

IN THE MATTER OF AN ARBITRATION

BETWEEN:

LOYALIST COLLEGE OF APPLIED ARTS AND TECHNOLOGY

(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE UNION)

AND IN THE MATTER OF THE GRIEVANCE OF R. COUGLAN (#02A341A)

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIR
ED SEYMOUR, UNION NOMINEE
JACQUELINE CAMPBELL, COLLEGE NOMINEE

APPEARANCES FOR THE COLLEGE:

D.K. GRAY, COUNSEL
R. SPARGO, DIR. H.R.

APPEARANCES FOR THE UNION:

RICHARD BLAIR, COUNSEL
HARRY PLUMMER, CHIEF STEWARD

A HEARING WAS HELD AT BELLEVILLE ON OCTOBER 10, 2002.

AWARD

Two grievances were filed by Rosemarie Coughlan under the provisions of the collective agreement in effect between the parties firstly dated April 7, 1995 which is -

“I grieve that the College has failed to recognize all my accumulating sick leave credits; specifically, the College has not included the 20 day entitlement for the academic year beginning September 1, 1992. Reference is Article 17.01(f)(1); 27.03(E).

The College will increase my current accumulated sick leave credit by 20 days and will continue to add 20 days per year on each September 1 for as long as I am an employee of the College.”

The second grievance signed on April 12, 2002 is:

“The College has failed to credit me with the requisite 20 days per year of accumulating sick leave under Article 17.01(F)(1).

The College’s stated intention to use my salary rate at the time I became disabled as the base to establish the per diem rate for my gratuity pursuant to Article 17.01(H) is a breach of Article 4.01(A) of the collective agreement and constitutes discrimination contrary to the provisions of the Ontario Human Rights Code.

The College will - add 160 days to my accumulated sick leave bank.

Establish the per diem rate for the gratuity using the current salary rate for Step 17 (68,279). Furthermore, the College will pay me reasonable interest on any amount determining

to be owing to me from the date of my retirement until the money is paid.”

The issues raised in these grievances involve firstly the accrual of sick days entitlement while an employee is absent from work and receiving long-term disability benefits and secondly, what salary rate is applicable for the purposes of the calculation of pay out of the sick leave gratuity. The Grievor was hired in 1974, became disabled and left work on LTD in 1992; she returned to work on January 1994 but left again in December 1995 from which time she has received LTD benefits which were continuing when she planned to retire which she did on April 30, 2002.

By letter dated February 25, 2002, Ms. Spargo advised the Grievor in part as follows:

“A submission has been made to the Ontario Council of Regents for approval to process a sick leave gratuity to you on your retirement date April 30, 2002. This payment is based on a final balance of 37 days in your sick leave bank and an annual salary of 63,097, the salary that was in effect prior to you going on long-term disability benefits with Sun Life.

As per our discussion, regarding the salary component of the calculation, we requested clarification from the Council of Regents. They informed us that the salary to be used in the calculation is the salary last received by you prior to going on LTD. They also indicated that any ad hoc adjustments that had been made to you since going on LTD do not enter into the calculation.

The lump sum payment for which we believe you are eligible is \$4,472.39...”

The Grievor responded on March 11th that she expected to be paid “for 37 + 160 = 197 sick days and be paid at the current rate of Step 17 or \$68,279 yearly”.

It is the Union’s position that in each year the Grievor was absent from work and receiving LTD that she be credited with 20 working days which any employee receives for sick leave. Further, the calculation of the lump sum gratuity should be based on the current salary rate and not the salary rate at the time she commenced her leave for disability.

Reference was made to the following Articles of the collective agreement -

It is the Union's position that the language of the collective agreement on its face does not detract from the right of an employee to accrue sick leave credits as an incident of employment which applies to those employees on LTD. The denial of the accrual of the credits is discriminatory and a breach of the Human Rights Code by reason of the Grievor's handicap. The Union submits that there is no basis in the collective agreement

to limit the pay out to an employee on LTD which pay rate should be governed by the current salary. The freezing of the employee's salary rate at the time of disability results from the Grievor's handicap and she should not be thereby prejudiced.

