

HEADNOTE

GSB NO.: _____

OPSEU NO.: _____ 94F185

LOCAL NO.: _____ 562

OPSEU (Casey) and Humber College of Applied Arts and Technology (Academic)

Decision Dated: January 10, 1996

Arbitrator Stanley Schiff

Summary: The grievor, a professor at the College, was absent due to illness from February 7 to May 1, 1994. During that time she received payment each month of an amount equal to her regular monthly salary installments. However, during July and August of that year, the College made deductions from the monthly installments and purported adjustment of the vacation pay according to a long standing policy. The grievor claimed violation of the collective agreement and asked for reimbursement of the total of the monthly deductions.

Issue(s): Vacations - payment for vacation during absence due to illness

Held: Grievance upheld:

The arbitration panel stated that Article 15.01(a) does not require full work attendance in the immediately academic year to justify the vacation. What the provision demands is only employment by the College for one year or more. Furthermore, the provision would not allow the College to reduce the dollar amount of salary installments during July and August below one twelfth of the salary the professor is entitled to receive according to the Article 14 grid and the College's practice of monthly payments. In addition, the College was found not to be able to make deductions from the vacation pay because of an alleged lack of vacation credits resulting from her absence earlier in the year due to illness. Under the agreement the board found that credits for vacation pay are not needed and cannot be calculated. Therefore, the College was ordered to reimburse the grievor for the amounts deducted plus interest.

Donald K. Eady

IN THE MATTER OF the grievance of Kathryn Casey
AND IN THE MATTER OF the arbitration of the grievance
BETWEEN:

Humber College of Applied Arts and Technology

– and –

Ontario Public Service Employees Union

94F185
Local 562
CAAT (A)
CASEY

PLACE AND DATES OF HEARING: Toronto, Ontario, February 24, May 15,
September 14, December 14, 1995

BOARD OF ARBITRATION:

Robert Gallivan
Sherril Murray
Stanley Schiff, chairman

APPEARANCES FOR EMPLOYER:

Nancy Hood, director, human resources
G. Hamilton Q.C., counsel

APPEARANCES FOR UNION:

Kathryn Casey
Gary Adams, counsel (except December 14)
Donald Eady, counsel (December 14 only)

AWARD & REASONS

The grievor, a professor at the College, was absent due to illness from February 7th to May 1st 1994. During that time she received payment each month of an amount equal to her regular monthly salary instalments. However, during July and August, the College made deductions from the monthly instalments in purported adjustment of vacation pay according to a long-standing policy. The grievor claims violation of the collective agreement and asks reimbursement of the total of the monthly deductions.

As we read the collective agreement, professors are paid an annual salary defined by a salary grid. Although Article 14, containing the various salary provisions, does not speak of "annual salary", the overall implication is clear. Moreover, provisions elsewhere use the precise words: see, for example, s. 15.01 B and clauses (i) and (ii) of s. 23.04. Under the agreement, therefore, the College is bound to pay to a professor in each calendar year the dollar amount of salary shown by the particular position of that professor on the grid as set out in s. 14.03 A 1 (a). However, nothing in the agreement prevents the College from paying the amount in twelve equal monthly instalments and, as a matter of long practice, that is what the College does.

Deductions from the annual salary--and from the monthly instalments the College pays--may only be made if the professor fails to perform his or her duties during some part of the academic year as defined in s. 11.03, "ten months in duration...from September 1 to the following June 30." The failure may be due to absence because, for example, the professor is on leave or is ill. In that event, the deductions may be taken only for, and targeted at the precise time period the professor is not performing the duties. And, of course, the fact and quantity of the deductions will be subject to any governing provisions of the agreement. So, if a professor is absent during, say, January when he or she is scheduled to teach, unless there is something contrary in the agreement, no part of the salary referable to that time period is payable.

