

CAAT(A)  
LOCAL 138

IN THE MATTER OF AN ARBITRATION

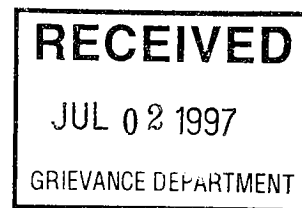
B E T W E E N :

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND  
TECHNOLOGY IN THE FORM OF ST. CLAIR COLLEGE  
(hereinafter called the "College")

- and -

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

GRIEVANCE OF GAYLE CROSS  
OPSEU FILE NO. 96I091  
(hereinafter called the "Grievor")



BOARD OF ARBITRATION:

Richard H. McLaren, C. Arb., Chair

Jon McManus, Union Nominee

Kevin Mailloux, College Nominee

COUNSEL FOR THE COLLEGE:

Barry Brown

COUNSEL FOR THE UNION:

Kelly A. Waddingham

A HEARING IN RELATION TO THIS MATTER WAS HELD AT WINDSOR, ONTARIO,  
ON MAY 15, 1997.

## PRELIMINARY AWARD

At the hearing in Windsor, Ontario on May 15, 1997, Counsel for the parties agreed to deal with a preliminary objection by the College with respect to the timeliness of the filing of the grievance. The grievance reads as follows:

The following grievance is being referred to arbitration as defined by Article 32.03 and 32.04A of the OPSEU Collective Agreement:

### **ITEM ONE: PREVENTING PROBATIONARY COMPLETION BY MAINTAINING AN EMPLOYMENT RELATIONSHIP**

It is my position that, through continuous and non-continuous full-time and less than full-time sessional contracts over a five year period, the College did maintain an employment relationship which prevented the completion of the probationary period as per Article 2.03B of the Collective Agreement which states,

...

As the attached "Summary of Sessional Contracts" shows, the continual fluctuation in hours between full and less than full-time prevented the completion of 24 months of sessional employment in either the period October 22, 1990 to October 22, 1992 or the period March 9, 1993 to March 9, 1995. These periods totalled 10.5 months and 10 months each of full-time employment.

I contend that beginning with the sessional contract dated October 22, 1990 until March 9, 1995, full-time teaching/counselling hours were combined with less than full hours in such a way as to prevent the completion of 12 or more months of sessional employment in a 24 month period which would have lead to roll-over to probationary status as outlined in Article 2.03B and Appendix VIII 3.

### **ITEM TWO: FAILURE TO FILL ONGOING POSITION**

In addition, Article 2.03A states,

...

Throughout the period June 15, 1992 until March 9, 1995, I held an ongoing position as a Counsellor in the College main campus Counselling Centre. Hired first as a replacement for a counsellor moving to full-time teaching and later to fill the gap left by the

retirement of three other counsellors, I continuously provided counselling and related services within this department. Each new contract followed immediately after the preceding [sic] one without any break in time which combined with the consistency in role and location, demonstrates the "ongoing" nature of this position.

**ITEM THREE: FAILURE TO DESIGNATE A FULL-TIME POSITION THROUGH USE OF OTHER SESSIONAL STAFF**

During a number of contracts, when my hours were reduced from full to less than full-time, other individuals were hired within the department on a sessional basis to perform counselling duties. When their contracts ended, my hours returned to full-time. This is especially evident during the period August 24, 1992 to August 29, 1994 outlined on the attached chart. My sessional hours decreased as other full-time sessional positions were established and then increased when those contracts ended or had their hours reduced as they approached completion of one full academic year. As Article 2.03C states,

...

Through the reduction of hours and the subsequent hiring of additional sessional counsellors, the College demonstrated its intent not to allow my completion of the 12 month probationary period.

**REMEDY SOUGHT**

I believe that the evidence stated above outlines how during the five year period October 22, 1990 until March 9, 1995, the College, on more than one occasion, through the use of full-time and less than full-time contracts and the hiring of additional sessional positions, did prevent my completion of the 12 months required for fulfilment of the probationary period. Further, the College, over this lengthy period, failed to recognize and designate my position as an ongoing full-time counselling position.

To correct this, I request that the College, in reference to Article 2.03 A, B, C, of the OPSEU Academic Employees Collective Agreement, adjust my seniority date to October 22, 1990.

