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IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ST. LAWRENCE COLLEGE

(The Employer)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF A. ABEL - #87E45

BOARD OF ARBITRATION:

Kenneth P. Swan, Chairman
R.J. Gallivan, Employer Nominee
Jane Bern, Union Nominee

Appearances:

For the Employer:

Chris White, Counsel

For the Union:

C.G. Paliare, Counsel

A W A R D

At the hearing in this matter, the parties were agreed that the board of arbitration had been properly appointed, and that we had jurisdiction to hear and determine the matter at issue between the parties. Although the matter is quite complex, counsel were able to proceed by documentary evidence admitted on consent and oral submissions, without the necessity of calling witnesses.

Despite its agreement on our general jurisdiction in this matter, the Employer argued that we were without jurisdiction to hear the merits of the matter for two substantial reasons, which were raised as preliminary objections. The first of these is that the grievance was filed beyond the time limits set out in the collective agreement. The second, and more fundamental objection, is that the grievor was a probationary employee at the time of the termination of his employment, and that the present grievance, which effectively characterizes that termination as discharge without cause, is not arbitrable. We shall deal with the second objection first.

Before turning to the undisputed facts of this matter, it is useful to set out the provisions of the collective agreement on which the parties rely:

1.01 The Union is recognized as the exclusive collective bargaining agency for all academic employees of the Colleges engaged as teachers (including teachers of Physical Education), counsellors and librarians, all as more particularly set out in Appendix I hereto save and except Chairman, Department Heads and Directors, persons above

the rank of Chairman, Department Head or Director, persons covered by the Memorandum of Agreement with the Ontario Public Service Employees Union in the support staff bargaining unit, and other persons excluded by the legislation and teachers, counsellors and librarians employed on a part-time or sessional basis.

NOTE A: "Part-time in this context shall include persons who teach six hours per week or less."

NOTE B: "Sessional in this context shall mean an appointment of not more than twelve months duration in any twenty-four month period."

. . .

3.03 (1) The Salary scales as set out in Appendix I will apply to persons teaching more than twelve (12) hours on a regular basis. Persons teaching over six (6) and up to and including twelve (12) hours on a regular basis will be covered by paragraph (2) hereto and Appendix II.

3.03 (2) Persons who teach over six (6) and up to and including twelve (12) hours per week on a regular basis shall be referred to as "partial-load" employees and shall not receive salary, vacations, holidays or fringe benefits (except for coverage of Worker's Compensation and liability insurance) under this Memorandum and Appendix I but shall be paid for the performance of each teaching hour at an hourly rate within the range of hourly rates set out in Appendix II and in accordance with the other provisions of Appendix II.

3.03 (3) It is recognized that a full-time teacher who may be assigned by the College to an instructional assignment of less than thirteen (13) hours per week shall continue to be paid on the basis of salary rather than on an hourly rate except as may occur through the application of Article 8, Seniority, or as may be mutually agreed between the employee and the College.

. . .

8.01 (a)(i) A full-time employee will be on probation until the completion of the probationary period which shall be two (2) years' continuous employment.

(ii) A full-time employee hired after September 1, 1981, who has completed a probationary period at another Ontario College of Applied Arts and Technology or who holds a valid Ontario Teacher's Certificate and who has one year or more of teaching experience in Ontario will be on probation until the completion of the probationary period which shall be one year's continuous employment.

(b) Effective September 1, 1976, the probationary period shall also consist of twenty-four (24) full months of non-continuous employment (in periods of at least one (1) full month each) in a forty-eight (48) calendar month period. For this purpose, only the period after September 1, 1975, shall be considered and no prior employment or calendar period shall be taken into account or credited. However, an employee's continuous service acquired in accordance with the provisions of the previous agreement dated the 17th day of September 1975, as at August 31, 1976, for the period back to September 1, 1975, shall count as continuous employment or months of non-continuous accumulated employment for the purpose of this Section.

For the purpose of this paragraph, effective September 1, 1976, a calendar month in which the employee completes fifteen (15) or more days worked shall be considered a "full month".

