94E243 ST CLAIR VS CHESTERTON

IN THE MATTER OF AN ARBITRATION

BETWEEN

ST. CLAIR
(The College)

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF F. CHESTERTON - #94E243

BOARD OF ARBITRATION:		Kenneth P. Swan	Chairman
		George Metcalfe	College Nominee
		Jon McManus	Union Nominee

APPEARANCES

For the College:	Barry Brown	Counsel	
		Kurt Moser	
		Kevin Mailloux	
For the Union:	Nelson Roland	Counsel	
		F. Chesterton	Grievor
		J. Jones	Steward
		L. Smith	Steward

A W A R D

A hearing in this matter commenced in Windsor on January 9, 1995, and continued on April 11 and 17, August 30 and October 11, 1995. At the outset, 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.

That matter is the grievance of Mr. Frank Chesterton, dated May 20, 1994, which is in the following terms:

> I grieve termination during second year of probation without cause and with work for which I am qualified available and being performed by others with less service than I.

The grievor is certified as a General Machinist in the province of Ontario. He apprenticed as a Machinist in the United Kingdom, and worked at a variety of skilled jobs prior to immigrating to Canada in 1982. He continued his employment as a tradesperson until 1992, when he was first engaged as an instructor at the Industrial Resource Centre on the Rhodes campus of the College. His duties there related to the Industrial General Machinist course, in relation to which he taught a number of skills on various pieces of equipment.

In the autumn of 1993, an unexpected vacancy was created in the Contract Training department when another faculty member was suspended because of pending criminal charges. The vacancy was of an unknown duration, and the grievor was hired on a sessional teaching contract from October 5, 1993 to March 31, 1994 to assume most, but not all of the duties of the absent faculty member. In particular, the grievor was not equipped to teach Computer Numerical Control (CNC) machining skills. While he asserted in his evidence that he could have learned to do so, the only previous experience on which he could rely was a period of time working on a numerically controlled (NC) boring mill in England during the 1960s and 70s, and we conclude that the grievor would have needed significant re-training in order to attain CNC skills. As a consequence, the CNC aspects of the teaching load which he assumed at this time were handled by Larry Smith, another faculty member of the Industrial Resource Centre, and the Union Steward for the Rhodes campus. The sessional contract was dated October 6, 1993, and actually signed by the grievor on October 22, 1993.

Sessional employment is covered by Appendix VIII of the collective agreement, which defines a sessional employee 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". Paragraph 3 of Appendix VIII, however, provides for what is sometimes called "roll-over" into probationary employment. That paragraph is as follows:

> 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 combination of the grievor's earlier teaching experience at the College, coupled with the sessional appointment beginning October 5, 1993, had the effect of satisfying the provisions of Article 8, paragraph 3 effective January 15, 1994. It is not clear to what extent this factor was clearly in the minds of those who were involved in hiring the grievor to replace the suspended employee in October 1993. It seems likely that factor was overlooked in the need to fill the position quickly, particularly because the Chair of the Contract Training Department, Mr. Jack Costello, was to be replaced in January 1994 by Mr. Curt Moser, and matters were somewhat in flux. In any case, this consideration was recognized at the latest by December 22, 1993, at which time a revision to the appointment letter was created. That revision included the following sentence:

> Effective 1994-01-15 your status will change from Sessional Instructor to Probationary. Please note that the completion date of 1994-03-31 does provide proper notice as per the Academic Collective Agreement.

Mr. Kevin Mailloux, who was Director of Human Resources for the College at the material time, testified that the revised letter was produced after it was discovered that the original sessional contract would have the effect of allowing the grievor to roll-over to probationary status. There are policies and procedures established at the College for recruitment and selection, and Mr. Mailloux testified that the implementation of those policies requires that roll-overs be approved by a member of the College's Executive Council, in effect the Vice-President. When it appeared that the grievor's new sessional appointment would have the effect of rolling him over into probationary status, Mr. Mailloux took the matter to a member of the Executive Council, although he cannot now remember who, and approval was granted to allow the roll-over to take its course. Mr. Mailloux's testimony was that such approval would have to come from the President. Therefore, when the revision to the appointment letter was issued on December 22, 1993, it was in effect a considered ratification of the effect of a previously unconsidered administrative act.

