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91H026  
(A)

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GEORGE BROWN COLLEGE  
(Hereinafter referred to as the College)

AND

OPSEU  
(Hereinafter referred to as the Union)

LOCAL: 556

AND IN THE MATTER OF THE GRIEVANCE OF M. BARTON (OPSEU FILE 91H026)

BOARD OF ARBITRATION: Gail Brent  
Robert J. Gallivan, Company Nominee  
Jon McManus, Union Nominee

APPEARANCES:

FOR THE COLLEGE: Stephen F. Gleave, Counsel  
Ann Lillepold  
Regina Park

FOR THE UNION: Pamela Munt-Madill

Hearing held in Toronto, Ontario on June 9, 1992.

DECISION

The grievance (Ex. 1) dated October 10, 1991 originally alleged the following:

- Art. 701(b) Management was not following college hiring policy, i.e. hiring according to Greatest qualification & experience (see written complaint)
- Appendix II - 2 Improper release procedure - no written notice
- Article 8.08 Improper layoff.

The board was informed that the allegation relating to Article 8.08 "Improper layoff" was withdrawn. The College raised objections concerning the arbitrability of the grievance, and the parties agreed that those objections should be dealt with before the merits were addressed. The board was also informed

that one of the allegations being made was that the College had acted in bad faith. This decision will deal only with the preliminary objections.

The parties agreed on the background facts necessary to deal with the objections. Neither party elected to call any evidence. As will become evident during the recital of the facts, there are six regular full-time academic bargaining unit members whose rights might possibly be affected by the outcome of this case. The College notified them; none of them appeared.

At all material times the grievor was employed by the College as a partial-load employee teaching English in the English and Liberal Studies Division at the College's St. James Campus. Her contract of employment ran from May 6 to August 30, 1991. She had no further contract with the College after August 30th; her employment ended on that date. It is admitted that the College gave her no written notice that her partial-load contract would expire on August 30, 1991.

During the summer of 1991 six vacancies arose for regular full-time English professors. Three of those vacancies were the subject of job postings 91-087, 91-088, and 91-089 in May 1991. A selection committee was convened to deal with the filling of those vacancies. It was made up of Ms Lillepold from the College's Human Resources Department, Ms Collins, Chair of English and Liberal Studies at the St. James Campus, Ms MacKenzie, Chair of English and Liberal Studies at the Casa Loma, Kensington and Nightingale Campuses, and two faculty members. On May 27, 1991 interviews were held for the three posted positions. The grievor was an applicant and was interviewed. At the time all of the candidates were told that there were likely to be three more vacancies for full-time English professors, and that they would not be

interviewed again for those positions because the two Chairs were involved in this round of interviews.

The grievor was not selected for any of the three posted positions. No complaint was made by her at that time. The three successful candidates were Ms Marra (91-087), Ms Brouse (91-088) and Mr Nore (91-089).

In July 1991 there were two postings for regular full-time English professors (91-137 and 91-138). Interviews were held on July 8, 1991 by a selection committee consisting of everyone who had been involved in the May interviews, except for the two faculty members, who were replaced by two other faculty members.

The College posted only two positions because it had moved a sessional employee, Lina Medaglia, into a regular full-time bargaining unit position rather than posting. The College did this because of Ms Medaglia's experience and expertise in teaching English to assaulted women and children.

The grievor requested a second interview for the two posted positions, and her request was granted. By July 8th one of the postings had gone because the College had re-assigned Paul Miskin, a laid off regular full-time professor, to the vacancy covered in posting 91-138. This was done pursuant to the lay-off procedure in the collective agreement. The grievor was told this at the interview. The successful candidate for vacancy 91-137 was Jennifer Baker, a sessional employee. The grievor was informed on July 18, 1991 that she had not gotten the job (see Ex. 3). Apparently she had some indication of this earlier, because on July 15, 1991 she wrote to Ms Lillepold (Ex. 7) asking for reasons why she had not been selected.

On July 24, 1991 the grievor wrote a letter of complaint (Ex. 4) to Ms Collins regarding the College's failure to select her for any of the

vacancies. This letter was answered on August 1, 1991 (Ex. 5) by referring the grievor to Ms Lillepold. The grievance followed.

