Suit No. 3620/83

IN THE QUEEN'S BENCH
(MANITOBA)

IN THE MATTER OF:	)	The Public Schools Act, C.C.S.M. P250.
	)	
AND IN THE MATTER OF:	)	A contract of employment between Norris
	)	Allan Thomas Aitken and The Frontier
	)	School Division No. 48
BETWEEN:	)	M. Myers, Q.C. for
	)	Applicant.
NORRIS ALLAN THOMAS AITKEN,	)	
Applicant,	)	R.B. McNicol for
	)	Respondent
- and -		
THE FRONTIER SCHOOL DIVISION	)	Judgment delivered:
NO. 48,	)	July 24, 1984.
Respondent	)	

SIMONSEN, J.
The applicant, by motion, seeks an order that the termination of his employment by the respondent was a nullity and of no force and effect and consequently asserts that his employment has not been terminated.

FACTS:
The evidence consisted of affidavits filed on behalf of both parties and the cross-examination of Handley, the official-trustee of the respondent.

On June 13, 1983 the applicant, a teacher, signed a contract of employment, in standard form, with duties to commence in September of 1983 at a school in Berens River, Manitoba. His employment was terminated November 28, 1983.

Although it is not my task to determine whether there was justification or cause for termination, there are facts related to the applicant's performance relevant to the issues.

The applicant had received evaluations for October and November, which were critical of his performance and attitude. The evaluations were made by persons on staff with the respondent. Meetings were held between the applicant and senior administrators including the superintendent at which time the contents of the evaluations were reviewed and discussed with the applicant. He knew there were substantial complaints about his work and attitude.

The official trustee attended at the school on November 28, 1983. He had reviewed the evaluation reports and had consultations with senior administrative staff and had reached the conclusion that the applicant was not performing satisfactorily. Upon his attendance at Berens River School the official trustee asked to meet the applicant. Paragraph 17 and 18 of his affidavit summarizes the meeting with the applicant as follows:

"17. That I asked the Applicant whether he required any further or other notice from me of our meeting or whether he wished to postpone it to another time. The Applicant indicated that my notice to him was satisfactory and that he had no objection to meeting with me.

18. That I indicated to the Applicant that I was concerned about his continued employment with Frontier due to:

a) his demonstrated inability as a language arts teacher;

b) his inability to participate actively in Frontier's sponsored professional development;

c) his negative attitude towards Frontier's administration and consultants;

d) his negative affect on staff morale at Berens River School."

Handley's cross-examination also contains reference to his approach to the meeting and for this purpose I quote questions 255 to 263 as follows:

"Q You're aware, though, as a probationary teacher, that under the Act, on termination, he doesn't have a right to arbitrate that; is that correct?

A That's correct.

Q While a person who is a non-probationary teacher is entitled to challenge a termination; isn't that correct?

A That's correct.

Q So you were aware in the meeting with Mr. Aitken that on termination, he couldn't have a right to challenge your decision; is that right?

A That's right.

Q Why did you ask him if he wanted any further notice or other notice of the meeting?

A Or whether he wanted to meet with me at all because -- well, first of all, it isn't -- I don't think it's required of him to even meet with me. He doesn't have to if he doesn't want to. I'm -- I'm not going to force him. If he wanted to tell me that this was inconvenient for him or whatever, I wanted to give him that opportunity.

Q Well, you said in your paragraph 17, 'I asked the Applicant whether he wanted any further or other notice of our meeting or whether he wished to postpone it to another time'. Why did you ask him that?

A Because I didn't know what he was doing that particular day, for one thing. Second, I didn't know whether he wanted to get on the phone to MTS or whatever he wanted to do. I certainly didn't want him to feel that he was being crowded by myself or rushed.

Q Oh, you didn't think you were crowding him, though?

A I thought I was being very fair to him.

Q You thought you were being very fair to him?

A Yes, I think I was very fair to him. I think I was very fair to even have the meeting with him.

Q You didn't think you needed the meeting at all; is that right?

