

IN THE MATTER OF AN ARBITRATION

BETWEEN:

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

AND

SENECA COLLEGE OF APPLIED ARTS AND TECHNOLOGY
(the "College")

AND IN THE MATTER OF THE GRIEVANCE OF NANCY SCHMIDT
(OPSEU FILE NO. 97B558)

BOARD OF ARBITRATION

Robert D. Howe, Chair
Sandra Nicholson, Union

Nominee

Peter Hetz, College

Nominee

APPEARANCES

For the Union
Grievance

George A. Richards, Sr.

Officer
Nancy Schmidt

For the College
Counsel

E.C. Carla Zabek,

Mel Fogel

A hearing in the above matter was held on March 10,
1998.

A W A R D

Introduction

The grievor, Nancy Schmidt, commenced employment with the College on March 14, 1996 as a full-time sessional employee (assigned to the English Language Institute at the College's Newnham Campus). The matter in issue in these proceedings is whether or not, at the time of her termination in March of 1997, she had completed in excess of twelve full months of full-time employment on a sessional basis in a 24 calendar month period, so as to have been converted, by operation of Appendix VIII of the collective agreement, from a full-time sessional employee into a full-time probationary employee considered as having completed the first year of the two year probationary period..ls1

Facts

During her initial sessional appointment (which, as noted above, commenced on March 14, 1996) the grievor taught fourteen hours per week. That appointment ended on April 26, 1996, but was followed by six other sessional appointments for the following periods of time and hours per week:

START DATE	END DATE	HRS/WK
May 5, 1996	June 21, 1996	18
July 2, 1996	August 16, 1996	20
September 3, 1996	September 13, 1996	18
September 16, 1996	October 18, 1996	16
October 29, 1996	December 13, 1996	18
January 7, 1997	March 28, 1997	20

(The grievor was also performed some replacement work, but it is common ground between the parties that this work cannot be considered as sessional employment for the purpose of determining the grievor's status at the time of her termination.)

In March of 1997, the College gave the grievor two weeks' written notice of release (through a letter to her from the Director of the English Language Institute, confirming that her contract would be terminated on March 28, 1997). After receiving that notice, the grievor filed a grievance dated March 18, 1997, alleging that the College had violated the collective agreement by improperly releasing her from employment..ls1

Collective Agreement Provisions

The provisions of the collective agreement (the "Agreement") referred to during the course of argument included the following:

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 26
PARTIAL-LOAD EMPLOYEES

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

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 A 1 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.

27.02 B 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.

APPENDIX VII SENIORITY CALCULATION AND PREDECESSOR INSTITUTIONS

PART I - SENIORITY CALCULATION

1 The following provisions shall govern the calculation of seniority for full-time employees whose service includes some work performed during certain periods, as follows:

- (i) effective September 1, 1976, seniority shall include the period of 24 full months of non-continuous employment (in periods of at least one full month each) in a 48 calendar month period, for those who completed a probationary period on that basis since that date. For this purpose, only the period after September 1, 1975, shall be considered and no prior employment or calendar period shall be taken into account or credited.

However, an employee's continuous service acquired in accordance with the provisions of the Agreement dated September 17, 1975, as of August 31, 1976, for the period back to September 1, 1975, shall count as continuous employment or months of non-continuous accumulated employment for the purpose of this provision;

- (ii) for the purpose of (i), effective September 1, 1976, a calendar month in which the employee completes 15 or more days worked shall be considered a "full month";
- (iii) for the purpose of (i) and (ii), effective September 1, 1981, 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.

APPENDIX VIII SESSIONAL EMPLOYEES

1 A sessional employee is defined as a full-time employee appointed on a sessional basis for up to 12 full months of continuous or non-continuous accumulated employment in a 24 calendar month period. Such sessional employee may be released upon two weeks' written notice and shall resign by giving two weeks' written notice.

3 If a sessional employee is continued in employment for more than the period set out in Appendix VIII, 1, such an employee shall be considered as having completed the first year of the two year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be 12 full months of continuous or non-continuous accumulated employment during the immediately following 24 calendar month period.

4 A person assigned to replace a full-time regular employee for up to 14 working days for unplanned absences in any

month shall not have such period(s) considered as sessional employment for the purpose of the computation of the 12 months sessional employment. During such periods such a person shall be paid as if partial-load and within the range of partial-load hourly rates as set out in Article 14.

