IN THE QUEEN'S BENCH
Grievance Issue: Teacher Termination Form 2A

IN THE MATTER OF: The Queen's Bench Act

AND IN THE MATTER OF: The Public Schools Act

BETWEEN:
AGASSIZ SCHOOL DIVISION NO. 13, Applicant,
- and -
HERMANN HOOGE, Respondent.

Counsel: R.A. Simpson for the Applicant
Mel Myers, Q.C. for the Respondent

September, 1981

WILSON, J.

Applicant School Division asks confirmation of termination of its employment of the respondent who, in reply, asserts a right to have the circumstances and validity of that end to his employment taken to arbitration.

More particularly, the Division says it hired the respondent for a fixed term, since expired, to which the respondent expressly agreed, and that with the end of that period of employment their relationship was at an end. Respondent says that indeed he agreed to such employment, but upon terms which have changed in his own favour so that, without termination of his contract in the ordinary way, he has tenure from year to year.

On August 8, 1967 respondent, then a permit teacher, was engaged by the applicant under the standard Form 6 called for by The Public Schools Act, C.C.S.M. P250 s.281(1), Exhibit "B" to the affidavit for the applicant, leaving in June 1968 to improve his qualifications by further studies at the university. Before leaving, on May 31, 1968 respondent signed a second contract Exhibit "H", Form 6 again, for employment beginning with the school term commencing September 3 that year. It may be convenient to note here that by Clause 6 of the statutory contract of hire, infra, that agreement (unless otherwise terminated) "shall be deemed to continue in force, and to be renewed from year to year" subject to variance of salary.

For the next school term, 1969/70, respondent taught for Turtle Mountain School Division, for Tiger Hill Division 1970/71, for Hanover Division 1975/77, and for Kelvin Christian School 1977/78.

He was not employed by the applicant after termination of his contract Exhibit "H" until February of 1980, when a Mr. G. Kaushal, a science teacher employed by the applicant, fell ill, and the respondent was hired under an oral agreement to substitute for the sick Mr. Kaushal for the balance of the term.

Still unwell, Mr. Kaushal applied for and was granted a one year medical leave of absence for the 1980/81 term and respondent was invited to continue, this time signing the usual Form 6 contract, Exhibit "L", June 25, 1980. Mr. Kaushal continued unwell and so could not return.
Presumably in answer to exchange between the parties, on July 3 respondent signed and delivered his letter Exhibit "M", addressed to the superintendent of the applicant School Division and reading:

"Re: Position at Whitemouth:
"Dear Sir:
In signing my teaching contract for Whitemouth School today, I understand and/or agree to the following;
(1) My contract is subject to Board approval at the next regular Board Meeting.
(2) My residence during 198081 will continue to be in Winnipeg, Man. subject to a waiving of the 'residency requirement' at the next regular Board meeting.
(3) I am taking the place of Mr. G. Kaushal, who is on a oneyear medical leaveofabsence during the 198081 academic year.
(4) Mr. G. Kaushal has the right to take my position in the 198182 academic year, in the event that he is medically fit to do so.
Under the above circumstances, I further understand that my contract with the Agassiz School Division will automatically terminate as of June 30, 1981."

And, on April 29, 1981, the superintendent wrote to the respondent as follows, Exhibit "N":

"Dear Mr. Hooge:
I am writing to advise you that your contract with the Agassiz School Division will terminate as of June 30, 1981."

To which respondent replied on May 5, 1981,Exhibit "O":

"Dear Mr. Czuboka:
In your notice of termination you have not stated the reason for termination. I therefore request that you do so."

Applicant's superintendent replied three days later to say, Exhibit "P":

"Dear Mr. Hooge:
In reply to your letter of May 5, 1981, requesting 'the reason' for your termination, I am writing to advise you that your contract is being terminated because, on the basis of our experience with you, we are not prepared to offer you a permanent position."

Which last drew from the respondent teacher the following, written May 13, 1981, Exhibit "Q":

"Dear Mr. Czuboka:
Pursuant to your letter of May 8, 1981, I request that the reason for the purported termination of my teaching contract be referred to a board of arbitration under the provisions of Section 92(5) of the Public Schools Act."

The superintendent's reply followed on May 20, 1981, Exhibit "R":

"Dear Mr. Hooge:
As you signed a fixed term contract expiring on June 30th, 1981; and further, as you do not have tenure under either the old or new Public Schools Act, the Board is not obliged to refer your case to Arbitration under either of those Acts.
It is also the Board's contention that the old Public Schools Act applies to your contract."

Respondent's case is that by reason of amendments to The Public Schools Act enacted by S.M. 1980 c. 33 (proclaimed as of December 1, 1980; Manitoba Gazette December 6, 1980) he is entitled to take the question of his employment to arbitration, as provided by s. 92(5) of the amended legislation, viz.:

"Action on termination of agreement. "92(5) Where an agreement between a teacherand a school board is terminated by one of the parties thereto, the party receiving the notice of the termination may within 7 days of the receipt thereof request the party terminating the agreement to give reasons for the termination, in which case the party terminating the agreement shall, within 7 days from the date of receipt of the request, comply therewith and where the school board terminates the agreement of a teacher who has been employed by the school board under an approved form of agreement for an aggregate of at least 20 teaching months of paid service, the following clauses apply.