It is the position of the College that by practice since 1982 when the STD plan became effective at the Colleges, that no employee has been allowed to accumulate sick leave credits while absent from work on disability or discretionary leaves except as otherwise stated in the collective agreement. It has been the invariable practice to use the employee's salary rate in effect as at the date of disability to calculate the lump sum gratuity in Article 18.01. The Grievor's salary rate for the calculation of this gratuity was set when she went on disability leave and in receipt of LTD in accordance with its past practice. The terms of the collective agreements refer to current salary without an automatic escalator to increase those costs other than ad hoc adjustments such as stated in the letter dated September 26, 2001 attached to the current collective agreement as follows:

It is the submission of the Union that Article 17.01(F)(1) is clear that every employee is entitled to 20 days of sick leave credits each benefit year set out in 17.01(D). There is no requirement that the employees are required to be actively at work to be credited with these days which if not used are carried forward. Because the Grievor remained as an employee of the College while on LTD, she was entitled to the sick leave credits less those used and drawn by her. The parties did not intend to restrict the accrual and accumulation of these sick leave credits while an employee is absent from work receiving LTD such as stated in the Prepaid Leave Plan provisions at Article 23.05(B), which specifically restricts the accumulation of sick leave credits during that leave period. This is contrasted with Article 22.02(A)(IV) where employees on pregnancy and parental leaves continue to accumulate sick leave credits. As a result of the Teplitsky arbitration award, the new language came into effect in 1991 so that it was submitted that whatever practice under the collective agreement applied by the College, it is only relevant to the date the first grievance was filed in 1995 and as such should not be relied on by the Board as it was a narrow term for the practice of the College and is not significant as to the application of Article 17 to the grievance.

It was submitted for the Union that the cases dealing with the accumulation of vacation entitlement while off work on disability are analogous to this issue with reference to Re Union Gas and OCAW, 27 L.A.C.(2d)72 (McLaren) in which it was decided that an employee absent on workers' compensation with the issue of whether the employee was entitled to vacation pay, the Board noted that the collective agreement did

not exclude time away from work while on compensation when computing vacation pay.

The Board held at p. 78:

“There are a number of cases which support the proposition that where an agreement is silent, as this one is, the pro-ration of a benefit is not to be considered by a Board of Arbitration. It has been held that, unless the collective agreement specifies otherwise, a person on disability or sick leave does not cease to be an employee and is entitled to full vacation pay.”

This decision was supported in Re Children’s Aid Society of Algoma and CUPE,

1 L.A.C.(4th)143 (Brent) in which the Board stated at p. 147:

As the Employer itself has conceded, the arbitral authorities have consistently held that unless the collective agreement specifies that vacation entitlement is to be reduced by time off work, etc., the employee’s vacation entitlement is not to be reduced by reason of absence from work on sick leave...”

Further reference on this issue was made to Re Lethbridge General Hospital and United

Nurses of Alberta, 26 L.A.C.(3d)372; Re Labatts Breweries 31 L.A.C.(3d)231(Brandt);

Re Board of School Trustees and CUPE, 6 L.A.C.(4th)338 (Munroe); Re Rahey’s

Supermarket and R.W.D.S.U., 3 L.A.C.(4th)311 (MacDonald).

It was further submitted with reference to these cases, that as this collective agreement is silent, Article 17 provides accrual based on employment and to remove that term would take specific language in the agreement. In addition, the Human Rights

Code which prohibits discrimination because of a handicap precludes the operation of this clause as applied by the College. Reference was made to Re Fanshawe College and OPSEU (M.G. Picher, November 25, 1996); ONA v. Orillia Solders Memorial Hospital, 42 O.R.(3d)692; Re Grismer Estate v. British Columbia Council of Human Rights, 181 DLR(4th)385; Re Entrop et al. v. Imperial Oil Ltd., 50 O.R.(3d)18.