Argument

In his submissions on behalf of the grievor, Mr. Richards contended that at the time of her termination she had completed in a 24 calendar month period more than twelve months of non-continuous accumulated employment as a full-time employee appointed on a sessional basis. After referring to the various categories of employment described in the Agreement and noting that the grievor was a full-time employee at all material times by virtue of having taught more than twelve hours per week, he submitted that a "full month" is one in which a teacher has been employed for fifteen days or more. Although he acknowledged that Appendix VIII does not contain a "tidy definition" of "full month", Mr. Richards suggested that sessional employment should be thought of as a way of working out the requirements of the probationary period. Thus, he contended that the "15 day test" set forth in Article 27.02 B is a useful aid to the interpretation of Appendix VIII. He further contended that applying that test to the facts of this case should result in the grievor being found to have exceeded the period set out in section 1 of Appendix VIII, because she worked fifteen or more days during twelve calendar months (March, April, May, June, July, August, September, October, and November of 1996, and January, February, and March of 1997), and because those twelve "full months" combined with her additional 13 days of work in December of 1996 result in her having been continued in employment for more than "twelve full months of continuous or non-continuous accumulated employment in a 24 calendar month period".

In support of his submissions, Mr. Richards referred to three previous awards: Ontario Public Service Employees Union and Mohawk College (Sobczak), unreported award dated April 30, 1993 (Mitchnick); Loyalist College and Ontario Public Service Employees Union (Daniels), unreported award dated February 7, 1985 (Delisle); and St. Lawrence College and Ontario Public Service Employees Union (Nutley), unreported award dated February 7, 1994 (Mitchnick).

In her submissions on behalf of the College, Ms. Zabek argued that the "15 day test" is not the correct test to be used to determine whether a full-time sessional employee has

exceeded the period set out in section 1 of Appendix VIII. She also argued, in the alternative, that if the "15 day test" is applicable, the grievor's situation does not fulfill the requirements of that test.

In support of her first argument, Ms. Zabek noted that the "15 day test" is found in two places in the Agreement: Article 27.02 B, which deals specifically with probationary periods for full-time employees in the bargaining unit and has no application to full-time sessional employees (who are excluded from the Agreement by Article 1.01(v)); and Part I of Appendix VII, which deals specifically with the calculation of seniority for employees in the bargaining unit. Thus, she contended that the negotiators of the Agreement decided that the "15 day test" would be used in those two instances, and she further contended that it would be inappropriate to extend its application beyond those two provisions. She also submitted that the College's position in this regard is supported by the language of those provisions, in that Article 27.02 B expressly states that it is "[f]or the purposes of 27.02 B" that "a calendar month in which the employee completes 15 or more days worked shall be considered a 'full month'", and section 1(ii) Appendix VII similarly states that it is "for the purpose of (i)" that (effective September 1, 1976) "a calendar month in which the employee completes 15 or more days worked shall be considered a 'full month'". Thus, she submitted that if the "15 day test" had been intended to apply to Appendix VIII, a specific reference to it would have been included in that Appendix. She also referred to Seneca College and Ontario Public Service Employees Union (Roy), unreported award dated February 10, 1988 (Samuels) in support of her contention that the "15 day test" has no application to Appendix VIII.

In her submissions regarding the cases relied upon by the Union, Ms. Zabek submitted that the Mohawk College is distinguishable from the instant case in that the issue there was whether partial months at the beginning and end of sessional contracts could be combined to make a "full month". In distinguishing Loyalist College, she noted that (although initially hired on a sessional basis) at the time of termination the grievor in that case was employed as a regular full-time faculty member entitled to all of the rights enumerated in the Agreement, including what is now Article 27.02 B (then 8.01(b)).

Ms. Zabek submitted that there are many cases that have not applied the "15 day test" in determining whether the period set out in section 1 of Appendix VIII has been exceeded, including: Algonquin College and Ontario Public Service Employees Union (Allegakone), unreported award dated March 1, 1996 (Bendel); Loyalist College and Ontario Public Service Employees (Wasilewski), unreported award dated December 23, 1991

(McLaren); St. Lawrence College and Ontario Public Service Employees Union (Nutley), unreported award dated August 8, 1994 (Mitchnick), and Cambrian College and Ontario Public Service Employees Union (Anderson et al), unreported award dated June 30, 1998 (H.D. Brown). She further contended that applying the approaches adopted in those awards would result in the grievor's sessional employment being found not to have exceeded the period set out in section 1 of Appendix VIII.

