

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

COLLEGE COMPENSATION AND APPOINTMENTS COUNCIL
FOR COLLEGES OF APPLIED ARTS AND
TECHNOLOGY IN THE FORM OF ST. LAWRENCE COLLEGE
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(hereinafter called the "Union")

GRIEVANCE OF MONICA ANGER
OPSEU Grievance No. 2003-0417-0036
OPSEU File No. 2003-417-179
(hereinafter the "Grievor")

BOARD OF ARBITRATION:

Richard H. McLaren, Chairman
Sherrill Murray, Union Nominee
Richard O'Connor, College Nominee

COUNSEL FOR COLLEGE:

Pat Brethour

COUNSEL FOR THE UNION:

Paul Champ

A HEARING IN RELATION TO THIS MATTER WAS HELD AT KINGSTON, ONTARIO, ON
22 APRIL 2004.

PRELIMINARY AWARD

At the time of the hearing in Kingston, Ontario, the parties agreed that the Arbitration Board was properly appointed. There were no objections as to the composition of the Board of Arbitration nor as to its authority to issue a final and binding decision in this matter. The College raised a preliminary objection as to the arbitrability of the matter. This Preliminary Award deals with that objection.

The Grievor had been a full-time employee of the College as a professor in the Nursing Department since October of 1989. She went on disability in 1996. In 1998 she returned to work on a part time basis pursuant to a rehabilitation program. Her medical advisor determined that she was capable of working 50% of the time and so advised the College and the Long Term Disability {LTD} carrier the Sun Life Insurance Company {Sun Life}. She did not always work 50% of the time and the College did not always pay her 50% of her salary under the Collective Agreement. A grievance was filed on the 26th of May, 2003, alleging:

That the College is violating Articles(s) 4/16/18 & JIC agreement on Salary Allocation dated June 28, 2002 specifically but not exclusively in that I have not been properly paid.

The settlement requested was for a declaration that the Collective Agreement had been violated, that the Grievor be properly compensated and that the College adhere to the Agreement.

The Grievor had been medically certified to participate in a rehabilitation program which would permit her to work at 50% of her normal work level. While she worked at various jobs assigned by the College she still received benefits from Sun Life. In being paid for the work she did pursuant to the rehabilitation program the Grievor had not always been paid 50% of her salary by the College. However, the College had rectified that aspect of her pay by the time of her grievance. This gives rise to a preliminary objection by the College that the matter is moot. If it is found that the grievance is not moot, it is asserted that the matter is inarbitrable under the Collective Agreement because it involves the application and administration of the LTD insurance policy. That is a matter that has been held historically to be outside the scope

of the Collective agreement and the grievance arbitration procedure. See the recent decision between the parties involving the grievance of Mr. Grightmire.

In order for the parties Counsel to make argument to the Board of Arbitration they orally articulated an Agreed Statement of Facts for the purposes of the preliminary determination. The facts as agreed by Counsel are set out below.

1. Following a period on permanent disability that commenced in October of 1996 the Grievor began a period of part time employment with the College while continuing to receive LTD benefits. This was commenced as a rehabilitation program through Sun Life.
2. The Long Term Disability Plan is established pursuant to Article 18.01 of the Collective Agreement, which provides as follows:

18.01 Employees shall pay the full premium of the present Long-Term Disability Plan, the benefit level to be 60% of monthly base salary in effect as of the date of disability reduced by: ...
3. Under Appendix 4 of the Collective Agreement, a Joint Insurance Committee {JIC} is established with equal representation from the Union and the College Compensation and Appointments Council. The duties of the committee amongst others include:
 - Development of the Specifications for the public tendering of any negotiated benefits which may be included in the Group Insurance Plan (to cover the bargaining unit only); and
 - Review of contentious claims and recommendations thereon, when such claim problems have not been resolved through existing administrative procedures.
4. The current carrier for LTD benefits is Sun Life.
5. The Council of Regents issued on 7 August 2002 a document entitled: *Salary Allocation Guidelines-Academic Staff*. The document was prepared as a result of cases brought to the JIC.
6. Benefits are described in a booklet entitled "Employee Benefits for Academic Employees of the Ontario Colleges of Applied Arts and Technology" effective January 1, 2002 filed as Exhibit #8. This document was developed by the JIC.

