S.C.A. No. 02674

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hallett, Matthews and Chipman, JJ.A.

BETWEEN:	)	
	)	
JOHN HORTON	)	Walter O. Newton, Q.C.
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
KINGS COUNTY DISTRICT SCHOOL BOARD	)	C. Peter McLellan, Q.C.
	)	for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	January 13, 1993
	)	
	)	
	)	Judgment Delivered:
	)	January 13, 1993

THE COURT: The appeal is dismissed with costs as per oral reasons for judgment of Chipman, J.A.; Hallett and Matthews, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

CHIPMAN, J.A.:

This is an appeal from a dismissal by Mr. Justice Boudreau of an application for an order in the nature of **certiorari.**

The appellant had been a teacher in the respondent's employ for some 24 years. He ceased teaching at the end of the 1986 - 1987 school year, following receipt of advice that his services were unsatisfactory. He was paid until the end of the 1987 - 1988 school year. On February 5, 1991, he secured an order in the Supreme Court in the nature of **mandamus** directing the Minister of Education for the Province of Nova Scotia to appoint a board of appeal pursuant to s. 56(14) of the **Education Act** to inquire into the termination of his contract as a teacher in the respondent's employ. Pursuant thereto the Minister appointed Milton J. Veniot, Q.C. as the board of appeal.

Section 56 of the **Act**, after making various provisions for suspension and discharge of a teacher and for termination of a teacher's contract by the employer, provides **inter alia**:

> " (13) A teacher who is suspended or discharged, or whose permanent contract is terminated, may appeal the suspension or discharge or termination by giving written notice of appeal to the employer and the Minister within twenty days of
>
> (a) any confirmation or variation of the suspension pursuant to subsection (5); or
>
> (b) any discharge or termination of contract.
>
> (14) When a notice of appeal is given pursuant to subsection (13), a board of appeal shall be constituted and shall be composed of one person appointed by the Minister.

> (15) The board of appeal shall have the powers of a commissioner appointed under the **Public Inquiries Act** and shall inquire into the suspension, discharge or termination of a contract and shall, after hearing the teacher and the employer, make an order confirming, varying or revoking the suspension or discharge or confirming or revoking the termination of contract.
>
> (16) An order made by a board of appeal shall be final and binding upon the teacher and the employer and a copy of the order and a copy of any decision, reasons or report shall be transmitted forthwith by the board to the teacher, the employer and the Minister.
>
> . . .
>
> (18) Nothing in this Section shall prevent a teacher from terminating a contract in accordance with the terms and conditions of the contract or in accordance with any method permitted by law."

At the initial appearance for hearing before the board on April 15, 1991, the respondent raised a preliminary objection to the board's jurisdiction to hear the appeal on the basis that there was not a "suspension discharge or termination of a contract" within the meaning of s. 56(15) of the **Act** and that therefore the Board had no jurisdiction to proceed. The basis of the objection was that the appellant had submitted a resignation to the Board. Following a preliminary hearing on the point, Mr. Veniot filed an award on jurisdictional matters on May 13, 1991. In that award, he reviewed at length the circumstances surrounding the appellant's ceasing to teach in the respondent's employ. Pressure had been put upon the appellant to leave, and the respondent took the position that the appellant had agreed to do so on terms whereby he would cease teaching at the end of the 1986 - 1987 school year, continue to receive pay for the following school year and submit a letter of resignation. The appellant ceased to teach, received pay for the one year but never

submitted the letter of resignation. Mr. Veniot concluded that there was no resignation but rather a refusal to resign. At p. 22 of his jurisdictional award he stated:

> " . . . Whether that refusal arose out of his failure to carry out an agreement, or undertaking to do so, or whether it arose because Mr. Horton never agreed to such a resignation in the first place seems to me at this point in the proceedings to be of little consequence."

He concluded his award with these words:

> " . . . The School Board has taken the position that there is no longer any contract, and again, from a jurisdictional point of view, I believe this mandates me to consider the circumstances in which this termination or suspension occurred."