As stated in the Orillia decision by the Court of Appeal for Ontario (January 12, 1999) with regard to the purpose of seniority in that agreement “the appropriate comparator group is the employees as a whole. Disabled employees are denied rights given to other employees in a manner constituting discrimination within the meaning of S. 5 of the Code”. The Supreme Court of Canada in Re British Columbia Government and Service Employees Union v. Public Service Employee Relations Commission, 176 D.L.R.(4th)1, adopted a unified approach to determine whether a prima facie discriminatory standard is a BFOR with a three-test step set out at p. 25 which was adopted in the Grismer and Entrop decisions. It was submitted that clearly it is only by reason of the Grievor’s handicap requiring her absence from work and receiving LTD that she did not accumulate the sick leave benefits which should be compared to other employee groups absent from work on leaves by reason of a prohibitive ground of gender or family status. The Grievor should therefore not lose 20 days of sick leave credit because of her absence from work during the year while receiving LTD the denial of which is a violation of Sec. 5 of the Human Rights Code.

On the second issue of the grievance concerning the salary rate to be used in the calculation of the lump sum gratuity under 17.01(H), it was submitted that the amount should be the same as employees who return to work from an absence on LTD and then retire who are credited with the current salary rate. The Grievor should not be prejudiced by the calculation of the salary rate as at the date of disability which has been the practice of the College but is not now applicable to an employee who remains handicapped. Based on the collective agreement, the calculation of the salary rate should be the rate as of the date of retirement of the employee and not the earlier date of the absence because of disability. The Grievor does not claim the discretionary increments to salary since her leave commenced but does claim her current salary rate at the time of retirement for the purposes of the lump sum gratuity calculation.

It was submitted for the College that its practice relating to the application of Article 17.01(H) as to the pre-existing sick leave plan should be accepted to indicate the intention of the parties as applied by the College. The allocation of the 20 days' sick leave must be assessed in the light of its purpose to allow employees to be paid while ill up to 20 days a year and for their retirement gratuity with credits which have not been used. An employee however, who is absent on LTD is compensated for each day of work so that there is no further purpose to allow sick leave credits for them. The sick leave plan applies to employees who would otherwise be scheduled to work which does not apply to those on LTD who are compensated for their time off work and are not scheduled to work. As the Grievor was hired before 1991 when the plan came into effect, the credits were grandparented for pay out purposes. Reference in its submission

was made to Re Mohawk College and OPSEU (Burkett, March 2001); which was submitted to be directly applicable and should be followed by this Board and to Re Niagara College and OPSEU (Saltman, July 2, 1999); Re City of Trail and 0International Association of Firefighters, 10 L.A.C.(3d)251 (Munroe); Re Ottawa Board of Education and OSSTF, 14 L.A.C.(3d)102 (Shime).

On the second issue, it was submitted that as the collective agreement is silent and the plan was promulgated unilaterally under Article 17.01(H), the pre-existing plan and practice is compelling evidence as to what salary rate should be used for the calculation of the lump sum gratuity which is the rate at the start of the employee's disability which was the last salary the employee earned before going on disability. That is the rate that has been consistently applied by the College and neither the language of the clause or the practice would support the Union's position.

It was submitted that the Orillia Soldiers Memorial Hospital award applies in that there has not been a violation of the Code by not accruing the 20 day sick leave for those on LTD which is a BFOR as the employee is compensated for not working and has therefore not been discriminated against. The test of the bona fide occupational requirement (BFOR) was applied by the Supreme Court to any kind of discrimination as set out in the Entrop decision. In the Orillia case, the Court dealt with both grounds as to Sections 5(1) of the Code and stated at p. 703:

“Disabled nurses do not receive this compensation because they are not providing services to their employer. It is not prohibited discrimination to distinguish for purposes of compensation between employees who are providing

services to the employer and those who are not. It would be prohibitive discrimination for the employer to provide different compensation to different groups of employees providing services if the distinction were based on a prohibitive ground.”

Reference was also made to: Re Waterloo Furniture Components and U.S.W.A., 88 L.A.C.(4th)75 (Baum); Re Cambridge Memorial Hospital and ONA, 79 L.A.C. (4th)392 (Barrett); Re OPSEU and OPPSU, 97 L.A.C.(4th)280 (Mitchnick). With two different schemes and two different purposes of the benefits, there was no discrimination by the College in the circumstances of the Grievor’s absence from work and in receipt of LTD benefits.

