

IN THE MATTER OF AN ARBITRATION

BETWEEN:

91D914
CAAT L.415

ONTARIO COUNCIL OF REGENTS FOR THE COLLEGES OF APPLIED ARTS
AND TECHNOLOGY IN THE FORM OF ALGONQUIN COLLEGE
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(hereinafter called the "Union")

GRIEVANCE OF MARY ANN BOYLE
(hereinafter called the "Grievor")

BOARD OF ARBITRATION:

Richard H. McLaren

J.R. Dalzell, College Nominee

Ron Cochrane, Union Nominee

COUNSEL FOR THE COLLEGE:

Paul Jarvis

COUNSEL FOR THE UNION:

Michael McFadden

A HEARING IN RELATION TO THIS MATTER WAS HELD AT OTTAWA, ONTARIO ON
APRIL 1, 1992.

A W A R D

Ms. Mary Ann Boyle has been an instructor of English in the School of Business at the College since December 19, 1976. For the past eleven of those years she has worked in the capacity of a partial-load instructor. She was advised by a memorandum dated March 12, 1992 from the College that according to Appendix 2, Paragraph 3 in the collective agreement, as a partial-load Professor she had accumulated a further ten months of on-the-job experience entitling her to one further year of service. As a consequence she progressed as of March 20, 1992 to step 13 on the grid which translates into an hourly rate of \$71.26. She was at that time the highest paid teacher within the English Department at the School of Business and also the individual with the highest seniority.

The College served the necessary documents to bring the contractual relationship to an end under the provisions of Appendix 2. The explanation provided to Ms. Boyle in a letter dated July 5, 1991 (Exhibit 3), indicated that the decision not to renew her partial-load contract was caused by financial constraints and was no reflection on her teaching ability. At the hearing it was agreed that the decision of the College was based purely on the fact that her hourly rate was more than the budget provided for.

In the fall term of 1991, during which Ms. Boyle did not work as a partial-load instructor, a Mr. Nicholas Strachan was retained as a partial-load teacher in the English department at an hourly rate of \$45.00/hr. It was agreed by Counsel that Ms. Boyle, while not being the instructor who had taught the particular students which Mr. Strachan had taught in the fall of 1991, was completely capable of teaching the same group of students. It was candidly admitted by the College that the hourly rate of Ms. Boyle was the reason for her not being re-employed in the fall of 1991 as a partial-load instructor.

In September 1991 a grievance was filed by Ms. Boyle complaining of the decision of the College. It reads as follows:

"After almost fifteen years as a teacher of English at Algonquin, at least eleven of them in the partial-load category, I have been informed by management that it can no longer afford my services at that level and that it offers me a sessional position instead. I have been assured that my competence is not in question and that only the pay rate is a problem.

In the School of Business, available teaching is being packaged into part-time and sessional segments while partial-load positions above an arbitrary pay level are being eliminated. In asking me to accept a sessional position, management is contravening the provisions contained in Appendix III which stipulates that ongoing positions will be filled by members of the bargaining unit. Furthermore, management is acting in a manner contrary to the principle of Article 28 regarding the enhancement of employment stability.

My latter-day pay rate is attributable to:

- (a) my qualifications and experience.
- (b) my membership in the Union, whose good offices recently negotiated increased rates for partial-load teachers.

It seems unjust that these two factors should render me unlikely to be rehired at my accustomed level.

(Exhibit 1)

At the hearing the remedy requested was essentially that of the grievance which was that she be continued as a partial-load instructor in the College.

On the basis of the foregoing facts it was agreed by Counsel for the parties that the matter could be argued without the calling of any viva voce evidence. It was further agreed by Counsel for the College that, while the argument of the College was a preliminary objection to the jurisdiction of the Board to hear the grievance, that argument was inextricably intertwined with the merits of the case. As such, the proper way to proceed was to reserve on the preliminary issue, hear the entire argument and make this award.