A No, I -- I think with the information I had, I could have just given him a letter.

Q You really met with the purpose of confirming the termination that you had decided earlier; isn't that right?

A And clarifying from him whether or not he had any concerns, felt that he was being treated unfairly by the consultant or by the principal and so on.

No prior notice of the meeting with the official trustee had been given to the applicant. The meeting proceeded without objection by the applicant. He did not dispute or protest the validity of the criticisms made of him.

He was asked to resign, which he refused, and a few hours thereafter the official trustee gave him his termination letter.

PROCEDURE

The remedy sought by the applicant as stated in the notice of motion reads:

"1. a declaration that the said decision of the Respondent to terminate the employment of the Applicant as at December 31, 1983 is illegal and/or void;

2. an Order quashing the said decision of the Respondent to terminate the employment of the Applicant as at December 31, 1983;

3. a declaration that the Applicant's employment as a teacher at the Berens River School does not terminate on the 31st day of December, 1983 or at all."

On the issue of a declaration, reference was made to Rules 536 and 537 of the Queen's Bench Rules which read:

"536 Where the right of any person depend on the construction of any statute, by-law, deed, will, or other instrument, he may apply by way of originating notice, on notice to all parties concerned, to have his rights declared and determined.

537(1) Where the rights of the parties depend: (a) on the construction of any contract or agreement and there are no material facts in dispute; or (b) on undisputed facts and the proper inference from such facts, such rights may be determined on originating notice.

537(2) A contract or agreement may be construed before there has been a

breach thereof."

Counsel for the applicant acknowledged that the rules were perhaps not appropriate to grant the relief sought and therefore his primary argument was directed to an order quashing, being a remedy in the nature of **certiorari**.

When faced with an application for a declaration and also an order to quash in the same proceeding, issues frequently arise as to the evidence or material the court should properly consider and whether such alternate remedies can be sought in the same action. Laycraft, J. in **McCarthy v. Board of Trustees of Calgary Roman Catholic Separate School District No. 1 et al. (No. 2)**, [1979] 4 W.W.R. 725 wrestled with that problem. No issue was raised on the procedural question before me and therefore no decision is made on the subject. Since the remedy of a declaration was not seriously pursued and the respondent did not dispute the material to be considered, I have proceeded upon the basis that an order to quash was the remedy sought and all material filed could be considered.

THE CONCEPT OF FAIRNESS:

Counsel for the applicant contended that a public body, such as a school board, even when exercising administrative or executive functions, had a duty to act with procedural fairness in its decision making process. In asserting this position, reliance was placed upon the decision of the Supreme Court of Canada in Re Nicholson and Haldimand-Norfolk Regional Board of Commissioners of Police (1978), 88 D.L.R. (3d) 671. Significantly, in my view, that decision involved a dismissal of a police officer who was found to hold "an office' rather than being an employee. The decision does not support the conclusion that every employee of a public body must be treated with procedural fairness. Historically an employee could be dismissed peremptorily or arbitrarily without the need of the elements of procedural fairness.

CONCLUSION:

The rights and obligations of a public body at common law could of course be altered by statute. In that regard the provisions of The Public Schools Act must be considered. Of significance in this regard is s. 92(4) which reads:

> "Where a complaint is made to a school board respecting the competency or character of a teacher, the school board shall not terminate its agreement with the teacher unless it has communicated the complaint to the teacher or his representative and given him an opportunity to appear personally or by representation before the school board to answer the complaint."

Undoubtedly the provision establishes a code, modifying the common law, which must be observed by a school board when exercising its functions.

The first criterion to be established in order to make the section operative requires that a complaint be made Dewar, C.J.Q.B. in Budnick v. Winnipeg School Division et al, unreported, dated November 9, 1981, in dealing with the same section in an earlier statute, found the term "complaint" did not include negative evaluations made by senior administrative staff. The position was expressed as follows:

> "Section 281(10) applies only where a complaint respecting the competency or character of a teacher is made to the board of trustees of a school division. This

> case does not involve a complaint of the nature contemplated by this provision. Plaintiff's employment was terminated because when assessed in accordance with the employer's system of rating probationary teachers her performance was not satisfactory."