Effective September 1, 1981, if an employee completes less than fifteen (15) days worked in each of the calendar months at the start and end of the employee's period of employment and such days worked, when added together, exceed fifteen (15) days worked an additional full month shall be considered to be completed.

(c) During the probationary period an employee will be informed in writing of the employee's progress at intervals of four (4) months continuous employment or four (4) full months of accumulated non-continuous employment and a copy given to the employee. Also, it is understood that an employee may be released during the first five (5) months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment upon at least thirty (30) calendar days' written notice and during the remainder of the employee's probationary period upon at least ninety (90) calendar days' written notice. If requested by the employee, the reason for such release will be given in writing.

(d) Upon the completion of the employee's probationary period, a full-time employee shall be credited with two (2) years' seniority if treated under 8.01(a)(i) or one (1) year's seniority if treated under 8.01(a)(ii). An employee who commenced full-time employment with the College directly from the College's predecessor educational institutions shall be credited for the purpose of this Article with seniority equal to the employee's continuous service in such predecessor institution. The list of predecessor educational institutions referred to herein is attached as Appendix VIII of the Collective Agreement.

8.02 (a) It being understood that the release of an employee during the probationary period shall not be the subject of a grievance under the Grievance Procedure, an employee who has completed the probationary period and is discharged for cause may lodge a grievance in the manner and to the extent provided in the Grievance Procedure.

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Appendix II
PARTIAL-LOAD EMPLOYEES

. . .

2. It is agreed that Article 8 has no application to partial-load teachers except

as referred to in Section 8.05(d) and Section 8.15(b). Such partial-load teachers may be released upon two (2) weeks' written notice and shall resign by giving two (2) weeks' written notice.

3. For the purpose of determining the service of a partial-load teacher under Section 8.05(d) a partial-load teacher will be entitled to credit for service from September 1, 1971 (but not earlier) on the basis of one-half (1/2) month's credit for each full month of service up to January 1, 1977 and thereafter on the basis of one-half (1/1) month's credit for each calendar month in which the employee teaches thirty (30) hours or more.

. . .

Appendix IV

In the administration of Section 8.05(d) and for that purpose only, a part-time employee shall be considered to have service based on one-quarter (1/4) month's credit respectively for each full month of employment with the College.

Article 8.05(d), which is referred to in the above provisions, relates to the relative priority of full-time, partial-load or part-time employees on lay-off. Reference will be made to this provision below, but there is no need to quote it in its entirety.

The grievor's service with the College began in 1983 on a part-time basis, and ended with a letter of termination dated September 25, 1986. The precise nature of the grievor's employment record is central to this case, so we shall set it out in detail. However, his employment is covered by nearly 20 overlapping payroll authorization forms, and we have decided to

summarize these for the purpose of our assessment of his rights in this matter. The following is our summary, based on the evidence presented:

1. From September 14, 1983 to September 9, 1984, the grievor was on a series of part-time academic staff appointments. While these specific appointment documents overlap somewhat, it appears that this can be treated as one single stretch of employment, but on a part-time basis only.

2. From September 10, 1984 to January 27, 1985, the grievor was on a partial-load academic staff appointment, which was interrupted by a strike from late September to early November 1984.

3. From January 28, 1985 to January 5, 1986, the grievor was on a series of sessional and partial-load and academic staff appointments, which both parties agree should be treated as continuous sessional employment for the purposes of this grievance.

4. From January 6, 1986 to October 10, 1986, he was on a probationary academic staff appointment, which was terminated by notice of his release by letter dated September 26, 1986, to be effective on October 10, 1986.

Based on this employment record, the parties are agreed that the grievor is entitled to count service from January 28, 1985 to October 10, 1986 as service toward the completion of his probationary period. The dispute is whether he can count any other appointment toward his probationary period, and if so how

that affects the determination of his probationary status at the time of his release. There are really three aspects to the disputed parts of the grievor's service:

1. Is the grievor entitled to count any of his service prior to January 28, 1985 toward his probationary period?

2. Is the 90 day notice period specified in Article 8.01(c), which in this case was partially worked and partially paid out, required to be counted toward the employee's probationary period?