In support of her alternative argument that if the "15 day test" is applicable, the grievor's situation does not fulfill the requirements of that test, Ms. Zabek submitted that even if it were legitimate to apply that test to find that the grievor worked twelve "full months" because she worked fifteen or more days during the calendar months of March, April, May, June, July, August, September, October, and November of 1996, and January, February, and March of 1997, it would not be legitimate to go back and pick up the thirteen days which the grievor worked in December of 1996 to support a finding that her sessional employment exceeded the period specified in section 1 of Appendix VIII. She argued that those thirteen days do not "count", because they do not meet the "15 day test", and because it is only for the first and last months that the formula contained in Article 27.02 B permits one to go back and pick up calendar month periods of less than fifteen days. Thus, she contended that days worked in a "middle month" can only assist the grievor's case if they exceed fifteen. She also characterised the position advanced by the Union as an improper mixing of formulas.

Before commencing his reply argument, Mr. Richards requested an opportunity to reopen the case and put an additional fact before the Board regarding the grievor's employment in December of 1996. However, that request was denied by the following oral ruling:

The majority of the Board, with Board Member Nicholson dissenting, are of the view that it would be inappropriate to permit the Union at this late juncture to reopen its case and add an additional fact (or facts) through stipulation or evidence. We have reached the final stage of this proceeding: reply argument. Both the Union and the Employer have argued the case on the basis of the undisputed facts introduced through documents which have been marked as exhibits on agreement. It would be unfair and prejudicial to the Employer to permit the Union, now that Employer counsel has completed her argument, to seek to introduce an additional fact (or facts) in an attempt to bolster its case now that it has heard the Employer's argument.

In his reply submissions, Mr. Richards suggested that some arbitrators have accepted the "15 day test" (in the context

of Appendix VIII) while others have not. Thus, he contended that this Board is presented with a choice of approaches and can properly consider which one is the most appropriate in the present circumstances. In commenting on the Seneca College case referred to by College counsel, Mr. Richards noted that it involved the same parties (and the same Director of Labour Relations) as the instant case, and submitted that it would therefore be in the best interests of sound labour relations for this Board to apply the same test which arbitrator Samuels applied in that case (on the agreement of the parties). He also noted that arbitrator Samuel's suggestion that the definition of "full month" contained in what is now Article 8.02 B is not relevant to a case involving Appendix VIII is obiter, and thus not particularly helpful in resolving the present grievance.

Mr. Richards also argued in reply that the probationary period under the Agreement can be completed through periods of normal full-time service, through periods of sessional service, or through a combination of those two types of service, and that there is no logical justification for interpreting the word "month" differently in different categories of employment. In this regard, he submitted that the purpose of a probationary period is to allow the employer to assess the suitability of an employee and to confirm the correctness of the original hiring decision. He also submitted that it would be inappropriate to apply the "exclusio rule" in the circumstances of this case, as to do so would be to presume that the negotiators of the Agreement assumed some test other than the "15 day test" would be applied to Appendix VIII but failed to set it out in that Appendix with any degree of certainty. He further contended that the approach advocated by the College would require a teacher who fulfilled the first year of the probationary period through sessional teaching to work longer than a teacher who fulfilled it another way. Thus, he submitted that the "15 day test" should be applied to Appendix VIII as a "rule of thumb" in determining what is meant by a "full month", in accordance with the Mohawk College case, which he submitted to be indistinguishable from the instant case.

Mr. Richards distinguished the Algonquin College case from the instant case on the basis that what was in issue in that case was a month that fell completely within a sessional appointment, but which the employer contended should not "count" for the purposes of section 3 of Appendix VIII because the sessional employee taught on less than fifteen days that month. He contrasted that situation with the instant case in which neither the Union nor the College has suggested that the fifteen days contemplated by the "15 day test" must be teaching days. He further submitted that neither the Loyalist College and Ontario Public Service Employees (Wasilewski) case nor the

Cambrian College case are of any assistance in that they did not address the issue of what is a "full month".

Mr. Richards reply to the College's alternative argument (that if the "15 day test" is applicable, the grievor's situation does not fulfill the requirements of that test) was that section 3 of Appendix VIII does not require thirteen "full months" of full-time sessional employment, but rather only requires that the full-time sessional employment be "more than" the period set out in section 1 of that Appendix, which is twelve full months of employment within a 24 calendar month envelope. Thus, he submitted that "one minute extra" should be sufficient to satisfy that requirement, and that it should not matter whether the extra minute occurs at the beginning, at the end, or in the middle of that envelope, in view of section 1's reference to "continuous or non-continuous accumulated employment". He further submitted that the Board cannot adopt the College's alternative argument because to do so would involve amending section 3 of Appendix VIII to include language which does not appear in that provision..ls1

