

IN THE MATTER OF AN ARBITRATION  
B E T W E E N :

ONTARIO COUNCIL OF REGENTS FOR COLLEGES  
OF APPLIED ARTS AND TECHNOLOGY  
(CENTENNIAL COLLEGE)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
(FOR ACADEMIC EMPLOYEES)

- Grievance of E. Bell  
90C078

BOARD:

MARTIN TEPLITSKY, Q.C.  
Chairman

ROBERT J. GALLIVAN  
College Nominee

JANE GRIMWOOD  
Union Nominee

APPEARANCES:

On behalf of  
the Union: Pamela A. Chapman, Counsel

On behalf of  
the Employer: D. K. Gray, Counsel

Hearing held April 9, 1992 in Toronto.

The relevant facts are not in dispute and may be summarized as follows:

Pursuant to Article 18 of the Collective Agreement, the grievor applied for and received a 12-month leave for the period of January 1, 1989 to December 31, 1989.

During this period a strike occurred for approximately 1 month. The employer did not pay the grievor for the period of the strike.

The grievor wanted his leave extended until the end of January, 1990. The employer insisted that the grievor return to his teaching duties as had been previously arranged. The grievor complied and launched this grievance.

There is no doubt that by reason of Sec. 59(2) of the Colleges Collective Bargaining Act, the grievor was "on strike" during the strike and was not "on leave". He cannot be paid for the period of the strike. There are many prior Awards. The closest from a factual perspective is Mr. Kates' Award in **Cambrian College and OPSEU (Dow Grievance)** dated November 11, 1985 which concerned a strike interrupted sabbatical leave as it was then called under the then Sec.18.01 of the then Collective Agreement.

I am satisfied that Mr. Kates' award is correct. However, he did not consider (it appears he was not asked to) whether the employee was entitled to have his leave extended, it having been interrupted by the strike. The only issue before Mr. Kates was whether the grievor was entitled to be paid for the period of the strike.

In an earlier Award decided by me, **Seneca College and OPSEU - Grievance of Kirkup**, dated December 3, 1986, the issue was vacation entitlement. The strike interrupted the vacation. The employer refused to pay for the period of the strike in reliance on Sec. 59(2) and rescheduled the vacation. I upheld its decision. The vacation entitlement was earned prior to the strike. The strike could not deprive him of this earned benefit although it could effect when the benefit could be enjoyed. Equally, the leave in this case was earned in the past. It was for 12 months. The grievor only received 11 months. I can find no reason why he should not receive another month to complete his entitlement.

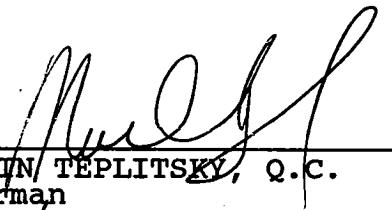
I am aware that in part, this reasoning may appear to contradict the result in **George Brown College and OPSEU - Grievance of French**, decided by a Board chaired by me (Award issued October 26, 1990) which was a case involving "sick leave benefits". Although sick leave benefits were also earned in the past, they can

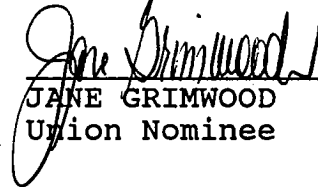
only be used when a person, but for illness, would be working. The grievor is deemed by the legislation to be "on strike". In the eyes of the statute he is not ill. Once the strike is over, he cannot be paid sick leave if he is healthy. Thus the strike, in that case, because of the statute, prevented enjoyment of the benefit.

Thus, in practical terms, the result in these cases may vary. Some leaves or vacations can be rescheduled if they fall in whole or in part during a strike. Sick leave credits and statutory holidays cannot be rescheduled. Recognizing a right to rescheduling does not conflict with Section 59(2).

I appreciate that rescheduling a professional development leave with but one month remaining may not be practical both from the perspective of the College and the Professor. If the parties cannot agree on a remedy, the Board will receive further submissions, including, whether and to what extent compensation should be paid. These submissions can be in writing, or if the parties prefer, a 4:00 p.m. hearing can be arranged.

ISSUED the 22nd day of July, 1992.

  
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MARTIN TEPLITSKY, Q.C.  
Chairman

  
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JANE GRIMWOOD  
Union Nominee

DISSENT ATTACHED

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ROBERT J. GALLIVAN  
College Nominee

DECISION OF R.J. GALLIVAN

With respect, I cannot agree with the Chairman's decision because I can find nothing in the collective agreement to support the proposition that professional development leaves are a vested benefit "earned in the past", nor can I find in the Colleges Collective Bargaining Act any exemption of such leaves from the application of the Act to strikers.

Rather than a vested benefit, these leaves appear in the collective agreement to be in the nature of a special privilege whose allocation is tightly rationed. No employee appears to have an absolute right to a leave. As few as three of every hundred employees with over fifteen years' service may be on leave at any one time (see Article 18.02). From this it is apparent that many employees never qualify, even though potentially eligible. While length of service is used to determine potential eligibility, service cannot be said to "earn" an employee the right to leave because not all employees qualify. This distinguishes leaves from other benefits such as vacations which every employee earns by service.

In my judgement a more accurate view of the leave is to see it as special permission for a select group of employees to take time off with pay. It is thus made up of two elements, time and money - in the grievor's case twelve months time at 70% pay.

The grievor did not lose any of his agreed time off. He enjoyed his full allotment of twelve months absence from work. That he spent a month of that time on strike was his decision - or one made for him by the majority of his colleagues. To now allow his grievance shifts the burden of that decision from him to the College and rescues him (but not his colleagues) from the consequences of striking.

The second element of the leave, money, or salary, is dealt with by the Colleges Collective Bargaining Act. The jurisprudence is clear that no salary or benefits may be paid to strikers. Thus by law he lost his salary during the strike. To accept his grievance and contemplate paying that salary later would put him, because he was on leave, in a better financial position than other strikers. It would do indirectly what the Act prohibits doing directly by creating two classes of striking employees.

The leave is analogous to a statutory holiday which happens to fall during a strike. The striker enjoys the time off on the day of the holiday but receives no salary for the day. It is not later rescheduled or paid for - it is over and done with. The grievor's leave is similar - he had the time off and by law was not paid. To now reschedule or extend the leave by reason of the strike would in my reading of the Act be inconsistent with the law and unsupported by the terms of the collective agreement. The grievance therefore should be dismissed.

*R.J. Gallivan*