

GRIEVANCE AWARD

Pay - Overtime

Headnote 88A297 - 88A301

H E A D N O T E

OPSEU File: 88A297 - 88A301
OPSEU Loc.: 562

CLARKE et al. (OPSEU) vs. HUMBER COLLEGE OF APPLIED ARTS AND TECHNOLOGY
Award dated December 23, 1988 (J.H. Devlin, A. Merritt, I. Freedman)

Pay - Overtime - Formula for payment for work performed in the "11th month" for Teaching Masters who do not teach as part of a continuous 12 month program.

Grievance upheld in part - The grievors taught from September until June. At the request of the College, they taught 1 week in August, 1987. The Board held that the calculation of the overtime wages due to the grievors is established by Article 5.01 of the collective agreement and not Article 4.01(11)(d). The Board also determined the proper formula to be used in applying article 5.01. The grievors were requested to teach the last week of August. Classes were cancelled on Monday, August 31. That was also the day of the President's Breakfast which was an optional event attended by teaching staff on their own time and without compensation. The Board held that these grievors should be paid for August 31 notwithstanding the cancellation of classes as they had returned from their vacation and the cancellation of classes would not result in a right to refuse to pay the grievors.

R. Ross Wells

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

HUMBER COLLEGE OF APPLIED ARTS AND TECHNOLOGY

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

GRIEVANCE OF CLARKE, DAVIDSON, HOWE, SLIZ AND STEWART

BOARD OF ARBITRATION:

JANE H. DEVLIN
ALLEN MERRITT
ISRAEL FREEDMAN

CHAIRMAN
COLLEGE NOMINEE
UNION NOMINEE

Appearances for the College:

John S. Williamson
Carol Boettcher
Angus King
Bert White

Appearances for the Union:

R. Ross Wells
Ron Sliz
John Huot

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Messrs. Clarke, Davidson, Howe, Sliz and Stewart are the teaching staff of the Electrical Apprenticeship Program at the College's Queensway campus and their grievance is to the following effect:

"STATEMENT OF GRIEVANCE

We grieve the college has violated Article 14.03 of the Collective Agreement by failing to implement the rate of overtime payment for the week of August 24, 1987 agreed upon by the College Committee and by failing to provide overtime compensation for August 31, 1987.

SETTLEMENT DESIRED

D. Clarke, J. Davidson, G. Howe and R. Sliz shall be compensated for the week of August 24, 1987 at the rate of 5/190 x annual salary and for Aug. 31, 1987 at the rate of 1/190 x annual salary; A. Stewart shall be compensated for the same periods at the rate of 5/180 and 1/180 respectively."

Article 14.03 of the Collective Agreement to which reference is made in the grievance, provides that the parties may set out in writing the resolution of a matter of clarification or a matter involving the local application of the Agreement.

The Electrical Apprenticeship Program, which is taught by the Grievors, is one of a number of Apprenticeship Programs for which the College receives funding from the Ministry of Skills Development. The Program is taught at three levels; namely, basic, intermediate and advanced and prior to 1987, there were 5 intakes each year, each of 8 weeks' duration. This necessitated

an additional two weeks of teaching each year beyond the 38 week period currently specified for non post-secondary programs in Article 4.01(2) of the Collective Agreement. This Article, together with Article 4.01(11)(a) which deals with the assignment of teaching contact days, Article 4.01(11)(c) which deals with the assignment of teaching contact hours and Article 4.03 which defines the academic year are as follows:

"

...

Article 4
WORKLOAD

4.01 (2) (a) Total workload assigned and attributed by the College to a teacher shall not exceed forty-four (44) hours in any week for up to thirty-six (36) weeks in which there are teaching contact hours for teachers in post-secondary programs including nursing and for up to thirty-eight (38) weeks in which there are teaching contact hours in the case of teachers not in post secondary programs.

The balance of the academic year shall be reserved for complementary functions and professional development...

4.01 (11) (a) Contact days (being days in which one or more teaching contact hours are assigned) shall not exceed one hundred and eighty (180) contact days per academic year for a teacher in post-secondary programs or one hundred and ninety (190) contact days per academic year for a teacher not in post-secondary programs.

(c) Teaching contact hours shall not exceed six hundred and forty-eight (648) teaching contact hours per academic year for a teacher in post-secondary programs or seven hundred and sixty (760) teaching contact hours per academic year for a teacher not in post-secondary programs.