Decision

In Loyalist College and Ontario Public Service Employees Union (Daniels), unreported award dated February 7, 1985 (Delisle), Appendix VIII (which was then Appendix III) was described (at page 8) as "a protective device to ensure that the College does not seek to avoid the granting of rights conferred by the agreement by continuing a teacher on a sessional basis rather than offering him full-time status". That statement of the Appendix's purpose was accepted in Cambrian College and Ontario Public Service Employees Union (Anderson et al), unreported award dated June 30, 1998 (H.D. Brown) with the following qualification (at page 24):

We can accept that statement of the purpose of this Section but it does not reflect the right of the College specifically given to it under Section 1(a) of Appendix III [now Appendix VIII] to release a sessional employee upon two weeks' notice.... As noted it is only when such an employee exceeds by contract and is therefore continued in employment for more than the period set out in Section 1(a) [now section 1], that the protective right must be accorded to that employee under Section 1(c) [now section 3], but that person must meet the threshold test of "if" she is continued in employment by the College. That discretion remains with the College consistent with its express right to hire under Article 7.01 [now Article 6.01].

As indicated above, section 1 of Appendix VIII 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 employment in a 24 calendar month period". Thus, the period set out in section 1 of Appendix VIII is "12 full months of continuous or non-continuous employment in a 24 calendar month period". If a sessional employee is continued in employment for more than that period, section 3 of Appendix VIII stipulates that the 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 failure of Appendix VIII to specify what is meant by a "full month" has given rise to arbitration awards reflecting a variety of interpretations of that phrase. In Loyalist College and Ontario Public Service Employees (Wasilewski), unreported award dated December 23, 1991 (McLaren), the Board adopted the approach of adding together the number of weeks that the grievor, Lisa Wasilewski, was employed as a full-time sessional employee (including those in which the College attempted to avoid the operation of the collective agreement by entering into an arrangement with the grievor whereby she formed a company and used it to bill the College via purchase order for the payment of the teaching services which she provided to the College during the summer of 1990), as reflected in the following passages from pages 13-14 and 15-16 of that award:

Ms. Wasilewski was employed as a sessional employee from September 5, 1989 to December 15, 1989 which was then extended from December 18, 1989 to January 19, 1990. This period of employment comprised 19 weeks. She then was re-deployed from January 22, 1990 to May 4, 1990 which was again subsequently extended to May 18, 1990 for a further total of 17 weeks and a grand total of 36 weeks.... The sessional contracts began again on September 10, 1990 and ran through until December 14, 1990. This is a further 14 week period for a total of 50 weeks in a period which began on September 5, 1989. She was then terminated on December 14, 1990. She can not grieve that termination as a member of the bargaining unit unless the time during the summer is included in the calculation. If it is then she would have become a probationary employee by the time of her grievance....

Arbitrator Mitchnick's unreported award dated April 30, 1993 in Ontario Public Service Employees Union and Mohawk College (Sobczak), used two different methods to compute the number of full months which the grievor, Daniel Sobczak, had been employed as a full-time sessional employees:

On the question of "part" months, the College notes in particular that the computation in section 1(a) is defined in terms of "full" months of employment, be it on a continuous or non-continuous basis. Considering the meaning of that definition first on a "continuous" basis, however, we would have great difficulty absent anything else expressly stipulated in the collective agreement, in finding that an individual hired and working, for example, from December 19, 1988, to January 18, 1989, had not at that point completed "one full month ... of employment". (Nor do we think, once again, that anything turns on what the individual was actually assigned to do during that period, as between teaching, preparation, or the other related responsibilities that the College in its own evidence noted this sessional rate is paid for). It seems to us that when one speaks of "non-continuous accumulated" employment, the inference is even stronger that "part" months are not simply to be ignored, but may be "accumulated". Again, if one looks at the dates worked solely on a month-to-month basis, a "full month" of employment would, as indicated, have been completed by the grievor as of January 18th, 1989. Similarly, a second full month by February 18th, and so on, with 5 full months in by May 18th. Even ignoring the remaining days in May and resuming from July 24th, 1989, the grievor would complete 2 more full months as of September 23rd. In the normal course he would complete a further month as of October 23rd. However, if one discounts the 4-week strike period, the "full-month" completion date moves back to November 20th. That adjusted date at that point would then cumulatively give the grievor 8 full months of employment. December 20th, 1989 would mark 9 months, January 20, 1990 10 months, February 20th 11 months, and March 20th 12 months - all of which would take the grievor to the limit.

That is one way of calculating the "part" months. However, there is another even more plausible way of dealing with the question. Article 8.01 (b) of the main body of the Agreement, as the parties have noted, specifically addresses this type of issue for probationers in the bargaining unit, and provides:

8.01 (b) The probationary period shall also consist of twenty-four (24) full months of non-continuous employment (in periods of at least one (1) full month each) in a forty-eight (48) calendar month period. For the purposes of this paragraph, a calendar month in which the employee completes fifteen (15) or more days worked shall be considered a "full month".

