1930

*Oct. 14
*Oct. 27.

THOMAS RICHARDS (PLAINTIFF) ..... APPELLANT;

AND

BOARD OF TRUSTEES OF THE ATHABASCA SCHOOL DISTRICT No. 839, OF THE PROVINCE OF ALBERTA (DEFENDANT) ..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Schools—Termination by board of school trustees of teacher's employment—Alleged wrongful termination—Terms of agreement—Teacher's remedy—School Act, Alta., R.S.A., 1922, c. 51 (as amended 1923, c. 35), ss. 196, 199 (2), 137 (1) (o).

The defendant board of school trustees employed plaintiff as teacher. Under the agreement of employment, either party might terminate it by giving 30 days' written notice, "provided that no such notice shall be given by the board until the teacher has been given the privilege of attending a meeting of the board (of which five clear days' notice in writing shall be given to the teacher) to hear and to discuss its reasons for proposing to terminate the agreement." In terminating plaintiff's employment, said proviso was not observed, nor, as found by this Court on the evidence, was there any effective waiver by plaintiff of his privilege thereunder. Plaintiff sued for damages for wrongful termination.

Held (1): S. 196 of the *School Act* (R.S.A., 1922, c. 51, as amended 1923, c. 35, s. 8), which provided for an appeal to the Minister by "any teacher who has been suspended or dismissed by the board," had no application to deprive plaintiff of his right of action. S. 196† should be read as relating to a suspension or dismissal under s. 137 (1) (*o*), and not to a decision to terminate an agreement under s. 199 (2). Further, moreover, s. 196 contemplated a re-hearing on the merits by the Minister of the matter on which the board's decision was given; and, whether in the case of a dismissal or suspension under s. 137 (1) (*o*), or in the case of termination under a provision such as that in the agreement in question (if s. 196 applied in such case), there was contemplated, before appeal to the Minister, a consideration of the matter by the board after giving the teacher a full opportunity to be heard; and where no such opportunity was given, the board's right to dismiss or suspend under s. 137 (1) (*o*), or to terminate under such a provision in the agreement, did not come into operation; and s. 196 did not contemplate the supersession of the ordinary jurisdiction of the courts where the sole question was whether or not the

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Smith JJ.

†Reporter's Note: Sec. 196 is dealt with, in this case, as it stood before the amendment of 1930, c. 39, s. 2, which brings the express wording of the section into conformity with the construction given in the present judgment.

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board had taken the necessary steps to put itself in the position to give an effective decision, and did not concern the merits of the decision itself.

Murray v. *Ponoka School District*, 24 Alta. L.R. 205, in effect overruled.

(2): In all the circumstances, the failure by the board to observe the terms of the agreement was a technical breach only; had they been followed, there was no doubt the agreement would have been terminated conformably thereto; plaintiff was entitled to recover as damages the wages to which he would have been entitled during the period required to make effective the stipulated proceedings for its termination (less amount earned during that period elsewhere). (He was not entitled to expenses incurred in moving: *French* v. *Brookes*, 6 Bing., 354).

APPEAL by the plaintiff (by special leave granted by the Supreme Court of Canada) from the judgment of the Appellate Division of the Supreme Court of Alberta dismissing his appeal from the judgment of Ives J. dismissing his action, which was brought to recover damages for alleged wrongful termination of his agreement of employment as school teacher by the defendant board of school trustees. The material facts of the case and questions in issue are sufficiently stated in the judgment now reported. The appeal was allowed with costs.

O. M. Biggar, K.C., for the appellant.

H. G. Nolan for the respondent.

The judgment of the court was delivered by

DUFF J.—This appeal concerns the claim of the appellant for salary as school teacher in the respondents' District, under an agreement dated the 27th of July, 1927.

The pertinent provisions of the agreement are these:

2. The salary to be paid said teacher shall be at the rate of Sixteen Hundred Dollars per year, such salary to be increased annually as follows:

3. The said Board further binds and obliges itself and its successors in office to pay the said Teacher during the continuance of this Agreement the sum or sums for which it hereby becomes bound in accordance with the provisions of The School Act.

