

93E423 MOHAWK VS ARORA

IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOHAWK COLLEGE OF APPLIED ARTS & TECHNOLOGY
(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(THE UNION)

AND IN THE MATTER OF THE GRIEVANCE OF R. ARORA - #93E423

ARBITRATOR: HOWARD D. BROWN

APPEARANCES FOR THE COLLEGE:

MICHAEL A. HINES, COUNSEL

APPEARANCES FOR THE UNION:

ALICK RYDER, Q.C.

A FURTHER HEARING IN THIS MATTER WAS HELD AT TORONTO ON FEBRUARY 20, 1996.

AWARD

By letter dated June 27, 1995, Counsel for the Union requested that the Board be reconvened to deal with the implementation of an award of the Arbitrator dated January 22, 1982 by which the Grievor was reinstated to his former position with the College without loss of seniority or other benefits and with compensation. The award dated January 22, 1982, in allowing the grievance, was that:

"The grievor shall be forthwith reinstated to his former position with the College without loss of seniority or other benefits and with compensation. As agreed by the parties at the hearing, I will retain jurisdiction to determine any issue arising between the parties as to the compensation payable to the grievor should they be unable to determine that matter between them."

Subsequently, a further hearing was reconvened to deal with compensation issues applicable to the Grievor which were dealt with in my award dated June 30, 1982. The issues raised at that time were mitigation, deduction of income tax and UIC and interest.

Mr. Ryder indicated that the "Union did not raise and the Board did not address the question of additional compensation to cover the loss of the pension benefits resulting from the Employer's pension contributions...". The Union therefore, requested a further hearing to consider the Grievor's loss with respect to his pension benefits. Mr. Gray, Counsel for the College, by letter dated July 4, 1995 objected to the reconvening of a hearing on the following basis:

(1) This matter was finally disposed of over thirteen (13) years ago.

(2) When the grievor was discharged, he was given a refund of his contributions to the pension plan; when he was reinstated, he was offered the opportunity to have his entire service purchased by simply refunding his own contributions; he declined to do so.

(3) The Union had every opportunity to raise this matter in 1982, and did not do so.

(4) The subject matter of this claim relates to superannuation which, under the College's Collective Bargaining Act, is not bargainable let alone arbitrable.

5 It is doubtful that the Board can be reconvened; I believe that two of the Board Members are deceased or unable to sit."

With regard to the last item of objection, I noted in response to that correspondence that it was agreed by the parties that I should act as Sole Arbitrator as a result of the illness of one of the Board Members at that time and the Board Members were excused and therefore, "the constitution of the initial Board of Arbitration is not an impediment in reconvening the hearing".

It was agreed by Counsel that at the hearing, the Arbitrator would deal only in the first instance with the preliminary objection of the College as to jurisdiction of the Arbitrator which was the issue on which submissions were made by Counsel at this hearing.

The grievance dated June 11, 1980 was a claim by the Grievor that he was dismissed without just cause and requested reinstatement with compensation. Hearings commenced on October 17, 1980 subsequent to which three awards were issued: February 17, 1981 by the Board at that time; January 22, 1982 and June 30, 1982 by the Chair as Sole Arbitrator referred to above. As a result, the Grievor was reinstated by the College in his position and returned to work on March 1, 1982. The subsequent award dealing with compensation issues set out the specific amounts of compensation with interest but without reduction by income tax, unemployment or insurance and awarded a gross amount of compensation without deductions. No issue with regard to the Grievor's pension plan at the College was raised at the time of that hearing and not, of course, dealt with in that award. It is the Union's position that the Grievor's loss in this respect was not appreciated until the summer of 1994 and therefore now requests a determination of the pension benefits as part of the award with regard to compensation following the Grievor's reinstatement to employment with the College.