(a) The teacher, by notice in writing served on the school board within 7 days of the "date the reason for terminating the agreement was given, may require that the matter of the termination of the agreement be submitted to an arbitration board composed of one representative appointed by the teacher and one representative appointed by the school board and a third person who shall be chairman of the board of arbitration, mutually acceptable to and chosen by the 2 persons so appointed, none of whom shall be a member or employee of the school board.

(b) Each party to the agreement shall appoint its representative to the board of arbitration within 10 days of the serving of the notice by the teacher under clause (a).

(c) Where the members of the arbitration board appointed by the parties cannot agree on a decision, the chairman shall make the decision and his decision shall be deemed to be a decision of the arbitration board.

(d) The issue before the arbitration board shall be whether or not the reason given by the school board for terminating the agreement constitutes cause for terminating the agreement.

(e) Where, after the completion of hearings, the arbitration board finds that the reason given for terminating the agreement does not constitute cause for terminating the agreement it shall direct that the agreement be continued in force and effect and subject to appeal as provided in The Arbitration Act the decision and direction of the arbitration board is *binding* upon the parties.

(f) The arbitration board shall, within 30 days after its appointment make its decision and shall immediately forward a copy thereof to each of the parties and to the ministers.

And, says Mr. Hooge, he had indeed served the applicant for "an aggregate of at least 20 teaching months" when on May 8, 1981 he served his notice in writing Exhibit "Q", supra calling for arbitration of his loss of employment.

To make up that time he must of course include his employment for 1967/68/69 because, without that, he has at best service from February to June 1980, five months, and through the 1980/81 term, a further ten months. And that, too, only if his oral hiring in February 1980 is to be treated as (constructively) pursuant to "an approved form of agreement", as to which he points to s. 281(1) of the Act, viz.:

"Teachers' agreement
281(1) Every agreement between a school district and a teacher shall be in writing, signed by the parties thereto and sealed with the seal of the district; and, except in the case of a school district authorized to use another form of contract approved by the minister, shall be in Form 6 in the Schedule."

Prior to the 1981 amendment the right to arbitration appeared with s. 281(3) of the Act whereby, instead of depending on employment "under an approved form of agreement for an aggregate of at least 20

teaching months" s. 92(5), supra, arbitration could be called for only "if the agreement has been in effect for more than two years".

Counsel agreed that reference to "the" agreement, s. 281(3), confined the teacher to his latest contract of service, i.e. employment initiated with a contract in Form 6 extended from year to year as may be by the automatic renewal clause earlier referred to.

Assuming repeal of that section and its replacement by s. 92(5) to apply retrospectively, however, respondent argues that his right to count service under "an approved form of agreement" is broad enough to include his employment in 1967/68/69, because teaching done under the statutory form of agreement. He would have it that the phrase "employed by the school board under an approved form of agreement for an aggregate of at least 20 teaching months" is to be read as meaning employment whenever it was, and whether or not for a consecutive term.

And certainly "aggregate" can only be read as the totality or collection of several units, the "sum total", as it is defined by the Shorter Oxford English Dictionary (2d) p. 35. "In its primary sense and meaning", the word "implies a plurality of units whose total amounts it represents" Ritchie, J. in M.N.R. v. Imp. Oil, 1960 C.T.C. 275. And, in Attorney General of P.E.I. v. The Attorney General for Canada, 1904 A.C. 37, "aggregate population of Canada" as the measure for representation of a province in the House of Commons was construed as meaning the whole population of Canada, including provinces admitted to Confederation since the passing of the B.N.A. Act, significant indeed for one of the original parties to that union, as P.E.I.

To extend the meaning as contended by the respondent, a school division and no doubt others would be affected as the applicant here might find itself locked into arbitration on the delicate question of termination of employment because of a contract or contracts long since expired. Employer/employee relationships are not always predictable, and the statutory Form 6 provides for cancellation upon the following terms, Clause 6:

"6. This agreement shall be deemed to continue in force, and to be renewed from year to year, with such variations as to the time of payment and the amount of salary as may be provided by the bylaws, resolutions, or schedules, of the district from time to time in force (of which variations the teacher must be notified forthwith, and concerning which he or she shall have the right of conference with the board of trustees of the district), unless and until terminated by one of the following methods: Provided that no variation of salary shall take place before October 1st, unless notice be given the teacher on or before the 30th day of June of the same year.

(a) By mutual consent of the teacher and the district.

(b) By written notice given at least one month prior to the 31st of December or the 30th of June, terminating the contract on the 31st of December or the 30th of June, as the case may be but the party giving notice of termination shall, on request, give to the other party the reason or reasons for terminating this agreement.