There is no doubt that the College takes the roll-over matter very seriously. Some sense of how seriously may be seen from a memorandum dated March 1, 1995 from the President of the College to all members of the Executive Council on the subject. While this memorandum was issued after the grievance, and indeed after the present arbitration had begun, its trenchant tone casts some light on one of the arguments to be made by the Union, and we therefore reproduce it here:

> You are aware of my policy on staff rollovers to full time status. The restrictions on hiring and prohibition of unauthorized rollovers predate my arrival, and have been expressed at executive Council and in my presentation to all managers. At the most recent EC meeting, I had occasion to express my feelings on two violations which occurred, and the lack of early warning and alternative solutions which are required to be provided by managers. I am led to believe that there are at least five more staff vying for full time status because their workloads have qualified them for such. I also understand that the managers involved have been encouraging these people to seek full time status themselves rather than have the managers represent them. I do not consider such practices qualify as either management or leadership, but the abrogation of responsibility. If these rollovers materialize, I will hold you personally responsible.
>
> I will also hold the managers between you and the individuals who rollover, or who are potential rollover candidates, responsible. The late notice to EC of potential rollover problems is not an excuse or a reason to proceed without holding those who failed to manage accountable.
>
> You may wish to discuss this with the candidates you are interviewing for administrative positions.

In the result, therefore, by the operation of Appendix VIII of the collective agreement, the grievor became a probationary employee effective January 15, 1994. That caused him to be entitled to the benefits of the collective agreement as they apply to probationary employees, and also caused him to raise the question of whether his workload should be charted on a Standard Workload Form (SWF), an exercise which would apparently entitle him to some lieu time off in order to compensate for an overload. This issue became a matter of disagreement between the grievor and Mr. Moser which the grievor alleges to be part of the real reason for terminating his employment. We shall return to the evidence on this issue below.

As March 1995 approached, discussions were taking place among the Human Resources office and the management of the Rhodes campus. The grievor's original appointment to March 31 would terminate about a month before the course with which he was involved would end, and there was some thought that it would be unfair to change instructors so close to the end of the program. On the other hand, a number of items of dissatisfaction had arisen with respect to the grievor's performance, according to the College's evidence. His inability to teach CNC courses was an ongoing concern, one which was known from the beginning. In addition, however, there were

concerns about the extent to which he was exercising proper supervision over his students, and concerns about his consumption of alcohol over lunch breaks. The grievor denies the latter allegations, and we shall deal with that issue below as well. Finally, however, it was decided to extend the grievor's contract by one month, and a new appointment letter dated March 9, 1994 was sent, in the following terms:

> This is to confirm that your current employment contract has now been extended to 1994-04-29.
>
> I am pleased to inform you that your original lay-off scheduled for 1994-03-31 has now been deferred until 1994-04-29. All other conditions of employment will remain unchanged.

In the result, therefore, the grievor taught until the end of the current course on April 29, 1994 and thereafter was given no further teaching assignments and was treated as terminated. There appears to have been no attempt to consider a recall for the grievor; he was simply allowed to drift away while the grievance was processed and referred to arbitration.

There is obviously a considerable degree of confusion about the grievor's precise status at the time in question. At the hearing, however, counsel for both parties acknowledged that by April 29, 1994 he was a probationary employee, having attained that status by the operation of paragraph 3 of Appendix VIII on January 15, 1994. It is therefore of importance to set out the provisions of the collective agreement which bear upon probationary status, and upon the other issues which this grievance raises. Those provisions are as follows:

Article 1
RECOGNITION

1.01 The Union is recognized as the exclusive collective bargaining agency for all academic employees of the Colleges engaged as teachers, counsellors and librarians, all as more particularly set out in Article 14, Salaries, except for those listed below:

(i) Chairs, Department Heads and Directors,

(ii) persons above the rank of Chair, Department Head or Director,

(iii) persons covered by the Memorandum of Agreement with the Ontario Public Service Employees Union in the support staff bargaining unit,

(iv) other persons excluded by the legislation, and

(v) teachers, counsellors and librarians employed on a part-time or sessional basis.

NOTE A: Part-time in this context shall include persons who teach six hours per week or less.

NOTE B: Sessional in this context shall mean an appointment of not more than 12 months duration in any 24 month period.

Article 2
STAFFING

2.01 The Colleges shall not reclassify professors as instructors except through the application of Article 27, Job Security.

