

93E815 ST. LAWRENCE VS BELL

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ST. LAWRENCE COLLEGE

(The College)

- and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF S. BELL - 93E815

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the College: Stephen C. Raymond, Counsel
Cindy Bleakney, Human Resources
Assistant
Gordon MacDougall, Director of
Educational Technologies

For the Union: Gavin Leeb, Grievance Officer
Mary Ann White, Chief Steward
Sebastian Bell, Grievor

AWARD

A hearing in this matter was held in Kingston, Ontario on March 23, 1994, at which time the parties were agreed that the board of arbitration had been properly appointed, and that we had jurisdiction to hear and determine the matter at issue between them. Although the original establishment of the board of arbitration in this matter was to deal with a different grievance, the grievance submitted to us upon consent was grievance 93E815, a complaint by Sebastian Bell dated October 12, 1993.

The grievance is in the following terms:

I grieve that the employer has violated the agreement by (a) characterizing my status improperly, (b) by paying me improperly, (c) terminating me from employment with resultant losses, (d) by failing to provide appropriate termination notice and monies, and (e) failing to have paid me for July 1, 1993.

After opening statements, the introduction of certain documentary evidence, and discussions between counsel, the parties were able to conclude an Agreed Statement of Facts on which this matter would be determined. Because of the complexity of the issues involved, it was decided to proceed by way of written argument, and a schedule for the submission of such argument was agreed between the parties. The Union's main submissions were received under cover of a letter dated April 29, 1994, and the College's main submissions were sent under cover of a letter dated May 31, 1994. The Union's reply submissions were subsequently received under cover of an undated letter. Later, on June 24, 1994, the College provided certain further submissions, and on June 28, 1994, the Union replied both objecting to the timeliness of those College submissions, and responding to them on the merits.

Following the receipt of all of this information, the board of arbitration attempted to meet in executive session, which it was unable to do by reason of the illness of the Union's nominee to the board of arbitration, Mr. Terry Kearney. Unhappily, Mr. Kearney is now deceased, without being able to participate further in this proceeding. By letter of August 9, 1994, the undersigned was advised that I had been constituted, by agreement of the parties, as a sole arbitrator for the purpose of concluding this matter. Neither Mr. Kearney, before his untimely death, nor Mr. Hugh John Cook, the College's nominee to the board of arbitration, has taken any part in the decision which follows.

The Agreed Statement of Facts concluded between the parties at the first day of hearing is as follows:

WHEREAS Sebastian Bell has filed a grievance alleging that St. Lawrence College has terminated him from his employment with resultant losses and failed to provide appropriate termination notice and monies and such grievance has been submitted to the Board of Arbitration as Exhibit 1;

AND WHEREAS the parties wish to dispense with the calling of evidence relating to the above grievance;

THE PARTIES AGREE TO THE FOLLOWING FACTS:

1. Sebastian Bell worked for St. Lawrence College from September 1990 to September 3, 1993 as an instructor in the Independent Learning Centre.
2. The employment of Bell was characterized by the College as a partial-load assignment from May 9, 1991 to September 3, 1993. This period of employment is reflected in Exhibits 2-11 submitted to the Board of Arbitration. Bell signed each document except Exhibit 8 and acknowledged the terms and conditions of employment.
3. The Independent Learning Centre is a non-traditional learning environment in which adult students engaged in independent and individual learning through the use of written and computer based training

materials supplied to the students by the Centre. The Centre is further explained in the attached document authorized by the employer and marked as Exhibit 12. This document is agreed to except for the last paragraph of the document relating to work being done at home. It is the Union's position on this document that the assumption of 2/3rd - 1/3rd ratio of teaching to ancillary duties is not accurate.

4. An instructor at the Centre is required to assist the students in individual and independent learning and as such engages in the administration of courses offered through the Centre including the instruction and assistance to the student with learning materials and traditional evaluation functions such as the marking of examinations and the review of course materials.

5. Partial-load instructors are paid under Article 26.02 of the Collective Agreement for each teaching hour.

6. Partial-load instructors not engaged at the Learning Centre are paid only for teaching hours yet are required to prepare for class, prepare support materials to the course, mark tests outside of teaching hours and meet with students outside of teaching hours. However, this work is normally not required to be performed at the College.

7. Pursuant to Exhibit 2, the grievor's pay included "preparation time". The learning systems used at the Centre do not demand traditional preparation by the instructor.

8. The College did not require Bell to do any work at home and in fact its intent was that all work would be done at the Centre. Bell did, however, work at home in accordance with his understanding that hours paid for "preparation time" by performing the following functions: professional development, such as reading in courses related to his teaching, learning course materials and computer programs, researching answers to student's questions, updating course materials and some marking.

9. It was the practice of the College to pay Bell for a number of teaching hours and require him to work for 1 1/2 hours for each teaching hour. This circumstance existed from May 9, 1991 and was not grieved until October 12, 1993.

