

# Breaking Legal News

---

November 17, 2015

Presented by Grace Garcia Cooke and  
Shasta Desbarats

ASBA Legal Services

# Mandatory Retirement of Bus Drivers

---



# Mandatory Retirement of Bus Drivers

---

- *Mortland and VanRootselaar v. Peace Wapiti School Division No. 76*, 2015 AHRC 9
- Decision dated April 29, 2015

# The Facts

---

- Ms. Mortland and Mr. VanRootselaar were bus drivers employed by the Peace Wapiti School Division No.76.

- 
- The two bus drivers were mandatorily retired, pursuant to School Division policy, at the end of the school year in which each reached the age of 65.

# *Alberta Human Rights Act*

---

7 (1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

# Decision

---

- *Prima facie* discrimination was established

- 
- *Bona fide* occupational requirement defence was not established



- 
- Tribunal concluded that a blanket restriction prohibiting the transportation of students after age 65 was not reasonably necessary

- 
- *Alberta System of Risk Management*

## Accommodation to the point of undue hardship

---

- Better approaches and alternatives to absolute age-based restriction.
  - ▶ Driver evaluations
  - ▶ Visual and cognitive assessments of drivers by specialists
  - ▶ Medical and functional assessment
  - ▶ Referral to ADFM for assessment

# Accommodation to the point of undue hardship

---

- Better approaches and alternatives to absolute age-based restriction (Con't)
  - ▶ Training programs
    - ◆ Knowledge test
    - ◆ Vision screening
    - ◆ Medical
    - ◆ Road test

# Accommodation to the point of undue hardship

---

- Better approaches and alternatives to absolute age-based restriction (Con't)
  - ▶ Response to:
    - ◆ driving incidents
    - ◆ reports of driving behaviour
    - ◆ on-road driving assessments
    - ◆ medical examinations

## Accommodation to the point of undue hardship

---

- Better approaches and alternatives to absolute age-based restriction (Con't)
  - ▶ Education of drivers

# Remedy

---

- Reinstatement of both drivers
- Proof of current Class 2 operating license
- Training in any changes made by School Division relating to school bus drivers since termination
- School Division is to provide training by a school bus instructor addressing items in Pre-Trip Inspection and Practical Evaluation Checklists.

# Remedy (con't)

---

- Training in any changes to the S-endorsement course since complainants obtained endorsements in 1995.
- Equivalent to the three-year driver review be conducted
- Complainants were subject to any new policy concerning medical, visual or cognitive assessment and on road assessment implemented by the School Division.



## Remedy (con't)

---

- lost wages
- General damages for injury to dignity and self respect in the amount of \$10,000.00 for each bus driver.

*Pelley and Albers v. Northern Gateway Regional School Division, 2012 AHRC 2 (January 30, 2012)*

---

- Bus drivers were hired, supervised and paid by an independent contractor
- School Division had policy that persons 65 or older shall not be permitted to drive students.
- School Division removed bus drivers from drivers list when turned 65

*Pelley and Albers v. Northern Gateway Regional School  
Division, 2012 AHRC 2*

---

- School Division was contractor's only client
- Bus drivers were terminated

*Pelley and Albers v. Northern Gateway Regional School Division, 2012 AHRC 2*

---

- Tribunal found that the School Division was an “employer” of the bus drivers under the *Alberta Human Rights Act*.

*Jurek v. Rocky View School Division No. 41, 2011*  
AHRC 6 (October 12, 2011)

---

- Bus driver was employed by an independent contractor.
- School Division had policy that bus drivers transporting students in its territory had to be less than 65.
- Bus Driver was not allowed to bid on contractor's routes under the jurisdiction of the School Division

*Jurek v. Rocky View School Division No. 41*, 2011  
AHRC 6 (October 12, 2011)

---

- Tribunal found that the School Division was **not** an “employer” of the bus drivers under the *Alberta Human Rights Act*.

# Decision

---

- Tribunal not required to determine if School Division was in contravention of the *Act* as it was not an “employer” under the *Act*.

# Duty to Accommodate School Employees with Disabilities

---





# *Alberta Human Rights Act*

---

7 (1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

(2) Subsection (1) as it relates to age and marital status does not affect the operation of any bona fide retirement or pension plan or the terms or conditions of any bona fide group or employee insurance plan.

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

- 
- **Physical disability** is defined in the *Act* to mean “any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, service dog, wheelchair or other remedial appliance or device.”

- 
- **Mental disability** is defined in the *Act* to mean “any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder”.

- 
- *Horvath v. Rocky View School Division No. 41*,  
2015 AHRC 5

# Analysis

---

1. Did Ms. Horvath make a *prima facie* case of discrimination
2. If so, has the School Division justified its conduct including demonstrating that it has accommodated Ms. Horvath's disability to the point of undue hardship.

- 
- Where *prima facie* case is made out, onus shifts to employer to disprove allegations, provide some other reasonable explanation or demonstrate accommodation to the point of undue hardship.