4.03 The academic year shall be ten (10) months in duration and shall, to the extent it be feasible in the several colleges to do so, be from September 1 to the following June 30. The academic year shall in any event permit year-round operation and where a College determines the needs of any program otherwise, then the scheduling of a teacher in one or both of the months of July and August shall be on a consent or rotational basis.

..."

In early 1987, the Ministry of Skills Development announced a change in the duration of the intakes at the basic and intermediate levels of the Electrical Apprenticeship Program to 10 weeks which was to take effect in the fall of 1987. In order to accommodate this change, the College found it necessary to begin the first intake on August 24, 1987, when the Grievors would otherwise be on vacation.

In the spring of 1987, the College circulated a memorandum to determine the willingness of the Grievors to teach during the week of August 24th and on August 31st and the College advised the Grievors that they would be compensated for this work according to the formula set out in Article 5.01 of the Collective Agreement which is to the following effect:

"

...

Article 5
VACATIONS

5.01 A member of the teaching faculty 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, except that a member assigned to teach for an additional month (11th month)

over the normal teaching schedule of the equivalent to ten months as part of a continuous twelve month program, shall be entitled to a vacation of one month, as scheduled by the College. Such member shall also receive a bonus of 10% of the employee's annual salary for the additional eleventh month of teaching assignment to be paid on completion of such assignment. A member assigned to teach in the eleventh month for less than a full month will be entitled to a pro-rata amount of the ten percent bonus referred to above to be paid on completion of such assignment.

..."

A series of discussions subsequently took place between representatives of the College and the Union concerning the additional teaching assignments required in the Electrical Apprenticeship Program and there is no dispute that for the 39th and 40th week of teaching which was to be done in June of 1987, it was agreed that the Grievors would be compensated in accordance with Article 4.01(11)(d) which is as follows:

"

...

4.01(11)(d) Compensation for work in excess of the maxima set out above shall be paid by the College to the teacher on the basis of:

- (i) 1/180 or 1/190 respectively of the teacher's annual salary for each contact day in excess of the 180 or 190 contact day annual maximum.
- (ii) 0.1% of the teacher's annual salary for each teaching contact hour in excess of the 648 or 760 teaching contact hour annual maximum.

Such compensation shall be for the greatest amount and shall not be pyramided under this clause or under 4.01(10).

..."

Initially, the Union also took the position that the College had agreed that the Grievors would be compensated in a similar fashion for teaching from August 24 to August 31, 1987. In fact, it is this agreement which is alleged to have been breached by the College in the grievance before the Board.

The Board heard a considerable amount of evidence concerning discussions between the parties with regard to the scheduling of additional teaching contact days in the Electrical Apprenticeship Program. Having considered that evidence, we agree with Mr. Wells, who appeared on behalf of the Union, who conceded that the evidence falls short of demonstrating that the parties were ad idem as to the manner in which the Grievors were to be compensated for teaching during August of 1987. To the extent that the Union believed that such an agreement had been reached with the College, the Union was in error.

In these circumstances, it was the submission of Mr. Williamson, who appeared on behalf of the College, that the grievance must be dismissed. Mr. Williamson contended that the grievance alleges a failure on the part of the College to honour an agreement regarding overtime compensation and having found that there was no such agreement between the parties, the Board is without jurisdiction to inquire any further into the matter. It was the submission of Mr. Wells, on the other hand, that there is a difference between the parties concerning the rate at which the Grievors were to be compensated for teaching during August of

1987 and that the existence of an agreement is not vital to the Union's case as the Union simply understood that the College had agreed to compensate the Grievors in accordance with the Union's interpretation of the Collective Agreement. Mr. Wells requested, therefore, that the Board assume jurisdiction in order to resolve the real issue in dispute between the parties.

In our view, it would be unduly technical to construe the grievance in the manner suggested by the College. It was not alleged in this case that the College made some commitment to compensate the Grievors in a manner which was independent of any obligation contained in the Collective Agreement. Instead, there was some difference of opinion between the parties as to whether Article 4.01(11)(d) or 5.01 governed the way in which compensation was to be paid. The agreement referred to in the grievance and relied upon by the Union was, in fact, no more than an understanding that the College had agreed that Article 4.01(11)(d) was applicable. In these circumstances, we do not find the Union's failure to prove the existence of an agreement to be fatal to its case, nor does this deprive the Board of jurisdiction to determine the real issue in dispute.

