

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Barbara M. Hamilton
Mr. Justice Alan D. MacInnes

BETWEEN:

ROLLING RIVER SCHOOL DIVISION)	
)	
(Applicant) Respondent	)	G. H. Smorang, Q.C. and
	)	T. K. Ray
- and -	)	<i>for the Appellant</i>
)	
BRENDA NICHOLSON	)	✓ R. A. Simpson and
	)	C. P. McNicol
(Respondent) Appellant	)	<i>for the Respondent</i>
)	
- and -	)	<i>Appeal heard:</i>
	)	October 22, 2009
)	
THE ROLLING RIVER TEACHERS'	)	<i>Judgment delivered:</i>
ASSOCIATION OF THE MANITOBA	)	March 23, 2010
TEACHERS' SOCIETY)	
)	
(Respondent))	

HAMILTON J.A.

1 This appeal is from a decision of a judge of the Court of Queen's Bench (the reviewing judge) who held that an arbitration board appointed under the provisions of *The Public Schools Act*, C.C.S.M., c. P250 (the *Act*), lost jurisdiction for failing to decide the issue before it.

2 The *Act* provides that a teacher whose employment agreement has been terminated has the right to submit the matter of the termination to arbitration on the issue of "whether or not the reason given by the school board for terminating the agreement constitutes cause for terminating the agreement"

(s. 92(4)(a) and (b) of the *Act*).

3 The appellant (Nicholson) was employed as a teacher until the board of trustees of the respondent school division (the Division) terminated her for cause. She exercised her right to submit the matter of her termination to arbitration. The majority of the arbitration board (the Board) concluded that the reason for her termination was “lack of competence.” It then determined that the Division had failed to prove the reason for Nicholson’s termination and, therefore, the Division’s reason did not constitute cause for terminating her employment agreement.

4 The reviewing judge concluded that the reason for Nicholson’s termination was not incompetency. Therefore, he determined that the Board decided the wrong issue and thus, lost jurisdiction. He set aside the Board’s award and substituted it with his order that the Division had cause for terminating the employment agreement.

5 Pursuant to s. 48 of *The Arbitration Act*, C.C.S.M., c. A120, Nicholson was granted leave to appeal the reviewing judge’s order on the following question (2009 MBCA 38, 236 Man.R. (2d) 247 at para. 26):

Did the [reviewing] judge err by concluding that the Arbitration Board lost its jurisdiction because it allegedly did not consider the issue that was to be decided?

Leave was denied on the questions of whether the motion judge failed to conduct the required standard of review analysis, whether he misinterpreted the word “cause” and whether he erred by substituting his own opinion rather than remitting the matter back to the Board with directions.

The Act

6 Section 92(4) of the *Act* sets out the rights, obligations and procedures that arise when a teacher is terminated. The following are those portions of s. 92(4) that are relevant to this appeal:

Action on termination of agreement

92(4) Where an agreement between a teacher and a school board is terminated by one of the parties thereto, the party receiving the notice of the termination may within seven 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 seven 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 a prescribed agreement for more than one full school year, as defined by the minister by regulation, the following clauses apply:

(a) the teacher, by notice in writing served on the school board within seven 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 two persons so appointed, none of whom shall be a member or employee of the school 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;

[emphasis added]

Background

7 Nicholson commenced employment, on a permanent basis, with the Division in August 2001. She had worked the two previous school years under term contracts. During her permanent employment she was a resource teacher until she was transferred, for her last year, to the position of remedial English teacher.

The Termination Letter

8 By letter (the termination letter) dated May 2, 2006, from the chairperson of the board of trustees, the Division terminated Nicholson's employment effective the end of June 2006:

The Board has determined that your performance both as a Resource Teacher and more recently as Remedial Teacher has not met the Division's basic expectations of our teachers which the Board believes has a detrimental effect on your students' education. We are hereby agreeing to the Superintendent's [*sic*] recommendation and are terminating your teaching contract effective immediately.