10. On a without prejudice basis to this grievance, and subsequent to this grievance, the Union and the College have agreed that the appropriate workload ratio for the Independent Learning Centre professors and instructors is 1:2.17. As a result under that agreement which was made without prejudice to this arbitration, an employee with 9 teaching hours would be classified as a partial-load employee and required to work for 18 hours. Also that agreement provides that all teachers would be classified as professors.

The document referred to as Exhibit 12 in paragraph 3 of the Agreed Statement of Facts will not be reproduced in its entirety in this award. However, the following section, to which specific reference is made in paragraph 3 of the Agreed Statement of Facts, is of particular interest:

SCHEDULED WORKLOAD VS CONTRACT HOURS:

For every teacher contract hour, he/she is scheduled into the Centre for 1-1/2 hours. This ratio of 1-1/2 to 1 is based on the assumption that the teacher may be in contact with a student for only two-thirds of his or her scheduled time in the Centre. The remaining 1/3 of the time is filled with ancillary duties such as marking, counselling, modifying tests, etc. Typical of any service industry, we cannot predict when our students will need personal attention: we can not predict when, within their scheduled time in the Centre, they will be working with students. On the average, we expect it to be about 2/3 of their time in the Centre. Hypothetically if full-time teacher were assigned a full teaching load of 18 hours per week in the Centre, he or she would be scheduled into the Centre for 27 hours. The remaining time would be assigned to committee work, curriculum development, and the like.

For our part-time staff, all of the ancillary duties are done within their scheduled hours in the Centre; no work is taken home.

At the hearing, the College also raised a number of preliminary objections to the arbitrability of various parts of the grievance. In particular, the College argued that, to the extent that paragraphs (a), (b) and (e) claimed monetary relief, they are out of time by reason of the stringent and mandatory time limits of the collective agreement, which a board of arbitration is given no jurisdiction to alleviate. In effect, the Union conceded that these time limit arguments were meritorious, and that it would not be pursuing remedies under paragraphs (a), (b) and (e) of the grievance. The complaint before me is thus based on paragraphs (c) and (d), and the grievance is therefore reduced to a complaint that the grievor was unjustly terminated from employment and was not provided the appropriate termination notice and monies.

In addition, the College advanced a number of other propositions which it characterized as preliminary objections at the outset of the hearing. Counsel for the Union objected to these matters being raised at that stage, but I am of the view that they are more in the nature of arguments about the appropriate outcome of the present arbitration than truly preliminary matters. I shall deal with them in the course of discussing this matter on the merits.

The relevant provisions of the collective agreement are as follows:

Article 26
PARTIAL-LOAD EMPLOYEE

26.01 A partial-load employee is defined as a teacher who teaches more than six and up to and including 12 hours per week on a regular basis.

26.02 A partial-load employee shall not receive salary or vacations but shall be paid for the performance of each teaching hour at an hourly rate calculated in accordance with 14.04.

26.03 It is agreed that Article 27, Job Security, has no application to partial-load teachers except as referred to in 27.04 A, 27.06 (iv), (v), (vi), 27.08 B and 27.12. Such partial-load teachers may be released upon 30 days' written notice and shall resign by giving 30 days' written notice.

APPENDIX VIII
SESSIONAL EMPLOYEE

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. Such sessional employee may be released upon two weeks' written notice and shall resign by giving two weeks' written notice.

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 noncontinuous accumulated employment during the immediately following 24 calendar month period.

The position of the College is that the grievor was at all material times a partial-load employee, whose employment was thus covered by Article 26 of the collective agreement. Indeed, the various appointment letters referred to in the Agreed Statement of Facts set out the status on that basis, and the appointments were accepted by

the grievor under those conditions. There is no real dispute between the parties that, if the grievor did in fact have the status of partial-load employee at the time of his termination, he received adequate notice pursuant to Article 26.03 of the collective agreement.

Moreover, the College further asserts that even if the grievor's employment constituted sessional employment at the time of his termination, which would require that he be a "teacher who teaches" more than 12 hours per week on a regular basis, he has no right to grieve pursuant to the collective agreement, and he also received adequate notice pursuant to paragraph 1 of Appendix VIII. Once again, there is no real dispute that, if his status was only that of a sessional employee, the grievance must fail.

The Union, however, argues that by the time of his termination, the grievor had accumulated more than 12 full months of continuous or non-continuous employment in a 24 calendar month period as a sessional employee, because he actually taught for more than 12 hours per week for those 12 months. That would have the effect of making the grievor a regular employee "considered as having completed the first year of the two year probationary period" pursuant to paragraph 3 of Appendix VIII. While the College makes certain submissions about the adequacy of the grievance to make and maintain such an allegation, I propose simply to by-pass those issues and go directly to the merits.