The Grievors reported for work on August 24, 1987 and, with the exception of Mr. Stewart, each of the Grievors was assigned teaching contact hours each day from Monday, August 24th to Friday, August 28th. Although Mr. Stewart was assigned contact hours on only four of the five days, Article 4.01(11)(b) of the

Collective Agreement provides that weekly contact hours may be assigned in less than five days and that such a compressed schedule shall be deemed to comprise five contact days.

Classes were also initially scheduled for Monday, August 31, 1987. However, in late July or early August of 1987, Angus King, the Dean of Technology was advised by the Ministry of Skills Development that no classes were to be held on August 31st. Mr. King testified that, as a result, he prepared a memorandum which he instructed be sent to all faculty members. Nevertheless, Ron Sliz, one of the Grievors, testified that this memorandum was not received by the faculty of the Electrical Apprenticeship Program. Both Mr. Sliz and Mr. Stewart testified that prior to leaving on vacation in June of 1987, they were informed that the President's breakfast would be held on August 31st. This is an annual event at which attendance by faculty is encouraged but is not compulsory. There is no dispute that when the breakfast has been held in August, faculty who have attended while on vacation have not been paid for the day and when the breakfast has been held in September, morning classes have generally been delayed or rescheduled and faculty have received their regular pay for the day.

Mr. Sliz and Mr. Stewart testified that prior to Friday, August 28th, they had not been advised of any change in the teaching schedule for the Electrical Apprenticeship Program for Monday, August 31st. As the President's breakfast was scheduled

that morning, however, Mr. Sliz and Mr. Stewart went to the office on Friday, August 28th in order to determine what arrangements, if any, they would have to make to reschedule morning classes on Monday. Both Mr. Sliz and Mr. Stewart testified that it was only at this point that they learned that classes on Monday had been cancelled.

Mr. Sliz and Mr. Stewart testified that the Grievors all attended the President's breakfast on August 31st and then returned to the College where they spent the balance of the day. Mr. King, however, testified that he was also at the College that day and that he could not recall seeing the Grievors. In any event, it was the position of the Union that the Grievors are entitled to compensation for Monday, August 31, 1987 as it was a regularly scheduled teaching day.

As to the manner in which compensation ought to be calculated for the teaching assignment in August of 1987, the Grievors testified that between September 1, 1986 and June 30, 1987, they were each assigned contact days in excess of the maxima specified in Article 4.01(11)(a) of the Collective Agreement. In the case of all of the Grievors except Mr. Stewart, this involved an assignment of more than 190 contact days. During 1987, Mr. Stewart also taught courses at the post-secondary level and, therefore, was subject to the 180 contact day maximum set out in article 4.01(11)(a). During the period from September 1, 1987 to June 30, 1988, the Grievors were also

assigned contact hours in excess of the maxima and, as Mr. Stewart was no longer teaching courses at the post-secondary level at that time, each was subject to the 190 contact day maximum.

Given the necessity for a teaching assignment in August of 1987, it was the position of Mr. Wells that the College extended the 86/87 academic year or, alternatively, effected an early commencement of the 87/88 academic year. In either case, Mr. Wells contended that the Grievors were entitled to compensation in accordance with Article 4.01(11)(d) of the Collective Agreement as by August of 1987, each had exceeded the maximum number of teaching contact days which could be assigned in an academic year as provided in Article 4.01(11)(a). In contrast, Mr. Williamson disputed any claim to pay for August 31, 1987 and submitted that for the week of August 24th, compensation was properly calculated by the College in accordance with the formula set out in Article 5.01 which applies to assignments during the eleventh month. If there was any doubt about the matter, Mr. Williamson suggested that the Board have recourse to evidence of past practise. In this regard, Mr. King testified that the College has always compensated Teaching Masters for teaching assignments during their vacation period in accordance with Article 5.01 even if such assignments have not been part of a "continuous twelve month program" as that term is used in Article 5.01.