Even if the applicant's contention is correct, that a complaint does include a negative evaluation by staff members, as distinguished from a criticism or complaint which has its origin outside the staff, I am not able to find that the school division failed to observe the statutory requirement of 92(4).

The applicant was fully and completely aware of the criticism which had been made. The criticisms were reviewed with him prior to the attendance of the official trustee. The official trustee, at his meeting, presented the applicant with an opportunity to be heard when the criticisms were reviewed with him once again. There was ample opportunity to answer. There was an offer to delay matters if the applicant had elected to do so.

It was alleged that the official trustee was biased and that he had decided to terminate the applicant before meeting with him. Bias is commonly applicable to disqualify a person exercising judicial functions. The nature of proceedings contemplated under s. 92(4) are not judicial in nature. In any event an official trustee who has been briefed by his administration must have an opinion before meeting with the teacher. The very purpose of his attendance was to deal with the problem which had been brought to his attention. He was bound to present his concerns to the applicant which he did. He gave the applicant an opportunity to be heard. His conduct cannot be criticized.

The applicant's motion is dismissed with costs.

SIMONSEN, J.

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Suit No. 331/84

IN THE COURT OF APPEAL OF MANITOBA

Coram: Monnin, C.J.M., Matas and Huband, JJ.A.

B E T W E E N:	**)**	
NORRIS ALLAN THOMAS AITKEN, (applicant) Appellant,	**)**	**M. Myers, Q.C. for the Appellant,**
- and -	**)**	**R.B. McNichol for the Respondent.**
THE FRONTIER SCHOOL DIVISION NO. 48, Respondent) Respondent.	**)**	**Appeal heard: January 22 and January 30, 1985**
	)	**Judgment pronounced: March 4, 1985.**

HUBAND, J.A.

Norris Allan Thomas Aitken (Aitken) was fired from his employment as a teacher with the Frontier School Division No. 48 (the Division) on November 28, 1983 - the termination to take effect on December 31, 1983.

Aitken challenges his dismissal, and in particular claims that he was not given a fair hearing as required by law.

Aitken brought an application before the Court of Queen's Bench seeking an order of certiorari, and an order to quash his dismissal, and also seeking a declaration that the termination of his employment is illegal and void. Simonsen, J. dismissed the application and the matter now comes before this court on appeal.

Let us put the proceedings in a proper factual setting.

Aitken was employed by the Division to teach at a public school at Berens Rivers, Manitoba for a school term commencing September 5, 1983. There was a written contract using a form approved under the Act.

Aitken was in his first year of employment with the Division. He was a probationary employee and as such susceptible to dismissal without the Division having to establish just cause - but subject to the provisions of the contract as to the timing of the termination.

Frontier School Division covers a massive area of northern Manitoba. Instead of an elected school board, one Joseph L. Handley is the official trustee for the Division, and that single individual holds and exercises all of the powers, duties and functions as may be exercised or performed by a school board under the Act. Handley is personally responsible for the hiring and dismissal of all teachers employed by the Division. Handley is also the school superintendent for the Frontier School Division. There are also area superintendents employed by the Division who report to Mr. Handley.

Aitken was assigned to teach language arts, accounting, history and geography at the Berens River school. Approximately 70% of his classroom time was allocated to teaching language arts. On October 18th and 25th, the principal of the school, Raymond Beaumont, visited Aitken's classroom, and as a result prepared a written classroom observation report. Further observations were made on November 15th and 17th, and the principal prepared a second report. Both reports indicate that Aitken was not performing his duties satisfactorily.

In addition to the classroom reports, the principal wrote a letter, dated November 5, 1983, to the area superintendent, one Mr. Reagan, which provides a broader assessment of Mr. Aitken than the classroom evaluations alone. The letter indicates shortcomings as a teacher:

> "He shows little understanding, if any understanding of the process."
>
> "He is opposed to the thrust of the language arts program."
>
> "He is cold and aloof" [with the children].