The salary earned shall be estimated as provided in Section 199 of The School Act, which is in part as follows:

"The salary of a Teacher shall be estimated by dividing the rate of salary for the year by 200 and multiplying the result obtained by the number of actual teaching days within the period of his engagement;

"Provided that if the salary stated in the Teacher's contract is given at a monthly rate, the rate of salary for the year shall be deemed to be a sum equal to twelve times the said monthly rate."

6. This agreement shall continue in force from year to year, unless it is terminated as hereinafter provided, or unless the Certificate of the Teacher has been revoked in the meantime.

Either party hereto may terminate the agreement by giving thirty (30) days' notice in writing to the other party:

Provided that no such notice shall be given by the Board until the Teacher has been given the privilege of attending a meeting of the Board (of which five clear days' notice in writing shall be given to the Teacher) to hear and to discuss its reasons for proposing to terminate the agreement.

8. All amendments to this agreement are subject to the provisions of The School Act and to the approval of the Minister of Education.

The appellant was present at a meeting of the respondents on the 20th of June, 1928. At that meeting there was some criticism by the secretary of the board directed against the conduct of the school by the appellant. Among other things, the sufficiency of the preparation of pupils for the forthcoming provincial examinations was adverted to. And after some discussion, one of the trustees, Mr. McLeod, suggested that it would be better to defer action until the results of the examinations were known. The appellant then asked the board, if they had any intention of terminating his agreement, to inform him of it, so that he might make arrangements for another position before the expiry of the summer vacation. Thereupon the chairman of the board appears to have said, (although there is some conflict of evidence upon this) that the matter would be further considered when the results of the examinations became known and the appellant would be communicated with. After the transpiry of the results of the examinations, a meeting of the board was held on the 4th of August, at which it was decided that a change should be made, and that the appellant should be given "the customary thirty days' notice" of the termination of his contract, and that applications for the vacant post should be advertised for. Notice in writing was accordingly sent by the secretary, but apparently the appellant did not receive it, and on his return to Athabasca on the 1st of September, it was read to him by one of the trustees in the presence of the secretary. It is stated in the respondents' factum that a meeting of the respondents was held on the 5th of September, at which the appellant was present with a representative of the Teachers' Alliance, and that the situation then was discussed, but apparently with no result.

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Duff J.

Admittedly the proviso of clause 6 of the agreement was not observed, and the contention on behalf of the respondents that there was an effective waiver by the appellant of his right under the proviso, is without support in the evidence.

The substantive defence of the respondents is that by force of section 196 of *The School Act*, the appellant's only remedy is by way of appeal to the Minister of Education. The courts in Alberta, following their previous decision in *Murray* v. *Ponoka School District* (1), gave effect to this defence.

Section 196* is in these words:

196. Any teacher who has been suspended or dismissed by the board may appeal to the Minister, who may take evidence and confirm or reverse the decision of the board and in the case of reversal he may order the reinstatement of such teacher;

Provided that if the teacher does not appeal from the decision of the board, or is not reinstated, the teacher shall not be entitled to salary from and after the date of his suspension or dismissal.

Before considering the argument founded upon this section, it is desirable to call attention to the terms of two other provisions of the statute.

By sec. 137 (1) of *The School Act* the powers of a school board are enumerated and it is (*inter alia*) provided that,

It shall be the duty of the board of every district, and it shall have power,

(*o*) to suspend or dismiss any teacher for gross misconduct, neglect of duty, or for refusal or neglect to obey any lawful order of the board and to forthwith transmit a written statement of the facts to the Department.

The other section is in these words:

199 (2) Unless otherwise provided for in the contract either party thereto may terminate the agreement for teaching between the teacher and the board of trustees by giving thirty days' notice in writing to the other party of his or its intention so to do.

It will be noticed that in article 6, the agreement reproduces, as one of its stipulations, the enactment of section 199 (2) with the addition of a proviso permitted by the section and sanctioned by the Minister.