If an employee completes less than fifteen (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 fifteen (15) days worked, an additional full month shall be considered to be completed.

We are mindful of the College's argument that Article 8.01 (b) does not strictly apply to sessionals, who, so long as they remain so, are not covered by the main body of the collective agreement. However, if one were to ask what "rule of thumb" the parties in dealing with this issue of part-month counting under Appendix III would most likely contemplate as a reasonable method of doing so, it is hard to ignore as a guide what is set out in Article 8.01 of this very collective agreement. Using the 8.01 (b) method, the only months that "count" are those with at least 15 days of employment (which we take to be the meaning of days "completed" or "worked", as the logical compromise method of "rounding" up or down on a typical calendar month of 30 days, bearing in mind also that what is being talked about are points part way in a month where an employment period either commenced or ceased). But at the same time, part months not otherwise counted at the beginning and end of each period of employment are added together to see if combined they equate to the mid- or cut-off point of 15 days that would be the equivalent of at least one month.

Applying that full method here, the grievor's initial period of employment from December 1988 to May 1990 would still, once again, produce 5 months in total. July 24th to the strike date of October 16 would be 3 more months (counting the 16 days in October alone, and thus not even taking into account the 7 days in July), November 15th to the end of the month, being another 16 days, would count as another month, and December, January and February 1990 would bring the total to 12. By this method, continued employment of the grievor at all into March, 1990 would have taken him beyond the 12-month limit.

The conclusion reached by the majority in that case (at page 14) was that "either way one computes it", the grievor had accumulated "12 full months of employment in 24".

The "fifteen day test" was also applied by arbitrator Samuels in a case decided in 1988 between the parties to the instant case: Seneca College and Ontario Public Service Employees Union (Roy), unreported award dated February 10, 1988. However, in that case the parties agreed that the definition of "full month" was the one contained in what was then Article 8.01(b) (now Article 27.02 B), and arbitrator Samuels made the following observations concerning that agreement:

For the purposes of this case, the parties have agreed that the definition of "full month" is the one set out in Article 8.01

(b) of the collective agreement. The second clause of this article reads:

For the purpose of this paragraph, effective September 1, 1976, a calendar month in which the employee completes fifteen (15) or more days worked shall be considered a "full month".

It is to be noted that this clause says clearly that this definition is only "for the purpose of this paragraph", and the paragraph as a whole is not relevant to our case. Nonetheless, this is the definition of "full month" which the parties agreed we should use.

In St. Lawrence College and Ontario Public Service Employees Union (Nutley), unreported award dated February 7, 1994 (Mitchnick), the majority found the formula contained in Article 27.02 B to be both "legally inapplicable and of little use as a blueprint" where there was a "constantly-fluctuating kind of relationship" between the College and the full-time sessional employee (whose teaching contact hours per week varied from 10 to 20, being 10, 11, 12, 13, 14, 16, 18, and 20 hours during various weeks). In rejecting the College's contention that the formula contained in Article 27.02 B had to be applied (and that the 15 days "worked" in Article 27.02 B had to be days of actual teaching contact), arbitrator Mitchnick wrote, in part, as follows:

The better view, it seems to us, on facts like the present is to disregard Article 27.02 B entirely, as being both legally inapplicable and of little use as a blueprint, and to attempt to give a reasonable meaning to a "full month" of "full-time employment" in Appendix VIII. In our view, the Union's approach does that, in looking to see whether the contract-employee on the whole demonstrates full-time hours (more than 12 a week) throughout the month, on a relatively consistent basis. That is the Union's claim, and is all in this case that we have to decide. The result, in our view, is a less capricious one than adopting an interpretation that leaves it to the happenstance of how the College chooses to spread a teacher's courses to determine the matter, while at the same time maintaining consistency with the essential purpose of a "probationary period", being to provide the employer an opportunity to assess the adequacy of a teacher through his or her performance on the courses assigned.

A supplementary award dated August 26, 1994 by arbitrator Mitchnick (sitting as a sole arbitrator due to the death of the Union Nominee) included the following observations (at pp. 7-9):

The question arising out of the initial award is whether the usage of the "sessional" or contract employee over the month - or more importantly, over a series of months, is such as to roughly approximate the load of a regular full-time employee, both in total hours used in each month, and in terms of the general way those hours are spread throughout the month. The Union acknowledges that where the College's requirements are for a high total of monthly hours but falling in a narrow span - for example, in a single week - one can see the need for a "contract" rather than a "regular" employee. Beyond that, it would seem to me reasonable to look for no less than an even split in the four full weeks of the month as between "full-time" hours (13 and up) and less than "full-time" hours, with, again, even the weeks that fall below the 13-hour level demonstrating something close to that, so that the month represents some kind of continuum "approximating" that of a regular employee.