The Grievor is a Professor at the College who began his employment as a Teaching Master in 1969 and was dismissed from employment on January 5, 1980. He was reinstated in accordance with my arbitration award and returned to work in March 1982. There is a pension plan at the College, the contributions for which are made both by the employee and the College. At the time of the Grievor's dismissal, he was required to accept a refund of his contributions to that plan together with interest which totalled \$13,605.02 which sum the Grievor transferred directly to his R.R.S.P. The defined benefit pension plan is based on years of service and age and because the Grievor, while having at the time of his dismissal ten years of service did not qualify for a vested plan, he was paid his contribution to the plan. It was stated that after his termination as it was necessary for him to support himself, he did not have the money to repurchase his benefits in the plan when he was reinstated. That meant that his pension benefits upon retirement will date from 1980 rather than from his date of service with the College in 1969. The years of the Grievor's service between 1969 and 1980 are not pensionable except by repayment of the full benefits which he had received at the time of his dismissal. It is the Union's position that the Grievor is entitled as a matter of damages as a result of the award of reinstatement to employment to be put in the same position as if he had not been discharged and that, in spite of the elapsed time, the Arbitrator is not functus officio but can deal with the issue of compensation to complete the award dated January 22, 1982.

The Grievor's pension benefits were not vested and therefore, the portion paid by the College during his years of employment prior to his dismissal was not refundable. Upon the award of reinstatement and having regard to the compensation subsequently awarded, which was not to be reduced by any deductions, it is the College's position that the Grievor was made whole at the time of that award by reinstatement to employment with full compensation to June 5, 1980. In 1984, the Grievor was advised by the College that sick leave credits were paid out after 10 years on termination of employment with the College and with regard to the pension information from C.A.A.T. from the Ministry in October 1984 that if the Grievor wanted to reinstate his service credits, he would be required to pay \$21,135.38 including of principal and applicable interest "no later than December 31, 1984". After that date, the pension benefits could not be reinstated but would require a purchase of prior service which is more expensive. In addition, the period from the Grievor's date of termination to his date of reinstatement required a payment of \$3,297.45 to be matched by the College plus interest and this was paid as a pension reinstatement in April 30, 1985. Because however, the 1984 window for reinstatement of benefits was missed, to purchase the prior service term for the pension plan from 1969 to 1980 was assessed by the College in April 1993 at \$74,648.42. The purchase of prior service is the only option now available to the Grievor under the terms of the pension plan. The purchase option is based on the best income of five consecutive years which would include the increase to salaries and movement through the wage grids since 1984. It is the position of the College that the delay in asserting this claim has prejudiced its ability to meet any liability which it had in the less expensive reinstatement option.

It is the submission for the College that by Section 3 of the Colleges Collective Bargaining Act, negotiations can be carried out by the parties except for superannuation which is pension entitlement and thereby, not set out in the collective agreement. It was submitted the Arbitrator has the authority to only enforce rights available under the collective agreement and not to deal with issues which cannot be bargained by the parties by statute. Any obligation

of the College in this regard does not arise under the terms of the collective agreement. Following a dismissal, the employee should not be placed in any better position than he was at that time.

It was further submitted that the Arbitrator is functus officio in that his jurisdiction is exhausted. Alternatively, if there is a discretion, it should not be exercised because of laches. The delay in this claim being over six years is not reasonable in the labour relations context and by which the College is prejudiced. The Arbitrator does not have jurisdiction to extend the time limits and there is no reasonable basis for the Grievor to be in an advantaged position for remedial relief given the delay in making the claim when the full issue of reinstatement of benefits was brought to his attention during the period when pension benefits could have been restored. There is no acceptable explanation for the Grievor's delay in making a claim on this issue. The Arbitrator should not therefore exercise his discretion to allow the matter to proceed.