In support of its position it was argued on behalf of the Union that Appendix II of the collective agreement in section 1 (b) provides the formula for the setting of rates which had resulted in the contract rate of \$71.26 as of March 1, 1991. The basis on which that rate was set was through the use of the seniority provisions in the collective agreement. It was further submitted that section 2 of the Appendix, again on the basis of seniority, provides for protection of a partial-load employee when a full-time employee is exercising the bumping rights of that section. Therefore, partial-load employees accumulate seniority for purposes of calculation of wages and also for protection from the bumping process contained in the collective agreement at Article 8. It was submitted that if the College needed to meet financial constraints there was a process for achieving that through the use of Article 8. It

was further submitted that this collective agreement, through the use of seniority, provides rights to the Grievor. Therefore, when the Grievor is terminated while Mr. Strachan is retained, merely because he is paid a lower wage, the College is violating the concept of seniority which is designed to protect otherwise vulnerable employees. Discontinuing Ms. Boyle's employment relationship with the College in this way, was an improper exercise of the College's discretion. It was submitted that there is an argument by analogy to the probationary employees and the jurisprudence which has been developed under this collective agreement by Boards of Arbitration with respect to the standard for the termination of such an employee. It was submitted that in exercising its discretion the College must act in good faith and that they have, in viewing the entire transaction, acted in bad faith. The whole course of conduct is to be examined, as was found in the George Brown decision. In that case, the employer was said to be acting without sufficient good faith, thereby establishing a lack of good faith. On that basis, the College did not exercise its discretion properly in terminating the Grievor.

In support of its position, the Union made reference to the decision of Re St. Lawrence College, 32 L.A.C. (3d) 322 (Brent, 1987), together with the dissent of the Union Nominee, who is the same Nominee in this proceeding. That decision was quashed at the Divisional Court and a transcript with the reasons was filed with the Board as dated February 17, 1989. The Divisional Court relied on the Union Nominee's dissent. In further support of its position reference was also made to George Brown College an unreported decision by Arbitrator Mitchnick dated September 24, 1991, involving a Mr. Trevor Ellis. Mr. Ellis was a probationary employee and was released during the probationary period. The Board concluded that a test for bad faith was appropriate under the circumstances. However, the College

attempted to fulfill its obligations and consequently, was found to be acting in good faith.

In support of its position it was argued on behalf of the College that the collective agreement divides employees into a number of classes, one of which is partial-load professors whose contractual rights are those found in Appendix II, and sessional employees whose rights are found in Appendix III. It was submitted that there is no right to be retained in employment and that the only obligation was to provide thirty days notice on release. That obligation was complied with in this case and the College maintained its objection to the grievance from the outset. As a consequence, the decision of the College became one of an exercise in management rights within Article 7.01 (c). It was submitted that this was a release, not a dismissal. Therefore, it is not appropriate to bring in by analogy the case law surrounding probationary employees and their relationship to the College under the collective agreement. On this basis there has been no violation of the collective agreement. The matter is not arbitral since it is within the discretion of the College to release such employees, and in so doing, the College has properly exercised its discretion. In the alternative, it was submitted that if there were a bad faith standard to be applied to the College in connection with the release of a partial-load employee, that standard would be whether the College's action resulted from an illegal act by the College. There is no evidence of such an illegal act in this instance. There is no positive obligation upon the College to have acted in a different way.

In support of the position of the College, reference was made to the decision in Re Lambton College, an unreported decision of Arbitrator Palmer dated July 14, 1988 with the

dissent of Arbitrator Robinson and a grievance involving a Mr. D. McIntyre. Reference was also made to a further decision between the parties in Centennial College, an unreported decision by Arbitrator Samuels dated December 8, 1988.

The relevant provisions of the collective agreement are as follows:

**Article 7
MANAGEMENT FUNCTIONS**

7.01 It is the exclusive function of the Colleges to:

(c) to manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment, or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement.