It should be noted that the parties agreed to extend the time limits in this case. It is not being asserted that timeliness affects the arbitrability of the grievance.

The College's objections, in summary, are that Article 7.01(b) provides that hiring is a management right, and there is no right granted a partial-load employee to be given consideration when filling a regular full-time position; that bad faith, arbitrariness or discrimination can't be relied on because Appendix II does not fetter or limit the exclusive right to hire into the bargaining unit under Article 7.01(b); that Appendix II, paragraph 2 only applies when a partial-load employee is released during the life of a contract and not on its expiration; and that in any event the board lacks the jurisdiction to grant the remedy sought in the grievance for a violation of Appendix II, paragraph 2. The remedy requested in the grievance is set out below:

- 1.) Reinstatement to faculty through assignment to a full-time position
- 2.) Recognition of continuing seniority from the last worked date
- 3.) Retroactive pay to last worked date.

The College argued that Article 7.01(b) recognizes management's exclusive right to hire, and that Appendix II does not create any right in partial-load employees to be considered for regular full-time vacancies. It contrasted that to Articles 8.12 (a) and (b), which are explicitly made inapplicable to partial-load employees, and in which the parties have dealt with the filling of full-time vacancies. The College also argued that there is no basis for applying any standard of bad faith in this case because that doctrine can not

be used to create a substantive right which is not found in the collective agreement. It asserted that the only limitations on management's rights in this case are those expressed in Articles 7.01(b) and 7.02. It argued that not every exercise of management discretion is subject to the bad faith standard of review, and that judicial decisions have limited such reviews to situations where the exercise of discretion has affected rights in other parts of the collective agreement. The College also asserted that the alleged violation of Appendix II, paragraph 2 was inarbitrable because it does not apply to situations where contracts of employment expire, and that in any event, even if it were arbitrable there is no jurisdiction to grant the remedy sought for a breach of that provision.

The Union took the position that the College's objection regarding Appendix II, paragraph 2 was not a matter of arbitrability, but rather one of interpretation. It also asserted that if the only arbitral issue was whether Appendix II, paragraph 2 had been violated, then the only remedy it would seek would be thirty days' pay. The Union argued that in making hiring decisions the College should be held to a standard of good faith, and in the alternative, should that not be the standard, the College in making its decision should at least be required in the specific situation to take into account the grievor's service and experience. The Union acknowledged that management is not held to a good faith standard in every exercise of a management right. However, it disagreed that such a standard only applies when there is another specific contractual provision that can be pointed to. The Union said that in each case the standard of review must be determined by the specific collective agreement and by the specific situation being dealt with. It pointed to Articles 8.12 (a) and (b) as provisions that benefit partial-load

employees like the grievor, and argued that to require posting would be inconsistent with the position that the College could then fill the vacancies as it wished without being subject to any standard of review. It also argued that since Article 8.12(b) set out specific factors which the parties agreed should be considered in making decisions, it would be inconsistent for the College to say that in other situations where vacancies were being filled it could do as it pleased. The Union referred to Appendix II, paragraphs 3 and 4, which contemplate the accumulation of "service" by partial-load employees, and benefits accruing from such accumulation. It argued that "service" was an important collective agreement right analogous to seniority and must be taken into consideration when making hiring decisions. It said that to deny a hearing on the merits would be tantamount to a denial of natural justice.

The College replied that in determining arbitrability regarding Appendix II, paragraph 2 one must consider whether the admitted facts would give rise to a violation, and that here they would not. It also asserted that we lack jurisdiction to order payment for time the grievor did not work. The College also took the position that the Union's argument relating to bad faith was tantamount to taking standards specifically agreed to by the parties and then applying them to everyone, even those who were explicitly agreed not to benefit from them. It said that the Union's position must fail because it cannot point to any provision applicable to partial-load employees which is in conflict with the exercise of management' right to hire. It asserted that there is no conflict with Appendix II, paragraphs 3 & 4 because once the partial-load employee becomes full-time Appendix II is irrelevant. The College also denied that there was any issue of natural justice involved here.