Reference was made to Re Cambrian College and Ontario Public Service Employees Union (Swan, October 18, 1994); Re Ottawa Board of Education and Canadian Union of Public Employees. Local 1400, 13 L.A.C.(4th) 170 (H.D. Brown); Re Kitchener-Waterloo Hospital and London & District Service Workers' Union. Local 220, 44 L.A.C.(4th)293 (H.D. Brown); Re Ontario Public Service Employees Union and Northern College of Applied Arts and Technology, (H.D. Brown, May 30, 1992); Re Goodyear Canada Inc. and United Rubber Workers. Local 232, 28 L.A.C.(2d)196 (M.G. Picher); Re George Brown College and Ontario Public Service Employees Union (Carter, December 12, 1988); Re Conestoga College and Ontario Public Service Employees' Union, (Kates, August 18, 1987); Re United Food and Commercial Workers International Union Local Unions 175 - 633 and The Great Atlantic and Pacific Company of Canada Limited (Miracle Food Mart Division), (Foisy, February 15, 1994); Re Air Canada and Canadian Airline Employees Association, 3 L.A.C.(2d)375 (Johnston); Re Algonquin College and Ontario Public Service Employees Union (Weatherill - November 16, 1981); Re The Ontario Council of Regents and Colleges of Applied Arts & Technology (Fanshawe College) and Ontario Public Service Employees Union (McLaren, January 19, 1982); Re Board of Governors of Fanshawe College of Applied Arts & Technology and Ontario Public Service Employees Union et al., 44 O.R.(2d)545; Re Branch Affiliates of Ontario English Catholic Teachers' Association and Haldimand-Norfolk Roman Catholic Separate School Board (Hunter, July 28, 1992); Re Association of Radio & Television Employees of Canada (CUPE-CLC) v. Canadian Broadcasting Corp., 40 D.L.R.(3d)1.

It is the Union's position that it is the obligation of the Arbitrator to complete the award and until that obligation is met, the Arbitrator is not functus. The fact that the award did not reserve jurisdiction on any additional items in dispute does not deprive the Arbitrator of his jurisdiction. The award made in January 1982 included a restoration of benefits which includes pension benefits. That matter was not dealt with in the subsequent award but which determined the matters of compensation which were known at the time. The Grievor's pension benefits remain an unresolved item in dispute flowing from the initial award of the Arbitrator. The failure to raise an item of damages is not a bar to the Arbitrator's jurisdiction to deal with such issue and to complete his award. The application of the doctrine of laches does not apply to jurisdiction and requires an explanation from the Grievor to assess the effect on the College. That evidence would be relevant to quantum of damages but not to jurisdiction of the Arbitrator who has the authority to make a remedial order to restore the pension benefits under the pension plan at the College. Reference in this submission was made to Re Canada Post Corporation and Canadian Union of Postal Workers (Medical Renumeration Supplement Grievance), 28 L.A.C.(4th)228 (Burkett); Re Consumer's Gas Co. and International Chemical Workers' Union. Local 161, 6 L.A.C.(2d)61 (Weatherill); Re Brokmann et al. and Board of Governors of the Hamilton Civic Hospitals, [1973] 1 O.R. 204; Re The Grievance Settlement Board 1141/86, (Watters, July 13, 1990); Re Chandler et al. v. Alberta Association of Architects et al., 62 D.L.R.(4th)577; Re Ottawa Newspaper Guild. Local 205 and The Ottawa Citizen, 1 O.R.669; Re Robin Hood Multifoods and United Food & Commercial Workers. Locals 416-P and 341-P, 14 L.A.C. (3d)221 (H.D. Brown).

In the Algonquin College award, the Board stated:

" In our view, retirement from employment at 65 in accordance with a College policy to that effect is an aspect of 'superannuation' within the meaning of section 4 of The Colleges Collective Bargaining Act, 1975. It is none the less so by reason of the inclusion in such policy of provisions for extension of employment for one-year terms, in certain circumstances. Section 4 of the Act (now section 3) is as follows:

Negotiations shall be carried out in respect of any term or condition of employment put forward by either party, except for superannuation.

That provision, in our view, removes the subject of superannuation from those over which the parties might negotiate, or which they might include in a collective agreement..."

The definition of superannuation is set out in the Fanshawe College award, which in effect relates to a pension or allowance to a person who has retired from service and in which it was stated:

"-the use of the noun 'superannuation' in section 3 must be taken to mean the pension, and related scheme by which it is established, which is paid to a person on being superannuated that is being discharged from service because of age..."