7. Pursuant to the rehabilitation program the Grievor was certified capable of returning to a workload of 50%. The College attempted to assign work as close to the recommended amount as possible.
8. The College initially paid the Grievor an actual salary based upon the actual workload as set out in Exhibit # 5. The College later adjusted that payment to a constant 50 % regardless of workload except where the actual work exceeded 50 % in which case the actual workload was paid as an equivalent actual salary.

ARGUMENT

It is argued on behalf of the College that the grievance is not one properly before the Arbitration Board because it involves the LTD provisions of the Agreement which are inarbitrable. It is further submitted that the Board has no jurisdiction to hear the matter because the grievance is moot to the extent it is about the non payment of salary. It is further submitted that the grievance is not arbitrable because the LTD plan and the contract of insurance are outside the scope of the Collective Agreement. The College submits that the only obligation it has under the Collective Agreement is to arrange for the coverage and have a plan in place. It is submitted that the only other reference to insurance is contained in Appendix 4 of the Collective Agreement where there is mention of a "Joint Insurance Committee". That provision sets up the purpose of the committee, which is to facilitate communication between the Council of Regents and OPSEU and to report their discussions to the plan carrier, Sun Life. It is further submitted that Sun Life is not a party to the Collective Agreement and, therefore, is not part of the arbitration process contemplated by the it. There are a number of College cases holding that the insurance policies are not incorporated into the Collective Agreement and therefore not subject to a grievance.

In support of its position a reference was made to the following cases:

An unreported majority decision of a Board of Arbitration chaired by Arbitrator Brent between Algonquin College and OPSEU involving the grievance of S. O'Farrell dated January 3, 1985; an unreported decision of a Board of Arbitration chaired by Arbitrator Shime between George Brown College and OPSEU involving the grievance of W. Tevens dated June 7, 1999; an unreported unanimous decision of a Board of Arbitration chaired by Arbitrator Brent between George Brown College and OPSEU involving the grievance of B. Richmond dated June 14, 2001 and a unanimous decision of a Board of Arbitration chaired by myself between this College and the Union involving the grievance of D. Grightmire dated March 29, 2004.

It is submitted on behalf of the Grievor and the Union that the matter is not to be considered moot just because the Grievor has no monetary relief claim because the on-going relationship gives rise to the apprehension that the issue may reoccur thereby justifying a declaratory award on the issue of the monetary relief. It is further submitted that there is an issue within the Human Rights provision of the Collective Agreement in Article 4. The characterization by the College that the matter is wholly outside of the Collective Agreement ignores the Article 4 aspects of the grievance. Therefore, the grievance is arbitrable.

In support of the position of the Union and the Grievor reference was made to the following cases:

Fleet Industries Lid and I.A.M., Frontier Lodge No. 171 109 L.A.C. (4th) 251 (Ontario 2002) and *Sherbrooke Community Society and Saskatchewan Union of Nurses, Local 2* L.A.C. (3rd) 97 (Saskatchewan, Norman 1981).

RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT AND RELATED DOCUMENTS

Article 4 NO DISCRIMINATION

4.01 A The parties agree that, in accordance with the provisions of the *Ontario Human Rights Code*, there shall be no discrimination or harassment against any employee by the Union or the Colleges, by reason of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

4.01 B It is understood that nothing contained in 4.01 A limits the right of an employee to grieve in accordance with the procedure as set forth in Article 32, Grievance Procedures.

4.01 C The parties agree that the implementation of a special program under Section 14 of the *Human Rights Code*, R.S.O., 1990, as amended, shall be deemed not to contravene 4.01 A.

...

Article 6 MANAGEMENT FUNCTIONS

6.01 It is the exclusive function of the Colleges to:

- (i) maintain order, discipline and efficiency;
- (ii) hire, discharge, transfer, classify, assign, appoint, promote, demote, lay off, recall and suspend or otherwise discipline employees subject to the right to lodge a grievance in the manner and to the extent provided in this Agreement ;

- (iii) manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment, or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement;

6.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement.

**Article 17
SHORT TERM DISABILITY PLAN (STD)**

Participation

17.01 A Effective April 1, 1991, all full-time employees shall be covered by this plan.

Funding

17.01 B This plan shall be funded by the College.

. . .