On all of that one can see the College's concern now at having conceded, on the basis of a test that it thought had been established in the 1982 Arsenault case, that April of 1992 was one that "counted". On the present test, it probably should not, since as was confirmed at the second hearing, it in fact was made up entirely of weeks having less than 13 hours of teaching. On the other hand, March 1992 turns out to have been made up of weekly hours as follows:

10
10
20
20

for 60 hours in total. As noted, that would still seem to meet the test adopted, as does February 1993, at

12
12
20
20.

As well

May '92
April '93
May '93
and June '93

are not on that test disputed by the employer.

More problematic, as it turns out, is the previously-agreed month of November '91, whose hours are now noted as:

13
13
10
10

Where months fall on the edge like that, it arguably would not be unreasonable to look at the context in which they occur - that is, whether as part of a "run" of generally "full-time" months - in deciding which way they might shade. But on reflection, perhaps a clearer line for the system to consider would be the application of an "average-hours-of-teaching-per-week" test; that is, looking to see whether the total of the teaching hours in the 4 full weeks of the month at least equal what the minimum total would be for a regular full-time employee: 13 hours a week, or 52 hours in total - once again looking to see that those hours are spread over some sort of reasonably substantial continuum across the month. On that basis, November '91 would not qualify. On the other hand, December '91 was a three-week month for everyone, and the grievor was assigned to teach:

20
10
and 10

hours a week, being in excess of the 13-hours-a-week "average" for a three-week month. December '91, therefore, is perhaps a clearer month to count, and I think the parties' long-term interests will be better served if this award were to find that the month of December '91 does count, while November 1991 does not. Those seven, then, plus the previously agreed and still agreed months of:

September '91
October '91
January '92
February '92
and March '93

thus make up the necessary 12 months over the spectrum.

Accordingly, the grievor must be said to have completed 12 full months of "full-time" employment in 24 by the end of June of 1993, and his continuation in employment into the month of July

would bring him within the provisions of paragraph 3 of Appendix VIII of the parties' collective agreement - as originally found.

The most recent award on this topic is Algonquin College and Ontario Public Service Employees Union (Allegakone), unreported award dated March 1, 1996 (Bendel). In that case Algonquin College contended that a month of work could only count as a "full month" for the purposes of Appendix VIII if the employee taught on at least fifteen days in the month. OPSEU, on the other hand, argued that although the requirement to have worked on fifteen different days in a month had been endorsed in some awards, it was not a requirement found in the collective agreement; OPSEU also urged the Board in that case to follow arbitrator Mitchnick's "Nutley" award dated February 7, 1994 in which the "15 day rule" was rejected. After reviewing the earlier cases, arbitrator Bendel wrote, in part, as follows (at pages 20-23) of the majority award:

Paragraph 1 of Appendix VIII, it appears to us, requires, first and foremost, an examination of the sessional employee's period and terms of appointment rather than of the hours and days worked by him or her. The paragraph refers to "a full-time employee appointed on a sessional basis for up to twelve (12) full months of continuous or non-continuous accumulated employment in a 24 calendar month period". Thus, in principle, the terms of the appointment - i.e. its duration and the full-time or non-full-time status of the employee - should determine whether the sessional employee attains bargaining unit status.

This was the approach of the board of arbitration in Re Mohawk College (Sobczak grievance). It noted, at pages 9-10 of the award, that the grievor there, unlike the one in Re St. Lawrence College (Arsenault grievance), was clearly appointed by contract as a full-time employee on a sessional basis and, since the employer had taken no steps to alter that relationship, he continued to be so employed. Nothing turned, noted the board at page 11, on what the individual was actually assigned to do during a period covered by a contract of employment....

The same approach of focusing on the terms of appointment was followed in the recent award in Re Niagara College (LeFaive grievance). There, the board of arbitration had to decide whether the grievor, who had been under contract for all 14 working days in the month of December, should count that as a full month for the purposes of attaining the status of a bargaining unit member. The board examined that question in terms, not of the number of days or hours taught, but of the duration of the sessional employment relationship.