3. At the time of the termination of his employment, the grievor had accumulated 18 days of unused vacation, which was paid out by the Employer. Was the grievor entitled to use those 18 days toward his probationary period?

The period of service which both parties agree that the grievor worked appears to be one year and 256 days, although there were a few brief interruptions in the grievor's sessional appointments and there is scope for arguing for a slightly lower count. As will be seen, however, it is sufficient in this case to take the one year and 256 day period as the basis for consideration.

We turn first to the question of whether the grievor is entitled to count any of his periods of part-time or partial-load employment prior to January 28, 1985. This issue divides into two separate considerations. During 1984, the grievor's employment always fell below the 13 hour per week limit for partial-load employees, but during the month of January, because of

additional assignments, his workload in the third week rose to 28 hours, while his workload in the fourth week was at 16 hours. Immediately after that last week, he began the sessional appointment from which time his accepted service counts.

The Union argues first that the provisions of Appendix II, paragraph 3 entitle the grievor to count his partial-load employment from September to December at one-half month's credit for each of those months. The argument is based first on a comparison with Appendix IV, which specifies that part-time employees are considered to accrue service credits "in the administration of Section 8.05(d) and for that purpose only", and Appendix II, paragraphs 2 and 3 in which no such restrictive language as "for that purpose only" is found. In our view, however, the effect of reading paragraph 2 of Appendix II, which provides that Article 8 has no application to partial-load teachers except for 8.05(d) and 8.15(b), combined with the service calculation set out in paragraph 3 of that Appendix, was clearly intended to achieve the same result as the wording used in Appendix IV. Given that the probationary period calculation is found in Article 8.01, and that Article 8 has no application to partial-load teachers except as specified, we are of the view that no credit is given for partial-load service towards the probationary period.

The Union also refers, however, to Re Sheridan College and Ontario Public Service Employees Union (Smith), unreported, May 17, 1982 (Weatherill). This suggests that partial-load

service may be counted at the half-time basis specified in Appendix II, paragraph 3 for the purposes of determining the position on a seniority list of an employee who has already completed a probationary period.

The Employer argues that this case is simply wrong, but in our view it may readily be distinguished in any event from the matter before us. In that case, there is no discussion of counting time as a partial-load employee toward the completion of a probationary period. The concept of "seniority" appears throughout clause 8.05, and it is entirely possible that the board in the Sheridan College (Smith) case was considering it in that context. In any event, there is nothing in the case to suggest that the question now before us was raised before that board and considered before they came to the conclusion which they did. In our view, the clear words of Appendix II mean that the grievor is not entitled to account any of his partial-load service toward his probationary period, whether or not such service may be used to establish seniority once the probation is completed.

We turn next, therefore, to the situation in January 1985. During this period, the grievor taught two weeks for a number of hours which clearly exceeded the definition of partial-load employee, which at the time was limited to 13 hours per week. The issue is whether the grievor can be said to have been teaching "on a regular basis" beyond the definition.

This matter has been dealt with between the parties in

Re St. Lawrence College and Ontario Public Service Employees Union (Arsenault), unreported, November 16, 1982 (Brent). At page 7 of that award, the unanimous decision concludes:

It is our view that anyone who teaches more than six hours per week and who also cannot be said to teach between seven and 13 hours per week "on a regular basis" must be considered to be a full-time teacher. It is the phrase "on a regular basis", which occurs in Article 3.03(b), which must be given meaning.

The award continued to find that in a month when an employee worked for 13 hours per week for 10 teaching days and for 22 hours per week for 11 teaching days, that person could not be said to have worked between six and 13 hours "on a regular basis" during that month.

In a recent award, Re Algonquin College and Ontario Public Service Employees Union, unreported, April 26, 1988 (Swan), the present chairman decided that not only the quantity but also the quality of the assignment must be considered to decide whether an assignment over the partial-load limit is on a regular basis. In this case, we really have very little evidence from either party to assist us to assess the nature of the extra work assigned. What we are able to infer from the documentation is that it was likely overload work of a non-recurring nature. Some of it, indeed, seems to have involved course outline work and student interviews on a one-time basis. In our view, this can hardly be called a "regular" assignment.