**Article 18
LONG-TERM DISABILITY PLAN (LTD)**

18.01 Employees shall pay the full premium of the present Long-Term Disability Plan, the benefit level to be 60% of monthly base salary in effect as of the date of disability reduced by:

- (i) any form of salary continuation from the employer or benefit from an employer sponsored retirement or pension plan;
- (ii) any basic disability benefits payable from government sponsored income security programs (e.g. C/QPP, W.S.I., E.I., or similar programs);

But this amount shall not be reduced by amounts payable under:

- (i) any privately sponsored group disability insurance plan;

- (ii) any increase in benefit arising from the C/QPP as a result of an adjustment in the Consumer Price Index.

**Article 19
OTHER INSURANCE PLANS**

Extended Health Plan

19.01 The College shall pay 100% of the billed premium of the Extended Health Plan for employees covered thereby and subject to the eligibility requirements of the Plan. Effective October 1st, 2001, the Extended Health Plan shall be amended to provide for a combined maximum annual coverage for all covered paramedical services of \$1,500.00.

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**APPENDIX IV
JOINT INSURANCE COMMITTEE**

Purpose of the Committee

1 A The purpose of the Joint Insurance Committee is to facilitate communication between the Council of Regents and OPSEU on the subject of group insurance applicable to the Academic Staff Bargaining Unit, including Basic Life, Supplementary Life Insurance, Extended Health Insurance, Long Term Disability Insurance, the Dental Plan and such other negotiated benefits that may, from time to time, be included in the group insurance plan.

1 B Nothing herein shall prevent this Committee from meeting jointly with any comparable committee, if established, concerning the Support Staff Bargaining Unit should it be mutually agreed between this Committee and such other Committee.

1 C It is understood that the group insurance benefits to be provided to employees and the cost sharing arrangements shall be as set out in the applicable Agreement and the matters for consideration by this Committee shall be only as set out in these terms of reference.

. . .

Composition of the Committee

2 The Committee shall be composed of an equal number of representatives from the Council and OPSEU with not more than eight representatives in total. At meetings of the Committee each party may be accompanied by up to two resource persons to provide actuarial or other technical advice. Additionally, when necessary, representatives of insurance carriers shall attend meetings to provide information but shall not act as resource persons for either party.

Duties of the Committee

- 3 The duties of the Committee shall consist of the following:
- development of the specifications for the public tendering of any negotiated benefits which may be included in the Group Insurance Plan (to cover the bargaining unit only);
 - consideration and examination of all tenders submitted in response to the specifications for tender and preparation of a report thereon;
 - recommendation to the Council of Regents on the selection of the insurance carrier or carriers to underwrite the Group Insurance Plans;
 - consideration and recommendation to the Council of Regents on the renewal of existing contracts of insurance upon expiry;
 - review of the financial reports on the Group Insurance Plan; and
 - review of contentious claims and recommendations thereon, which such claim problems have not been resolved through the existing administrative procedures.

RELATED DOCUMENTS

ACADEMIC STAFF Salary Allocation and Income Replacement Guidelines for SHORT AND LONG TERM DISABILITY (June 28, 2002).

. . .

6. Basic Principles of Salary Allocation Under Rehabilitation/Return to Work;

Once a determination has been made that the employee is capable of returning to work, an employee's capability to undertake rehabilitation work shall be expressed as a fraction of a whole job. The fraction shall be determined by the employee and Sun Life Counselor in consultation with the employee's medical advisor(s). The information on the fraction of time will be provided to the College in writing. Subsequently, the College will conduct a workload assignment meeting with the employee.

In determining the workload assignment on return from illness/injury, consideration should be given to issues such as:

- the length of time the individual has been absent from work
- the possible need for accommodation
- the need for preparation time prior to student contact

The assignment and consequent pay is to be reviewed in accordance with the physician's recommendation.

The fraction of time shall be used to determine:

- \$ the maximum assignable contact hours
- \$ the maximum assignable workload hours (include preparation, evaluation and complementary function)
- \$ the fraction of the employee's salary that will be payable.

The rehabilitation assignment should be documented like that of a full-time/full-load employee. A SWF should be prepared to document the assignment and a note should be added to the SWF indicating the assignment is based on a rehabilitation arrangement with Sun Life.

During periods when teaching contact hours are not available (i.e. the non-teaching period), the employee continues as a reduced load employee on the same basis (ratio) as the arrangement existing immediately prior to the non-teaching period.

