

ARBITRATION BULLETIN

Grievance Issue: Form 2A Contract

June 30, 1995

THE SCHOOL DISTRICT OF MYSTERY LAKE
v.
DONNA SMUD AND THE MANITOBA TEACHERS' SOCIETY

-and-

THE FORT GARRY SCHOOL DIVISION
v.
MARK GADIENT AND THE MANITOBA TEACHERS' SOCIETY

IN THE COURT OF APPEAL OF MANITOBA

APPEARANCES:

V.M. Lemieux and E.H. Leven: for the applicants

R.B. McNicol, Q.C.: for the Fort Garry School Division No. 5

R.A. Simpson and E.V. Murray: for the School District of Mystery Lake No. 2355

A.L. Berg: for the Minister of Education and Training

Appeals heard: May 8, 1995

Judgement delivered June 15, 1995

Coram: Twaddle, Helper and Droft JJ.A.

TWADDLE J.A.

The individual applicants are school teachers, the applicant Society their union. They appeal from an order dismissing their claims that the form of employment contract used to engage each of the teachers on successive occasions did not meet statutory requirements.

Background

The employment of a teacher is governed by s. 92(1) of *The Public Schools Act*, R.S.M. 1987, c. P250. It provides:

- ? *Every agreement between a school board and a teacher shall be in writing signed by the parties thereto and sealed with the seal of the school board and except in the case of a school board authorized to use another form of contract approved by the minister shall be in Form 2 of Schedule D.*

The Act is silent as to

- ? (i) When, by what means and in what circumstances a school board is authorized to use another form of contract; and

? (ii) the scope of the minister's authority to approve another form of contract.

No other legislative provision exists to fill these voids.

Form 2 of Schedule D, the only statutorily authorized contract in the absence of one approved by the minister, contains provision as to the contract's duration. Paragraph 6 provides:

6. This agreement shall be deemed to continue in force, and to be renewed from year to year, ... unless and until terminated by one the following methods:

.....

(b) By written notice given at least one month prior to December 31 or June 30, terminating the contract on December 31 or June 30, 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 school division or school district or of the teacher . . .

Section 92(4) of the *Act* confers on a teacher employed pursuant to a Form 2 contract a right to require a school board to justify the termination of the teacher's contract before a board of arbitration.

Before any alternative form of employment contract was approved by the minister, school boards engaging a teacher for a temporary assignment would either do so without a written contract or use an amended Form 2 contract. The amendment, often effected by means of an attached letter, stipulated the temporary nature of the assignment and thereby negated the effect of paragraph 6 of the statutory form. Such an amended form of contract was approved by this Court in [*Agassiz School Division No. 13 v. Hooze \(1982\)*](#), 17 Man.R. (2d) 134.

This adaptation of the statutory form was in some respects unsatisfactory. The minister, the applicant Society and the Manitoba Association of School Trustees consequently made efforts to devise a new form of contract for use where a teacher was being engaged for a temporary assignment. A new form of contract to cover such assignments was agreed upon and the minister, purporting to exercise the authority apparently contained in s. 92(1) of the *Act*, gave her approval to it.

This new form of contract (sometimes called a "Form 2A contract") was substantially the same as the Form 2 contract save in one respect. In the Form 2A contract, the termination clause was different from paragraph 6 of the Form 2 contract. The Form 2A termination clause provided that the teacher's employment would terminate at the earlier of the end of the school year to which the contract was applicable or the resumption of duties by the teacher who had been temporarily replaced.

Soon after the minister had given her approval to the Form 2A contract, the applicant Society expressed concern over the lack of any accompanying legislation or regulation mandating its use or preventing its abuse. Without such legislation or regulation, the Society feared that school boards would continue the practice of employing teachers for temporary assignments without the benefit of a written contract or, worse still, would use the Form 2A contract in circumstances in which it should not be used, particularly for the employment of new teachers who would thereby be deprived of the tenure provided after one year of service by the combined effect of paragraph 6 of the statutory form and s. 92(4).

Despite the Society's concerns, the Form 2A contract remained in use without regulation. It was the form of contract used for the employment of each of the individual applicants in these cases.