The Superintendent's Report

9 The superintendent's recommendation referred to in the termination letter is contained in a 13-page report dated April 18, 2006 (with 100 pages of appendices attached) written by the Division's superintendent, Neil Whitley.

The report's conclusion stated, in part:

In spite of coaching, the evaluation process and the significant supports put into place, no appreciable improvement is evident in delivery of instruction and students' skill development. What was noted in September for areas of improvement, continue to be areas requiring improvement in April.

As recently as April 6, 2006, Brenda Nicholson continued to be confrontational, argumentative, and unwilling to accept direction from her immediate supervisor, Kathleen Slashinsky. Therefore, I am recommending that Brenda Nicholson's employment with Rolling River School Division be terminated.

It is my opinion that Brenda Nicholson has not demonstrated the skills necessary for competency in teaching. As the Superintendent of Schools, I have a duty of care to the students in my jurisdiction. Therefore, based on my observations, and the recommendations of Kathleen Slashinsky, I am recommending to the Board that Brenda Nicholson's contract with the Rolling River School Division be terminated by written notice.

[emphasis added]

The Division's Response to Request for Reasons

10 On Nicholson's behalf, the Manitoba Teachers' Society sought the reasons for the termination pursuant to s. 92(4). The chairperson of the board of trustees of the Division replied by letter dated May 11, 2006:

.... The reasons for termination of Mrs. Nicholson's contract are clearly outlined in the Superintendent's April 18th report to the Board and further in my letter to Mrs. Nicholson dated May 2, 2006.

Arbitration Proceedings

11 Nicholson, exercising her right under s. 92(4)(a), required that the
matter of the termination of her employment agreement be submitted to
arbitration.

12 The arbitration board, comprised of A. Blair Graham, Q.C.
(chairperson), Carole Wylie (nominee of Nicholson) and Gerald Parkinson
(nominee of the Division), convened a hearing that took place over eight days
in April and May 2007.

13 At the hearing, the Board heard evidence from four witnesses called by
the Division: Whitley and Kathleen Slashinsky, the principal during
Nicholson's tenure as a resource teacher, as well as the principal of the school
where she worked during her last year as a remedial English teacher, and the
student services coordinator in the Division. Nicholson testified on her own
behalf.

14 The evidence was extensive and pertained to Nicholson's educational
background and her teaching career with the Division commencing in March
2000. The Board heard evidence about the evaluations of Nicholson's
performance, as well as the meetings held, and efforts made, to address the
concerns of the Division, and of Nicholson, with respect to her teaching
assignments. The concerns included the Division's allegations that Nicholson
was, at times, confrontational, argumentative and unwilling to accept
direction. Suffice it to say that the Board heard detailed evidence over the
course of the eight-day hearing about the Division's concerns and

Nicholson's responses.

- 15 The Board issued its award on July 31, 2007. The majority directed that the employment agreement be continued. Parkinson dissented in written reasons dated August 17, 2007.

The Majority's Award

- 16 In his introduction, Graham, for the majority, explained the background leading to the arbitration. He quoted the letter of termination and explained that the decision of the Board to terminate was based on the recommendation contained in the superintendent's report. He specifically noted that the superintendent, in his concluding paragraph, wrote: "It is my opinion that Brenda Nicholson has not demonstrated the skills necessary for competency in teaching."

- 17 Before commencing a detailed review of the evidence, Graham wrote:

These proceedings are notable because the Division terminated the employment agreement with Nicholson because they concluded that she was not a competent teacher. There are no allegations that Nicholson had engaged in any type of culpable misconduct. Indeed, the evidence established that Nicholson was a conscientious employee who, in the words, of one Division witness, "tried very hard" to fulfill her employment responsibilities.

[emphasis added]

- 18 After his review of the evidence (22 pages), Graham analyzed the evidence under two distinct time periods: September 2002 to June 2005, when Nicholson worked as a resource teacher, and September 2005 to April

2006, when she worked as a remedial English teacher.

19 For the first time period he noted that “[t]here are significant factual disagreements between the parties” and he commented at length on two contentious issues. The first was Nicholson’s performance with respect to funding applications for students. The second was the accuracy and fairness of the evaluations concerning Nicholson.