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

**Article 8
SENIORITY**

8.05 When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntarily full-time employees who have completed the probationary period to another position from that previously held as a result of such lay-off or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected. Where an employee has the competence, skill, and experience to fulfill the requirements of the full-time position concerned, seniority shall apply consistent with the following:

(d) failing placement under paragraph (c) above, such employee shall be reassigned to displace two partial-load employees (as referred to in Appendix II) provided that:

(i) the displacing employee has the competence, skill, and experience to fulfill the requirements of the position concerned; and

(ii) each of the partial-load employees being displaced has lesser months of service with the College as determined in Appendix II than such displacing employee's months of seniority; and

(iii) it is understood that the College retains the right to assign additional work to the employee, where warranted, subject to the limits prescribed by Article 4.

(e) (i) failing placement under paragraph 8.05(d) above or where the employee has waived in writing the right in paragraph (d) above, such employee shall be reassigned to displace one partial-load employee (as referred to in Appendix II) and one or more part-time employees whose assigned courses are as described in paragraph 8.05 (e) (ii) below, provided that:

(a) the same as, or

(b) essentially the same as, or

(c) pre-requisite courses to those taught by the partial-load employee concerned.

(e) (iii) such employee shall have the layoff notice extended until completion of the assignment so created, and shall maintain current salary and benefits for the duration of that assignment.

(e) (iv) upon completion of the assignment so created, or as mutually agreed between the College and the employee, such employee shall be reassigned within the College to a vacant full-time position if the employee has the competence, skill, and experience to perform the requirements of a vacant full-time position.

(e) (v) failing placement under paragraph 8.05(e) (iv) above, such employee shall be laid off without further notice upon completion of the partial-load assignment.

(f) (i) failing placement under paragraph 8.05(e) above or where the employee has waived in writing the right in paragraph (e) above, such employee shall be reassigned to displace one partial-load employee (as referred to in Appendix II) and engage in approved retraining activities such that the employee retains current salary and benefits for the duration of the partial-load assignment provided that:

(a) the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned; and

(b) the partial-load employee being displaced has lesser months of service with the College as determined in Appendix II than such displacing employee's months of seniority.

(f) (ii) such employee shall have the layoff notice extended until completion of the partial-load employee's assignment, and shall maintain current salary and benefits for the duration of the partial-load assignment.

(f) (iii) upon completion of the partial-load assignment, or as mutually agreed between the College and the employee, such employee shall be reassigned within the College to a vacant full-time position if the employee has the competence, skill and experience to perform the requirements of a vacant full-time position.

(f) (iv) failing placement under 8.05(f) (iii) above, such employee shall be laid off without further notice upon completion of the partial-load assignment. ...

8.07 (a) In January of each year, the College shall prepare and post lists as follows:

(i) a seniority list of all regular full-time employees showing the employee's name, classification, division or department, and seniority as determined pursuant to this Article.

(ii) a list of all probationary employees showing the employee's name, division or department, date of hire, and date of completion of the probationary period.

(iii) a seniority list of all partial-load employees employed since the previous January showing the employee's name, division or department, and accumulated service to date.

Such lists shall also be sent to the Union Local President.

8.08 (b) If the grievance is processed through Step 2, the written referral to arbitration in Article 11.03 shall specify, from the positions originally designated in (a) above, two full-time positions, or positions occupied by two or more partial-load or part-time employees (the sum of whose duties will form one full-time position), who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the grievance thereafter under only one of sub-paragraphs (a), (b), (c), (d), (e), (f), (g) or (h) of Article 8.05.

8.15 (b) During the last week of September, January and May the College shall notify the Local President of all personnel covered by the Agreement hired or terminated since the last notification, together with the classification, location and Division or Department concerned. At such times, the College shall also include notification of all hirings of personnel assigned to teach credit courses including, in particular, sessional appointments.

APPENDIX II
PARTIAL-LOAD EMPLOYEES

1. (a) As referred to in Article 3.03 (2) of the Agreement, a partial-load employee is defined as a teacher who teaches more than six (6) and up to and including twelve (12) hours per week on a regular basis.

