commitment ceremony.

The Hewens case (Board File 166-2-22732) has decided this very issue and nothing has changed since then to warrant a different decision. It is interesting to note that the "no discrimination" clauses in Hewens and in the PIPSC Master Agreement specifically refer to sexual orientation whereas article 31 of Exhibit G-1 does not.

In Layland v. Ontario (Minister of Consumer and Commercial Relations), 104 D.L.R. (4th) 214, the Divisional Court of Ontario found that refusing to issue a marriage licence to persons of the same sex did not constitute discrimination contrary

to section 15 of the Charter even though it did conclude that sexual orientation was an analogous ground of discrimination under the said section 15.

Basically, the law equates same sex partners with common law spouses who also don't get marriage leave. Homosexuals of opposite sexes may marry and obtain marriage leave. The bottom line is that there has to be a marriage to get marriage leave.

In Egan et al v. Canada (1995), 124 D.L.R. 609, the Supreme Court of Canada determined that refusal to grant certain financial benefits on the basis of sexual orientation was not contrary to the Charter. Based on this jurisprudence, the grievor's claim for marriage leave must be denied.

The next issue in this case centers on the availability of paid special leave once marriage leave has been found not to be appropriate in this case. Clause 20.13 of the collective agreement is fully discretionary.

In any event, the grievor sought special leave to get married. Since Mr. Boutilier is not entitled to marriage leave, he cannot obtain the same benefit indirectly under a special leave clause. The Nandy (Board File 166-2-15442), Black (Board File 166-2-17248 and 17249) and Kwamsoos (Board File 166-2-13612 and 13613) decisions support these views.

There is therefore no basis for Mr. Boutilier's grievance which must necessarily be denied. This matter should be resolved through the collective bargaining process.

Reasons for Decision

The grievor in this case was denied marriage and special leave following a commitment ceremony with his same sex partner. The discussions surrounding sexual orientation in recent jurisprudence have been more in the nature of a polemic than anything else.

In Egan (supra) the Supreme Court of Canada was split on the issue. Four of the nine judges found the definition of "spouse" in the Old Age Security Act which

extended its benefits only to heterosexual couples did not violate section 15 of the Charter. Another four judges determined that the Old Age Security Act did, in fact, offend the Charter and that its provisions in this regard were not saved by section 1 of the Charter as a reasonable limit prescribed by law in a just and democratic society. Mr. Justice Sopinka tilted the scales of justice in that case in favour of the State. He found that the definition of spouse in the Old Age Security Act did infringe on section 15 on the Charter but was saved by section 1 on the stated belief that a government with limited funds to address social needs must be given some flexibility in determining the disbursement of those public funds.

Of importance in all this is the fact that a majority of the judges in Egan concluded that sexual orientation is an analogous ground for the purposes of section 15 of the Charter. It was following this decision and as a result of it that the Canadian Human Rights Act was amended in 1996 to include sexual orientation as a prohibited ground of discrimination.

The Supreme Court of Canada has stated on many occasions the particular importance of human rights legislation. Its edicts must govern the conduct of our lives and provide a backdrop against which legislation, regulation and certain contracts must be interpreted. It is not sufficient in a case of this kind to decide the issues on the simple basis that the parties to the collective agreement obviously never intended that marriage leave apply to homosexual unions. The decision of any adjudicator under the Public Service Staff Relations Act must reflect the societal values contained in the Charter and the Canadian Human Rights Act. The fact that the parties likely did not discuss this matter during their negotiations is therefore of little solace to me.

I was struck by the level of commitment that exists between the grievor and his partner. Mr. Boutilier did everything possible, from the commitment ceremony attended by family, friends and colleagues, to the preparation of wills and various powers of attorney to prove that the level of commitment in his union was as high as that found in most heterosexual marriages. In a case such as this one, it serves little purpose to argue that homosexuals can benefit from marriage leave by marrying a person of the opposite sex, when the obvious preference for gay persons is to choose partners of the same sex.