In the grievor's case, subject to any contrary provision of the agreement, the College might have withheld payment of that portion of her yearly salary referable to the period from February 7th to May 1st. Since the absence was due to illness, the contrary provision is in the agreement's Short-Term Disability Plan. Under s. 17.01 F 1, the grievor was entitled to "receive 100% of regular pay for up to and including 20 working days in [the] benefit year plus any unused credits carried forward from previous years." The grievor had more than enough accumulated credits to cover all the working days during her absence and, in the event, she received what she saw as her regular monthly cheques during the whole time she was away. On the evidence it appears that the College continued to pay her during the first four weeks as if she were not absent and that payments for the rest of the time came from the Short-Term Disability Plan.

Following the direction of the Ministry, the College has long applied a policy of making deductions from a professor's monthly instalments of salary for July and August proportionate to the number of teaching days' absence during the preceding ten month academic year in excess of four weeks. The policy is based on the theory that, since s. 15.01 A provides for a two-month vacation at the end of the ten-month academic year, the pay instalments for July and August are vacation pay and that the professor loses vacation pay credits as the result of absences during the academic year. The policy has been applied to persons who were absent on maternity leave, semi-sabbaticals and leave due to injury subject to the Workers' Compensation Act. It has also been applied to persons, like the grievor, absent due to illness who received

sick leave pay or payment under the Short-Term Disability Plan. It has been set out in the College's Policy and Procedure Manual at least since the early 1980s and has been referred to consistently in letters sent by the College to persons whose pay instalments for July and August were reduced according to its terms.

The College argued before us that s. 15.01 A provides for a two month vacation only if, according to its precise words, the "employee...has completed one full academic year's service...". If the person has not completed the full period of service during the immediately previous ten months, says the College, s. 15.01 A does not apply. Since the questions of vacation and vacation pay are then at large, the Ministry's policy which the College applies fills the gap. Sections 27.3 and 27.14 A, based on the assumption that the agreement elsewhere authorizes vacation pay and credits for it, support the policy's underlying theory. The College does not argue that the policy is specifically authorized by any statute or statutory regulation. The College may well seek to find the legal authority in the collective agreement's management's rights clause.

We conclude that the deductions from the grievor's pay instalments violate the agreement.

We are inclined to think that s. 15.01 A does not require full work attendance in the immediately preceding academic year to justify the vacation. What the provision probably demands is only employment by the College for one year or more. That certainly was the reading of its identically-worded predecessor by the board chaired

by Don O'Shea in an award issued in 1976 respecting Conestoga College (Membury grievance). Be that as it may, we need not decide the point: even if the provision should be read as the College wants, it would only allow reducing vacation entitlement to less than the full two months. The employee would then be on vacation for some lesser time (and for the rest, we may assume, would be on some kind of leave). So reading the provision would not allow the College to reduce the dollar amount of salary instalments during July and August below one-twelfth of the salary the professor is entitled to receive according to the Article 14 grid and the College's practice of monthly payments.

The policy is based on the mistaken assumption that the collective agreement and especially s. 15.01 A provide for vacation pay--that is, special pay referable to the two months vacation s. 15.01 A contemplates--separate and apart from the yearly salary set by the grid. The idea of such special vacation pay is drawn from the industrial model where hourly-rated or weekly-rated employees receive wages that cover only their hours and days of actual work. Entitlements to vacations and to vacation pay are added on by specific formulas in collective agreements providing for paid vacations of certain lengths defined by periods of employment or service. That model is not duplicated in this collective agreement. Some of the awards the College has referred us to, drawn from the industrial context, therefore do not help us. Here, as we have said, even though professors have duties during only ten of the twelve months, they are entitled to receive a salary of a certain dollar amount referable to the calendar year payable, as the College has chosen to do, in twelve monthly

instalments. No separate vacation pay is contemplated or payable and no credits for vacation or vacation pay are needed. Certainly s. 15.01 A contains no reference to vacation pay or credits. Instead, payment to cover the vacation period is built into the yearly salary; it is a part of the whole. If a model must be found, it is that of the professional lawyer employed by a law firm as an associate and paid a salary referable to a calendar year who, under an express or tacit understanding with the firm, takes a vacation at some time in the year with no extra pay attached and no deduction taken for the time away from work.