(b) A partial-load employee shall not receive salary, vacations, holidays or fringe benefits (except for coverage of Workers' Compensation and Liability insurance) but shall be paid for the performance of each teaching hour at an hourly rate calculated as follows:

$$\frac{\text{Equivalent grid salary}}{52 \text{ weeks} \times 18 \text{ or } 20 \text{ TCH as appropriate}}$$

"Equivalent grid salary" means the annual salary for a Professor or Instructor, as appropriate, calculated in accordance with the appropriate qualifications and experience under Appendix I.

*It is understood that some variation of this formula will be required to take into account the results of the deliberations of the task force and/or arbitration board concerning the "post-secondary/non-post-secondary" issue, referred to in a letter of understanding attached to this Agreement on page 90.

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 earnings in lieu of vacation for work performed as a partial-load employee after September 1, 1981.

5. A partial-load employee shall pay dues in accordance with Article 12.

6. The College will give preference to the designation of full-time positions as regular rather than partial-load teaching positions subject to such operational requirements as the quality of the programs, attainment of the program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community.

The real complaint of Ms. Boyle in this case is that she had been of long service as a partial-load instructor and she was released under Appendix II while another individual teaching within the same department and in the same school was retained. This action was taken for purely financial considerations as evidenced by the fact that the replacement employee was earning \$26.00/hr less than she was. However, there are no bumping rights for partial-load employees so this matter cannot be addressed in that fashion.

As a consequence the Union is left with asserting that there is some standard of review which must be met for the use of partial-load employees. Appendix II contains the provisions of the collective agreement which apply directly to partial-load employees. Appendix I incorporates certain other provisions of the collective agreement and indicates that other articles such as Article 8 have no application unless they are specifically referred to in the Appendix.

Appendix II indicates that a partial-load teacher may be released upon thirty days written notice and shall resign by giving thirty days written notice. This portion of the Appendix limits the management's right contained in Article 7.01 to manage the College and to "plan, direct and control operations... direct its personnel, determine complement... the extension, limitation, curtailment, or cessation of operations or all the other rights and responsibilities not specifically modified elsewhere in this Agreement". On the basis of Article 7.01, together with the limitation on the exercise of those rights by paragraph two of Appendix II, the College released Ms. Boyle from the partial-load contract.

The distinction between the release of the partial-load employee and a dismissal was explored in the decision in Re Lambton College, *supra*. In that decision it was found that there was a distinction between employees who are released under contractual arrangement of partial-load and employees who would be dismissed. The Board concluded that a partial-load employee cannot grieve a loss of employment. That conclusion was based on a reading of paragraph two of Appendix II. All that is required to release a partial-load employee is to give the notice required in the paragraph. In Re Lambton College, the College indicated that there was poor work performance on the part of the released individual. However, Arbitrator Palmer refused to inquire into the College's reasons for acting. In so doing, he expressed the view that the admission by the College that poor work performance was the reason for the employee release did not make the otherwise non-grievable release grievable. The probationary employee lacks contractual rights, and this fact is not altered by the College's actions. Arbitrator Palmer drew a distinction between the concept of release, which is used for probationary employees under the collective agreement, and the concept of discharge, which is used for those same employees who have completed the probationary period, and as a result become full-time employees who enjoy the protection measures under the collective agreement. It is on that basis that this present argument is put to this Board of Arbitration, and that, by analogy, even though the collective agreement is silent, there ought to be a standard of review of the management discretion.

The issue of management discretion and its use has been the subject of much discussion in the arbitral jurisprudence. The jurisprudence has read into collective

agreements an obligation on the part of management to act in good faith in dismissing a probationary employee. The Municipality of Metropolitan Toronto and the Canadian Union of Public Employees, Local 43, in a Divisional Court decision in July of 1981, established a standard that a Union could grieve the dismissal of a probationary employee if the action of the Employer was taken in bad faith in the sense that the decision was motivated by unlawful considerations or resulted from management actions which precluded the probationary employee from doing their best.

This approach has been adopted in respect of probationary employees under this collective agreement. It has become part of the framework of the jurisprudence which is applied with respect to probationary employees.