We have come to the conclusion that, looked at as a

whole, the month of January 1985 must be treated as partial-load employment, and the grievor therefore is not entitled to count this service toward his probationary period. The extremely high workload in the second week must be seen in light of the pattern of the grievor's employment prior to that week, and indeed in light of what occurred after until he began his full-time sessional employment following January 28. On balance, we think the Employer is right on this issue.

The second issue to be considered is the 90 day notice period. This notice is required by Article 8.01(c), and is expressed to be "at least ninety (90) calendar days' written notice" to be given "during the . . . probationary period". This matter has been considered in a number of earlier cases involving this collective agreement and its predecessors, including Re Ontario College of Regents of Colleges of Applied Arts and Technology and Civil Service Association of Ontario (1976), 13 L.A.C. (2d) 82 (Weatherill), Re Fanshawe College and Ontario Public Service Employees Union (Safran), unreported, January 21, 1981 (Rayner), Re Durham College of Applied Arts and Technology and Ontario Public Service Employees Union (McIntyre), unreported, December 6, 1982 (Weatherill) and Re Sheridan College of Applied Arts and Technology and Ontario Public Service Employees Union (Brackenridge), unreported, May 8, 1985 (Brunner). All of these cases find, in effect, that the entitlement to three months' notice is entirely independent of the two year duration of the probationary period, and that a release

within the last three months of the probation period is equally effective as one before, provided always that the full three months' notice must be given. Where the notice period is not to be worked, the cases also conclude that payment in lieu of notice is sufficient.

The Union attacks all of these cases on the basis of the underlying principles, but we are of the view that the decisions outline what is a perfectly reasonable interpretation of all of the language of the collective agreement, and that it is an interpretation which has persisted between the parties through several renegotiations of the collective agreement. Some of these decisions, we observe, have been unanimous.

In our view, it would be wrong to disturb a line of jurisprudence on which the parties have relied to regulate their relationship, and which is of such long standing. In addition, however, we think we should observe that, while the matter is not entirely free of doubt, we would have reached the same conclusion as to the meaning of the collective agreement.

We turn finally to the question of whether the grievor is entitled to count the 18 days accrued but unused vacation to which he was entitled as of the termination of his employment toward his probationary period. From the findings we have already made, it will be obvious that our decision on this matter will not be conclusive of anything, but we shall nevertheless respond to the arguments made by counsel.

The only provision in the collective agreement to which

we were referred is clause 8.02(b). That refers to the discharge of an employee who has completed the probationary period, so it is of no direct relevance here. It does, however, contemplate that vacation may be paid out in addition to the notice period. While once again there is scope for some doubt, it would appear to be an unusual practice to permit accrued vacation to count toward a probationary period unless specifically provided for in the collective agreement. Under the employment standards legislation applicable to most employment in this province, vacation pay accrues from day to day, and is the subject of a statutory trust. The Union's reasoning would therefore have the effect of making any express probationary period reduced by the amount of accrued vacation, surely a rather extraordinary and complicated approach to the measurement of probationary periods.


However, the Union also argues that vacation may not be a part of the notice period, because Regulation 286 under the Employment Standards Act provides, in section 11, that the length of notice of termination of employment shall not include any week of vacation without the agreement of the employee terminated. The Employer points out, however, in our view correctly, that Regulation 286 applies to the so-called mass termination provisions of the Employment Standards Act, and that section 11 must therefore be read as applying to the statutory notice periods set out in that provision. Therefore it cannot have general effect, and it does not apply to the particular circumstances of this case. We find this argument persuasive, and we therefore find

that the 18 days of accrued vacation do not count toward the grievor's probationary period.

In the result, the grievor was still well within his probationary period at the time of his termination of employment, and his grievance against that termination, pursuant to Article 8.02(a), which has been interpreted in a number of cases involving this collective agreement, is not arbitrable. In these circumstances, it is not necessary for us to deal with the Employer's preliminary objection relating to timeliness.