(c) By one month's previous notice in writing given by either party to the other in case of an emergency affecting the welfare of the district or of the teacher: Provided that in that event the district may, in lieu of one month's notice as aforesaid, pay the teacher one month's salary at the said rate.

(d) By one month's notice in writing by the teacher in case of variation of salary, which notice shall be given, at the discretion of the teacher, at any time after notification of the variation, and shall take effect one month after the date it is given.

No doubt in some divisions security of tenure forms part of a collective agreement between the division and its teachers, except for which the teacher's protection flows from the automatic renewal clause, ancillary to which is his right to arbitration, which right arose under the earlier legislation after at least two years of uninterrupted service. A term fixed, no doubt, with an eye to the reasonable supposition that if the division had reason to avoid relationship upon those terms, that reason would emerge in plenty of time to cancel the agreement prior to expiry of the magic 24 months.

Capacity to perform is not necessarily constant or everimproving, and it could well be that a teacher with acceptable qualities at one time is less satisfactory some years later. So that, not having seen a teacher for some time, upon reengagement of this former employee the assessment is against continuing that employment beyond the first year of rehire. To protect itself against the inevitable anxiety and expense of arbitration in such case, should the respondent's view be correct, every division would have to chase through files and records, it could be of many years since, to see if, by engaging a particular candidate for employment, the division might find itself caught under s. 92(5) because of an earlier period of engagement.

Somewhat the reverse, perhaps, of the dilemma canvassed by the Supreme Court with Acme Fields School District v. SteeleSmith, 1933 S.C. 47, touching amendment of the Alberta legislation to require approval of a school inspector before a school board might terminate the teacher's contract. Rejecting the argument against retrospective effect of the amendment, Crocket, J. said, p. 59:

"It would be impossible for the Department of Education to know whether it was in effect at all without an examination of all teaching contracts, to ascertain whether they were entered into before or after the coming into force of the Act. It would necessitate the division of all teaching contracts into two classes: those entered into before July 1, 1931, and those entered into afterwards, and thereby entail such inconvenience and confusion in the administration of the provincial school system as to render the new enactment extremely difficult, if not practically impossible, of observance."

Language which would apply with equal force where, as here, similar confusion and inconvenience could result, redounding possibly against the rehire of a teacher who, for whatever reason, had separated from the division some years before.

To succeed and again, assuming that s. 92(5) is to be treated as retrospective respondent must persuade me that "an approved agreement" means any and all such, a complete change from the earlier legislation under which the period of employment relied upon must be through an uninterrupted contract of hire, "the agreement".

" 'The' is the word used before nouns, with a specifying or particularizing affect, opposed to the indefinite or generalizing form of 'a' or 'an'; U.S. v. Hudson, 65 F. 68, p. 71, from Words and Phrases Defined (U.S.), so that "An order for examination of 'an' officer of a corporation may mean any officer;" Conn. v. Hengeren, 273 N.Y.S. 148, ibid. On the other hand, " 'a' may mean one, where only one is intended"; First Trust v. Armstrong, 269 N.W. 502, p. 506.

Black's Law Dictionary, p. 107, is not free from ambiguity in telling us that 'an' is "the English indefinite article. In statutes or legal documents it is equivalent to 'one' or 'any' ".

The learned editors of the Shorter Oxford English Dictionary consider 'an' to be "the older and fuller form of 'a', now retained only before a vowel sound", which throws us back to 'a', of which that authority says, p. 1, that it may mean one, some, or any, depending on the context. But, "3A, a certain, a particular".

Stroud, 4th, with examples, tells us that 'a' is sometimes to be read as 'the' and of 'an' that "in the most

absolute sense" it may be read as meaning "any whatsoever".

From all of which we are returned to the context of its use, to help one decide whether "a/an" means any of whatever number, or a particular, "approved form of agreement".

The phrase is in the singular, "an" agreement, whereas if the Legislature had in mind the accumulation of service under a plurality of agreements the legislation could have been so worded. Nor may I ignore The Interpretation Act, C.C.S.M. c. 180, s. 25(1), whereby "Where an enactment is repealed in whole or in part, the repeal does not (c) affect a right, privilege, obligation, or liability acquired, accrued, accruing, or incurred under the enactment so repealed. "

At all events the word "an" is capable of the meaning which appeals to me, namely to confine it to none but the existing agreement of hire, which of course excludes service interrupted by ten years or more, as here.

Given this interpretation it is not necessary for me to decide whether the amendment introduced on December 1, 1980, by s. 92(5) is to be treated as retrospective and so applying to the contract signed by this teacher some six months earlier. Equally, absent the right to challenge severance of his employment by way of arbitration, it is unnecessary to pursue here the question (flowing from his letter, Ex. "M", supra) of whether Mr. Hooge left the service of the applicant by way of notice of dismissal, or upon expiry of an agreed term of employment.

The applicant is entitled to costs.

DELIVERED this 18th day of SEPTEMBER, 1981.
Wilson, J.