

CAAT (A)
98C192
L562

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HUMBER COLLEGE

- AND -

O.P.S.E.U.

(GRIEVANCE OF M. **BADYK**, **98C192**, ACADEMIC)

Before: Susan **Tacon**, Chair
 Sherril Murray, Union Nominee
 Jacqueline **Campbell**, Employer Nominee

Appearances:

For the Union: Andrew Lokan, Counsel
 Michael Badyk, Grievor
 Robert Mills, Chief Steward

For the Employer: Ross Dunsmore, Counsel
 Mile Komlen, Student-at-Law
 Hyacinth James, Senior Human Resources Consultant

THIS MATTER WAS HEARD IN TORONTO
ON NOVEMBER 10, 1998 AND APRIL 23, 1999

DECISION

This grievance concerns the "seniority" granted to the **grievor**, Michael Badyk, in view of his prior service with the employer. The union contends that the seniority credit given contravened the collective agreement. The employer, also referred to as the "College", seeks the **dismissal** of the grievance and, indeed, asserts that the **grievor** was entitled to no seniority credit whatsoever. In fact, he initially received nine months' credit, which was later reduced to eight months. There was no objection to our jurisdiction to hear and determine the grievance.

The **facts** were agreed to by the parties. No witnesses were called; documentary material was **filed** on consent. The factual context in which this grievance is to be determined is next recounted. The format of the **facts** generally follows that agreed to by the parties, except where grouping of several points is convenient or better **reflects** the chronology. The import of some of the references will not be clear until the parties' submissions and the various collective agreement provisions are set out.

FACTS

1. The grievor was hired into a full-time continuing position with the College effective September 1986.

2. The appointment letter, dated July **19, 1986**, read, in part:

"The normal two year probationary period has been adjusted to recognize the 9 months of sessional service that you have accumulated. As a result, your seniority date is 1985 12 01 and you will reach the end of your probation period on 1987 12 **01.**"

3. Prior to the **date** of his full-time continuing appointment, the **grievor** had worked at the College for various periods as follows:

Sept 1981 - May 1982 - Full Time - Human Studies
Sept 1982 - **Dec** 1982 - Full Time - 3 classes Human Studies, 2 Technology
Jan 1983 - May 1983 - Part Time - **Technology** (2 classes)
Sept 1983 - May 1984 - Full Time - 3 classes Human Studies, 2 Technology

Sept - Dec 1984 - Part Time - Technology (2 classes)
 Jan - May 1985 - Part Time - Technology (2 classes)
 June - August 1985 - Part Time - Summer Intake - Human Studies (2 classes)
 Sept 1985 - May 1986 - Full Time - Human Studies.

[It should be noted that the union was only relying on the **full-time** periods, not those worked on partial load, in calculating the seniority entitlement. The parties' respective methods of calculating seniority entitlement are reflected **infra**.]

4. Prior to April **24, 1996**, the grievor had initiated inquiries with the College as to his seniority entitlement. The employer, through Joanne Maguire (manager, hr. systems) had responded in writing on April **24, 1996** recalculating his seniority entitlement. The result was to reduce his entitlement to eight months from nine. No grievance was **filed** at that time. Nor was a grievance filed regarding the calculation of the grievor's seniority entitlement prior to the instant grievance dated December **16, 1997**. There was no agreement between the employer and the grievor that his probation would consist of "twenty-four months in forty-eight" [as detailed **infra**].

5. In a memorandum to Hyacinth James in human resources dated February 17, 1997, the grievor noted an earlier request that his academic seniority be reviewed in light of past service. The memo recounted that, as a result, his seniority was reduced by one month. He formally requested that the status of his seniority be reviewed. It was agreed that, following the February **17th** memo, Maguire verbally advised the grievor that the recalculation of seniority entitlement as per the April **24th** memo was correct.

6. On November **25, 1997**, the **grievor** sent an **official** complaint to James, outlining his prior service and asserting a higher seniority entitlement than that he had been accorded. The employer responded in a memorandum dated December **5, 1997** indicating, inter alia, that his seniority was calculated in a manner consistent with the College's **long-standing** practice.

7. The collective agreement in force at the time the grievor was hired into a full-time continuing position contained wordii similar to that in the current collective agreement. Excerpts **from** the agreements of **1985-87, 1987-89**, 1989-91 and the collective agreement under which this grievance arises were tendered in evidence and will be dealt with further below.