But the November 5th letter deals more extensively with his personal characteristics.

"A most disagreeable young man."

"It is a case of arrogance in the extreme."

"He refuses to learn."

"I do not feel he is working hard. "

"During our meetings with him he was defensive, argumentative, and uncooperative."

On November 22, 1983, the principal and the superintendent met with Mr. Aitken to discuss his teaching performance and his relationships with other staff members. He was not told, at that time, that his dismissal was imminent. However, six days later, on November 28, 1983, the trustee of the Frontier School Division flew into Berens River for the purpose of meeting with Mr. Aitken. Mr. Handley had already seen the evaluation reports. The area superintendent was also present.

The trustee, Mr. Handley, requested a meeting with Aitken. Although Aitken had received no prior notice, and was not advised as to the purpose of the meeting, he attended. A discussion ensued between the trustee and Mr. Aitken, which dealt with some of Mr. Aitken's perceived deficiencies. At the end of the meeting the trustee gave Aitken the choice of resigning effective December 31, 1983, or be dismissed. Aitken wanted to think it over. Within a very short time frame, however, (less than an hour) a letter was delivered to Mr. Aitken advising that his services were terminated effective December 31, 1983, and signed by the trustee.

Under the common law an employer can dismiss an employee for any reason the employer thinks proper - or indeed, for no reason at all. The sole issues which arise are the extent of the notice to which the employee is entitled, or the amount of payment in lieu of notice. The common law authority of the employer is often circumscribed by collective agreements, individual employment contracts, human rights legislation prohibiting certain forms of discrimination, or other statutory restrictions. The exercise of the common law right to terminate an employee's services is not a judicial or quasi-judicial function, and it does not normally involve concepts of procedural fairness or natural justice.

In this case Mr. Aitken was a probationary employee, and as such was susceptible to dismissal without cause during his first year of employment. Under s. 92(5) of The Public Schools Act, a teacher who has been employed for more than one full year is entitled, upon termination of services, to arbitrate the dismissal and seek reinstatement. The grievance procedures are not open to Mr. Aitken.

When he was hired as a probationary employee, Mr. Aitken entered into a written contract with the Division. It provides that the agreement "shall be deemed to continue in force...." unless and until terminated by one of the methods stipulated in the agreement. One of the methods so stipulated is for the Division to give written notice "at least one month prior to the thirty-first of December or the thirtieth of June, terminating the contract on the thirty-first of December or the thirtieth of June, as the case may be....".

Mr. Aitken did, of course, receive a letter of termination effective December 31, 1983. It was delivered to him with only two days to spare in order to effect his dismissal by the December 31st deadline.

In Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, a police constable who, like Mr. Aitken, was discharged during a probationary term, was held to be entitled to procedural fairness. Laskin, C.J.C. wrote as follows at p. 324 of the majority judgment:

> "In short, I am of the opinion that although the appellant clearly cannot claim the procedural protections afforded to a constable with more than eighteen months' service, he cannot be denied any protection. He should be treated 'fairly' not arbitrarily. I accept, therefore, for present purposes and as a common law principle what Megarry J. accepted in Bates v. Lord Hailsham, at p. 1378, 'that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness'."

There are some who contend that the rules of natural justice on the one hand, and the duty of procedural fairness on the other, are not precisely the same. For the purpose of this litigation, however, I do not think that any slight distinction is of consequence, and I will employ the words "procedural fairness" throughout.

Later in the same judgment Laskin, C.J.C. explains what the concept of procedural fairness entails.

> "In my opinion, the appellant should have been told why his services were no longer required and given an opportunity, whether orally or in writing as the Board might determine, to respond. The Board itself, I would think, would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination. Once it had the appellant's response, it would be for the Board to decide on what action to take, without its decision being reviewable elsewhere, always premising good faith. Such a course provides fairness to the appellant, and it is fair as well to the Board's right, as a public authority to decide, once it had the appellant's response, whether a person in his position should be allowed to continue in office to the point where his right to procedural protection was enlarged..."