A Board of Arbitration does not have jurisdiction to deal with superannuation because of the provisions of section 3 of the Act. The term 'superannuation' means that the pension paid to a superannuated person and the related scheme by which a fund is established, administered and payments made cannot be dealt in the collective agreement and cannot, therefore, be the subject of arbitration before a Board deriving its jurisdiction from the collective agreement..."

and it was found that the Board had no jurisdiction to determine matters of superannuation. While that award referred to a College policy of retirement of employees by the College because of age, it is clear from these awards and the awards referred to therein that the subject of superannuation being retirement falls outside of the scope of the collective agreement which these parties can negotiate as being restricted therefrom by section 3 of the Act.

The basic principle of damages is to restore an aggrieved party to the same position as reasonably as possible to that which would have existed had the disputed action not taken place. The extent however, of the remedial authority of an arbitrator in determining a grievance filed under the terms of a collective agreement does not encompass rights which the Grievor could not have obtained through the application of the terms of that agreement. Those issues of remedy which I dealt with in the award dated June 30, 1982 related to compensation factors of loss of income and interest thereon which could be assessed through the Grievor's improper termination of employment as found. At that time however, had the subject of the Grievor's right to pension benefits been raised, it was not then nor is it now a subject of damages which the Arbitrator could adjudicate as pension benefits are excluded by statute from the terms of the collective agreement entered into by the parties. Therefore, that heading of damages cannot be considered by the Arbitrator because it falls outside of the contractual arrangement affecting the parties and covering the Grievor.

Whatever right the Grievor had as to reinstatement of his pension benefits by the end of 1984 or the subsequent purchase of his past service benefits flows from and through the administration of the College's pension plan which itself is not negotiable by the parties and does not form part of the collective agreement. In the reservation by the Arbitrator of "any issue arising between the parties as to the compensation payable to the Grievor" in the award dated January 22, 1982, there cannot be included as a matter of compensation, pension benefits which arise separately and apart from the collective agreement but under the C.A.A.T. pension plan. Because of that, I find that the Arbitrator does not have authority to make an award with regard to either the reinstatement or repurchase of benefit rights under the C.A.A.T. plan arising from the Grievor's discharge and subsequent reinstatement to employment.

I find that I exercised my functions as an Arbitrator in completing the award dated January 22, 1982 by the terms of the award dated June 30, 1982 which dealt with the compensation payable to the Grievor as directed in the earlier award. Having done so, I am now functus officio and therefore, without authority to deal with any issues arising from the Grievor's termination of employment on June 5, 1980. At that time, there was no issue left outstanding between the parties which I could remedy in the context of compensation payable to the Grievor which was the jurisdiction reserved to the Arbitrator in the award of January 22, 1982. There was a final and binding settlement of the issues relating to the Grievor's termination of employment when that award was completed in June 1982.

The Arbitrator dealt with the monetary relief in the form of compensation resulting from the violation of the collective agreement in that it was found that the College did not have just cause to discipline the Grievor and was in violation of the collective agreement. To restore the Grievor by way of damages as a result of that breach required the consideration of compensation which jurisdiction was reserved by the Arbitrator and dealt with in the subsequent award dated June 30, 1982 which I find was a final determination of the issues arising from the wrongful termination of the Grievor's employment as found. The issue of pension benefits subsequently raised and brought to the Arbitrator as noted above is not a matter which arises from the terms of the collective agreement and is therefore, not a matter of remedy within the jurisdiction of the Arbitrator who completed his award on June 30, 1982. It is therefore not necessary to deal with the delay involved in making this claim.

For these reasons, I find that I do not have jurisdiction to deal with the matter of pension benefits of the Grievor raised by the Union with regard to the implementation of the award dated January 22, 1982. These proceedings are therefore terminated.

DATED AT OAKVILLE THIS 25th DAY OF MARCH, 1996

H.D. BROWN, ARBITRATOR