DECISION

The root case on the arbitrability of a dispute under the LTD benefit is the *Algonquin* case, *supra*. The issue in that case was to determine if the Grievor was entitled to a certain level of LTD benefit. The board of arbitration found that the college was under no obligation to provide a certain level of benefit and the dispute was one between the insurance carrier and the Grievor not involving the college. The matter was determined to be inarbitrable because the board of arbitration lacked the jurisdiction to enforce any obligations of the Sun Life as the insurance carrier for the LTD benefit.

In the most recent *George Brown* decision, *supra*, the issue involved the manner in which the benefit should be calculated. The board of arbitration unanimously determined at p. 7 that: *... If the dispute is that the insurance company is misinterpreting the plan or misapplying it, then that is a matter which is not arbitrable under the collective agreement ...*

The board went on to cite with approval the earlier *George Brown* decision, *supra*, by Arbitrator Shime in which it was found that a board of arbitration only has jurisdiction inside the Collective Agreement and the insurance issue before it was outside the agreement thereby causing the board of arbitration to have no jurisdiction to deal with the issues raised

Based upon the foregoing arbitral jurisprudence and the *Grightmire* decision, *supra*, between these parties this Board must conclude, as it did in the *Grightmire* decision, that the Board of Arbitration is without jurisdiction to deal with the salary allocation issue under the LTD benefit in so far as it involves interpreting the LTD benefit or determining if it has been misapplied. Therefore it follows that we have no jurisdiction to review the Salary Allocation Guidelines for Academic Staff filed as Ex. #3. However, that does not conclude the issues arising for preliminary determination.

The parties have agreed in Article 4 of the Collective Agreement that there is to be *no discrimination or harassment against any employee by the Union or the Colleges*. Under the *Ontario Human Rights Code* the College has an obligation to accommodate its employees who have suffered disability and may be in receipt of the LTD benefit. The Union has a like obligation to assist their members in matters related to return to work. To the extent that the Grievor has been on Long Term Disability since 1996 the Board of Arbitration has through Article 4 jurisdiction to deal with matters arising in connection with the obligations of both the College and the Union contained in that article which may also intersect with the LTD benefit. Therefore, this grievance is unlike the cases cited to this Board by the College in that the Collective Agreement by Article 4 may come into play in connection with the LTD insurance policy. Therefore, to this extent the Board of Arbitration does have jurisdiction over the grievance and the preliminary objection of the College must be denied with respect to this aspect of our jurisdiction.

In exercising the jurisdiction found by this Board to exist, it could review the issue of the connection between workload on a rehabilitation plan sanctioned by the insurance carrier and the

payment of wages in connection thereto if the issue is within the language of Article 4. We do not have to undertake such an analysis in this case because of the view we take of the alternate preliminary objection by the College. On the facts of this case the College has made an adjustment of salary payments to reflect a payment of 50% of salary which is in accordance with the workload the Grievor is considered by appropriate medical personnel to be capable of performing. There is therefore, no monetary issue to be determined by this Board arising out of the grievance. Therefore, we agree with the preliminary objection of the College that the grievance is moot and ought not to be arbitrated. We therefore, are not required to determine if the Collective Agreement in Article 4 is applicable to this dispute because there is no longer any dispute requiring consideration which might bring into play Article 4.

This Board of Arbitration is deciding an individual grievance not a policy grievance. Such a grievance is one for determining rights based grievances. There is no longer a dispute giving rise to a grievance as to compensation under the LTD benefit. The workload provided was because of the employer's duty to accommodate. The workload or the pay related thereto for the accommodated employee may potentially come within the language of Article 4. However, because the grievance is moot there is no basis for the Board to determine rights. We respectfully disagree with those arbitration cases which might conclude that there is a continuing issue of a policy nature to be resolved in this matter as being applicable herein. The cases cited by the Union are distinguished and not applied in this proceeding.

Based upon all of the foregoing it is found that the matter is moot and the preliminary objection of the College is upheld. Therefore, this Board must hereby order that the grievance be dismissed.

DATED at LONDON, ONTARIO THIS DAY of MAY, 2004.

Richard H. McLaren, C.Arb.
Chairman

I concur / dissent

Sherrill Murray, Union Nominee

I concur / dissent

Richard O'Connor, College Nominee