Prior to addressing the merits of the grievance, consideration must be given to a submission of Mr. Williamson to the effect that a claim under Article 4.01(11)(d) is properly a matter for a Workload Resolution Arbitrator rather for a tripartite Board, such as the present one, which was constituted under Article 11 of the Collective Agreement. Mr. Williamson pointed out that Article 4.02(1)(f)(i) provides that any difference relating to the application, administration or interpretation of Article 4.01 or 4.02 is to be referred to the Workload Monitoring Group and failing resolution, to a Workload Resolution Arbitrator. Article 4.02(1)(f)(ii) also excludes from the procedure set out in Article 11, grievances arising under Articles 4.01 and 4.02. It was the submission of Mr. Wells that the claim in the instant case is for overtime pay and is not in the nature of a workload dispute. If necessary, Mr. Wells suggested that the Board take jurisdiction under Article 3 of the Collective Agreement which deals with salaries.

As pointed out by Mr. Wells, the issue in dispute involves the entitlement to and the method by which compensation is to be calculated for a teaching assignment in August of 1987. To this extent, the matter is not one relating to a workload assignment which is generally the province of a Workload Resolution Arbitrator. Moreover, the Union is alleging that the College violated the Collective Agreement by compensating the Grievors in accordance with Article 5.01 and a difference between the parties concerning the application of this Article is clearly a matter

within the jurisdiction of this Board. Finally, if the College were correct in its interpretation, then no single Board would have jurisdiction to determine the issue raised in the grievance. The Workload Resolution Arbitrator would have authority to deal with the matter insofar as it involves the application of Article 4.01(11)(d) and a Board constituted under Article 11 would have authority to consider the applicability of Article 5.01. This, in our view, could not be what the parties intended and, for the reasons set out, we find that we have jurisdiction to resolve the issue raised in the grievance.

Turning then to the merits, Articles 4.01(11)(a) and (c) of the Collective Agreement establish the maximum number of teaching contact days and teaching contact hours which may be assigned in an academic year. The contact day maximum is either 180 or 190 depending upon whether the teacher is teaching at the post-secondary or non post-secondary level. The corresponding contact hour maxima are 648 and 760, respectively. Compensation for work in excess of the maxima is to be paid in accordance with Article 4.01(11)(d) at the rate of 1/180 or 1/190 for each contact day or 0.1% of annual salary for each contact hour. The teacher is entitled to the greatest amount and pyramiding is proscribed.

In our view, the compensation provided for in Article 4.01(11)(d) applies only to contact days or contact hours assigned in excess of the maxima during the academic year. The academic year is described in Article 4.03 as being 10 months in duration and,

where feasible, shall be from September 1 to the following June 30. Article 4.03 further specifies that the academic year shall, in any event, permit year-round operation and the scheduling of a teacher during July or August shall be on a consent or rotational basis. The issue, therefore, is whether the teaching assignment in August of 1987 was made during the academic year.

The Grievors went on vacation in the normal course in late June of 1987, having taught since September of 1986. They returned from vacation on August 24th, as they had previously agreed to teach from August 24th to 31st to accommodate a change in the schedule for the first intake of the Electrical Apprenticeship Program. In our view, this assignment did not effect an extension of either the 86/87 or the 87/88 academic year. The assignment was made during a period in which the Grievors would otherwise have been on vacation and when they taught in August of 1987, they did not perform work within the academic year. In these circumstances, Article 4.01(11)(d) has no application and, it becomes necessary to consider the provisions of Article 5.01.

Article 5.01 begins by providing that teaching faculty who have completed one full academic year of service are entitled to a vacation of two months as scheduled by the College. At the same time, a member may be assigned to teach an eleventh month "as part of a continuous twelve month program". Such a member is entitled to a bonus of 10% of annual salary to be paid on

completion of the assignment. A member assigned during the eleventh month to teach for less than a full month is entitled to a pro-rata share of the 10% bonus on the completion of the assignment.

In our view, the use of the phrase, "A member" at the outset of the final sentence of Article 5.01 indicates that the compensation provided for teaching less than a full eleventh month is not restricted to assignments which are part of a continuous twelve month program. We appreciate that the effect of this interpretation is that there is then no provision in Article 5.01 for compensating teachers for teaching the full eleventh month unless the assignment is part of a continuous twelve month program. This apparent deficiency, however, does not assist the Union in persuading us that the Grievors should be compensated under Article 4.01(11)(d). For the reasons set out previously, the assignment, in this case, was not made during the academic year and, therefore, Article 4.01(11)(d) does not apply.