Gayle Cross

N.B. See revised Remedy sought

Amended as of Dec. 18/96 "Gayle Cross"

**REMEDY SOUGHT**

I believe that the evidence stated above outlines how during the five year period October 22, 1990 until March 9, 1995, the College, on more than one occasion, through the use of full-time and less than full-time contracts and the hiring of additional sessional positions, did prevent my completion of the 12 months required for fulfilment of the probationary period. Further, the College, over this lengthy period, failed to recognize and designate my position as an ongoing full-time counselling position.

To correct this, I request the following:

- 1) That the College, in reference to Article 2.03 A, B, C, of the OPSEU Academic Employees Collective Agreement, adjust my seniority date to October 22, 1990.
- 2) That the College adjust my step designation to reflect this increase in seniority.
- 3) That the College award retroactive pay for the entire period during which full-time status was denied.
- 4) That the College remove me from the lay-off list (as the decision to lay-off was made based on low seniority resulting from the errors outlined in this grievance) and recall me to my previous faculty position.

Gayle Cross

(Exhibit 1)

At the hearing, the Union raised an issue with respect to the College Nominee. Counsel agreed that the Nominee for the College would sit to hear the preliminary objection. However, should the matter proceed to the merits, the College agreed to replace its Nominee with a new person.

At the time of the hearing the parties submitted an Agreed Statement of Facts and agreed to argue the preliminary matter. The Agreed Facts are:

**AGREED STATEMENT OF FACT**

1. The grievor began her employment as a sessional employee on October 22, 1990.
2. The grievor had 2 sessional contracts between October 1990 and May 31, 1991. The grievor had 19 sessional contracts between October 1991 and March 1995.
3. The College calculates the grievors seniority date as being May 10, 1994.
4. On April 3, 1996, the grievor was laid off from her position effective September 30, 1996.
5. On April 15, 1996, the grievor received an amended lay-off notice effective January 31, 1997.
6. On April 15, 1996, the grievor sent a memorandum to management disputing her seniority date.(attached)
7. On May 1, 1996, management sent a memorandum to the grievor denying her complaint. (attached)
8. On May 7, 1996, the grievor contacted Human Resources Director, Martha Young inquiring from which date her seniority was calculated.
9. On June 6, 1996, the President of OPSEU Local 138, spoke with Martha Young and inquired how the College calculated the grievor's seniority. Ms. Young said that she would review the calculation of the grievor's seniority and get back to the Union.
10. On or about July 17, 1996, Ms. Young met with Ms. Webster and confirmed that the College had properly calculated the grievor's seniority. Ms. Young also advised Ms. Webster that because the collective agreement requires that questions over the accuracy of seniority lists be raised withing [sic] two weeks of posting, it was now too late for Ms. Cross to challenge the way in which her seniority had been calculated.

11. On August 16, 1996, the grievor met with Elaine Labbee, from Human Resources regarding seniority calculation. The grievor outlined her concerns to Ms. Labee [sic].
12. On September 10, 1996, Ms. Labee [sic] responded in a memorandum to the grievor's concerns.(attached)
13. On September 17, 1996, the grievor filed a grievance. (attached)
14. On September 24, 1996, management responded to the grievor denying her grievance. (attached)
15. On or about October 9, 1996 a step one grievance meeting was held. Management was represented by Carol Libby Director of Student Services and Donna Moro, Chair of Student Services. The grievor was also in attendance.
16. On October 10, 1996, a formal written response to the step one meeting was provided to the grievor denying her grievance. (attached)
17. On November 5, 1996, the grievor received an amended lay-off notice effective February 17, 1997.
18. On December 2, 1996, a step two grievance meeting was held. Management was represented by Lynne Watts, Vice President, Administration, and Martha Young, Human Resources. The Union was represented by Chief Steward, Gerry Trottier and the grievor.
19. At December 2, 1996 meeting. [sic] Ms. Young advised the grievor and the union that pursuant to Article 27.04 of the collective agreement, it was now too late for the grievor's seniority to be challenged. Ms. Young also advised the grievor and the union that pursuant to article 32.02 of the collective agreement, the grievor was untimely because the events complained of had happened so long before."[sic]
20. On December 6, 1996, a formal written response to the step two meeting was provided to the grievor denying her grievance. (attached)
21. On December 20, 1996, the Union referred the grievance to arbitration. (attached)

22. On May 9, 1997, counsel for the College informed counsel for the Union that the College would be basing a preliminary issue regarding the Board's jurisdiction and timeliness.