2.02 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.

2.03A The College will give preference to the designation of full-time positions as regular continuing teaching positions rather than sessional teaching positions including, in particular, positions arising as a result of new post-secondary programs subject to such operational requirements as the quality of the programs, enrolment patterns and expectations, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community. The College will not abuse sessional appointments by failing to fill ongoing positions as soon as possible subject to such operational requirements as the quality of the programs, attainment of program objectives, the need for special qualifications, and enrolment patterns and expectations.

2.03B The College will not abuse the usage of sessional appointments by combining sessional with partial-load service and thereby maintaining an employment relationship with the College in order to circumvent the completion of the minimum 12 months sessional employment in a 24 month period.

2.03C If the College continues a full-time position beyond one full academic year of staffing the position with sessional appointments, the College shall designate the position as a regular full-time bargaining unit position and shall fill the position with a member of the bargaining unit as soon as a person capable of performing the work is available for hiring on this basis.

Article 27
JOB SECURITY

27.01 On successful completion of the probationary period, a full-time employee shall then be appointed to regular status and be credited with seniority equal to the probationary period served.

Probationary Period

27.02 A1 A full-time employee will be on probation until the completion of the probationary period. This shall be two years' continuous employment except as amended in this Article.

27.02B The probationary period shall also consist of 24 full months of non-continuous employment (in periods of at least one full month each) in a 48 calendar month period. For the purposes of 27.02 B, a calendar month in which the employee completes 15 or more days worked shall be considered a "full month".

If an employee completes less than 15 days worked in each of the calendar months at the start and end of the employee's period of employment and such days worked, when added together, exceed 15 days worked, an additional full month shall be considered to be completed.

27.02C During the probationary period an employee will be informed in writing of the employee's progress at intervals of four months continuous employment or four full months of accumulated non-continuous employment and a copy given to the employee. Also, it is understood that an employee may be released during the first five months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment upon at least 30 calendar days' written notice and during the remainder of the employee's probationary period upon at least 90 calendar days' written notice. If requested by the employee, the reason for such release will be given in writing.

27.02D The Union Local shall be advised of the date on which an employee completes the probationary period.

Discharge

27.14A An employee being discharged who has completed the probationary period shall be notified in writing by the College President or the person(s) the College President designates for that purpose. When the reasons for discharge of the employee are no 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 or to any payment in lieu thereof.

27.14B It being understood that the release of an employee during the probationary period shall not be the subject of a grievance under Article 32, Grievance Procedures, but may be subject to the internal complaint process as referred to in 7.02(iii), an employee who has completed the probationary period and is discharged for cause may lodge a grievance in the manner and to the extent provided in Grievance Procedure.

It is of some passing interest to observe that the layoff and recall provisions, found in clause 27.05 to 27.11, apply only to full-time employees who have completed the probationary period; those provisions are thus not applicable to someone in the grievor's position at the time his employment terminated.

The Union relies on the award in Re Regional Municipality of Ottawa-Carleton and Ottawa-Carleton Public Employees Union, Local 503 (1987), 31 L.A.C. (3d) 422 (Gorsky). At page 430, the award sets out the following standards for the treatment of employees during a probationary period:

> There was no cause furnished for terminating the grievor except for the completion of the term for which he had been hired. The employer never considered the grievor to be a probationary employee who might, on completing six consecutive calendar months of service, as defined in art. 9.3, become a seniority employee. The employer did not do so because it was of the view that it did not have to treat the grievor as it would a probationary employee. That is, to genuinely consider him for seniority employment, wherein the employer would consider a number of matters including questions of compatibility and potentiality: cf. Brown and Beatty, Canadian Labour Arbitration, 2nd. ed. (1984) para. 7:5020, at p. 510. Before terminating the grievor, the employer would have to establish that the grievor was, in good faith, assessed as being suitable or unsuitable for the attainment of seniority status. It cannot be said that the employer acted in good faith, here, as it had no intention of furnishing the grievor with "a fair opportunity to demonstrate whether or not. . .[he]. . . possesses the appropriate qualifications and suitability for permanent employment and that the employer had made a fair assessment of [his] qualifications and suitability for permanent employment": see Re Pacific Western Airlines Ltd. and C.A.L.F.A.A. (1981), 30 L.A.C. (2d) 68 (Sychuk) at p. 76. At the very least, the employer, under the collective agreement, is required to bona fide consider the grievor for permanent employment following the probationary period. As limited as the rights or a probationer are, he/she is entitled to be considered during the probationary period for permanent employment. I do not have to go any farther than this. As the grievor was never considered for permanent employment, being treated as a temporary employee who need not be considered for permanent employment, my finding is limited to the issue presented to the board.