It appears to us that the preoccupation with the number of hours and days worked by sessional employees properly arises only where the employee cannot pass the threshold on the basis of his or her terms of appointment, and particularly where the sessional employee's courses and hours of work fluctuate, with the teacher picking up hours or courses as the academic year progresses. Arbitration boards have not aborted their inquiry when the terms of appointment do not support the crossing of the threshold, but have looked at the hours and days worked by the employee. While, in our view, there is little or no justification in the language of Appendix VIII for concluding that a sessional employee can pass the threshold by virtue of the number of hours and days he or she actually works, there has been a general acceptance by the parties and by arbitration boards of the legitimacy of this sort of calculation. It would appear that the reason for this unanimity is to be found, not in the language of Appendix VIII or in the other provisions cited in argument, but in the perceived danger of employers abusing their recourse to sessional employees, a danger which the parties themselves have recognized in Article 2.03 A, B and C. These provisions read as follows:

2.03 A 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 the 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.

2.03 B 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.

2.03 c 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.

The difficulty facing boards of arbitration in cases where hours and days of work fluctuate, and the reason for the confusion in the case-law, is that, while there is a general acceptance of the notion that, regardless of the terms of appointment, hours worked can be added up to produce "full months" of "full-time" sessional employment, Appendix VIII offers no guidance on the method of doing so. See, e.g., the two awards in Re St. Lawrence College (Nutley grievance).

The present case, however, does not require us to examine any of the competing formulae for determining what constitutes a "full month". As noted earlier, the grievor was appointed, in January 1993, to teach a course known as ENL 5950 for the period from January 5 to June 18, 1993. The month of May 1993, which is entirely within the period of the grievor's assignment to teach this course, must count, it seems to us, as a "full month" of employment. Every day that month, the grievor was employed as a sessional employee as a result of this assignment. It would be torturing the language of Appendix VIII, paragraph 1, and introducing notions alien to the Appendix, to hold that a month that was completely encompassed by an assignment as a sessional employee was not a full month of sessional employment..rr0

If the cumulative duration of the grievor's full-time sessional appointments were all that could legitimately be considered in determining whether, as of the time of her termination, she had been employed for more than "12 full months of continuous or non-continuous accumulated employment in a 24 calendar month period", the grievance would have to be dismissed, because the terms of Ms. Schmidt's sessional appointments total only about 10.25 months. However, as indicated by arbitrator Bendel in the Algonquin College case, although an examination of the duration of the sessional employee's appointments is a logical first step in determining whether the sessional employee has crossed the "12 full months" threshold, arbitration boards have not aborted their inquiry when the simple arithmetic involved in that process does not yield a sum of that magnitude, but rather have proceeded to further examine the situation based upon the hours and days worked by the employee.

In the instant case, the grievor taught more than twelve hours per week at all material times. Thus, unlike the St. Lawrence College case in which the ebbs and flows in Mr. Nutley's workload made it difficult to determine the periods during which he was working "full-time hours (more than twelve a week)", the instant case involves a series of sessional

appointments which were indisputably "full-time". Thus, this case does not involve a "constantly-fluctuating kind of relationship" of the type which led arbitrator Mitchnick to conclude that, on the facts before him, the "15 day test" would be "of little use as a blueprint", and that it should accordingly be disregarded in that type of case. The instant case is more analogous to Mohawk College, in which the grievor (Daniel Sobczak) was employed as a full-time sessional employee pursuant to a series of sessional appointments (running from December 19, 1988 to March 31, 1989, April 1, 1989 to May 26, 1989, and July 24, 1989 to May 18, 1990, with Mr. Sobczak's teaching of regular courses having been interrupted for periods in October and November of 1989 as a result of a strike in the academic unit). In that context, arbitrator Mitchnick concluded that although adding the length of those contracts together was "one way of calculating the 'part' months", "another even more plausible way of dealing with the question" was to use the "15 day test", on the basis of the following reasoning:

We are mindful of the College's argument that Article 8.01 (b) [now Article 27.02 B] does not strictly apply to sessionals, who, so long as they remain so, are not covered by the main body of the collective agreement. However, if one were to ask what "rule of thumb" the parties in dealing with this issue of part-month counting under Appendix III [now Appendix VIII] would most likely contemplate as a reasonable method of doing so, it is hard to ignore as a guide what is set out in Article 8.01 of this very collective agreement. Using the 8.01 (b) method, the only months that "count" are those with at least 15 days of employment (which we take to be the meaning of days "completed" or "worked", as the logical compromise method of "rounding" up or down on a typical calendar month of 30 days, bearing in mind also that what is being talked about are points part way in a month where an employment period either commenced or ceased). But at the same time, part months not otherwise counted at the beginning and end of each period of employment are added together to see if combined they equate to the mid- or cut-off point of 15 days that would be the equivalent of at least one month.