This Board of Arbitration is not willing to extend that concept in the context of partial-load employees because of the very different nature of the contractual relationship which these individuals enjoy. A probationary employee is one who has the ability to become a full-time employee. There are a series of contractual rights surrounding probationary employees and their movement from probationary status to full-time status. In dealing with another category of employees, that of the sessional employees, Appendix III provides that under certain circumstances they can become probationary employees. The partial-load employees do not even have this ability to become, through longevity, a probationary employee. That is one of the distinctions between the partial-load and the sessional employee. Indeed, this particular individual has been a partial-load employee of the College for the past eleven years. In this situation there is not a sufficient contractual nexus to allow the development of the jurisprudential theory surrounding a decision of a college to

bring a probationary employee's employment to an end. There has been some further development of that standard in the St. Lawrence decision which was reviewed by the Divisional Court and put before the Board. However, whatever the precise formulation of standards might be at the present time, they are not ones which might be moved over and applied by analogy to the release of a partial-load professor.

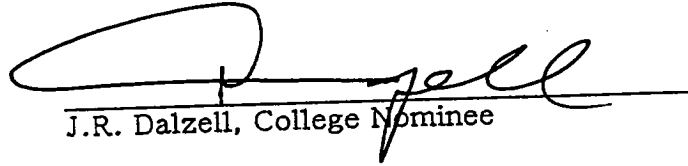
The rights of the partial-load employee in connection with the discontinuance of the contractual arrangement is clearly set out in paragraph 2 of Appendix II as being the right one to be released upon 30 days written notice. That is what has occurred in this case. The College had the management right to so act under Article 7.01 (c). The reasons for so acting are not reviewable when there is no contractual nexus upon which to move to some review even on the narrow standard of bad faith. Therefore, while this matter is extremely unfortunate in that this individual has been allowed to work for such a lengthy period of time as a partial-load employee, there is no ability for this employee to have displaced some other employee in the same department who was working and doing similar teaching. It is not a matter which this Board of Arbitration can remedy without contractual language which would allow it to intervene and evaluate the decision of the College or determine that there were bumping rights in favour of Ms. Boyle. Therefore, on the basis of all the foregoing reasons, this Board has no jurisdiction to entertain the grievance and find a violation of a provision of the collective agreement for which a remedy could then be ordered. In the absence of jurisdiction to have heard and determine the grievance, it must be concluded that the grievance be dismissed. It is so ordered.

DATED AT LONDON, ONTARIO THIS 25th DAY OF ~~APRIL~~, 1992.
JUNE



Richard H. McLaren
Chairman

I ~~concur~~/dissent



J.R. Dalzell, College Nominee

I ~~concur~~/dissent

See Attached Dissent

Signed "Ron Cochrane"
R. Cochrane, Union Nominee

2536W

DISSENT OF UNION NOMINEE

My problem with the draft is focused on the fact that your award would give all the colleges in the system the ability to trim their rosters by releasing the highest paid faculty who cost the most money. In the collective bargaining process, the parties are required to bargain in good faith. In this case, the parties were the Council of Regents and OPSEU. They bargained a rate of pay for employees such as Mrs. Boyle and now the Employer, a party to this agreement, is saying that rate was too high and it has no intention of paying that rate. Its solution is to invoke the 30 days' notice clause, release the most senior employee, who happens to be the highest paid, and boldly tell us there is nothing we can do about it. I don't agree. The good faith the parties extended in reaching that rate of pay at the bargaining table must be carried forward when the agreement is interpreted. Otherwise the legal requirement of good faith bargaining is emptied of all meaning. In effect, the college is saying: We don't care what rate you have negotiated for people like Mrs. Boyle; if it's too high, she's fired. The only way to avoid this conduct is to interpret the 30 days' notice clause, as other than an unfettered right clause. The test should be a bad faith test. My concern is that the majority decision will open the door to all colleges to ignore what has been negotiated in good faith and terminate the highest paid, most experienced staff.



R. A. Cochran.