We observe, however, that the collective agreement language on which this decision was based is significantly different from the language in the collective agreement before us. That language has been interpreted by other boards of arbitration, and has been the subject of judicial review proceedings as well. We propose here simply to review briefly the central elements of that jurisprudence before proceeding to apply the language of the collective agreement to the grievor's situation.

In Re St. Lawrence College and Ontario Public Service EmPloyees Union (1987), 32 L.A.C. (3d) 322 (Brent), the board of arbitration discussed the award in Re Seneca College and Ontario Public Service Employees Union (Hacker), unreported, September 17, 1986 (Swan), an award written by the present chair. The Seneca College award discussed the implications of two well-known court decisions, Re Council of Printing Industries of Canada

and Toronto Printing Pressmen and Assistants' Union. No. 10 (1983), 149 D.L.R. (3d) 53 (C.A.), leave to appeal to S.C.C. refused 52 N.R. 308n., and Re MetroPolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association (1981), 124 D.L.R. (3d) 684 (C.A.), leave to appeal to S.C.C. 34 N.R. 449n. The St. Lawrence College board quoted the following passages from the Seneca College award, which it then applied to the facts before it:

> While matters of this nature ought not to be decided in the abstract, in the absence of facts, we think it is a reasonable interpretation of this provision [the predecessor of clause 27.02(c)] that conduct in bad faith intended to subvert the protections given to probationary employees by this clause, or to avoid the obvious obligations of the employer under this clause, could be a breach of the clause. Since the grievor has alleged, in her grievance, bad faith in respect of her release on probation, and her counsel has identified, in the course of argument, that the bad faith was in relation to the employer's obligations under [what is now clause 27.02(c)], we think that the grievor is entitled to offer her proof of this allegation so that we can assess . . . whether or not there has been a breach of that clause.
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> As a matter of contractual interpretation, therefore, we have found that the grievor is entitled to pursue her grievance to the extent that it alleges bad faith in the administration of her probationary employment, and to the extent that it alleges discrimination. In respect of both of those allegations, the onus is on the grievor to make out her case. The grievor is-not entitled to pursue, however, her allegation that her dismissal was not for just cause, and the employer is put to no obligation to demonstrate that it had just or any cause for releasing or dismissing her.

The St. Lawrence College award concluded that this statement of the proper test was intended to convey the meaning of the following paragraph from the Divisional Court in Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43, an unreported decision which is, however, summarized at 9 A.C.W.S. (2d) 347. That decision, which is quoted at pp. 328-329 of the St. Lawrence College case, includes the following sentence:

> A probationary employee would be entitled to succeed on a grievance in relation to discharge only if he were able to affirmatively establish that 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 his best.

This test, which the St. Lawrence College award characterizes as "illegality or obstruction", appears on the face of it to be a very narrow reading of the "bad faith" concept identified in the Re Seneca College case. However, the narrower test has been applied in other cases, including Re Centennial College and Ontario Public Service Employees Union (preliminary award), unreported, December 8, 1988 (Samuels). In that award, the board of arbitration adopted the St. Lawrence College test, and made the following statement in so doing:

> "Bad faith" is not simply "unfairness" or "unreasonableness", but is conduct which goes beyond these two circumstances. Bad faith involves conduct which is inimical to the contractual relationship itself. It involves illegality or obstruction.

The St. Lawrence College award, however, was the subject of an application for judicial review. While the decision of the Ontario Divisional Court in that matter is not reported, the following note appears at 41 L.A.C. (4th) 128:

> Upon application for judicial review, the above-noted award was quashed by the Ontario Divisional Court in a decision dated February 17, 1989 (Campbell, Reid and O'Brien J.J. [unreported]). The Court held that the board of arbitration erred in limiting its jurisdiction to the tests of illegality and obstruction in considering whether the grievor, a probationary employee, had been terminated in bad faith. The Court

> found that the collective agreement imposed a code of positive obligations on the employer with respect to the treatment of probationary employees; and for that reason it concluded that the board of arbitration had jurisdiction to consider bad faith in a broader sense. The Court therefore remitted the matter to the board of arbitration to determine whether the conduct of the employer involved bad faith in that broader sense. In a decision dated November 8, 1989 [16 C.L.A.S. 71], the board of arbitration found that the employer's power to release the grievor on probation had been exercised in bad faith, in that the employer had failed in its contractual obligation to give reasons for the release.