The first issue to be determined by the Board is whether in each year of the Grievor’s absence from work and in receipt of long-term disability benefits, she should be credited with 20 days of sick leave accumulated each year pursuant to Article 17.01(F)(1). There is no doubt that the Grievor who was hired before April 1, 1991 is entitled to the then unused and available sick leave credits for the purposes of the lump sum gratuity calculation which for her was a total of 37 days. The issue is whether in addition, the Grievor is entitled in that calculation to the accumulation over eight years of 20 sick leave days each year totaling 160 in her sick leave bank to be added to the carry over of 37 days which she has claimed in the grievance. The evidence of the early history of the sick leave provisions indicates that there was a payment of one and one-half days per month accumulation with pay “for illness but the days are not so used are allowed to accumulate”. In 1968, those employees who had 10 years of continuous

service with the Colleges were entitled to a cash payment for their accumulated sick leave credits at the rate of 1.66 days per month which in 1975 was contracted at 20 days per year credited on September 1 of each year and that any of those unused days may be accumulated up to 200 days. There was then implemented a provision for a retirement gratuity which could not exceed one-half of annual salary based on the unused days of sick leave for those employees with at least 10 years of service. The STD plan did not become effective until 1982. It was accepted that no employee was allowed to accumulate sick leave credits while on leave because of disability or discretionary leaves of absence unless otherwise specified in the collective agreement.

In Article 21.03 in the 1982/4 collective agreement, the employees were required to pay the full premium of the LTD plan brought in for the first time providing 60% of basic monthly earnings. In the collective agreement, effective September 1, 1987, there was an “ad hoc adjustment for existing claimants to bring their benefit level to 60% of current salary”, which was followed in 1989 relating to the award of Arbitrator Teplitsky by an LTD plan in the same language and with an ad hoc adjustment. Other than a similar adjustment, there was no change in the successor collective agreement to August 31, 1994 and was adopted in the collective agreement effective to August 31, 2001. The current collective agreement contains an ad hoc adjustment but there was a change in the wording of Article 18.01 that the benefit level to be 60% of monthly based salary “in effect as of the date of disability”.

A parallel decision was made by the Board in the award at Mohawk College, (supra), where the Grievor was granted a professional development leave but was not credited with any unused sick leave credits for the period he was absent from work. The Board referred to the:

“underlying purpose of the provision. Sick leave credits are intended to protect an employee’s income should he/she suffer illness or injury. The sick leave gratuities intended to provide an economic incentive to be circumspect in the use of sick leave...”

While it is the language of the collective agreement that governs, the language must be interpreted having regard to its underlying purpose...”

The Board found that the entitlement to sick leave was based on absences due to illness or injury when the employee “would otherwise be scheduled to work” which circumstance did not apply to the Grievor and in denying the sick leave credits, the College was not in violation of the collective agreement.

Similarly, the STD and LTD plans provided in the collective agreement now in effect between the parties, are for the same purpose which is to provide compensation to employees during absences due to illness or injury so as to compensate them for their inability to be at work because of such circumstances. While absent from work, employees are covered by these plans and remain employees of the College but are not scheduled to work as a result of their disability and are entitled to be paid 100% of their regular pay up to the 20 sick days provided in Article 17.01(F)(1) with a carry over of

any unused benefits. For absences in excess of those accumulated sick days, the employees are entitled to 75% of regular pay under Article 17.01(F)(2) until the employee qualifies for LTD benefits. At that point, it is clear in the application of the Short-Term disability plan, the intent is that the 20-day accumulation would be used up in any year in which it has been applied through the STD plan and when an employee converted to the LTD benefits, those credits no longer would be applicable except for the credits “standing in his or her name under this plan (STD)” which may be used instead of the LTD benefits but the accumulation year by year is not under these terms, continued while an employee receives LTD benefits pursuant to Article 18.

Clearly, the Grievor did not apply the 37 days of accumulation in her sick leave bank to the period prior to her transfer to the LTD plan and those days remain to be counted in the retirement gratuity which is not in dispute. The annual accumulation of 20 workdays under the STD plan in Article 17.01(F)(1) does not we find, apply or can be availed by employees when they have qualified for and in receipt of long-term disability benefits. Such employees are being paid through that plan to cover their absence from work because of their medical unavailability and are not otherwise scheduled for work by the College.

In the Niagara College award, the Board found that:

“As the Grievor was not otherwise scheduled to work during the period in question, she was not entitled to sick pay.”