The College submits in support of its preliminary objection that the grievance is lacking compliance with the Collective Agreement as to timeliness, thereby precluding the Board from having the jurisdiction to deal with the grievance. The Grievor had become a full-time employee in March of 1995. Any issue with respect to the Grievor having become a full-time employee by operation of provisions of the Collective Agreement is past. It represents a specific event which while having continuing consequences, is not a continuing grievance. In support of that proposition, the following cases were referred to:

An unreported decision between Fanshawe College of Applied Arts & Technology and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Swan, dated November 26, 1991; An unreported decision between Cambrian College and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Swan, dated October 18, 1994; An unreported decision between The Board of Governors of Algonquin College of Applied Arts and Technology and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Brunner, dated October 4, 1983; An unreported decision between The Board of Governors of Fanshawe College of Applied Arts and Technology and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Brunner, dated October 24, 1983; An unreported decision between Fanshawe College and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Devlin, dated May 25, 1989; An unreported decision between Niagara College and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Swan, dated March 20, 1995; Re Dominion Glass Co. Ltd. 1 L.A.C. 151 (Reville, 1972); Re Dominion Class Co. Ltd. [1973] 1 O.R. (2d) 408 (C.A.)

It was further submitted that there was no waiver, either express or implicitly, as a result of the facts or the conduct of the College. In support of that proposition, reference was made to:

Re Municipality of Metropolitan Toronto 5 L.A.C. (2d) 311 (Carter, 1974); Re Algoma Contractors Ltd. 25 L.A.C. (2d) 292 (Hinnegan, 1980); Re Province of British Columbia 5 L.A.C. (3d) 404 (Getz, 1982); Re Construction Products Inc., Canadian Division 22 L.A.C. 125 (Brown, 1970).

In the alternative it was submitted that even if the grievance is properly before the Board of Arbitration either because it is a continuing grievance or a waiver has occurred then the jurisdiction of the Board is limited to the current agreement which was effective from November of 1992 until the present. In support of that proposition, reference was made to the following:

Re International Nickel Co. of Canada Ltd. 22 L.A.C. 286 (Weatherill, 1970); Re Goodyear Canada Inc. 28 L.A.C. (2d) 196 (Picher, 1980); An unreported decision between Ontario Council of Regents for Colleges of Applied Arts and Technology in the Form of Fanshawe College and Ontario Public Service Employees Union by a Board of Arbitration, chaired by Arbitrator McLaren, dated March 30, 1994.

On the alternative argument as to the inherent limitation of the jurisdiction of the Board with respect to the life of the Collective Agreement, it was ruled at the hearing that the Board would not make any preliminary determinations on that matter as it would affect the merits if they were proceeded to and is more properly to be dealt with in that aspect of the case should it be required.

In support of its position the Union argued that waiver had occurred. In the alternative, it was submitted that the grievance was a continuing grievance and therefore on

either basis, the Board had jurisdiction to deal with the merits of the grievance. In support of its position reference was made to the following cases:

An unreported decision between The George Brown College of Applied Arts and Technology and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Burkett dated December 29, 1995; An unreported decision between Fanshawe College and Ontario Public Service Employees Union by a Board of Arbitration chaired by Arbitrator Bendel dated March 7, 1994; Re Network North 57 L.A.C. (4th) 9 (Thorne, 1996).

The relevant provisions of the Collective Agreement read as follows:

**Article 27  
JOB SECURITY**

...

**Lists**

**27.04 A** In January of each year, the College shall prepare and post lists as follows:

- (i) a seniority list of all regular full-time employees showing the employee's name, classification, division or department, and seniority as determined pursuant [sic] to this Article.
- (ii) a list of all probationary employees showing the employee's name, division or department, date of hire, and date of completion of the probationary period.
- (iii) a seniority list of all partial-load employees employed since the previous January showing the employee's name, division or department, and accumulated service to date.

Such lists shall also be sent to the Union Local President.

**27.04 B** Such lists shall be posted for at least two weeks and the information contained therein shall be considered correct for all purposes unless the employee disputes its accuracy within such two week period by filing written notice thereof with the College.

**27.04 C** If an error is established subsequent to the period referred to in 27.04 B, the correction shall not render the College liable in any manner for actions based thereon.

**Article 32  
GRIEVANCE PROCEDURES**

...

**Complaints**

**32.02** It is the mutual desire of the parties that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the employee and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the employee.

...

**General**

**32.05A** If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

...

**Definitions**

...

**32.12C** "Grievance" means a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.

This Board finds, as many other Boards have previously in looking at predecessor versions of the Collective Agreement between the parties, that the combined effect of Article

32.02 and 32.05A is to make the time limits contained in Article 32.02 mandatory. There is no discretionary power to relieve against a breach of the mandatory time limits derived either by statute or contract in the Board of Arbitration appointed under the provisions of this Collective Agreement. See for example the decision of the Board of Arbitration, chaired by Arbitrator Swan in Re Fanshawe College, supra, in the grievance of L. Dobos.