Laskin, C.J.C. appears to have invoked the concept of fairness because of the position held by police constable Nicholson. He stressed that the court was dealing with a holder of a public office, engaged in duties connected with the maintenance of public order and preservation of peace.

In McCarthy v. Calgary Roman Catholic Separate School District No. 1 (No.2) (1980) 30 A.R. 213, Sinclair, J. of the Alberta Court of Queen's Bench followed the Nicholson case and set aside the dismissal of the superintendent of a separate school division in Calgary on the ground that he had been denied procedural fairness. In that case Mr. McCarthy was not a probationary employee. It would appear that he was accorded the right to procedural fairness by virtue of his position; he was the senior employee, occupying a permanent position in a school system which was governed by elected trustees. The way he discharged his responsibilities could and would affect the public interest.

Mr. Aitken is not the holder of a public office, nor the senior administrative position in a public institution. However, the right to procedural fairness can arise for other reasons apart from the position held by the person who is being discharged. In this case the statute itself conveys the notion of procedural fairness. Section 92(4) deals with all teachers, whether they are probationary or otherwise. Section 92(4) states:

> "Where a complaint is made to a school board respecting the competency or character of a teacher, the school board shall not terminate its agreement with the teacher unless it has communicated the complaint to the teacher or his representative and given him an opportunity to appear personally or by

representation before the school board to answer the complaint."

The essence of procedural fairness is contained in this provision. The teacher is entitled to know the charge against him, and be given the opportunity to respond. When, as here, the statute confers the right to make answer, it necessarily means to make answer to a board that is open to persuasion rather than one which has already reached a fixed and unchangeable position. In other words, s. 92(4) conveys more than the sum of its words. It imports the notion of procedural fairness, including an adjudication by an unbiased board.

Section 92(4) of the Act has been the subject of judicial consideration before. In Husain v. Portage la Prairie School Division No. 24 et al. (1980) 4 Man.R. (2d) 108, Wright, J. of the Court of Queen's Bench rejected the argument that s. 92(4), which was then numbered s. 281(10) of the previous Public Schools Act, reflected an administrative function. On the contrary, Wright, J. concluded that it established "an important procedural provision, and, in my view, places a quasi-judicial responsibility on the school board". I take those words to mean what I have said, namely that the employee is entitled to procedural fairness.

The Husain decision was appealed to this court, where damages were increased, but otherwise the judgment of Wright, J. was affirmed.

Counsel for the Division contends that s. 92(4) has no application whatever. It is urged that the "complaint" under s. 92(4), which gives rise to a right to be heard and make answer, must be an external rather than an internal complaint. It is argued that where, as here, the termination flowed from internal assessments, there is no right to be heard. There is indeed judicial authority for that position, to be found in the judgment of Dewar, C.J.Q.B. in Budnick v. The Winnipeg School Division No. 1, [1981] Man. D. 4032-02. That case involved the dismissal of a probationary teacher as a result of unsatisfactory assessments of the plaintiff's work in the classroom, by her superiors. Dewar, C.J.Q.B. held that these internal assessments did not constitute complaints under s. 281(10) of The Public Schools Act [now s. 92(4)], accordingly Dewar, C.J.Q.B. held that she was not entitled to the right to appear before the School Board to make answer. He wrote:

> "...Section 281(10) applies only where a complaint respecting the competency or character of a teacher is made to the board of trustees of a school division. This case does not involve a complaint of the nature contemplated by this provision. Plaintiff's employment was terminated because when assessed in accordance with the employer's system of rating probationary teachers her performance was not satisfactory."