Section 27.13, governing notice upon resignation, is the only provision in the agreement referring to either "vacation pay or [vacation] credit to which the employee is entitled under [the] agreement". In light of how we read Article 14 and s.15.01A, we cannot see how s. 27.13 can override the demand that every professor receive in total over a year the salary the grid sets, reduced proportionately, as we have said, respecting any length of time within the year when the professor fails to perform requisite duties. For the professor whose contract is brought prematurely to an end in mid-year, that will be the whole period after the termination takes effect. We do not deny that the reference to vacation pay and credit is based on the drafters' assumption that provisions elsewhere in the agreement create them. In context, it seems clear that the assumption was made solely to help set up the device of alternative vacation payments to induce timely written notice when an employee resigns. The device fails because the assumption is wrong: the employee receives the minimum vacation payment set by "applicable legislation", presumably the Employment Standards Act. (Counsel agree that, although that Act does not in law

bind the College, a Crown agency, the College nonetheless applies its terms as a matter of policy.)

In s. 27.14 A, applicable to discharge, the last sentence directs payment of whatever "vacation entitlement" is available. Absent entitlement under this agreement, that means, again, vacation pay as defined by some statute, and again, presumably the Employment Standards Act.

We recognize our duty, as the College reminded us, to attempt a reading of the agreement harmonizing all the provisions. At the same time we must read the provisions to implement the parties' intentions and, in doing that, find meanings the words will reasonably bear. Here, as we look for the proper reading of ss. 27.13 and 27.14 A in light of Article 14 and s. 15.01 A, we must make a choice as to which shall prevail. We choose Article 14 and s. 15.01 A. Article 14 creates professors' right to yearly salary of a certain amount and s. 15.01 A defines the vacation period without mentioning that any special pay or credits are attached. Sections 27.13 and 27.14 A, for purposes removed from these, merely assume the existence of the pay and credits which nothing else in the agreement -- and certainly nothing in the words of either Article 14 or s. 15.01 A -- creates.

As we see the importance of Article 14 and s. 15.01 A, we might even concede that pay instalments for July and August are "vacation pay". The result is the same. The grievor was entitled to receive in 1994 that dollar amount directed by the Article 14 grid

and the provisions of the Short-Term Disability Plan. The College could not make deductions from the vacation pay because of an alleged lack of vacation credits resulting from her absence earlier in the year due to illness. Under this agreement credits for vacation pay are not needed and cannot be calculated.

Section 16,01A, which the College touched on, does not help its argument. To the contrary: by ensuring that Canada Day (in July) and Civic Holiday (in August) are "granted...[as] holidays...without reduction of salary ", the very language of the provisions confirms that what professors receive during the vacation months is indeed "salary", part of what Article 14 demands. This brings us back to our original conclusion.

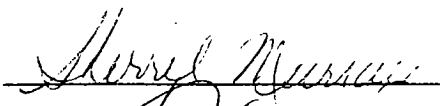
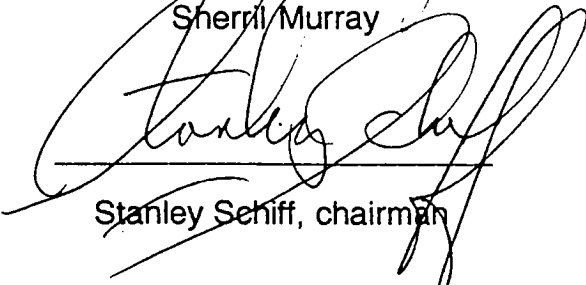
In all, as we read the agreement as a whole, it is tolerably unambiguous about the bearing of its provisions on this grievance. But, even if ss. 27.13 and 27.14 A cause some ambiguity, we are not persuaded by the evidence of the long-standing practice that s. 15.01 A in context should be interpreted as the College wants. Even the evidence of the union's lack of response to the practice does not convince us. And since the College does not claim that the facts warrant a bar against the union's reading of the agreement on the basis of estoppel, we do not consider that matter here.