So that only employees who are otherwise scheduled to work are entitled under the provisions of Article 17 to the credits thereby provided and those credits are not accumulated when the employee transfers to the LTD plan under which the sick days accumulation is not applied. The employee is then paid under the long-term disability plan because of an illness or injury and as such is not available for work and does not accumulate sick leave credits which are applied in the STD plan which was applicable to the Grievor prior to her qualification for and receipt of LTD benefits.

Therefore, having regard to the terms of the collective agreement, we find that the Grievor does not qualify as an employee entitled to 20 working days in any benefit year of accumulation while she was absent from work and remained on and received LTD benefits. In that regard, the Grievor is entitled only to the available sick leave credits in her account at the time of her retirement for the purposes of calculation of the lump sum gratuity.

A similar issue was determined in the Ottawa Board of Education award (supra) where it was determined that teachers who were receiving long-term disability benefits but not salary were not entitled to accumulate sick leave. The purpose of sick pay was dealt with at p. 105 - 106 where it was stated inter alia: -

“sick pay credits thus served as a form of insurance for illness. Sick pay was also used as a retirement bonus...

With the introduction of sickness and accident insurance and long-term disability benefits, the sick leave plans, to a great extent became obsolete. Indeed the new insurance schemes provided greater protection to employees...”

As in the collective agreement in this case, the applicable Articles in that case were contingent “on the teacher performing services” and was held that that it was not intended by the parties that teachers would accumulate sick leave while the teacher was on LTD. It was stated at p. 108:

“-and finally, we adopt the reasons in those cases which hold that the mere status of an employee does not entitle a person to all of the benefits in the agreement. It is necessary to decide in each case whether the employee comes within the scope of the intended benefit...”

On the basis of the Court’s decision in Re Orillia Soldiers Memorial Hospital (supra), we conclude that there has not been a violation of the Human Rights Code by the College on this issue as there is a requirement to work in order to obtain the accumulated sick leave credits which the Grievor could not perform because of her illness and that distinction is a bona fide occupational qualification which distinguishes the benefits applicable to the group of employees at work and those such as the Grievor who are not at work and in receipt of LTD benefits. All employees within that group are treated in the same manner by the College through the application of the terms of the LTD plan.

There was then no discrimination by the College either directly or indirectly in the denial of the accumulation of the sick leave credits in the application of the STD plan while the Grievor was not working and being paid benefits pursuant to the LTD plan.

We also have reference to the Entrop decision of the Ontario Court of Appeal to conclude that even if there was established a prima face case of discrimination by the College, it would be impossible for it to accommodate the Grievor who was absent from work and in receipt of LTD benefits and thereby could not perform work for the College which is the condition for the accumulation of the 20 days. As the Grievor could not be “otherwise scheduled to work” by the College, it could not accommodate the Grievor because of her disability. We must conclude that there was no violation of the Human Rights Code established by the Union with regard to the first issue contained in the grievance.

The second part of the grievance is the issue of the correct rate of salary for the purposes of calculation of the lump sum gratuity upon the Grievor’s retirement. Pursuant to Article 17.01(H), the Grievor claims the pay rate at the time of her retirement at \$68,279 while the College maintains that the rate of salary is that which applied when the Grievor left work on disability. Her annual salary at that time was \$63,097 which as set out in the letter dated February 25, 2002 to the Grievor “was in effect prior to you going on long-term disability benefits with Sun Life”.

It is the Union's position that the freezing of the salary by the College results from the Grievor's handicap by which he should not be prejudiced. The calculation applied by the College is of first instance an issue in the awareness of the Union which arose through this grievance. Those employees who return to work after being absent and covered by the LTD benefits prior to their retirement are entitled to the gratuity calculation at their current salary at the time of retirement and it is only those disabled employees such as the Grievor who did not return to work after being on LTD benefits but retired while absent from work had their gratuity calculated at the lesser salary rate in effect at the time of the employee's disability. The retirement gratuity in the Union's submission, is not connected to the date of disability for the purposes of the LTD benefit and to the extent of the practice of the College, in that regard is not now applicable to the defined group employed by the College prior to 1991 who should not be penalized. It is in its submission, the date of retirement when the calculation of the lump sum gratuity should be made on the applicable salary then in effect and that calculation should not be related to the Grievor's earlier date of absence from work because of her disability which caused her separation from employment so that her current rate of salary upon retirement should be applied as claimed.