The Facts

The applicant Gadiant was engaged under five successive term contracts beginning in 1987. Each was for a full school year. The fifth contract terminated with the school year in June, 1992. Some of these contracts were not full-time positions, the contract for the 1991/92 school year, for example, being for a 0.86 full-time equivalent position. In each case, Mr. Gadiant was engaged to replace a temporarily absent teacher, a circumstance known to him.

Ms Smud's employment record is somewhat different. Between October, 1987, and the present time, she was employed under five term contracts, each lasting for several months, and occasionally as a substitute teacher without a written contract. There was thus no continuity in her employment. The term positions for which she was engaged were the result of temporary, unexpected increases in enrollment or the sickness of another teacher. The circumstances of each engagement were known to Ms Smud from the outset.

Each of the individual applicants, joined by the applicant Society, commenced these proceedings for the following relief:

1. *A declaration that Form 2A contracts are null and void;*
2. *A declaration that the respondent School Division or District should have entered into a Form 2 contract prescribed by Schedule D to the legislation when employing the individual applicant;*
3. *An order extending the time for the individual applicant to refer his or her termination to arbitration, a right to do which would have been conferred on the individual applicant by the statutory Form 2 contract, but not by the ministerially approved Form 2A contract.*
4. *An order of prohibition preventing the respondent Division or District from using Form 2A contracts in the future.*

The applications were heard together. Each was dismissed in its entirety by Monnin J. It is from such dismissal that these appeals are brought.

The Applicants' Contention

The applicants contend that the minister had no authority to approve, or school boards to use, the Form 2A contract. Although the applicant Society apparently approves the form of this contract, the applicants' position is that, without some legislation or regulation spelling out when and in what circumstances the Form 2A contract may be used, the minister had no authority to approve it. *They* argue that s. 92(1) does not give the minister authority to approve a form of contract which does not provide the same security of tenure after a year's employment as that contained in the Form 2 contract.

The individual applicants therefore claim entitlement to be treated as though the contracts they had entered into provided them with the security of tenure they would have had had the Form 2 Contract been used.

Analysis

The meaning of s. 92(1) of the *Act* is far from clear. It is difficult to read the subsection as conferring authority on the minister to approve a form of contract or on school boards to use a form so approved. Rather, s. 92(1) assumes that such authority is otherwise conferred. As it is not, we appear to have a legislative vacuum.

Fortunately, I do not find it necessary to say whether such a vacuum does exist or the section reads as conferring authority on the minister and school boards by implication. I find it sufficient to decide these appeals that the parties to a teaching contract can amend a Form 2 contract to provide for a temporary engagement. If the parties can do that, as this Court held they could in [*Agassiz School Division No. 13 Y.*](#)

Hooge, supra, it seems to me they may adopt the Form 2A contract to achieve that end whether the minister had authority to approve it or not.

A different situation would obviously arise if a Form 2A contract was used to cover what was intended to be more than a temporary engagement. If a court found that to be the case, it would then have to consider whether the minister was authorized to approve the Form 2A contract and, if so, the circumstances, if any, in which a school board is authorized to use it.

The legislature may wish to consider whether it should amend the legislation

1. to confer express authority on the minister to approve forms of contract for use in situations in which a Form 2 contract would be inappropriate;
2. to define the scope of that authority and the circumstances in which it may be exercised;
3. to specify when and in what circumstances a school board is authorized to use a ministerially-approved form of contract.

Application

In the present cases, all of the impugned contracts were for temporary engagements and known to be such by the teacher when they were entered into. Although they followed a form approved by the minister, this form was no more than an appropriate adaptation of Form 2 to meet the temporary nature of the engagements. This, for the reasons I have given, is permitted.

In the result, the impugned contracts were not void: they were valid. A declaration that the school boards should have entered into a Form 2 contract would be inappropriate. No entitlement to arbitration, whether time is extended or not, arises. Nor would it be appropriate in the circumstances to prohibit the future use of Form 2A contracts for temporary engagements. No evidence was tendered that they have been used for other engagements.

I would consequently dismiss the appeals with costs.

- Twaddle, J.A.

We agree:

- Helper, J.A.

- Droft, J.J.