In the end, we see that our reasoning is supported in whole or in part by many other arbitrators: see the award in Conestoga College, referred to above; Cambrian College (Ziegler grievance), issued in 1978 by a board chaired by Wes Rayner;

Canadore College (Bell grievance) (1982) (Brunner, chairman); Centennial College (McCormack grievance) (1983) (Brent, chairman); St. Clair College (Union grievance) (1989) (H.D. Brown, chairman); Cambrian College (multiple grievances) (1995) (Devlin, chairman). Indeed, the facts in Canadore College are materially identical to those before us and the reasoning, leading to allowing the grievance, much the same as ours. The award in Northern College (Connell grievance), issued in 1991 by a board chaired by Martin Teplitsky, is not entirely clear in its discussion of whether the collective agreement demands special vacation pay. To the extent that the reasoning there differs from ours, we disagree with it.

The grievance is allowed. The College shall reimburse the grievor for the amounts deducted plus interest calculated at the prejudgment interest rate applied in the Ontario Court (General Division). We shall remain seized to determine the precise total should the parties fail to agree.

DATED at Toronto this 10th day of January, 1996.


Sherril Murray

Stanley Schiff, chairman

DECISION OF R.J. GALLIVAN

It is not within the purview of this Arbitration Board to bind the parties to a determination that they have erred in drafting their collective agreement - that they have based their contract (in the words of the Chair) on a "mistaken assumption that the collective agreement...provide(s) for vacation pay...."

This collective agreement is a creature of the parties' own making. The role of the Arbitration Board (also a creature of the parties' making) is to interpret that agreement as the parties wrote it, not to tell them they wrote it incorrectly, and to interpret it within the confines of the powers the parties themselves have conferred upon it. Those limits are set out in the following Article of the contract:

"32.04D The arbitration board shall not be authorized to alter, modify or amend any part of the terms of this Agreement nor to make any decision inconsistent therewith; nor to deal with any matter that is not a proper matter for grievance under this Agreement."

Thus our Board is limited to making an interpretation of the agreement as it exists, interpreting the actual words used by the parties themselves. It is not within the jurisdiction of the Board to decide that because certain provisions of the agreement don't follow a particular model, or because giving other provisions their plain meaning would require admitting to ambiguity, they simply then can be ignored or erroneously explained away as drafting errors. Yet that is precisely what the Chair has done here. He has effectively read out of the contract, in violation of Article 32.04D, the two Articles

which mention vacation pay and accrual of vacation credits, contract provisions which specifically contradict the contention of the grievor and her union.

It is only by such deletion that the Chair is then able to conclude that the contract is not ambiguous, thus dismissing the extensive evidence put before us of the College's past practice and the union's concurrence in it over many years.

Furthermore, it must be pointed out that there was no evidence put to the Board by the parties about their intent when drafting the vacation provisions of the agreement. Nor was there any evidence about any assumptions the parties might have made during that drafting process. Yet despite the absence of such evidence the Chair makes a finding based on what he concludes the parties' assumption to have been - and compounds the error by telling the parties their assumption was wrong.

In addition to those errors of jurisdiction and interpretation, the Chair also errs in logic and common sense by holding that although employees receive vacation during a period when they are being paid, the pay for that period cannot be vacation pay. That conclusion is inconsistent with the agreement and so also violates Article 32.04D.

In view of those fundamental errors by the Chair, I must dissociate myself from his decision.

The union made two arguments: first, that since employees are paid an "annual salary" under this collective agreement, none of that salary is identifiable separately as "vacation pay" and therefore cannot be pro-rated; and second, that since the agreement is silent on the issue of whether or not the employer may pro-rate vacation entitlement to reflect absences during the prior academic year, there is no ambiguity which would entitle the Board to consider evidence of past practice. Both of those arguments demonstrably are flawed.

The error in the first of the union's arguments, that the contract does not provide for vacation pay, is quite simply illustrated by the plain words of the following Articles from the collective agreement:

"27.13 An employee shall resign by giving at least 90 calendar days' written notice to the College, failing which...the employee shall receive the minimum vacation payment to which the employee is entitled under applicable legislation in lieu of any vacation pay or credit to which the employee is entitled under this Agreement." (emphasis added)

"27.14A An employee being discharged...shall be notified in writing by the College President....When the reasons are not such as to warrant immediate discharge, the College will give 90 calendar days' written notification. Any vacation entitlement of an employee shall be paid in addition to the 90 days' notice period...." (emphasis added)

If there is no vacation pay or paid vacation entitlement under this contract as the union contends (and the Chair agrees), what is it that is being paid under Articles 27.13 and 27.14A? I believe the answer is self-evident: it is vacation pay and, at least under these Articles, it is paid out on the basis of proportional credits - that is, it is pro-rated.