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We respectfully agree with that reasoning. Although the absence of language such as that found in section 1(ii) and (iii) of Appendix VII makes it possible to interpret the phrase "full month" in the manner advocated by College counsel in her able submissions, adopting that approach would give rise to the anomalous result that a full-time employee attempting to attain regular (non-probationary) status through a series of sessional appointments might have to serve a considerably longer probationary period than a full-time

employee attempting to attain that status under Article 27. The latter could complete a two-year probationary period by working only 15 days per month in each of twenty-four calendar months (in a 48 calendar month period). If the College's interpretation of Appendix VIII is correct, a full-time sessional employee who worked only 15 days per month in each of twenty-four calendar months would, at most, be found to have completed one-year of probation. Moreover, adopting the College's interpretation of "full month" in the context of Appendix VIII would presumably result in that disparate treatment continuing even after the sessional employee had been "converted" into a probationary employee by section 3 of the Appendix, since the second sentence of section 3 provides that the "balance of such an employee's probationary period shall be 12 full months of continuous or non-continuous accumulated employment during the immediately following 24 calendar month period" (emphasis added), and on the basis of the College's approach the absence of an express clause (in Appendix VIII) making the "15 day test" applicable in construing that phrase in the context of that Appendix would logically require the phrase "full months" in that sentence to be interpreted in the same manner as in section 1 of that Appendix.

As noted by arbitrator Bendel in the Algonquin College case (at page 22), there has been a general acceptance by arbitration boards, and by the parties to the Agreement, of the legitimacy of calculating the number of hours and days that a sessional employee works in order to determine whether he or she has passed the Appendix VIII threshold. Indeed, as indicated above, in Seneca College and Ontario Public Service Employees Union (Roy), unreported award dated February 10, 1988, arbitrator Samuels applied the "15 day test" in determining whether a full-time sessional employee had passed that threshold because Seneca College and the Union agreed that the definition of "full month" in the context of what is now Appendix VIII (then Appendix III) was the one set out in what is now Article 27.02 B (then Article 8.01(b)). Although the parties are only bound by that agreement for the purposes of that case, their preparedness to so agree is reflective of the usefulness of that test as a "rule of thumb" in interpreting the phrase "full month", and is consistent with arbitrator Mitchnick's conclusion that the negotiators of the Agreement most likely contemplated that applying the "15 day test" would be a reasonable method of dealing with the issue of part-month counting under what is now Appendix VIII. For the foregoing reasons, we have concluded that for the purpose of determining (under section 3 of Appendix VIII) whether a sessional employee has been "continued in employment for more than the period set out Appendix VIII, 1", "full months of ... non-continuous

accumulated employment" should be construed as including any calendar month (within a 24 calendar month period) in which a full-time employee appointed on a sessional basis completed fifteen or more days worked.

In the instant case, it is common ground between the parties that the grievor worked fifteen or more days in each of the following twelve calendar months: March, April, May, June, July, August, September, October, and November of 1996, and January, February, and March of 1997. Thus, applying the interpretation of "full month" described above results in our finding her to have worked a "full month" as a full-time sessional employee in each of those twelve calendar months. The undisputed facts also indicate that the grievor worked thirteen days in December of 1996. Those thirteen days are insufficient to warrant a finding that she worked a "full month" in December of 1996. However, section 3 does not require an employee to have worked thirteen "full months" in order to be entitled to "be considered as having completed the first year of the two year probationary period". Section 3 grants that entitlement to any sessional employee who "is continued in employment for more than the period set out in Appendix VIII, 1" (emphasis added). The fact that the grievor worked thirteen days in December of 1996 combined with the fact that she worked the aforementioned twelve "full months" within the meaning of Appendix VIII indicates that at the time of her termination, she had during the period from March of 1996 to March 1997 (inclusive) worked a total of twelve "full months" and thirteen days as a full-time employee appointed on a sessional basis, which is thirteen days "more than the period set out in Appendix VIII, 1" of "12 full months of continuous or non-continuous accumulated employment in a 24 calendar month period".

Accordingly, we find and hereby declare that, at the time of her termination, the grievor was entitled by section 3 of Appendix VIII of the Agreement to be considered as having completed the first year of the two year probationary period.

In accordance with the agreement of the parties, we shall remain seised for the purpose of determining what additional remedial relief, if any, should be awarded to the grievor, in the event that the parties are unable to agree upon that matter.

DATED at Burlington, Ontario this 15th day of May, 1998.

Robert D. Howe
Chair

I concur.

"Sandra Nicholson"
Union Nominee