- 
- The duty to accommodate

- 
- The duty to accommodate



- 
- The Decision

- 
- *Toronto District School Board v. Ontario Secondary School Teachers' Federation District 12*, [2015] O.L.A.A. No. 301
  - Decision dated July 13, 2015

- 
- *Toronto District School Board v. Ontario Secondary School Teachers' Federation District 12*, [2015] O.L.A.A. No. 301

- 
- *Finn v. Halifax Regional School Board*, [2014] NSCA 64 (June 18, 2014)

# Recitation of the Lord's Prayer

---

- Supreme Court of Canada case: *Mouvement laïque québécois v. Saguenay (City)* 2015 SCC 16
  - ◆ Municipal council meetings
  - ◆ Mayor made sign of the cross and recited a prayer
  - ◆ Atheist constituent argued that his freedom of conscience and religion was being infringed in violation of *Quebec Charter*.
  - ◆ SCC found that the Tribunal's finding that there had been discriminatory interference with constituent's freedom of conscience and religion was reasonable.

# Recitation of the Lord's Prayer

---

- Public School boards in Alberta may direct that a school be opened by the recitation of the Lord's Prayer.
- Legislation:
  - ▶ Section 93 of the *Constitution Act, 1867*
  - ▶ *Constitution Act, 1982* – s.2(b) *Canadian Charter of Rights and Freedoms*
  - ▶ *Alberta Human Rights Act*
  - ▶ *School Act*

# Recitation of the Lord's Prayer

---

- Legislation(cont'd):
  - ▶ *Alberta Act, 1905*
  - ▶ *Ordinances of the Northwest Territories*
- The *Fancy* Decision
  - ▶ 1999 Saskatchewan Human Rights Complaint against the Saskatoon Public School Board
  - ▶ Saskatchewan also subject to the NWT School Ordinance

# Recitation of the Lord's Prayer

---

- The *Fancy* Decision (cont'd)
  - ▶ School assemblies during different hours of the school day and commenced with the saying of the National Anthem, then recitation of the Lord's Prayer
  - ▶ Students who did not want to participate would either stand for the prayer and not bow, or be excluded



# Recitation of the Lord's Prayer

---

- The *Fancy* Decision (cont'd)
  - ▶ Considerable evidence was given by the students involved as to the adverse impact such practices had on them.
  - ▶ Bd of Inquiry recognized the overriding nature of constitutional law and concluded that the recitation of the Lord's Prayer at the opening of the school day is a constitutionally entrenched right.

# Recitation of the Lord's Prayer

---

- The *Fancy* Decision (cont'd)
  - ▶ However, that protection did not extend to the use of the Lord's Prayer at any other time during the school day.
  - ▶ Board of Inquiry also found a fundamental flaw in the school board's practice of delegating the discretion to teachers.
  - ▶ s.137(2) of the Ordinance allows a "board" to direct that a school be opened by the recitation of the Lord's Prayer.

# Recitation of the Lord's Prayer

---

- Notice under s.50.1(1) of the *School Act*
- Written request from parent to authorize student to leave, or remain and not participate (s.50.1(2))
- Practical considerations

# Accommodating Transgender Students

---

- Terms
- S. 4 of the *Alberta Human Rights Act*
- *An Act to Amend the Alberta Bill of Rights to Protect Our Children*
  - ▶ Includes amendment to the *Alberta Bill of Rights* to include “gender identity or gender expression”

# Accommodating Transgender Students

---

- *An Act to Amend the Alberta Bill of Rights to Protect Our Children*
  - ▶ Includes amendment to the *School Act* to include support for an organization/activity that promotes equality and non-discrimination with respect to, without limitation, race, ... gender identity, gender expression, ...”

# Accommodating Transgender Students

---

- School Records
  - ▶ Student Record Regulation AR 225/2006
  - ▶ *C.F. v. Alberta (Vital Statistics)*, 2014 ABQB 237

# Accommodating Transgender Students

---

- Accessing Restrooms
- Participation in sports
- School dress codes

# Accommodating Transgender Students

---

- Schools and the school communities must become educated about issues related to transgender rights.
- Schools must balance the rights of transgender students with school safety concerns and political implications in the broader school community.
- Students' rights must be respected.



# Accommodating Transgender Students

---

- Policies and procedures should address these students' rights.
- Bullying and harassment must be swiftly addressed.
- Proactively communicate your policies and procedures.
- Encourage parents of transgender students to immediately communicate their child's status to school administration.

# Accommodating Transgender Students

---

## Resources

- *Source: Which Way to the Restroom? – Respecting the Rights of Transgender Youth in the School System: A North American Perspective.* Authors: Grant Bowers & Wendy Lopez. Copyright, 2012, National School Boards Association.
- American Institutes For Research (AIR) – [www.air.org](http://www.air.org)

# FGM 2015

---

THANK YOU!