Even the union agrees, at least for a new employee with less than a full academic year's service, that the College correctly pro-rates to reflect vacation accrual under Article 15.01A even though that Article does not specifically refer to pro-rating:

"15.01A A full time employee who has completed one full academic year's service with the College shall be entitled to a vacation of two months as scheduled by the College." (emphasis added)

As the Chair points out, employees are paid year-round, an annual salary. Is it not logical to conclude that if the employee is on "a vacation of two months" and is being paid, that the pay for the period of vacation should be inferred as being "vacation pay", particularly in light of the specific references in Articles 27.13

and 27.14A to vacation pay? While it is a common necessity of contract interpretation to have to draw inferences when meanings are unclear, the inference drawn here by the Chair - that there is no vacation pay despite specific references to it - defies logic and common sense.

It is agreed that employees do receive vacations under this contract. But if they are not paid vacations, as the Chair contends, then the only logical alternative is that they are unpaid vacations. Yet by the Chair's own reasoning there can be no part of the year left for an unpaid vacation since employees are paid year-round. The egregious nature of his error, in basing his decision solely on the concept of an annual salary, is thus obvious.

In reaching his decision the Chair has two explanations for dismissing the reference in Article 27.13 to "vacation pay or credit" and the reference in 27.14A to payment of "vacation entitlement". The first is that those provisions cannot "override the demand that every professor receive in total over a year the (annual) salary the grid sets...." The second is that those Articles are based on "the mistaken assumption" that the "agreement elsewhere authorizes vacation pay and credits for it...."

Those explanations are erroneous. With respect to the first, the contract contains many provisions which "override the demand" of Article 14 that employees receive a year's pay (see for example Article 17 re sick leave and workers' compensation; Article 20 re professional development leave; Article 21 re personal leaves of absence; Article 22 re maternity/parental leave; Article 23 re sabbaticals, and so forth, all of which may result in an employee receiving less than a full year's pay to reflect less than a full year's work). While the matter of vacation pro-rating to reflect absence is admittedly not as explicit as some of those other reasons for less than a full year's pay, it is in my view implicit when the contract is read as a whole.

The Chair's second explanation, that the drafters of Articles

27.13 and 27.14A simply erred in assuming that the contract provided for vacation pay, is a finding beyond the Board's jurisdiction. The agreement was made by the parties and the Board must interpret what they wrote. We must fit all the Articles into the overall scheme of the contract and interpret the whole as best we can - not avoid the issue of what the Articles' references to "vacation pay" mean by dismissing them as drafting errors. As I have argued above, such a determination is outside our mandate under Article 32.04D, since it has the effect of reading those Articles out of the Agreement.

The Chair claims to find support for his decision in other arbitration awards such as those at Cambrian College (Rayner, 1978) and Cambrian College (Devlin, 1995). However, those awards did not even deal with the vacation issue. The Rayner award dealt with the question of whether "annual salary" is for a ten or a twelve months period (and concluded it is for twelve) while the Devlin decision dealt with whether or not the annual salary could be paid in monthly (instead of semi-monthly) installments and found that it could be. Except for establishing that employees are paid year-round (which was not disputed in our case) those decisions give no help on the issue we must resolve.

Other awards do come closer to the vacation issue before us, such as Canadore College (Brunner, 1982) and Northern College (Teplitsky, 1991). The former holds that vacation pay cannot be pro-rated while the latter, a much more recent decision, holds that it can be. The 1982 Brunner award concludes that the "agreement does not provide for vacations with pay", but like the 1976 decision of O'Shea in Conestoga College cited by the Chair, the award does not mention either Article 27.13 or 27.14A (see above) and so it is unknown if those provisions which specifically mention vacation pay were argued before those boards or even were part of the collective agreement when the decisions were made. The later Teplitsky decision makes the following observation:

"Although the facts surrounding this grievance are not in dispute, a proper resolution is difficult to reach, principally because in approaching like problems, arbitrators have reached dramatically different results....

