

IN THE MATTER OF AN ARBITRATION

BETWEEN:

MOHAWK COLLEGE

("College")

AND:

O.P.S.E.U.

("Union")

AND IN THE MATTER OF:

GRIEVANCE OF GASPARE BONOMO — #00D315

BOARD OF ARBITRATION:

Kevin M. Burkett - Chairperson
 - College Nominee
 - Union Nominee

APPEARANCES FOR THE COLLEGE:

Brenda Boulby - Counsel
Steve Evans - Director of Human Resources

APPEARANCES FOR THE UNION:

Alick Ryder - Counsel
Fred Deys - President Local 240
Mike Walton - Chief Steward Local 240

A hearing in this matter was held in Hamilton, Ontario on February 14, 2001.

A W A R D

The Union grieves in this matter that the College breached article 17.01 F 1 of the collective agreement when it refused to include within the grievor's sick leave gratuity calculation 20 days of unused sick leave credit for the school year September 1, 1999 to August 31, 2001. The College disputes that the grievor was entitled to sick leave for the period in question. There is no dispute with respect to my authority to hear and determine this matter.

The facts in this matter,, which are uncontroverted, are as follows. The grievor, a teacher of mathematics who commenced employment with the College in the fall of 1986, applied for and was granted a professional development leave under article 20 of the collective agreement for the period September 1, 1999 to August 31, 2000. The grievor was off work on professional development leave for this period and was paid the 70% of salary as provided for in article 20. The College circulated a memorandum dated February 21, 2000 advising all full-time academic staff that in accordance with the

collective agreement eligible employees were being afforded the opportunity "to have their sick credits cashed in at .75 cents on the dollar, based on the amount that would otherwise be payable upon separation from employment under the terms of the pre-existing Cumulative Sick Leave Plans." The grievor was an eligible employee who made application. In making the necessary calculation the College did not credit the grievor with any unused sick leave credits for the period during which he was absent on professional development leave. The grievor maintains that he is entitled to unused sick leave credits for the period he was absent on professional development leave, thereby joining issue with the College on the amount of his unused sick leave buy-out.

The relevant provisions of the collective agreement are set out below.

Benefits

17.01 F 1 During absences due to illness or injury, participating employees who would otherwise be scheduled to work shall receive 100% of regular pay for up to and including 20 working days in any one benefit year, plus any unused credits carried forward from previous years. Days not utilized in any year shall be considered to be credits (on the basis that one credit represents 100% of regular pay for one working day) and shall be carried forward to the next benefit year. Debits shall be made from the total assigned benefit on a day-for-day basis.

Professional Development Leave

20.01 The College recognizes that it is in the interests of employees, students and the College that employees are given the opportunity by the College to pursue College-approved professional development activities outside the College through further academic or technical studies or in industry where such activities will enhance the ability of the employee upon return to the College to fulfill professional responsibilities.

20.02 To that end, each College will grant a minimum of two percent of full-time members of the academic bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than six years, and an additional one percent of full-time members of the academic bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than 15 years, to be absent on professional development leave at any one time in accordance with the following conditions:

- (i) the purpose of the leave is for College-approved academic, technical, industrial or other pursuits where such activities will enhance the ability of the teacher, counsellor or librarian upon return to the College;
- (ii) a suitable substitute can be obtained;
- (iii) the leave will normally be for a period of from one to 12 months;
- (iv) the employee, upon termination of the professional development leave, will return to the College granting the leave for a period of at least one year, failing which the employee shall repay the College all salaries and fringe benefits received by the employee while on professional development leave;
- (v) the salary paid to the employee will be based on the following scale: 55% of the employee's normal salary increasing by five percent per year after six years of employment with the College concerned to a maximum of 70% of the employee's normal salary after nine years. It is understood that the College's payment is subject to reduction if the aggregate of the College's payment and compensation or payments from other sources during the period exceeds the amount of the employee's normal salary. The amount and conditions of payment will be pro-rated for shorter leaves;

The Union sought to rely on a booklet entitled "Your Benefits" prepared by individuals currently on the Academic Joint Insurance Committee and representatives of

Sun Life, the carrier. The College objected on the grounds that the collective agreement governed and, therefore, because the booklet is extraneous to the collective agreement, it is irrelevant. The board, without commenting on the ultimate relevance of the booklet, ruled that article 17.01 F 1 may be latently ambiguous and, therefore, the booklet could be introduced both for the purpose of establishing the ambiguity and resolving it. The relevant provisions of the benefits booklet read as follows.

Section 18 - Short Term Disability Plan (STD)

The Short Term Disability Plan (STD) is not an insurance plan. It is a benefit paid directly to you by the College. The full description of the STD plan is documented in Article 17 and 21.07 of the current Academic Collective Agreement.