20 With respect to the funding applications Graham concluded:

... [O]n balance, and notwithstanding some lingering concerns, Nicholson’s work in relation to Funding Applications was satisfactory and was not, and should not have been, a serious negative consideration in relation to her performance as a resource teacher.

My overall conclusion with respect to the issue of [the funding applications] ... is that Nicholson did have a challenging and burdensome caseload and did show progress in the development and completion of [the applications]. However, deficiencies persisted in the areas of both timeliness and content. I have also concluded that the deficiencies persisted notwithstanding the substantial supports which were provided to Nicholson by the Division. Furthermore, I have concluded that the deficiencies were not minor, or problems merely of form, but rather related to issues of substance and important content. [The applications] are important documents and when prepared and utilized properly can have a very beneficial impact on a student’s progress and development. It was therefore reasonable and appropriate for the Division to take Nicholson’s continuing difficulties with [the applications] into account when determining her ongoing suitability as a resource teacher within the Division.

[emphasis added]

21 With respect to the evaluations he wrote:

The period from September 2002 to June 2005, and the events that

occurred during that period ... are important to the outcome of this case. Although Nicholson's employment agreement was not terminated until April, 2006, at which time she was employed as a remedial language arts teacher, her performance as a resource teacher ... is relevant because the decision of the Division to terminate Nicholson's employment was based in part on the conclusion of Whitley and other senior administrators, that Nicholson has not reached an acceptable level of performance as a resource teacher.

[emphasis added]

22 After reviewing the evidence with respect to the evaluations, Graham wrote that "it is impossible to conclude on the basis of the evaluation reports that she was not progressing towards the goal of becoming an effective resource teacher."

23 He also concluded:

... [T]hat Whitley's decision, taken after consulting with [the other administration staff], to remove Nicholson from resource teaching and to provide her with another assignment for the 2005/2006 school year was logical and sensible. The decision was made in good faith, and a considered assessment of Nicholson's strengths and weaknesses as a resource teacher.

It should be emphasized that this conclusion is not equivalent to a finding that Nicholson was an incompetent resource teacher, nor that she could never become a competent resource teacher.

24 For the second period of time (September 2005 to April 2006), Graham accepted Whitley's evidence that "he thoughtfully attempted to provide a teaching assignment for Nicholson ... in which she could succeed." He reviewed in detail the divergent evidence of the Division's witnesses and of Nicholson with respect to the criticisms of her work as a remedial English

teacher. He expressed concerns about the objectivity of her primary evaluator (Slashinsky) in light of the deteriorating relationship between the two during her position as a resource teacher. He wrote that "it would have been preferable ... to have assigned another Principal or administrator to conduct classroom observations, pre-, and post-conferences, and to otherwise become responsible for Nicholson's evaluation." He also noted that Nicholson had not worked as a classroom teacher for some years and "[t]he assessments which had been conducted of her performances as a classroom teacher in the early stages of her career had been positive."

25 Graham concluded that the decision to terminate was "premature":

.... All of these factors, taken together, and combined with Nicholson's other positive attributes, including her scholastic achievements and her dedication, lead me to the conclusion that the Division's decision to terminate her employment agreement was premature, and cannot be sustained.

The Division has not proven that Nicholson is an incompetent teacher. The Division has also not demonstrated that there are no positions available within the Division into which Nicholson could be reasonably assigned. Such an assignment would be one in which there would be reasonable prospect for her to succeed and for her students to receive the high standard of education to which they are entitled.

[emphasis added]

26 Graham concluded:

... [T]he reason given by the Division for the termination of their employment agreement with Nicholson, namely a lack of competency on the part of Nicholson, has not been proven. Therefore, the reasons given by the Division do not constitute cause for terminating the

employment agreement of Nicholson. Accordingly, we direct that the Division's employment agreement with Nicholson be continued in force and effect.

[emphasis added]

Dissenting Reasons

27 While Parkinson accepted that the majority award "fairly recites the facts," he took issue with its analysis of the evidence and how it "incorrectly directed its mind to determining that the Division has not proven a lack of competency."