The grievance is therefore denied.

DATED AT TORONTO, Ontario this 19th day of January, 1989.



Kenneth P. Swan, Chairman

I concur

"R.J. Gallivan"

R.J. Gallivan, Employer Nominee

I dissent; see attached

"Jane Bern"

Jane Bern, Union Nominee

A D D E N D U M

We have received and considered our colleague's careful dissent in this matter, but we regret that we still differ from her. There is, however, one point which she raises which requires us to clarify the basis of the majority award.

On the issue of whether the 90 day notice period must be given, in effect, prior to the expiration of 21 months of the probationary period, so that the notice period may be served, day for day, within the two year probationary period, she relies on Re C.S.A.O (Inc.) and The Ontario Council of Regents for Colleges of Applied Arts and Technology, et al., unreported, June 18, 1975 (Ont. Div. Ct.), which may be referred to as the "Aitchison case". She concludes, quoting us, that it would not be "wrong to disturb a line of jurisprudence" when the Divisional Court has spoken so clearly.

The line of jurisprudence of which we speak, however, is based upon Re Ontario Council of Regents of Colleges of Applied Arts and Technology and Civil Service Association of Ontario (Inc.), (1976) 13 L.A.C. (2d) 82 (Weatherill). In that case, the majority distinguished the Aitchison case from the facts of the case before it. In Aitchison, the effective date of release was outside the probation period; in the second case, the employee was terminated within the last three months of the probation period, but the termination was made of immediate effect, and payment in lieu of notice was provided. The majority concluded that payment in lieu of notice was sufficient compensation for the loss of an actual three months' notice, and that

termination of employment during the two year notice period was sufficient to satisfy the principles set out in the Aitchison case, even where it took place during the last 90 days of the probationary period. This decision, and in particular its reasoning distinguishing the Aitchison case, was upheld on judicial review by another panel of the Divisional Court in Re C.S.A.O (Inc.) and Ontario Council of Regents for Colleges of Applied Arts and Technology, unreported, March 7, 1977 (Ont. Div. Ct.).

The case before us falls squarely into the reasoning of the board of arbitration chaired by Mr. Weatherill, which reasoning has received not only the "blessing" of the Divisional Court, but the reasoned concurrence of a number of other boards of arbitration, referred to in our original decision, since that time. As we have observed, the interpretation is not beyond reasonable disagreement, but it is the interpretation upon which the parties have conducted themselves for a decade, and we think it would be wrong to disturb it now.

With the greatest of respect for our colleague, therefore, we must continue to disagree; as we have already suggested, reasonable people may reasonably do so on this issue.

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D I S S E N T

I have had an opportunity to review the award of the majority and disagree with a number of the findings as well as the result.

At page six, Mr. Swan makes it clear that the parties agreed that the grievor was entitled to count service from January 28, 1985 to October 10, 1986, as service towards the completion of his probationary period. Thus, the grievor had

approximately one year and nine months of service toward his probationary period of two years. I find it simpler to deal with this matter in terms of months rather than to say that the grievor had one year and 256 days to his credit.

I would have come to a different conclusion than the majority with respect to each of the questions asked. I will simply follow the order as set out in the draft award.

Can the Grievor Count Part-Time or Partial Load Employment

My conclusion is different than those of the majority at pages eight and nine. In my view, both the provisions of Appendix II, Paragraph three and the Re Sheridan College and Ontario Public Service Employees Union (Smith) case lead to the conclusion that the grievor would have been entitled to one-half months' credit for each month of employment from September to December, 1984. The distinction drawn by the majority in the Sheridan College (Smith) case is not one that can be made on a full and fair reading of that decision.

Then, for the month of January, 1985, where the grievor worked two weeks in excess of 13 hours per week, coupled with his appointment to a regular full-time position, can only lead to the

conclusion that the grievor began working full-time "on a regular basis" at the beginning rather than at the end of that month. Thus, the entire month of January ought to count towards the probationary period as well.