SUBMISSIONS

The submissions of the parties are next set out in highly abbreviated form.

Union counsel asserted a common sense proposition that the length of the prior relationship between the employee and the College should be recognized, subject to the precise wording of the

collective agreement. It was contended that any ambiguity should be interpreted in favour of this common sense view of seniority. Counsel reviewed the **facts** and the various provisions in the collective agreements in some detail.

Counsel noted that the issue was the calculation of the grievor's prior service for those periods when he was employed on a full-time basis, in accordance with article 27.02 B. It was argued that those periods were not **significant** unless and until the grievor received a **full-time continuing** appointment. At that point, the grievor became entitled to count that prior service, to the extent permitted by **specific** provisions in the collective agreement. Counsel submitted that the concepts of seniority and the probationary period were closely linked. Essentially, counsel argued that the collective agreement, including the relevant Appendices, created a "rolling window" of a **forty-eight** month period prior to the date of the grievor's full-time continuing appointment during which the grievor was entitled to have his prior full-time service credited toward the probationary period. When the "rolling window" was applied to the grievor's circumstances, he was entitled to sixteen months' credit for that prior service, leaving eight months to be served as probation.

Counsel contended that no other provisions in the collective agreement negated the union's approach to calculating prior service. Specifically, Appendix VIII was not relevant herein as that provision addressed circumstances where the individual was retained **for** too long a period and at too concentrated a teaching load, in **effect**, the provision mandated an automatic conversion to a full-time continuing appointment. With respect to the College's initial calculation **of nine** months and then reduction of the credit to eight months, it was submitted that the College could not rely on its original calculation as "binding" on the grievor with regard to his prior service entitlement and then renege **from** that "deal" to reduce the entitlement.

Cases referred to included: St. Lawrence College (unreported, November 16, 1982) (Brent); Loyalist College (unreported, February 7, 1985) (Delisle).

Employer counsel, as well, reviewed the various provisions of the collective agreements in

support of his assertion that the **grievor** was entitled to no credit for his prior service or, in the alternative, to eight months' credit or, in the **further** alternative, to nine months' credit. Counsel also contended that the operation of article 27.03 C, which was not in the collective agreements prior to 1989 and, thus, was not considered by the College at the time of the **grievor's** full-time continuing appointment, would limit the prior service credit to a maximum of twelve months. Counsel distilled those cases referred to by the union, in part on the basis that the language of the current collective agreement had changed, in particular, article **27.03C**.

Employer counsel argued that the various provisions of the collective agreement, when read together, grounded a conclusion that the **grievor** was not given a full-time continuing appointment under an arrangement wherein the probationary period was to be "twenty-four months in **forty-eight**" on an absolute or "rolling window" basis. Consequently, the **grievor** was required to serve a twenty-four month probationary period since he did not fall into a special category in article 27.02 A 2. To hold otherwise, counsel contended, would create undue **administrative difficulties**, particularly in connection with the performance review schedule in article 27.02 C. Counsel argued that shortening the probationary period was counterintuitive, in that the parties expected time to evaluate an individual's performance. Further, in counsel's view, the phrase "on that basis" in Appendix VII, Part I, 1 (i) should be read, in the **grievor's** context, to warrant zero prior service entitlement since the "basis" on which the **grievor** received a **full-time** continuing appointment, as noted in his appointment letter, was not a probationary period of "twenty-four months in forty-eight".

In the alternative, the credit for prior service should be limited to the eight months, as corrected by the College in its communication with the **grievor** when he asked that his credit be reviewed. In the further alternative, the credit should be limited to the nine months which was initially credited and on which basis the **grievor** accepted his full-time continuing appointment in 1986.

Cited were: Seneca College (unreported, February **3, 1988**) (Brent); Northern College (unreported, June 11, 1991) (Swan); Fanshawe College (unreported, **May 10, 1982**) (Brent).

In reply, union counsel distinguished those cases cited by employer counsel. It was contended that the calculation of the "rolling window" was not **administratively** difficult. Further, counsel rejected the interpretation asserted with respect to Appendix VII, Part I, I(i), specifically the phrase "on that basis". **With** regard to article 27.03 C, counsel argued that the provision was applicable only to "new" **full-time** employees, not those with prior service as a sessional. Moreover, to restrict the grievor's prior service would **be** to give the current collective agreement a retrospective application and would effectively lengthen the grievor's probationary period to twenty-eight months. In the alternative, if article 27.03 C was applicable, the **grievor** was entitled to twelve months' credit for his prior service, rather than sixteen.