He therefore dismissed the preliminary motion.

Mr. Veniot then heard evidence on the merits on August 19, 20 and 22, 1991. At this hearing, the appellant objected "to the calling of evidence on the issue of resignation". It was the appellant's position that the issue of termination was fully litigated and adjudicated upon in the hearing and award on jurisdictional matters, and that there was nothing further for the board of appeal to consider. This objection was not acceded to, and Mr. Veniot proceeded with the hearing. In his written award dated September 19, 1991 Mr. Veniot concluded that there was a binding agreement entered into between the parties on June 30, 1987, the terms of which were that the appellant would cease teaching at the end of the 1986 - 1987 school year, submit a letter of resignation and in return, receive pay from the respondent for the 1987 - 1988 school year. The fact that the letter of resignation was not submitted was merely a matter of non-performance. He held that the contract was therefore terminated pursuant to s. 56(18) of the **Act** which permits a teacher to terminate a contract "in accordance with the terms and conditions of the contract or in accordance

with any method permitted by law". The contract of employment between the appellant and the respondent provided by Article 3.01 that where the parties were in mutual agreement it could be terminated at any time. Mr. Veniot concluded:

> "The conclusion that there was such a mutual agreement is inescapable."

Mr. Veniot found the termination of the contract to be lawful in accordance with the statute and he confirmed it.

Mr. Justice Boudreau rejected the appellant's argument that the jurisdictional ruling precluded the respondent from litigating the issue of termination on the merits. He said:

> "In my view, the award on the jurisdictional matter, dated May 13, 1991, while it contained numerous thoughts and discussions by the arbitrator on the ultimate requirements of proof in the matter, was only dealing with the jurisdictional issue, i.e., the matter of whether the Tribunal had jurisdiction to go on to a full hearing. There is no question the discussion by the arbitrator went far beyond what was required to dispose of the matter, but in my opinion, it falls short of a final disposition of the entire matter. There is no question there is a great deal of evidence overlap between the jurisdictional hearing and the final hearing, but such an overlap is not uncommon even though it was more extensive than usual in this case."

Mr. Justice Boudreau therefore concluded that as the award on the jurisdictional matter dated May 13, 1991 did not fully dispose of the matter, the board had jurisdiction to continue with the hearing on the merits and make a final disposition.

On this appeal the appellant contends, as he did before Mr. Justice Boudreau, that Mr. Veniot exceeded his jurisdiction by proceeding to a hearing on termination after

finding that the appellant did not resign or agree to resign and in rehearing the evidence on the issue of resignation. A review of the record and in particular the award on jurisdiction satisfies us that Mr. Justice Boudreau was correct in concluding that the board acted within its jurisdiction. It must be remembered that the scope of the preliminary hearing was only to determine whether there was a "suspension discharge or a termination" within s. 56(15) of the **Act**. The existence of one of these was basic to the board's jurisdiction. In rejecting the suggestion that the appellant resigned, the board made an express decision that there was a termination and thus there was jurisdiction to proceed. The question whether the contract was lawfully terminated was an issue properly belonging not to the preliminary hearing on jurisdictional matters but to the hearing on the merits.

The appellant also contends that the board of appeal erred in purporting to proceed under s. 56(15) of the **Act** where the appellant "did not resign and the (respondent) failed to execute the mandatory termination procedures".

The legislation (s. 56(16)) provides that the order of the board of appeal is final and binding upon the parties. Mr. Justice Boudreau did not find that the board exceeded its jurisdiction in concluding that the appellant's contract was lawfully determined by mutual agreement. Not only was he not shown to be wrong in this respect, but the record fully supports the conclusion reached by the board of appeal.

The appeal must be dismissed with costs which are fixed at $700.00, plus disbursements to be taxed.

J.A.

Concurred in:

Hallett, J.A.

Matthews, J.A.