The parties referred us to the following provisions of the collective agreement:

7.01 It is the exclusive function of the Colleges to:

- (b) 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;

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

8.12 (a) Notice will be posted in the College of all vacancies of full-time positions in the bargaining unit. Such notice will be posted for at least five (5) working days.

At the same time, notice of these vacancies will be sent to the College's Union Local President for distribution to the other Union Local Presidents.

The College will also forward copies of the notice to the other Colleges with the intention that they be posted.

8.12 (b) Where a vacancy of a full-time position in the bargaining unit occurs, and is not filled internally, the College will give consideration to applications received from academic employees laid off at other colleges before giving consideration to other external applicants. Such consideration shall be given for up to and including ten (10) working days from the date of posting as described in 8.12 (a)

Consideration will include review of the skill, competence and experience of the applicants in relation to the requirements of the vacant position.

## APPENDIX II PARTIAL-LOAD EMPLOYEES

2. It is agreed that Article 8 has no application to partial-load teachers except as referred to in Article 8.05 (d), (e), (f), Article 8.07 (a), Article 8.08 (b) and Article 8.15 (b). Such partial-load teachers may be released upon thirty (30) days' written notice and shall resign by giving thirty (30) days' written notice.

3. For the purpose of determining the service of a partial-load teacher under Article 8.05 (d), (e), (f) and 8.08 (b) and for the purpose of determining progression through the grid 10 months of on-the-job experience will entitle the employee to one year of service and to progress one step on the grid.

On-the-job experience will be calculated as follows: 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 (1/2) month's credit for each calendar month in which the employee teaches thirty (30) hours or more.

4. A partial-load employee who completes twelve (12) months of employment with the College will be entitled to four percent (4%) of the earnings in lieu of vacation for work performed as a partial-load employee after September 1, 1981.

We were also referred to the following authorities: Canada Packers Inc. and UFCW Local 175, (1991) unreported (Hinnegan); Re British Columbia District Telegraph Co. Ltd. and IBEW Local 213 (1984); 17 L.A.C. (3d) 131 (Kelleher, B.C.); Westin Harbour Castle and Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351, (1991) unreported (R. Brown); Seneca College and OPSEU (Hacker), (1986) unreported (Swan); Niagara College and OPSEU (Mills), (1991) unreported (Swan); Georgian College and OPSEU (1983), 10 L.A.C. (3d) 359 (Brown); Municipality of Metropolitan Toronto and CUPE Local 43 (1991), 19 L.A.C. (4th) 287 (Davis); and Photo Engravers and Electrotypers Ltd. and Toronto Printing Pressmen and Assistants' Union, No. 10 (1980) 25 L.A.C. (2d) 88 (Adams) affirmed sub nom. Council of Printing Industries of Canada and Toronto Printing Pressmen & Assistants' Union No. 10 et al. (1983), 149 D.L.R. (3d) 53 (O.C.A.).

In reaching our decision we have considered only the facts agreed to as set out in this award, the collective agreement, the submissions of the parties, and the authorities cited.

We will first deal with the matter of the alleged violation of the notice provision in paragraph 2 of Appendix II. We do not agree that the question of whether notice should have been given to the grievor under the circumstances

described is one of arbitrability. The essence of the objection is that the provision cannot be interpreted as providing for notice in situations other than the premature termination of the contract. In order to determine that we are obliged to interpret the provision, and it is arguable that the clause could be construed as applying in other cases. Therefore, we believe that the question is properly considered to be one of whether the contractual provisions were breached rather than one of arbitrability.

We agree that the remedies sought in the grievance are inappropriate if the only arbitrable matter is the question regarding notice. The Union has indicated that it would not seek those remedies if the only matter before this board were to be the notice issue. If there has been a breach of that provision, then there must be some remedy which can be fashioned to make the grievor whole, and we can deal with that issue when we come to it. We consider that we have the jurisdiction to grant appropriate remedial relief for a breach of Appendix II, paragraph 2.