DECISION

It is useful to first set out the relevant provisions of the current collective agreement which we must interpret. For our purposes, except as specifically noted, there are no **significant differences** in the language of the current collective agreement **from** those in the periods **1985-87, 1987-89** and 1989-91, although the relevant provisions appear in different places in those various agreements.

Article 27 JOB SECURITY

27.01 On successful completion **of the** probationary period, a **full-time** employee shall then be appointed to regular status and be credited with seniority equal to the probationary period served.

Probationary Period

27.02 A 1 A full-time employee will be on probation until the completion of the probationary period. This shall be two years' continuous employment except **as** amended in this Article.

27.02 A 2 The probationary period for the following will be one year's continuous employment:

- (i) a **full-time** employee who has completed a probationary period at the same, or another Ontario College of Applied Arts and Technology, and is hired by the College in the same **classification** which the employee held during the previous probationary period.

(ii) a **full-time** teacher who holds one of the following professional **qualifications** and who has one year or more of full-time teaching experience in Ontario:

- valid Ontario Teacher's Certificate;
- Bachelor of Education Degree;
- **Master** of Education Degree.

(iii) a full-time **counsellor** who holds one of the following professional **qualifications** and who has one year or more of **full-time counselling** experience in an educational **institution** in **Ontario**:

- valid Ontario Guidance Specialist's **Certificate**;
- **Master's** Degree in **Counselling** or Guidance.

(iv) a full-time librarian who holds a Bachelor's Degree in **Library** Science or a Master's Degree in Library Science and who has one year or more of full-time experience as a professional **librarian** in **Ontario**.

27.02 B The probationary period shall also consist of 24 full months of non-continuous employment (in periods of at least one **full** month each) in a 48 **calendar** month period. For the purposes of 27.02 B, a calendar month in which the employee completes 15 or more days worked shall be considered a "full month".

If an employee completes less than 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 15 days worked, an additional **full** month shall be considered to be completed.

27.02 C During the probationary period an employee will be informed in writing of the employee's progress at intervals of four months continuous employment or **four** 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 months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment upon at least 30 calendar days' written notice and during the remainder of the employee's probationary period upon at least 90 calendar days' written notice. If requested by the employee, the reason for such release will be given in writing.

...

seniority

27.03 A The calculation of seniority for full-time employees whose service includes some work performed during certain periods shall be governed by the provisions of **Appendix** VII.

...

27.03 C Notwithstanding anything in this Agreement, it is agreed that every new full-time

employee in the bargaining unit, except those on leaves under Article 22. Parental leave, shall serve at least one year of active **full-time** employment in the bargaining unit as a probationary period.

...

APPENDIX VII - SENIORITY CALCULATION AND PREDECESSOR INSTITUTIONS

PART I - SENIORITY CALCULATION

1 The following provisions shall govern the calculation of seniority for **full-time** employees whose service includes some work performed during certain periods, as follows:

(i) effective September **1, 1976**, seniority shall include the period of 24 full months of non-continuous employment (in periods of at least one full month each) in a 48 calendar month period, for those who completed a probationary period on that **basis** since that date. 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.

...

APPENDIX VIII - SESSIONAL EMPLOYEES

1 A sessional employee is **defined** as a **full-time** employee appointed on a sessional **basis** for up to 12 **full months** of **continuous** or non-continuous accumulated employment in a 24 calendar month period. . . .

...

3 If a sessional employee is continued in employment for more than the period set out in Appendix VIII, 1, such an employee shall be considered as having completed the first year of the two year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be 12 full months of continuous or non-continuous accumulated employment during the immediately **following** 24 calendar month period.

...

The submissions of counsel have been **carefully** considered. Further, the cases cited have been reviewed. We do not regard it as necessary to discuss those cases extensively; references are made to the decisions as appropriate.

We agree that the various provisions of the collective agreement must be read together and interpreted as a functional whole to the extent possible. Moreover, these are sophisticated **parties** operating in a complex academic environment. In our view, the concepts of seniority and probationary period are linked in the collective **agreement** in that the parties have created a **framework** for considering the prior service of employees who subsequently receive **full-time continuing** appointments. That **framework** rejects some forms of prior service altogether and restricts other forms to a **specific** temporal context.