It was submitted by the Union that the grievance being a continuous one would not be subject to the mandatory time limit proscribed in Article 32.02. The thrust of that argument is to say that the series of appointments as a sessional employee gave rise to a determination under the provisions of the Collective Agreement that the Grievor had become a full-time employee earlier than when the College acknowledged that to be the case on March 15, 1995 (Exhibit 2). As the outcome on the merits of that issue would affect the seniority date of the employee, which it was agreed was May 10, 1994, the matter was a continuing one. Matters of status and seniority may on some occasions constitute a continuing grievance. However, in this case the Grievor became a full-time employee in March of 1995. The grievance was not filed until September of 1996. The possibility of the grievance being a continuing one based on status and seniority had to cease as of the appointment of the individual to a full-time position. The only issue remaining after attaining full-time employment would be whether that status ought be have been acknowledged earlier. Therefore, this matter cannot be characterized as a continuing grievance, which might give rise to an exception to the otherwise mandatory operation of Article 32.02.

This has to be the case, despite the fact that the Grievor's seniority was corrected while the matter was under discussion between the Grievor and the College on three occasions

before the date of May 10, 1994 was finally settled upon as the seniority date. It was the settlement of that date by communication to the Grievor on September 10, 1996, which ultimately triggered the grievance. If there was a triggering factor which made the employee full-time earlier than the date acknowledged by the correspondence of March 15, 1995, it is a single event based on the time frame between 1990 and March of 1995. While it may have had ongoing consequences for the Grievor, it cannot be considered to have been a continuing breach following full-time employment which would give rise to the grievance being considered to be within the mandatory time limits of Article 32.02.

It must now be determined whether there has been any waiver of the mandatory provisions contained in Article 32.02. It is now well settled arbitral jurisprudence that when there has been no reference to a complaint as to the timeliness of the filing of the grievance and its subsequent reference to arbitration, then the doctrine of waiver can be applied. In so doing it has been held by Arbitrator Hinnegan in Re Algoma Contractors Ltd., *supra*, at pp. 299 that:

"... Applying the doctrine of waiver, the board must be certain that the facts do indicate that one of the parties intended to relinquish its rights under the collective agreement. ..."

It has become well settled subsequent to that decision that a complete absence of any reference to issues with respect to the application of the time limits to the grievance process with a collective agreement or the reference to arbitration will result in the time limits being deemed to have been waived. The facts in this case do not reveal a complete absence of reference to timeliness of the grievance. There can be no deemed waiver on that basis.

In July of 1996 during the period of on-going discussions about the situation Ms. Young advised about the time limits concerning the accuracy of the seniority list. The discussions continue and lead to the formal grievance on September 17th. There is an immediate denial of the grievance without reference to time limits.

On October 9, 1996 there is a formal Step One meeting without discussion of time limits. Written response is provided the next day without reference to time limits. Then, there is the conduct on the part of the College on November 5, 1996 altering the effective date of lay-off from January 31, 1997 to February 17, 1997. This is the very thing that was said in July would not be done because of time limits in the Collective Agreement. It is conduct during the grievance procedure amounting to estoppel or waiver of the time limits.

The Step Two meeting occurred on December 2, 1996 and reference is again made by Ms. Young to time limits. The formal reply contains no such reference. Has the waiver or estoppel been brought to an end?

The quick answer to that question is no! The previous time that reference to time limits had been made orally and not referred to in any written responses despite the process being more formal because of the grievance, there was an adjustment in effective date of lay-off. The Grievor and the Union could rely on the prior conduct as setting up a waiver. Ms. Young had to do more than refer to time limits in the December 2 meeting to bring the waiver to an end.

The first notification of a formal nature to the Union did not occur until one week prior to the hearing when Counsel for the College advised the Counsel for the Union that it intended to maintain a preliminary objection as to the timeliness of the filing of the grievance. Those facts are similar to the situation in cases where there has been no reference to time limits and usually results in a deemed waiver. See, for example, the decision of the Board of Arbitration, chaired by Arbitrator Burkett in Re George Brown College, supra, in the grievance of Giovanni de Simone.