Prior to addressing the method by which compensation is to be calculated under Article 5.01 about which there is also some dispute, it is necessary to determine the nature of the work for which the Grievors are entitled to compensation and specifically whether they ought to be compensated for Monday, August 31, 1987. There is no dispute that classes were initially scheduled that day and it would appear that each of the Grievors was assigned teaching contact hours that day. Classes, however, were

subsequently cancelled on August 31st and while Mr. King issued a memorandum to this effect, it was evidently not received by the teaching staff of the Electrical Apprenticeship Program. It was not, therefore, until Friday August 28th that the Grievors learned that there were to be no classes the following Monday. Moreover, although Mr. King testified that he could not recall seeing the Grievors on campus that day, there was no evidence as to when Mr. King was at the College or for how long. In the circumstances, therefore, there is no basis for disregarding the evidence of Mr. Stewart and Mr. Sliz that all of the Grievors attended the President's breakfast and then returned to the College for the balance of the day.

Article 5.01 provides a method of compensating teachers for certain teaching assignments and, in our view, it is not restricted to days on which teaching is actually performed. Mr. King testified that had classes been cancelled due to a snowstorm, the Grievors would have been paid for the day and we find that they are equally entitled to compensation for having been assigned to teach on Monday, August 31st, particularly as they only learned of the cancellation of classes on the preceding Friday. The Grievors were not sent back on vacation at that point and classes resumed on Tuesday, September 1st and continued for the balance of the ten-week period of the initial intake.

The final issue relates to the manner in which compensation is to be calculated for the period from August 24 to August 31, 1987. For assignments of less than the full eleventh month, the College has in the past compensated teachers by dividing the SWF (Standard Workload Form) hours during the period in question by the maximum number of hours which could have been assigned during that period and multiplying this by 10% of the teacher's annual salary. During the summer vacation in 1987, the College determined that there were 45 potential working days (9 full weeks) including 2 statutory holidays or, in other words, 4.3 weeks in each of July and August. As Article 4.01(2) of the Collective Agreement provides for a maximum assigned workload of 44 hours per week, there were 189 potential workload hours (4.3 x 44) during the month of August, 1987. In the result, the College compensated the Grievors in accordance with the following formula:

$$\frac{\text{Total SWF Hours}}{189 \text{ hours}} \times \frac{01}{10} \times \text{Teacher's Annual Salary}$$

It was the position of the Union that the formula used by the College was improper and Mr. Wells proposed the following formula for compensating teachers for assignments for less than

the full eleventh month:

$$\frac{\text{SWF Hours} \times 01}{167.2} \times \frac{\text{Teacher's Annual Salary}}{10}$$

The figure of 167.2 was obtained by multiplying 38 (being the maximum number of weeks with teaching contact hours as provided in Article 4.01(2)) by 44 (being the maximum number of workload hours per week) and dividing the product by 10 (being the number of months in the academic year).

Having considered the matter carefully, we are of the view that neither of the calculations proposed by the parties is correct. Article 5.01 provides for compensation in the form of 10% of annual salary for a teacher who is assigned to teach an eleventh month and a pro-rata share of this amount where the assignment is for less than a full month. Given that the academic year is ten months, it is apparent that a teacher assigned to teach the eleventh month is entitled to the equivalent of one month's salary during the academic year, provided that annual salary is payable (or is treated as payable for the purpose of the calculation) over the period of ten months. In this case, the Grievors worked for one week and one day in August of 1987 and they are entitled to an amount equivalent to that which they would receive for the same period during the academic year provided again that annual salary is

treated as payable over the period of the ten-month academic year. The entitlement to 10% does not depend upon the hours worked or, in other words, upon the workload of the teacher in the eleventh month and the same must be true of the pro-rata share of that amount for a teaching assignment for less than a full month. The pro-rata share, therefore, is to be calculated on the proportion of the month during which the teacher is assigned to teach and not on the basis of the teacher's workload during the period of the assignment.

In the result and for the reasons set out, the grievance is allowed in part. We find that the Grievors are entitled to compensation in accordance with Article 5.01 for the teaching assignment for the week of August 24 and for the assignment on August 31, 1987. Compensation shall be calculated in the manner set out and the Board retains jurisdiction for purposes of implementation of this award.

DATED AT TORONTO, this 23rd day of December, 1988.



 Chairman

"Allen Merritt"

 College Nominee

"Israel Freedman"

 Union Nominee