Ninety Day Notice Period

Without question, this aspect of the majority decision has caused me the most amount of concern because the decision is clearly contrary to the plain wording of the collective agreement. Also, the majority has totally ignored a Divisional Court decision squarely on point which contradicts the arbiprudence quoted by the majority. The issue is one of whether the employer must give 90 calendar days written notice during the probationary period or whether the employer can give payment in lieu of notice thus shortening the probationary period. The grievor received his letter of termination September 26, 1986, with a purported effective termination date of October 10, 1986. Thus, he received approximately two weeks' written notice. The Union argued that he was entitled to three months' written notice such that he could not have been terminated in the circumstances of this case until at least December 26, 1986.

The starting point in considering the validity of the Union's argument, is the wording of the collective agreement. Article 8.01(c) reads, in the relevant portions, as follows:

"Also, it is understood that an employee may be released during the first five (5) months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment upon at least thirty (30) calendar days' written notice and during the remainder of the employee's probationary period upon at least ninety (90) calendar days' written notice."

It is obvious that the parties contemplated that a probationary employee who had survived five months of the probationary period was entitled to at least 90 days' written notice in order to be terminated. The purpose of such a clause in a teaching context would be to ensure that the teacher had an opportunity to find alternate employment while still maintaining a teaching position. It is obviously clear that it is easier to find a job when one has a job and the parties must have had this simple proposition in mind when they agreed upon the clause in question. It would have been an easy matter to have said that employees were entitled to 90 days' notice had the parties intended that payment in lieu of notice would have been adequate. Rather, the parties specifically stated that the employee was entitled to 90 days' written notice and not money in lieu thereof. The majority has obviously "written out" the requirement of written notice in Article 8.01(c). Amending the collective

agreement in this fashion is expressly prohibited under this collective agreement.

It may be that the result of the interpretation which the Union advanced and which I accept is that the probationary period is shortened by 90 days but, this appears to be what the parties contemplated. Obviously, this would not work any great injustice upon the employer since the probationary period is a very lengthy two years.

Moreover, the Divisional Court clearly dealt with a decision which had erroneously interpreted Article 8.01(c) in the same way as the majority. In that case the Court stated:

" In our view, the term 'release' must mean the total cessation of the relationship of employer and employee and this cessation of the relationship in this case must occur before the expiration of the two year period.

The mere notification that such termination will occur in the future does not of itself terminate the relationship. In adopting this view, we recognize the fact that this interpretation of the term 'release' will have the effect of shortening the probationary period to 21 months as it will then be incumbent upon an employer in circumstances like this to give the three months' notice at a time sufficiently distant from the expiration of the probationary period to allow the three months to run within the two year period. I should add as well that, in our view, this interpretation of the agreement is not only the proper one, but also the only interpretation that the language of this agreement could reasonably bear." (emphasis added)


The Civil Service Association of Ontario (Inc.) and The Ontario Council of Regents for Colleges of Applied Arts and Technology, et al. (unreported decision of the Divisional Court, June 18, 1975, Zuber, Morden and Reid, JJ.)

In the face of the clear wording of the Divisional Court and the clear wording of Article 8.01(c) of the collective agreement, it is difficult to understand how the majority has opted for relying upon arbitral awards to the contrary. Thus, it would not be "wrong to disturb a line of jurisprudence" when the Divisional Court has spoken so clearly.

Vacation Days

I read the provisions of the Employment Standards Act differently than the majority. In my view, Section 11 of Regulation 286 does not apply simply to mass terminations. An employer cannot shorten a notice period by deducting vacation. Therefore, it logically follows that the vacation period must be included in determining the period of employment for the employee in question. I would have found that the 18 days in question should have been counted. Obviously, if the employee had taken the 18 days vacation at an earlier time, no one would have argued that he had not completed his two year probationary period simply because he took the amount of vacation that he was entitled to during the two year time frame. In other words, the probationary period is not elongated beyond the two year time frame to include the amount of vacation to which an employee is properly entitled.

Accordingly, in my view, the employee has exceeded the probationary period and we should have dealt with the merits of this case in terms of determining whether he was dismissed for cause.



JANE BERN