I cannot accept the proposition that an internal assessment which is critical of the competency and character of a teacher, and leads to the dismissal of that teacher, does not constitute a complaint within the meaning of s. 92(4). The section itself makes no distinction between an internal or an external criticism. Moreover, I have no doubt that in many instances what begins as an unsubstantiated external complaint might result in an internal evaluation recommending termination. In other cases there will be both external complaints and internal critical evaluations, and I think both should be considered by a school board contemplating termination and the teacher should be entitled to answer both as constituting a complaint under s. 92(4).

The Budnick decision runs against the current of other decided cases in this jurisdiction. In Husain, (supra), which was decided a year earlier , Wright, J. concluded that a teacher is entitled to the benefits of s. 92(4) in order to answer critical internal evaluations. Some two years after the Budnick decision

Kroft, J. delivered judgment in Andrich v. The Winnipeg School Division No. 1 (1983), 24 Man.R. (2d) 178. In that case the area superintendent recommended termination. The recommendation was considered and adopted at a board meeting. Unfortunately, the teacher, who wished to contest the recommendation, was not advised of the date and time of the board hearing. Kroft, J. held that he was entitled to proper notice of the hearing in order that he might be heard and make answer to the complaint. Obviously, it was his conclusion that it was no less a complaint because the recommendation flowed from an internal assessment.

Following the Husain and Andrich decisions, I too would conclude that a teacher facing internal evaluations recommending his dismissal is entitled to the benefit of s. 92(4) which in my view entitles him to procedural fairness. Having reached that conclusion one must confront the issue as to whether procedural fairness was extended to Mr. Aitken, and in my opinion it was.

Counsel for Mr. Aitken argues that procedural fairness means a determination of the issue by an unbiased adjudicator. He contends that Mr. Handley approached the critical meeting of November 28, 1983 with his mind made up.

The Division is an unusual one requiring unique solutions to unique problems. So we find a single person, Mr. Handley, who functions both as school superintendent and as official trustee, exercising all the powers and responsibilities that normally would be exercised and performed by an elected school board. As superintendent, he is bound to receive and consider reports which come to him in that capacity. As trustee, exercising board functions under s. 92(4), he is to be unbiased.

But unbiased does not mean uninformed. It does not mean that he has not read and is not troubled by negative evaluations of a member of the teaching staff of the Division. In the context of this case it means approaching the critical meeting with Mr. Aitken with a mind open to persuasion. The record before us suggests that this was so. An affidavit by Mr. Handley forms part of the record, and in addition, there is a transcript of a cross-examination of him on his affidavit. In that evidence Mr. Handley makes it clear that he flew to Berens River on November 28th, after having considered the evaluations of Mr. Aitken, and with a view of terminating his employment. But Mr. Handley also testified that the purpose of the meeting was to give Mr. Aitken the "opportunity to respond to the - the concerns about him". Far from approaching the matter with a closed mind, the trustee testified that his main purpose was "...to hear from him, what his response will be to the complaints, to the charges, whatever you want to call them, to - to determine whether he felt they were unfair".

In the context of this particular case, in my opinion, a claim of bias against the trustee is not established.

Counsel for Mr. Aitken complains that his client was not given adequate notice of the meeting with Mr. Handley on November 28th. Further, it is contended that he was not given sufficient notice of the complaints against him, or that termination of his services was being considered in the meeting of November 28th.

As to the notice of the meeting itself, the evidence is clear that Mr. Handley attended Berens River, and, upon his arrival asked for a meeting with Mr. Aitken, without any prior notification. Once again, the unusual role played by Mr. Handley assumes some importance. He is the personification of an elected school board. Instead of a teacher being notified that a meeting of the board will be held at a certain time and place, where termination will be considered, the school board, in the person of the official trustee, attends upon the teacher, to discuss termination with the teacher directly. This is not a case where the teacher was not able to attend and make representations because of insufficient notice; in this case the teacher did attend because, in effect, the board came to him.

On the question of notice, the learned chambers judge appears to have relied upon para. 17 of the affidavit of the official trustee which reads as follows:

> "That I asked the applicant whether he required any further or other notice from me of a meeting or whether he wished to postpone it to another time. The applicant indicated that my notice to him was satisfactory and that he had no objection to meeting with me."