Now we will turn to the other issues regarding arbitrability. We have been pointed to no provision in the collective agreement which provides partial-load employees with a right that might come into conflict with the general management right to hire in Article 7.01(b). There is, for example, nothing in the collective agreement to which we were referred that gives partial-load employees any rights in relation to the filling of posted vacancies for regular full-time academic appointments. The only provision to which we were referred regarding postings was Article 8.12 (a) and (b). Appendix II specifically states that that provision does not apply to partial-load employees. It may be that partial-load employees are a group which benefits from the fact that vacancies must be posted; however, that benefit is

incidental rather than intended. That is, it is clear that Article 8.12 was not negotiated with the intention of benefiting partial-load employees, because the parties agreed that the provision did not apply to them; however, the fact of posting publicizes vacancies, and to that extent confers an incidental benefit on anyone who is looking for a job. Article 8.12 would not become meaningless if the College were allowed to fill regular full-time vacancies as it chose insofar as partial-load employee candidates were concerned because Article 8.12 was never intended to apply to that group of candidates in the first place.

Article 7 is specifically constrained only by the terms of the collective agreement. In the absence of some provision which makes an unfettered right to hire into full-time positions inconsistent with the rights of partial-load employees or the obligations of the College to partial-load employees, one must ask if there nevertheless exists an obligation on the part of the College to act reasonably and in good faith when exercising its otherwise unfettered discretion to hire partial-load employees into regular full-time positions.

In Seneca (supra) there was a positive obligation owed to the class of employees of which the grievor was a member. That positive obligation formed the basis for the implication that the obligation had to be carried out in good faith in order not to subvert the intent of the clause (see page 22). In Canada Packers (supra) Arbitrator Hinnegan was considering an allegation that management rights had been exercised unfairly. At page 7 he said:

... where management rights are left exclusively with management or, in other words, are not limited or circumscribed by some other substantive provision of the agreement, the reasonableness or fairness of the exercise of that power is not reviewable by an arbitrator.

However, where a management rights is made subject to another provision of the agreement, the exercise of management's discretion in the context of that other substantive provision must be reasonable and not arbitrary, discriminatory or in bad faith.

That was also the basis of the Court of Appeal decision in the recent Metro Toronto Civic Employees case. There the Court dealt with a rule of management having disciplinary consequences and held at page 256 that "it is not patently unreasonable for an arbitrator to oblige management to exercise its discretion reasonably, where to do so unreasonably would be to create a conflict with or undermine the rights conferred by some other provision in the collective agreement."

Thus, it follows that, where the management right in question is not limited or circumscribed, explicitly or implicitly, by some other provision of the collective agreement, the manner in which management exercises its discretion is not subject to review by an arbitrator.

Using that test, certainly one can find no basis for reviewing the exercise of management's discretion in this case. However, even if one were to accept some other more holistic school of contractual interpretation and not be limited to situations where there was some direct conflict or positive obligation, then we believe that the exercise of discretion would not be reviewable here either. It is difficult to argue that the parties intended to limit management's discretion implicitly when they explicitly agreed to exclude the partial-load employees from the only provision which creates any obligations with regard to the filling of regular full-time bargaining unit vacancies. What is implicit is not that the College was to act reasonably and in good faith when exercising its discretion with regard to hiring partial-load employees to fill regular full-time vacancies, but that the parties agreed to treat partial-load employees like strangers off the street when it came to hiring decisions for regular full-time bargaining unit vacancies.

In a case such as this the fact that no hearing on the merits is to take place is not a denial of natural justice. It is simply a recognition that the

parties never intended a board of arbitration set up under the collective agreement to have jurisdiction to review everything.

For all of the reasons set out above, we find that we lack jurisdiction to review the exercise of management's discretion to hire in this case, but that we have jurisdiction to consider whether there has been a violation of Appendix II, paragraph 2. Should the Union wish to have that issue determined, then perhaps the parties could agree on written submissions or some expeditious way of dealing with it since there is no factual dispute that we are aware of. We will leave it to the parties to arrange that between themselves and to contact us concerning the form the hearing is to take.

DATED AT LONDON, ONTARIO THIS 5<sup>TH</sup> DAY OF August, 1992.

Gail Brent  
Gail Brent

I concur / ~~dissent~~

"R. J. Gallivan" #3  
R. J. Gallivan, College Nominee

I concur / ~~dissent~~

"for Mr. McManus" #3  
Jon McManus, Union Nominee