It would therefore appear that the Divisional Court has simply reminded the board of arbitration in the St. Lawrence College case of the paramountcy of the language of the collective agreement itself. That paramountcy appears to have been recognized in the Seneca College case, which uses the language "conduct in bad faith intended to subvert the protections given to probationary employees by this clause, or to avoid the obvious obligations of the Employer under this clause". In conclusion, therefore, we are entitled simply to apply here the test of bad faith as set out in the Seneca College award.

In our view, what occurred here is that, sometime after January 15, 1994, the College found itself with a probationary employee whose services it did not wish to retain. The reasons which it advanced for coming to that conclusion included the grievor's inability to teach CNC machining, as well as a general absence of state-of-the-art technological skills which the College would have preferred to have in an instructor being considered for a permanent appointment. It also had concerns about the grievor's attentiveness to his supervisory responsibilities for students engaged in learning to operate inherently dangerous machinery, and about the grievor's consumption of alcoholic beverages at lunch, thus further reducing the College's confidence in his supervisory capacity.

These are all, in our view, legitimate concerns. The Union's position, however, is that they are essentially trumped up after the fact, and that the real reason for the College's decision was either the animosity which had arisen between the grievor, assisted by Mr. Smith, and Mr. Moser, or the application of a College policy not to allow unauthorized roll-overs to continue. We must therefore consider first of all the validity of the College's ostensible reasons, and then the validity of the Union's allegations of other, unstated motives for the action which was taken.

As to the grievor's lack of current technological knowledge and skills, related in particular to CNC processes but not restricted to that, we think the evidence makes clear that it was a legitimate concern. Nothing in the evidence of the grievor gave us any confidence that he actually had skills of such currency, or that he could gain them with any speed. In our view, the evidence makes it clear that the grievor had a skill set sufficient to teach the non-CNC elements of the course which he picked up, but certainly not a skill set which would make him a desirable candidate for continued employment on a permanent basis without some significant re-training. Nothing in the collective agreement places any obligation on the College to provide retraining to probationary employees. As to the matter of the consumption of alcohol, while the grievor denies it, three College witnesses testified that they noticed alcohol on the grievor's breath from time to time during the afternoon, and it was apparently a matter of some discussion among them. The evidence of one of these employees was subjected by the Union to considerable criticism because of the date at which a written report of such observations was made, and a degree of apparent animosity between that employee and the grievor. Nevertheless, there is sufficient evidence at the very least to indicate that there was a legitimate concern which would not fall into the category of bad faith.

It is common ground that no member of management had any discussion with the grievor about consumption of alcohol over the lunch break. It appears that the reason for this is that the grievor's termination at the end of the course for which he had been retained had already been decided on the basis of a general lack of qualifications for permanent employment, and that it was decided not to deal with the embarrassment of confronting the grievor on this issue. We think we should observe, in passing, that if this were the sole reason for releasing the grievor on probation, it might very well constitute bad faith to simply ignore this issue without bringing it to the grievor's attention. On the other hand, there is evidence that there was a College policy about consumption of alcohol over the lunch period, and that this policy had been brought to the grievor's attention by Mr. Smith, who had indicated to

him his view that such conduct would be unprofessional. Taken as a whole, therefore, the evidence on this issue may well disclose a certain degree of undue reticence on the College's part, but does not disclose bad faith.

The Union's two assertions of improper motive must also be considered. As to the assertion that Mr. Moser was somehow so angered by the dispute about the SWF that he retaliated against the grievor, that assertion simply does not hold up. While there had been discussions before, the formal exchange of memoranda on the subject occurred on April 15, 1994, when the grievor wrote to Mr. Moser, and on April 19, 1994 when Mr. Moser replied. By that time, on the basis of all of the evidence, Mr. Moser and his superiors, in consultation with the Human Resources Department, had already considered the grievor's case, and the grievor had been given notice that his employment would be extended until the end of April and no longer.