28 He concluded that the reason given for the termination was as specifically stated in the termination letter, which was not incompetency. He wrote:

... [T]here is no question that the Division did prove an inadequate performance Whether that inadequate performance was due to incompetency or some other reason was not for this Board to decide.

Had the Board turned its mind to the correct question, that is the reason given, they would have correctly concluded, ... that the performance of Nicholson had not met the Division's basic expectations of their teachers and it had to date, a detrimental effect on the students' education.

.....

The detrimental effect on students' education was the concern given by the Board of Trustees as their reason for terminating Ms. Nicholson's employment. That reason has not been considered in any way shape or form by the majority

Reasons of the Reviewing Judge

29 As earlier stated, the reviewing judge “set aside the arbitration award and [substituted] an order that the [D]ivision had cause for terminating Brenda Nicholson’s employment” (at para. 18). His rationale for doing so is set out at the end of his reasons (at para. 17):

As pointed out by the [Division] in its brief that there was a distinction to be made between unsatisfactory performance and lack of competency. Lack of competency was not the reason given by the [Division] for terminating Nicholson’s employment. This appears to be an error on the part of the Board. The Board did not consider the issue that was clearly to be decided and thereby lost jurisdiction and as the [Division] argues this alone warrants court intervention.

[emphasis added]

30 Before stating his conclusion, the reviewing judge summarized the background facts, during which he made reference to the wording in the termination letter and the conclusions in the superintendent’s report. He briefly referred to the arguments of counsel on various issues, including the applicable standard of review, noted the questions he had to decide pursuant to the consent order granting leave (see s. 92(4)(e) of the *Act* and s. 44 of *The Arbitration Act*) and quoted excerpts from the reasons of the majority and the dissent.

31 With respect to the standard of review, the reviewing judge quoted from *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, to explain the difference between the standard of reasonableness and the standard of correctness. He did not engage in a standard of review analysis.

The Positions of the Parties

Nicholson's Position

32 Nicholson's position is that the reviewing judge erred in law when he concluded that the Board lost jurisdiction because it considered the reason for termination to be Nicholson's lack of competency. She points to the specific reference in the superintendent's report that she has not demonstrated "the skills necessary for competency in teaching" and says that the essence of the commentary in the report is focussed on his concerns of poor performance and poor skills as a teacher that did not meet the Division's expectations. She asserts that "poor performance," "failing to meet the Division's basic expectations of its teachers" and "failure to demonstrate the skill necessary for competency in teaching" are terms without any appreciable difference and they all call into question her competency as a teacher.

33 Nicholson argues that the Board's mandate was two-fold. First, to consider whether the reasons given for her termination were proven. This, she says is a factual determination. Second, if proven, the Board must determine whether the reasons constitute "cause." This she says is a legal question. She says that the Board did both in a careful and detailed decision and therefore exercised its jurisdiction by carefully considering the issue that was to be decided.

The Division's Position

34 The Division's position is that the reviewing judge correctly concluded

that the Board never considered the fundamental reason that the Division gave for terminating Nicholson, as required under s. 92(4) of the *Act*. It asserts that the Board focussed on whether the Division had proven, on a balance of probabilities, that Nicholson was an incompetent teacher and did not consider the more broadly stated reason that Nicholson's performance had not met its basic expectations and that the board of trustees believed this was having a detrimental effect on Nicholson's students. While the Division acknowledges that competency was an element of the superintendent's report, the fundamental reason for termination was Nicholson's inadequate performance, with its resulting detrimental effect on students. In this regard, the Division points to its concerns that Nicholson was confrontational, argumentative and unwilling to accept direction. These attributes, the Division says, are more than being incompetent.

Analysis and Decision

35 Given that leave to appeal was granted on only one question, this appeal is narrow in focus. It is not about the factual findings by the Board or its interpretation of cause. Nor is it about whether the judge erred when he did not engage in a standard of review analysis. It is only about whether the reviewing judge erred when he concluded that the Board lost jurisdiction because it did not decide the issue before it.