The only way in which the grievor can be said to have been a full-time employee is by counting, for the purpose of Article 26, not the hours which were assigned to him as "teaching hours" and paid as including "vacation and preparation time" but the hours which he was required to spend in the Independent Learning Centre. This, as the Agreed Statement of Fact makes clear, was calculated on a ratio of 2:3; that is, for each paid hour, including vacation and preparation time, the grievor was required to be in the Learning Centre for 1.5 hours.

Clearly, the grievor can only succeed in this case if it can be demonstrated that he was assigned to "teach" more than 12 hours per week on a regular basis during the requisite number of months. Thus, the central question must be whether the time he was required to be in the Learning Centre is all time during which he was involved in teaching. The College's argument requires that I accept its ratio of 2:3; the Union's argument requires not just that I reject that ratio, but that I conclude as a matter of contractual interpretation that every hour spent in the Centre pursuant to the College's policy was a teaching hour, whether paid for or not. There is no evidence before me as to what the grievor actually did during any particular time period, and therefore the Union's argument is not based on fact, but on a conclusion of law.

That legal argument has as its first branch an assertion that the 2.3 ratio of paid teaching hours and scheduled hours in the centre constitutes a unilaterally imposed individual contract of employment contrary to the collective agreement. It is well settled that the advent of collective bargaining removes any individual bargaining rights employees may have, and requires the College to deal with the Union in respect of terms and conditions of employment. That does not mean, however, that there is no scope for direct arrangements between the College and its employees; it simply means that those arrangements cannot violate or modify the collective agreement.

With respect to partial-load instructors, the Agreed Statement of Facts makes it clear that even outside the Independent Learning Centre partial-load instructors are assigned, or assign themselves, to a variety of duties which are clearly a required part of the job, but which take place outside of the specific hours for which they are paid as teaching hours. The assumption is that remuneration for those duties is included within the remuneration based on the number of assigned teaching hours. There could be no complaint, in my view, that the assignment of such duties constituted a breach of the Union's representational rights, nor could there be a complaint that a requirement that a partial-load instructor attend a meeting at the College or keep reasonable office hours on the College premises for routine out-of-class assistance to individual students should be counted toward the number of teaching hours for the purpose of determining the employment status of the partial-load instructors.

In my view, therefore, the arrangement made with instructors in the Independent Learning Centre that they would be present in the Centre for 50% more time than they were actually paid for, on the assumption that only two-thirds of the time during which they were present would be dedicated to teaching as that word has meaning for the purposes of Article 26, is consistent with the way in which other partial-load instructors are treated outside the Independent Learning Centre. It is simply a part of the ongoing accommodation between the instructors and the College, rather than any attempt to undermine any particular provision of the collective agreement. It is clear from the Statement of Facts and Exhibit 12 that the expectation was that at least one-third of the time spent in the learning centre would be available to partial-load instructors to perform the ancillary duties which, if they were employed elsewhere in the College, they would have to perform on unstructured time.

The central question, therefore, is one of fact. The collective agreement bases the distinction between partial-load status and full-time status on the number of hours an employee "teaches". For the Union to succeed, it would be necessary to demonstrate that the grievor "taught" for more than 12 hours during the requisite number of months. That would require some affirmative demonstration that the ratio used in practice in the centre did not accurately reflect the amount of the assigned time that was devoted to teaching. While the Union's argument asserts that the College failed to provide any evidence to this effect, the onus to establish the facts to support the grievance is on the Union. The facts on which the grievance must be determined can come only from the Agreed Statement of Facts, and there is nothing in that document that supports the notion that the grievor actually taught for more than two-thirds of the time that he was in the Learning Centre. There is an assertion that he engaged in professional development and other teaching related duties on his own time, but the agreement between the parties in paragraph 8 of the Statement of Facts is that the College did not require him to do that, that the intent was that all such work would be done at the Centre, and that he did this work in accordance with his own understanding of the preparation time for which he was paid. It is not unusual for employees in many kinds of occupations to spend time outside of working hours improving their skills, or even doing additional work. But merely to state that it has been done does not clearly demonstrate that there was no time to do it, by someone working with the reasonably expected degree of efficiency and skill, during the assigned hours when "teaching" was not required.

Finally, if in fact the ratio did not adequately provide time for the grievor to perform his ancillary duties when he was in the Learning Centre but not called upon to engage in actual teaching, the time to have raised that was when it occurred, and not months later when it arises for the first time as a part of a grievance aimed at altering the employment status under which he was hired and paid, the terms and conditions of which he was apparently satisfied to accept.

In conclusion, while this is a difficult and unusual case, and one which has caused me some concern, I am satisfied that the Union has not met the onus of demonstrating, on the balance of probabilities, that the grievor was assigned teaching duties such as to make him a full-time employee for the requisite number of months to gain him probationary status pursuant to Appendix VIII. In the result, therefore, the grievance must be denied.

DATED AT TORONTO this 8th day of December, 1995.

Kenneth P. Swan, Arbitrator