Arbitrators have differed about whether under this Collective Agreement there is a paid vacation or there is not a paid vacation....

In any event, in my opinion, the employer was correct in pro-rating vacation pay."

Thus the awards on which the Chair of our Board relies either didn't deal with the vacation issue or didn't consider all the Articles of the contract which were argued before us.

I must also disagree with the conclusion of the Chair that this collective agreement is not ambiguous. The union argued that because there is no specific language in the contract which deals with vacation pro-rating to reflect sick leave absences, there can be no ambiguity to be clarified by past practice. In my view, it is the very absence of clear language which creates ambiguity. The dichotomy between Articles 27.13 and 27.14A on the one hand (including their references to vacation pay credits, entitlement and legislated minimum vacation pay) and the rest of the contract on the other (particularly Article 15.01A), together with apparently conflicting or incomplete arbitral awards, leads me to conclude that the contract is indeed ambiguous. In the face of ambiguity we are entitled to have recourse to the extensive evidence of past practice put before us.

There was no dispute on the basic facts about that practice. The College for a number of years has followed a policy of pro-rating July and August vacation pay to reflect employee absences during the previous ten months. Its policy and practices are set out in a Manual, a copy of which (plus revisions/updates) is given to the local union (a fact confirmed by both the local union witnesses). The College's evidence was that the policy consistently had been applied (any exceptions being by inadvertence) for a number of years to absences caused by sick leave (with a one month absence "grace period" before pro-rating applies), reduced work load (where Article 14.02C2 provides

for pro-rating of salary and benefits), leaves without pay, "mini" sabatticals, workers' compensation, maternity/parental leave, and in those cases where an employee lacked sufficient service in the first year of employment to earn a full two month vacation.

On the evidence of the College witnesses, the local union had been made fully aware of this practice in effect since at least 1982 and, until the instant case, had never grieved any of the numerous examples of vacation pay pro-rating which had been applied to union members over the years and put into evidence before our Board.

The union's evidence confirmed that there was no issue between the union and the College on any of the pro-rating reductions of salary except in cases of sick leave. In the union's mind the grievor's case - absence on sick leave - was distinguishable from all other pro-rating triggers because she had not experienced a reduction in salary while on leave, unlike the reduced pay experienced by employees during other absences.

That evidence then raises the question of whether or not the distinction made by the union is sufficient to allow the grievance to succeed in the face of the College's long-standing practice. In my view it is not. The union clearly has accepted the principle that vacation pay may be pro-rated to reflect absences such as workers' compensation, maternity leaves and "mini" sabatticals, cases where the employee suffers a reduction of salary during the absence.

In the grievor's case, she too would have experienced a reduction of salary during her sick leave but for her lengthy service resulting in an accumulation of sick leave credits. Had her absence been of greater duration than actually occurred however, her credits eventually would have been exhausted and her salary would have been reduced. In that event she would then have fallen outside the parameters of the union's reasoning for regarding sick pay cases as being different from other absences. A reduced salary because of illness would of course

occur much sooner for employees with shorter service than the grievor, and they would then be no different than employees on maternity leave or workers' compensation. It is not logical to distinguish an absence financed by the employer-paid workers' compensation fund from an absence financed by the employer-paid sick pay fund.

Thus the union's rationale for regarding sick leave as being somehow distinguishable from other absences is a distinction without a difference, a sophistry, and its acceptance of the principle of pro-rating logically should be interpreted as applying to sick leave as well.

In summary, I find the collective agreement does in fact provide for paid vacations, and that when considered as a whole it is ambiguous on the issue raised by the grievance thereby entitling the Board to take account of the past practice evidence put before us. I find that practice to be compatible with the collective agreement, to have been applied consistently over many years and, with the exception of absences because of sick leave, to have been accepted knowingly and without demur by the union. I further conclude that there is no rational basis for distinguishing sick leave from other types of absence. Thus I find that in the summer of 1994 the grievor was on a two month paid vacation and that the College was entitled to reduce her vacation pay during that period because of her absence from work earlier in the year. Her grievance therefore should be dismissed.


R.J. GALLIVAN