Cumulative Sick Leave Credits

A member of the Academic Bargaining Unit employed by the College on a full-time basis on or after April 1, 1991, will accumulate sick leave credits at the rate of 20 days per year of continuous service, or pro-ratio thereof.

The argument of the Union, simply put, is that there are two components to the sick leave benefit provided under article 17.01 F 1, a maintenance of income component of 100% of regular pay for up to 20 working days for absences due to illness or injury and a gratuity component made up of accumulated unused sick leave credits. The Union argues that there is no threshold in respect of the gratuity component other than that the sick leave credits not be utilized, in which case they are carried forward. The Union argues in the alternative that if there is a threshold, it is one of maintaining continuous service, as specified in the benefits booklet, such that 20 days of sick leave credit are

advanced each year and the unused portions are carried forward to be included in the sick leave gratuity calculation. It is the position of the Union that because the grievor was entitled to 20 days of sick leave credit at the commencement of the year, because he maintained continuous employment during the period of his professional development leave and because he did not use any of his sick leave credits, these credits carried forward and should properly have been included in the calculation of his sick leave gratuity.

The College argument is equally straightforward. The College submits that under article 17.01 F 1 there is an absolute threshold that governs the granting of sick leave credits; that is that an employee be absent due to illness or injury when he/she "would otherwise be scheduled to work." Given that the grievor was absent on paid professional development leave and was not, therefore, absent due to illness or injury when he would otherwise be scheduled to work, the College takes the position that he did not satisfy the threshold and, therefore, had no unused sick leave credits for the period of his professional development leave be carried forward. In so far as the benefits booklet suggests that the threshold is continuous service, the College asserts that it is wrong, but that, in any event, the booklet is made subject to the collective agreement and it is the collective agreement that governs. Finally, the College argues that if in the face of article 17.01 F 1 there had nevertheless been an intention to provide those on professional development leave with sick leave credits, that intention would have been expressly

recorded, as in article 8.02, Leave for Union Business, and article 22.02, Pregnancy Leave. Absent an express provision for sick leave credits in article 20.01, we are asked to conclude that no such coverage was intended. In so far as there is a reference to fringe benefits being provided to an employee on professional development leave in article 20.02(iv), it is argued that this is a reference to insured benefits. We are asked to find that not having satisfied the threshold for the provision of sick leave credits, the grievor was not entitled to sick leave credits for the period in question and, therefore, his gratuity was calculated correctly.

The Union reiterates in reply that the grievor, having remained in the employ of the College at all relevant times, was entitled to have unused sick leave credits for the period of his professional development leave carried forward. In so far as the College relies on the express provision of sick leave when absent on Union leave or pregnancy leave, the Union points to the express elimination of sick leave when absent on prepaid leave.

It is useful in a case such as this to have reference to the underlying purpose of the provision. Sick leave credits are intended to protect an employee's income should he/she suffer illness or injury. Indeed, this is clear on the face of article 17.01 F 1. The sick leave gratuity, on the other hand, is intended to provide an economic incentive to be circumspect in the use of sick leave. In this case the grievor was off work at his own request on professional development leave and subject to article 20 under which he was

guaranteed 70% of his salary for the period of his absence. The guaranteed 70% of salary is the amount negotiated as full compensation to an employee who applies for and is granted professional development leave. In this case, therefore, the grievor did not require the protection from loss of negotiated earnings nor, correspondingly, did he require an incentive not to abuse his sick leave for this period.

While it is the language of the collective agreement that governs, the language must be interpreted having regard to its underlying purpose. Furthermore, where a party advances an interpretation that is not consistent with its apparent purpose, the language must be clear and compelling. Such is not the case here. Article 17.01 F 1 is unequivocal in its requirement that entitlement to sick leave is triggered by "absences due to illness or injury" at a time when an employee "would otherwise be scheduled to work." The grievor was not absent due to illness or injury when he would otherwise be scheduled to work. He was, by choice, off work on professional development leave with a guaranteed income in accord with terms negotiated between the parties. Accordingly, he had no entitlement to sick leave credits for this period and, by necessary implication, he had no entitlement to the carry forward of unused credits.

The benefits booklet which speaks to an entitlement to sick leave credits on the basis of continuous service was put into evidence. However, there was no evidence of any corresponding practice. Accordingly, no ambiguity was established, with the result that we are taken back to the language of the agreement. Indeed, the booklet is made

subject to the language of the agreement upon which we have relied.

Having regard to all of the foregoing, the College did not violate the collective agreement when it failed to credit the grievor with sick leave credits for the period of his professional development leave. Further, by necessary implication, it did not violate the collective agreement when it failed to include within the calculation the grievor's sick leave gratuity 20 unused sick leave credits for the period he was absent from work while on professional development leave. This grievance is hereby dismissed.

Dated this _____ day of February in the City of Toronto.

KEVIN BURKETT

I concur/dissent _____
- UNION NOMINEE

I concur/dissent _____
- COLLEGE NOMINEE