36 I agree with the parties that the standard of review in this court for this question is correctness. Thus, no deference is owed to the reviewing judge's conclusion that the Board lost jurisdiction. Rather, this court must undertake

its own analysis in that regard. See *Dunsmuir*, at para. 50.

37 By concluding that the Board “lost jurisdiction,” the reviewing judge determined that the Board had erred by not addressing the issue before it. This type of error has been described as a “decision-making error” or a “jurisdictional error” for failing “to determine a matter that was submitted for adjudication.” See Donald J. M. Brown & David M. Beatty, *Canadian Labour Arbitration*, 4th ed., looseleaf (Toronto: Canada Law Book Inc., 2006) vol. 1 at para. 1:5300. This type of jurisdictional error is to be distinguished from the concept of jurisdiction referred to by Bastarache and LeBel JJ. in *Dunsmuir* that “in the narrow sense of whether or not the tribunal had the authority to make the inquiry” (*Dunsmuir* at para. 59). They cautioned against branding issues as jurisdictional when they are “doubtfully so” (at para. 59). This appeal is not about jurisdiction in that “narrow sense.” Rather, as already stated, it is about whether the reviewing judge erred when he considered the Board lost jurisdiction when it did not decide the issue before it.

38 In *Halifax Employers Association v. Workers’ Compensation Appeals Tribunal (Nova Scotia)*, 2000 NSCA 86, the Nova Scotia Court of Appeal reviewed a decision of a workers’ compensation appeal tribunal. Cromwell J.A. (as he then was), for the court, explained how a tribunal may commit jurisdictional error by asking itself the wrong question. He also explained that such an error will not occur when the substance of the issue is addressed. He wrote (at para. 29):

A Tribunal may commit jurisdictional error if it misinterprets the provisions of a statute so as to embark on an inquiry or answer a

question not remitted to it (see for example, **Canada (Attorney General) v. Public Service Alliance of Canada**, [1993] 1 S.C.R. 941 per Cory J. at 955, citing with approval **Canadian Union of Public Employees v. New Brunswick Liquor Corp.**, [1979] 2 S.C.R. 227 at 237; **Service Employees International Union, Local 333 v. Nipawin District Staff Nurses Association et al.** [1975] 1 S.C.R. 382 per Dickson, J. at p. 389) or where it does not perform the task required of it by the relevant legislation (see **Metropolitan Life Insurance Co. v. International Union of Operating Engineers, Local 796**, [1970] S.C.R. 425 at p. 434). A tribunal does not, in my opinion, commit jurisdictional error simply by rephrasing the issues before it for the purposes of analysis so long as the tribunal addresses the substance of an issue properly before it and within its jurisdiction.

[emphasis added]

39 In dismissing the appeal, Cromwell J.A. concluded that the tribunal had “addressed and decided the fundamental issue” before it. He continued (at para. 30):

.... To rephrase the issues as it did was not an error, let alone a jurisdictional error. I agree with the submission on behalf of the Board that the appellant’s argument on this ground of appeal is one of semantics, not of jurisdiction.

40 More recently, in *National Automobile, Aerospace, Transportation and General Workers Union of Canada v. Bristol Aerospace Ltd.*, 2008 MBCA 62, 228 Man.R. (2d) 125, this court came to a similar conclusion when it considered an appeal from a reviewing judge’s determination that an arbitrator had exceeded his jurisdiction because he failed to address the question submitted to him. The arbitrator in that case was appointed to address a grievance under a collective agreement. The judge’s decision was reversed on appeal. Steel J.A., for the court, explained that the arbitrator had

not exceeded his jurisdiction because he had addressed the substance of the grievance before him (at para. 21):

In whichever way the grievance is framed, it is the arbitrator's mandate to answer the substance of the grievance, not the form of the question. See **Hydro Ottawa Ltd. v. International Brotherhood of Electrical Workers, Local 636**, (2007), 223 O.A.C. 114; 281 D.L.R. (4th) 443; 2007 ONCA 292, at para. 13, and **Ringer v. Workers' Compensation Board (Man.) et al.** (2005), 192 Man.R. (2d) 201; 340 W.A.C. 201; 2005 MBCA 37, at para. 70.