As noted in Northern College, supra, prior service in **the** form of partial load or part-time teaching does not count toward the calculation of the probationary period and seniority. The union herein is not seeking to have such periods worked by the **grievor** counted, rather, its claim is restricted solely to the prior full-time periods, as set out in item 3 of the agreed **facts**. Accordingly, the reasoning in Northern College, supra, is not of assistance in **determining** the issue before us.

As well, we regard the decision in Seneca College, supra, as inapplicable to the instant grievance. In that case, the arbitration board determined that the individual's resignation **from** his full-time continuing teaching position resulted in a rupture of the employment relationship so **that**, when the individual was subsequently rehired to a **full-time** continuing teaching position, he was not able to count his prior service towards his probationary period so that he had completed **his** probationary period as of the date of his rehire. It was held that the individual was entitled to serve only a twelve-month probationary period because of other provisions in the collective agreement which recognized his prior service to a maximum of one year's credit toward what would otherwise have been a twenty-four month probation. We do not **disagree** with the analysis in Seneca College, supra, but the case is not helpful in resolving the question **of the grievor's** entitlement toward his probationary period **in this instance**.

Finally, the decision in Fanshawe College, supra, was **referred** to by employer counsel in the context of passages therein which noted that the collective agreement governs the calculation of the probationary period. In that case, the arbitration board was satisfied that the individual's

probationary period was properly calculated. We take no issue with that decision but, again it is not apposite to the instant circumstances.

More **useful** is the reasoning in St. Lawrence College, supra, and in Loyalist College, supra. Neither case **is** precisely on point but there are aspects of both decisions **which** are applicable herein. We are not satisfied that the cases are **distinguishable** since, for the purposes the **decisions** are relied on, the language in the relevant collective agreements does not **differ significantly**.

We accept the proposition, enunciated in Loyalist, supra, that an individual who is given a **full-time** continuing appointment becomes entitled to all the rights enumerated in the collective agreement, including the counting of some forms of prior service toward the calculation of the probationary period. We likewise **affirm** the finding that [now] Appendix **VIII**, 3 was intended as a protective device to provide for “automatic” conversion to a **full-time** continuing appointment where a sessional is continued in employment **for** a period in excess of that **specified**.

The issue in St. Lawrence College, supra, concerned the calculation of prior service toward the probationary period. The individual was **credited** with four months of such service and that figure was reflected in her appointment letter to the full-time **continuing** position. Ultimately, the arbitration board determined that the calculation was incorrect and the individual was entitled to one additional month of credit. In reaching that conclusion, the arbitration board rejected the assertion by employer counsel that the individual had agreed to the **four** month figure and could not challenge that number, particularly since no grievance had been **filed** at the time. The arbitration board held that the individual could not contract for lesser rights than those provided under the collective agreement. Accordingly, she had not waived, nor was she otherwise estopped, from challenging the calculation of her prior service. **With** that conclusion, we agree. Our acceptance of **this** proposition also disposes of the argument by employer counsel **herein** that the grievor should be restricted, in the alternative, to eight or nine **months'** credit **for** prior service. We are not persuaded that, in accepting the appointment to a full-time **continuing** position, the **grievor** was bound by the College's calculation of his prior service if such calculation was not in

accordance with the collective agreement. Conversely, we do not **agree** that the College would be bound to the figure in the appointment letter if that was in error: see, **Loyalist College, supra**. The context in which such errors may be corrected may well **have** an impact on the appropriate relief which should **be** granted but cannot generally serve to “carve in stone” **an** error which **could** negatively affect the seniority rights of other employees.

We have **carefully reviewed** the various provisions of the collective agreement regarding the probationary period and the calculation of seniority. We conclude that Appendix VII, Part I, I(i) creates a “rolling window” of twenty-four months in forty-eight, as asserted by the union, **in** which an individual’s prior **service** may be examined **for** purposes of seniority calculation. We reject the argument of employer counsel that the phrase “on that **basis**” in the provision **should** be interpreted to mean that there must be a **specific** agreement in the appointment letter to that effect before an individual is entitled to **the** benefit of the “rolling window”.