The learned chambers judge cites that paragraph, plus a portion of the transcript of the cross-examination of Mr. Handley on his affidavit, which touches upon the same subject matter:

> Q. Well, you said in your paragraph 17 'I asked the applicant whether he wanted any further or other notice of our meeting or whether he wished to postpone it to another time.' Why did you ask him that?
>
> A. "Because I didn't know what he was doing that particular day, for one thing. Second, I didn't know whether he wanted to get on the phone to M.T.S. [Manitoba Teachers Society] or whatever he wanted to do. I certainly didn't want him to feel that he was being crowded by myself or rushed."

It is true that the affidavit evidence of Mr. Aitken is somewhat different. But the learned chambers judge was entitled to rely on Mr. Handley's affidavit and his answers on cross-examination, and on the basis of that evidence I cannot conclude that notice of the meeting was deficient.

There was ample evidence that Mr. Aitken was made aware of the internal criticisms and assessments which constituted the complaints of November 28th. The school principal had reviewed the same complaints with him a week earlier. At the meeting with Mr. Handley on November 28th, the same complaints were reviewed and his explanations and comments were sought. According to Mr. Handley, at the end of the meeting Mr. Aitken was asked if he had any particular comments or whether he would deny the charges, and Mr. Handley said that, "He didn't deny anything that I presented to him and the meeting was over".

There was also ample evidence to support the conclusion that Mr. Aitken knew, at the outset of the meeting, that termination of his contract was under consideration. The following two questions and answers appear in the cross-examination of Mr. Handley:

> Q. "Right. He didn't know at the beginning of the meeting that you were talking to him about termination, did he?
>
> A. "Yes, he did. He did know that I was talking to him about whether or not he would be able to continue at the school."
>
> Q. "Well, how would he know that?"
>
> A. "Cause I told him."

And later during his cross-examination on his affidavit Mr. Handley added this:

A. "I explained to him that we were there to discuss his performance and the possibility of him not continuing or continuing or whatever at Berens River. I explained to him what we were discussing. It was clear in his mind we were discussing termination."

Aside from the question of notice, Mr. Aitken complains that he was not given a proper opportunity to prepare his response to the complaints. Under s. 92(4) the teacher is to be afforded an opportunity to appear and make answer, either personally, or by a representative. The procedures which were followed on November 28th did not allow him to seek aid or advice in making answer at the meeting with the official trustee. But the official trustee responds that Mr. Aitken was satisfied with the notice of the meeting, did not wish it to be postponed, and was satisfied to proceed ahead.

Counsel for Mr. Aitken also complains that the entire matter was dealt with too hastily to meet the requirements of procedural fairness. The crucial meeting took place on minutes' notice. The meeting Itself, according to the teacher, lasted for Bless than one-half hour". Mr. Aitken was given the option to either resign or be discharged, but not having exercised the option, the trustee proceeded to terminate the contract within an hour. While I agree that things moved quickly, they were not so rushed as to deny procedural fairness. Notice of the meeting was short indeed, but Mr. Aitken acquiesced in that short notice. I am not surprised that the meeting with Mr. Handley to review the complaints was not a lengthy one. A similar review had taken place before. Mr. Aitken was familiar with the material and, according to the official trustee, his answers were brief. At the end of the meeting the official trustee reached the decision to terminate, and so advised the teacher, but then extended the option to Mr. Aitken to resign instead. I agree that the time to exercise that option was very brief, and it was unilaterally curtailed by the official trustee. But that abruptness comes after the decision to terminate had been made, and does not affect the procedural fairness of the decision itself.

Accordingly, I find myself in agreement with the learned chambers judge in concluding that this is not a case for either certiorari to quash the decision to terminate arrived at during the November 28th meeting, nor is it a case for declaratory relief declaring the decision to terminate to be illegal or void. I would dismiss the appeal with costs to the Division.

Huband, J.A.

Monnin, C.J.M.

Matas, J.A.