As to the issue of a College policy against unauthorized roll-overs, while the College denies that such a policy exists, it patently clear to us that the College is indeed anxious to prevent a roll-over to probationary status occurring through the kind of inadvertence that accompanied the grievor's case. Indeed, we think that the College should have such a policy, and should ensure that only persons whom it intends to consider seriously as permanent full-time employees should be allowed to gain probationary status. To treat probationary status less seriously would be incompatible with the obligations which the College has assumed under Article 2, and would be clearly unfair to the individuals concerned. What occurred in the present case is that, following an inadvertent roll-over to probationary status, the College made a consideration of its obligations to the grievor, and decided that it did not wish to pursue a permanent full-time relationship with him. Had the College wished to invoke the full rigor of its policy, it could have terminated the grievor pursuant to the terms of his sessional contract before it turned into a probationary contract by the passage of time. Instead, the College elected to keep him until the end of the course, and then to deal with his case as a probationary employee.

In our view, therefore, there simply is not sufficient evidence of any of the allegations made by the Union to found a case of bad faith against the College. The worst that could be said about the College is that the administration of the grievor's employment was inattentive. Once the full implications of that inattention had been discovered, the College carried on with the obligations which it had undertaken, and did not attempt to escape their implications, except, as we shall see, in one material respect.

Once the grievor had become a probationary employee, he was entitled to compliance by the College with the provisions of clause 27.02C. Since four months had not elapsed since the establishment of the probationary period by the time of the grievor's termination, we do not think that it could be said that the obligation to issue the grievor written progress reports had yet arisen, so that the failure to do so, which is here admitted, would constitute a breach of this provision.

On the other hand, the effect of the roll-over was that the grievor became entitled to "at least 90 calendar days' written notice", and if requested by him, the reason for his release was required to be given in writing. There is no evidence that the grievor ever invoked the requirement for reasons in writing, but it is our view that there was a breach of the requirement for 90 days' written notice.

According to evidence which we accept, the College considered the continuing employment of the grievor beyond the end of March, and decided that it would extend his employment to April 29, but no longer. This is communicated to the grievor by a letter dated March 9, 1994. In doing so, the College simply repeated an error which it had made throughout the process in dealing with the grievor's case.

Both of the letters appointing the grievor to the position from which he was terminated were based upon the College's usual form of sessional appointment. The fact is, when the grievor rolled over to probationary status, he became a probationary employee and therefore was an employee on an indefinite term, rather than an employee on a fixed contract. In our view, therefore, the College could no longer rely after January 15, 1994 on the termination date set out in the appointment letter of october 6, 1993 and reiterated in the revision dated December 22, 1993, as

constituting appropriate notice of release. For one thing, it was clearly intended not to be notice of release at all, but to be notice of a fixed contractual term. When the grievor became probationary, and thus on an indefinite term of employment, the College was required to act affirmatively if it wished to give him notice of release. The only attempt to do so was the letter of March 9, 1994, which certainly did not constitute 90 days' notice of release, and indeed did not constitute notice of release at all, since it purported to rely on notice already given at a time when the grievor was not a probationary employee.

In our view, therefore, the College was in breach of its obligations under clause 27.02C to the extent that it failed to give the grievor three months' notice. That breach is one which can be cured in damages. It is not a breach which entitles the grievor to continued employment or in particular to the kind of continued employment envisaged by the Union, namely a continued altered teaching load to accommodate the fact that the grievor had no CNC qualifications and was therefore unable to teach the entirety of the teaching load which he was engaged to pick up.

In the result, the present grievance must be dismissed to the extent that it alleges bad faith in the termination of the grievor's employment, but must be allowed to the extent that the grievor did not receive the notice to which he was entitled pursuant to the collective agreement. We therefore order that the grievor be compensated by a payment equivalent to 90 calendar days of salary and benefits. With the agreement of the parties, we retain jurisdiction to whatever extent is necessary to bring this matter to a full and final conclusion.

DATED AT TORONTO this 17th day of June, 1996.

Kenneth P. Swan, Chairman

I concur "George Metcalfe"
George Metcalfe, College Nominee

I concur "Jon McManus"
Jon McManus, Union Nominee