We also agree with union counsel’s submission that the seniority **provision** in **Appendix VII**, Part I, 1 (i) is linked to the calculation of the **probationary** period through article 27.02 B. In our view, the collective agreement language, when read together, creates a **framework** for calculating prior service and may reduce the probationary period from the usual twenty-four months. While we concur with employer counsel that the **grievor** does not **fall** within **the** exceptions **specified** in article 27.02 A 2, we are not persuaded that the **grievor is** not covered by article 27.02 B. On the face of that provision, the probationary **period** is “also” **defined** as twenty-four months in **forty-eight**. There is no dispute herein that the months in question are “**full**”, within the meaning of the article. In the instant case, that **framework** would result in the credit of **sixteen** months of prior service toward the probationary period. As noted, **infra**, that conclusion is not the end of the matter.

Employer counsel submitted, in part, that a probationary period was necessary to **evaluate** the capabilities of an employee. We agree with that general proposition **In** the **instant** collective agreement, however, the parties have negotiated a limitation on the probationary period **which**

would otherwise apply. This arbitration board must respect that bargain. We also **disagree** with employer counsel that the “rolling window” approach poses **undue administrative difficulties**. In our view, the collective agreement provides a “formula” for calculating prior service credit which is readily ascertained at the time the appointment to a full-time **continuing** position is offered and accepted. Indeed, the appointment letter includes a calculation of such credit. The fact that the figure was erroneous in this case in that the collective agreement was improperly interpreted does not prove that the calculation is unworkable.

Despite our initial comments about the union’s calculation of sixteen **months’** credit, we are of the view that, in the instant case, no more than twelve months’ credit may be granted. The current collective agreement **contains** the following provision in article 27.03 C:

“Notwithstanding **anything** in this Agreement, it is agreed that every new **full-time** employee in the bargaining unit, except those on leaves under Article 22, Parental leave, shall serve at least one year of active **full-time** employment in the bargaining **unit** as a probationary period.”

This provision first appears in the current collective agreement. However, it is this agreement under which the grievance was filed. Union counsel **asserted** several **grounds for** not holding this article applicable in the **instant** case. We intend to deal briefly with each in **turn**. While the grievor was not a “new” employee in the sense that he had prior teaching service with the College, we are satisfied that he is a “new full-time employee **in the bargaining unit**”, for purposes of the applicability of this article. Our conclusion is reinforced by the **express** language of the article in that the provision applies **“notwithstanding anything in this Agreement”** and covers “every” new full-time employee in the bargaining unit. We agree that, as a general principle, provisions are not given retrospective application. However, we derive our **jurisdiction from** the instant collective agreement **and**, in consequence, are bound to give effect to the terms **and** conditions in that agreement. It **may** well be that, had the **grievor filed** his grievance under a predecessor agreement, the result may have been **different**. But, we have determined that, **while** the grievor is entitled to challenge the calculation of his prior **service** at the point in time the instant **grievance** was **filed**, he must do so within the conks of the current collective agreement.

While, **from** one perspective, this reasoning may appear to impose a probationary period of twenty-eight months, the probationary **period in** the context of the **current** collective agreement remains twenty-four months. It is simply that the prior service is capped at twelve months because of the operation of this article. That is no **different**, conceptually, **from** the "loss" of prior service as a result of the operation of the "rolling window".

For the foregoing reasons, we **find** that the grievance is allowed to the extent that the grievor is entitled to twelve months' credit toward seniority and the calculation of the probationary period as at the date of his appointment to a **full-time** continuing position, effective September 1986. Obviously, the probationary period has long since passed. Having issued our declaration as to the grievor's entitlement, we remain seized to deal with any **difficulties arising** out of the interpretation or implementation of this decision.

DATED this August **11, 1999**,



Susan Tacon, Chair

"I concur" (with addendum)

Sherril Murray, Union Nominee

"I dissent"

Jacqueline Campbell, Employer Nominee

Addendum

This member reluctantly concurs with the decision of the Chair

It is obvious that the probationary period of one year must be served. What is not so clear is the relationship between probation and seniority. This member would argue that the use of the word credits to apply to the calculation of seniority, severs the **issue** between calculation of seniority and probation. The calculation of those credits earned **from** prior service does not interfere with the mandatory one year of probation. **The** credits to be calculated are applied **after** the employee has **successfully** completed probation; the point at which the employee may actually use their **seniority**.

The interpretation given the grievance by the Chair allows the grievor to apply more credits towards his seniority than calculations made by the employer and it is on that **basis** this member concurs.

Sherril Murray