The unique facts of this case are that when the matter went to Step Two, Ms. Young from the Human Resources Department of the College advised the Grievor orally that it was too late to challenge the seniority as posted because of Article 27.04 and the 20 day provision of Article 32.02. The formal written response to the Step Two meeting was provided to the Grievor on December 6, 1996, it makes no reference to the maintenance of an objection. The Union referred the matter to arbitration on December 20, 1996. No subsequent notification as to the timeliness of the grievance was set out by the College in either the formal written response to the grievance procedure or subsequent to the referral of the matter to arbitration by the Union. The waiver was not brought to an end so as to permit application of the time limits.

This case is different than many of the decided cases where there has been no reference to the maintenance of the objection to timeliness and therefore the effect of it on the jurisdiction of the Board to hear the case when the time limits are mandatory. Here at the final stage of the grievance procedure there is some verbal discussion, but no formal notification of the point. The grievance procedure is intended for the open and frank discussion of a matter with a view to its resolution. As part of that negotiation process and in recognition of the give

and take which occurs it might well be appropriate in those discussions for potential issues of timeliness to be raised and discussed. That appears to be what occurred here. However, at the formal point of denying the grievance, particularly when it is to be the conclusion of the grievance procedure, one would normally expect that there would be an indication that the grievance was untimely and that if the matter proceeded further the College would be maintaining a preliminary objection as to the jurisdiction of any Board of Arbitration to hear the matter. That was not done in this case. Nor was any objection taken following the Union's formal referral to arbitration, which occurred a few weeks after the letter formally rejecting the grievance at Step Two. Do these facts then amount to sufficient inaction on the part of the College to say that a deemed waiver of the mandatory time limits has taken place in this case?

Had the formal document concluding the grievance procedure indicated that objection as to the jurisdiction would be made, it may well have influenced the decision of the Union as to whether or not the matter would proceed to arbitration. The Union on formal notification might well have decided that it would not continue with the matter. However, it might have tested the College's resolve by proceeding even if there had been formal notification by filing an intention to proceed to arbitration. At that stage, at the very least, one would expect a reiteration of the point if it had not been made in the grievance procedure, that there would be a preliminary objection to jurisdiction. That did not occur formally in this case. Indeed, it only occurred one week prior to the hearing. The College has not preserved unto itself the opportunity to make the argument which it did raise in the grievance discussions which are really intended as part of a process of trying to resolve a dispute. The College should not be able to rely on something said in those discussions to assert later a jurisdictional argument with respect to time limits. If the College wished to do so, they ought to have preserved that right by the

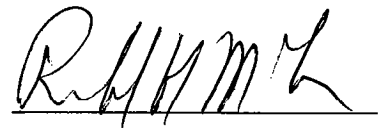
formal notification of denial of the grievance at the end of the grievance procedure, or at the very least if not then, shortly after the formal reference to arbitration had been made by the Union. This did not occur in this case. Thus, the inaction of the College amounts to, in effect, a waiver of the mandatory time limits. It is too late to rescind that waiver a week before the hearing by indicating that an objection is going to be taken to the jurisdiction of the Board to deal with the matter.

In this regard, the Board has been mindful of Arbitrator Hinnegan's comments that facts indicate intention to relinquish rights under the collective agreement. Here the parties were adjusting the seniority date right up to the date of the grievance in September, 1996. Conduct to that point indicated no regard for time limits, although it was raised in a discussion in July. Seniority had been adjusted three times during a six month ongoing discussion. The College had not acted on its rights. In the grievance procedure it argued the point of timeliness but did not formally document it in answering the Step 2 grievance. The Grievor was entitled to assume they were not relying on that position as they had not done so in the past during the discussions leading to the three adjustments in seniority date. Without this prior conduct, which is a statement of intention, this case might well be different.

For all of the foregoing reasons it is found that the actions of the College in failing to preserve its right to maintain an objection to the grievance on the grounds of jurisdiction for lack of timely processing of the grievance is deemed to have been waived in this case. For all of the foregoing reasons the Board does have the jurisdiction to hear the merits of the case. It is hereby ordered that the merits be proceeded with at a subsequent hearing date

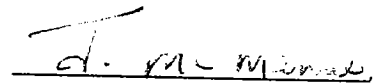
to be determined between Counsel for the parties and the Board. There is to be a conference telephone call about this process between Counsel for the parties and this Board before Mr. Mailloux is replaced.

DATED AT LONDON, ONTARIO THIS 24TH DAY OF JUNE, 1997.



Richard H. McLaren, C.Arb.

I concur/dissent



Jon McManus, Union Nominee

I concur/dissent

"signed"  
Kevin Mailloux,  
College Nominee