The point in controversy, as touching the application of this section, is, whether or not, the phrase "any teacher who has been suspended or dismissed by the board" applies

(1) 24 Alta. L.R. 205; [1929] 2 W.W.R. 439.

*As it stood in R.S.A., 1922, c. 51, as amended 1923, c. 35, s. 8. See now later amendment, 1930, c. 39, s. 2 (Reporter's note).

to the appellant in the circumstances of this case. It is contended on behalf of the appellant that section 196 has no application to a decision by a board to effect the termination of an agreement under section 199 (2) or under a clause in the agreement embodying it.

I am unable to agree with the conclusion of the Alberta courts for two reasons. First, I think that, regarding the provisions above quoted as a whole, the more natural construction is to read section 196 as relating to a suspension or dismissal under section 137 (1) (*o*), and not to a decision to terminate an agreement under section 199 (2).

Then it appears to me that section 196 contemplates a re-hearing on the merits by the Minister of the matter in which the decision of the board is given. In the case of a dismissal or suspension under section 137 (1) (*o*), the Minister would have to consider whether any of the statutory causes had in fact arisen. In the case of the termination of an agreement under clause 6 (if I am wrong in thinking that section 196 does not apply to such a case), the question for the Minister would be whether the board had adequate reasons for terminating the agreement. In either case, it seems to me, the statute contemplates, before appeal to the Minister, a consideration of the matter by the board after giving the teacher a full opportunity to be heard. The appellant's agreement provides for this in express terms, but the law would attach an analogous condition to the exercise of the powers of a board in proceedings under section 137 (1) (*o*).

Where no such opportunity is given to the teacher, the board's right to dismiss or suspend under section 137 (1) (*o*), or to terminate the agreement under cause 6 of the agreement before us, does not come into operation. The board has in such circumstances no title in point of law to give a decision under the statute or the agreement, and any decision in fact given would be simply inoperative. An appeal to the Minister would be a most inappropriate remedy in such a case; and, in my opinion, section 196 does not contemplate the supersession of the ordinary jurisdiction of the courts, where the sole question is, whether or not the trustees have taken the necessary steps to put themselves in a position to give an effective decision, and does not concern the merits of the decision itself.

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Duff J.

The question of damages remains. The plaintiff is entitled to reparation in respect of the loss incurred by reason of the wrongful termination of his contract. Had the contract (art. 6) been complied with, there appears to be no probability that notice of termination of the contract would not have been given.

Indeed, there is no doubt as to the dissatisfaction of the board at the end of the term, or that action was postponed solely with a view to ascertaining the results of the examinations. There is no room for a suggestion that the board were actuated by any sort of personal feeling, or by any motive other than a desire to secure efficiency in the conduct of the school. In this, the board were simply doing their duty. They may have erred in judgment, there is always a possibility of that, but it was their duty to give effect to their judgment and there is no ground for supposing that the appellant could have invoked any consideration which would have altered their view. In all the circumstances, the failure to observe the terms of the proviso was a technical breach of contract only, in the sense that the observance of it would not, I am entirely convinced, have helped the appellant in any material way.

The appellant is entitled to be placed in the same position (so far as that can reasonably be done by pecuniary reparation) as if the contract had been performed; but if the strict terms of the engagement had been followed, there can be no doubt that the contract would have been brought to an end in conformity with its terms. As I have said, in my opinion, there would have been no appeal to the Minister under section 196. Therefore, the appellant is entitled to recover as damages, the wages to which he would have been entitled during the period required to make effective the stipulated proceedings for its termination. He is not entitled to the expenses incurred in moving. *French* v. *Brookes* (1). On the whole, I think it would be fair to calculate this period from the 5th of September; and therefore the period of five days, from the 1st to the 5th of September, must be taken into account In the result, the appellant is entitled to wages for forty-one days, computed in the manner directed by the contract, less the amount received from the Celtic School District, that is to say, to $207.50.

(1) (1830) 6 Bing. 354.