41 I see no reason to distinguish between the arbitrator in *Bristol Aerospace* and the Board here. The only difference is that in *Bristol Aerospace*, the grievance set out the issue to be decided and here it is the *Act*. In both instances, the mandate of the arbitral decision-maker is to answer the substance of the issue before it.

42 The reviewing judge never asked himself whether the Board answered the substance of the question mandated by the *Act*. In my view, he addressed form and not substance. He only considered that the reference to incompetency in the majority's reasons differed from phraseology used in the termination letter and the superintendent's report. In my view, more analysis was required to determine if the substance of the question had been addressed by the Board. When I review the majority's reasons, I can only conclude that the substance of the Division's reasons for termination were thoroughly addressed.

43 The Division's reasons for termination were set out in two documents. The termination letter stated that Nicholson's "performance ... has not met the Division's basic expectations of our teachers which the Board believes has

a detrimental effect on [her] students' education." The superintendent's report concludes with two observations, which I repeat here:

As recently as April 6, 2006, Brenda Nicholson continued to be confrontational, argumentative, and unwilling to accept direction from her immediate supervisor, Kathleen Slashinsky. Therefore, I am recommending that Brenda Nicholson's employment with Rolling River School Division be terminated.

It is my opinion that Brenda Nicholson has not demonstrated the skills necessary for competency in teaching. As the Superintendent of Schools, I have a duty of care to the students in my jurisdiction. Therefore, based on my observations, and the recommendations of Kathleen Slashinsky, I am recommending to the Board that Brenda Nicholson's contract with the Rolling River School Division be terminated by written notice.

44 The superintendent's report raised the issue of Nicholson's competency. The Division argues that incompetency was just one of the reasons for termination. It says that the Board never turned its mind to Nicholson's inadequate performance. Whether the phrase used to describe the reason for termination is incompetence or inadequate performance is really a question of semantics in this case. The reasons of the majority demonstrate that the Board addressed all the concerns raised by the superintendent's report and the termination letter, as expanded upon at the hearing. The evidence over the course of the eight-day hearing was summarized in detail. This evidence concerned Nicholson's performance, her attitude, her conduct during meetings, her relationship with the supervisors, including Slashinsky, her shortcomings and her strengths. The fundamental issue was her ability to do the job. The Board understandably stated the reason for termination to be "lack of competence" given the nature of the

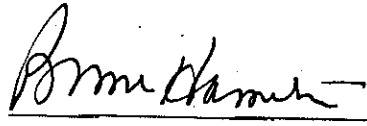
concerns raised and the superintendent's own reference to competency in his concluding paragraph.

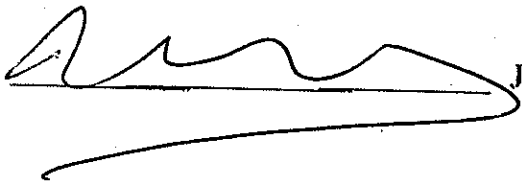
45 In summary, the majority understood its mandate under the *Act*, and in keeping with that mandate, it reviewed in detail the allegations of the Division that founded its decision to terminate Nicholson. These included not only the allegations of what the Division called incompetence, but also what it now calls inadequate performance. By doing so, the Board addressed the substance of issue before it. As a result, it did not, as determined by the reviewing judge, answer the wrong question.

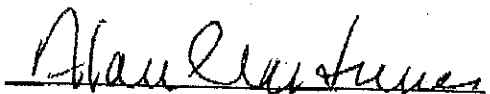
Conclusion

46 The judge erred when he concluded that the Board lost jurisdiction and substituted his own decision for that of the Board. The Board answered the question submitted to it pursuant to s. 92(4) of the *Act*.

47 I would allow the appeal, reinstate the order of the Board and order costs in favour of Nicholson.

 J.A.

I agree:  J.A.

I agree:  J.A.