Unlike Article 18.01 in the current collective agreement where the parties have specifically provided that it is the base salary "in effect as of the date of disability", Article 17.01(H) is silent as to that basis for the calculation but requires the "lump sum gratuity calculated in accordance with the terms of the pre-existing cumulative sick leave plan". The meaning of that qualification is unclear on its face and must in our view, be

determined having regard to the long practice applied by the College in dealing with the pre-existing sick leave plans whereby the calculation of the College was based on the employee's salary rate in effect as at the start of their disability. There has been no change by the College in that respect since the implementation of the sick leave plan at least from 1982 from which there was not an automatic escalator but only ad hoc adjustments to the benefit levels relating to current salary. The terms in those collective agreements did not relate to the calculation of the lump sum gratuity upon retirement from the status of an employee absent from work receiving LTD benefits. That status of employment is not comparable to the situation when an employee has returned from a disability leave to active employment prior to retirement which focuses the calculation of benefits based on the salary in effect at that time and not at the date of disability, the leave for which, has been concluded by a return to work. The circumstances of the Grievor who was unable to return to active employment and remained on LTD from which status she retired, causes the consideration of the application of the above qualification in Article 17.01(H) by which we find, the date of disability is the correct basis of the salary rate to be used for the lump sum gratuity calculation as the last wage rate earned by the Grievor before her absence from work. The practice of the College in the application of Article 17.01(H) and as applied to the Grievor is not, we find, a violation of the collective agreement.

The Board further finds that the Grievor has not been discriminated against because of disability as a result of the calculation of the gratuity based on the salary rate at the time of her disability in that the purpose and extent of such leave of absence differs

substantially from other forms of leaves of absence of employees covered under the collective agreement such a Pregnancy and Parental leaves. The Grievor has been treated in the same manner as any other employee in the same class of employees who are absent because of their disability and in receipt of LTD benefits which follow and are applied to such employees for that purpose which is to provide income while an employee is disabled from active employment pursuant to the qualifications of the LTD benefit plan.

It was made clear in the Gibbs decision referred to at p. 704 that -

“the appropriate comparator group could only be determined by looking at the purpose of the disability plan...

The purpose of the plan in Gibbs was to ensure employees against the income- related consequences of becoming disabled and unable to work. That was appropriate to compare the benefits received by one group of disabled with the disabled generally but not the workforce as a whole. Again, as in Brooks, the Employer was not obliged to provide this form of income replacement but having done so, it could not discriminate against employees on a prohibitive basis..”

There is no evidence that the Grievor was discriminated against in the calculation of the lump sum gratuity on a prohibitive ground under the Code. In the OPSEU award, (supra), Arbitrator Mitchnick dealt with the ratio of Orillia Soldiers decision and the Meiorin decision of the SCC “which eliminated any distinction and approach between matters of direct and indirect or adverse-effect discrimination” and went on to indicate in the circumstances of an issue whether the continuation of a car allowance in the collective agreement while on unpaid parental leave was discrimination and referred to

the application of the Orillia Soldiers decision to the question of entitlement of benefits while on leave from the workplace and the Board refused to find a violation of the Code referring to the Courts determination that:

“requiring work in exchange for compensation is a reasonable and bona fide requirement. There is no suggestion that the Employer can do anything to accommodate the needs of this group or modify the requirement to place them in a position where they can perform the work”.

There are different purposes for these benefit schemes negotiated by the parties over the extent of their collective agreements which is not a matter for accommodation of the Grievor by the College but to be determined in the application of Article 17.01(H) of the collective agreement. The circumstances of the application of that provision by the College to the Grievor does not disclose a contravention of the Ontario Human Rights Code. Further, we find that the use by the College of the salary rate of the employee in effect as at the date of disability giving rise to her leave of absence from work to calculate the gratuity is not a violation of Article 17.01(H).

For all of these reasons, it is the Board's award that both grievances must be dismissed.

DATED AT OAKVILLE THIS 17TH DAY OF FEBRUARY, 2003

H.D. BROWN, CHAIR

ED SEYMOUR, UNION NOMINEE

JACQUELINE CAMPBELL, COLLEGE NOMINEE