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The appeal is allowed with costs in this Court and the Court of Appeal, and judgment will be entered for the appellant for the sum mentioned, with the costs of the action. The costs in the Alberta courts will be calculated according to the appropriate scale.

Appeal allowed with costs.

Solicitor for the appellant: *G. H. Van Allen.*

Solicitor for the respondent: *P. G. Thomson.*

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*May 7.

TATISICH (DEFENDANT) .....APPELLANT;

AND

HARDING ET AL. (PLAINTIFFS).....APPELLANTS;

AND

EDWARDS (DEFENDANT) .....RESPONDENT.

TATISICH (DEFENDANT) .....APPELLANT;

AND

EDWARDS (PLAINTIFF) .....RESPONDENT;

TATISICH (DEFENDANT) .....APPELLANT;

AND

GALL (PLAINTIFF) .....APPELLANT;

AND

EDWARDS (DEFENDANT) .....RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Negligence—Motor vehicles—Driver of motor car swerving off pavement to avoid collision threatened through negligence of driver of another car, and on regaining pavement colliding with other cars—Question as to which driver was responsible for injuries caused by the collision.

APPEAL by the defendant Tatisich from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing her appeal from the judgment of Wright J. in the above mentioned actions, which were tried together.

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*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

(1) (1929) 64 Ont. L.R. 98.

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TATISICH v. EDWARDS.

Mrs. Tatisich (defendant in the three actions) was driving her motor car westerly, and Edwards (defendant in two of the actions and plaintiff in the other) was driving his car easterly, on the highway between Hamilton and Niagara, on August 12, 1928. It was alleged that Mrs. Tatisich turned out to pass a car ahead of her and that Edwards (coming in the opposite direction), in order to avoid a head-on collision with her car, swerved to his right off the pavement, and on returning to the pavement his car collided with others, causing injuries or loss to the plaintiffs.

Wright J. held that the accident was caused by the negligence of Mrs. Tatisich, and that Edwards was not chargeable with any negligence causing the accident, and gave judgment in all actions in favour of the plaintiffs against Mrs. Tatisich, and dismissed the actions against Edwards. This judgment was affirmed by the Appellate Division (1). Mrs. Tatisich appealed to the Supreme Court of Canada. The plaintiffs Harding et al. and Gall also appealed, in so far as their claims against Edwards were dismissed, and asked that, in the event of the appeal of Mrs. Tatisich being allowed, they be awarded judgment against Edwards. Leave to all said appellants to appeal to the Supreme Court of Canada was given by the Appellate Division.

After hearing argument by counsel for the appellant Tatisich, and counsel for the appellants Harding et al. and Gall having stated that they were satisfied to have the judgment below (as given against the appellant Tatisich) sustained as it stands, the members of the Court retired to consider the case, and on their return to the Bench, the Court, without calling on counsel for respondents, delivered judgment dismissing the appeal of the appellant Tatisich with costs. The Chief Justice stated that the Court was of opinion that the question involved was purely a question of fact on which the Court had the explicit finding of the trial judge, confirmed by the majority of the Appellate Division; that question of fact being whether Edwards had recovered sufficiently from the condition of nervous excitement, into which the rash act of the appellant Tatisich had thrown him, to be held responsible for

(1) (1929) 64 Ont. L.R. 98.

what subsequently occurred, or, whether he should be regarded as still acting involuntarily under the influence of that condition; the Court took the view, notwithstanding Mr. Hellmuth's very able presentation of the appeal, that nothing had been shewn which would entitle it to determine the question before it otherwise than as the Appellate Division had done.

(The appeals of Harding et al. and of Gall, against Edwards, were, on counsel for the parties concurring, dismissed without costs.)

Appeal dismissed with costs.

I. F. Hellmuth K.C. and *G. C. Elgie* for the appellant Tatisich.

H. J. McKenna and *T. McCombs* for the appellants Harding et al.

L. W. Gay for the appellant Gall.

C. W. R. Bowlby for the respondent Edwards.