I believe it is wrong to equate the union between the grievor and his partner to a common law relationship between heterosexuals. Such an equation invariably leads to the argument that since common law couples don't get marriage leave, neither should same sex partners. A better analogy would be to equate common law couples with same sex partners who live together without the benefit of a commitment ceremony and the other legal steps taken by Mr. Boutilier in this case. In both these latter situations a choice has been made not to formalize the relationship that exists between the partners.

The Layland case (supra) stands for the proposition that a marriage licence cannot issue to same sex partners in Ontario. Presumably the same conclusion would be drawn by the Courts of Nova Scotia. I am not, in this case being asked to have issued a marriage licence or to strike down legislation which does not allow for such possibility. I am simply required to interpret the words of a collective agreement in a manner that is consistent with the very basic human rights principles mandated by Parliament.

It is interesting to note that the majority in Layland, while finding that the common law limitation of marriage to persons of opposite sex did not violate section 15 of the Charter, in fact left many questions unanswered when they concluded by saying: "Whether parties to homosexual unions should receive the same benefits as parties to a marriage, without discrimination because of the nature of their unions, is another question" (op cit, at page 223).

I recognize that marriage has traditionally been limited to unions between men and women. This principle has been consecrated in case law for a long time. The law however is never static. It moves over time to reflect the values of the society it regiments. “Law can never issue an injunction binding on all which really embodies what is best for each; it cannot prescribe with perfect accuracy what is good and right for each member of the community at any one time. The differences of human personality, the variety of men’s activities and the inevitable unsettlement attending all human experience make it impossible for any act whatsoever to issue unqualified rules holding good on all questions at all times.” (Plato, Politicus)

Giving marriage leave benefits to gays and lesbians pursuant to a collective agreement, does not take away from the institution of marriage between heterosexuals. Rather, the granting of such "family related" leave in situations such as the one I am faced with in this case, merely recognizes the fact that the homosexual community possesses the right to establish families in pursuance of their sexual orientation.

I have decided that Mr. Boutilier's grievance should succeed. In doing so, I need not do violence to the collective agreement, strike down portions of it or read in missing portions, I need only interpret its words in a manner that is consistent with the principles set out in the Canadian Human Rights Act. Rejecting this grievance, on the other hand, would amount to denying to Mr. Boutilier the equal benefit of the collective agreement as required by the Canadian Human Rights Act.

Although The grievor's request for marriage leave precedes the 1996 amendments to the Canadian Human Rights Act referred to earlier, the Federal Court in Nielsen v. Canada (Human Rights Commission), 95 CLLC 230-021 at 145,214/5, has previously ruled that, as of 6 August 1992, sexual orientation had to be read into section 3 of the Canadian Human Rights Act as a prohibited ground of discrimination. The principles contained in the Canadian Human Rights Act therefore clearly apply in this case. The application of those principles in this matter requires that I do more than simply pay lip-service to them.

My decision in this case should not be taken to mean that the grievor has entered into a lawful marriage under the laws of Nova Scotia. That I have no authority to do. This decision merely recognizes that the steps taken by the grievor in this case were sufficient to bring about the application of paragraph 20.09(b)(iv) of the collective agreement and that “marriage” for the purposes of article 20.09 includes the union which took place in this case. Article 20.09 generally applies to leave for family related responsibilities. The definition of family after Lorenzen and Yarrow must necessarily include certain homosexual relationships.

I do not accept the employer’s contention that the granting of annual leave to Mr. Boutilier precluded him from pursuing his grievance. The grievor accepted annual leave under protest and only because of his correct intention not to be absent from

work without adequate permission and documentation. The grievor's request for leave makes this very clear (Agreed Statement of Facts, Annex A). This document also puts the employer on notice that any refusal to grant marriage or special leave will likely be contested.

Because of what precedes, I need not discuss the question of special leave. I would nevertheless like to state that considering the language of the special leave provisions in this case, I would have found that the grievor was not entitled to special leave. The employer's decision in this case to refuse special leave was well within the exercise of discretion allowed to it by the collective agreement.

For the reasons set out herein, Mr. Boutilier's grievance is allowed.

Yvon Tarte,
Chairperson

OTTAWA, June 4, 1997.