

In the Matter of an Arbitration
Pursuant to the Collective Agreement between the
**COLLEGE COMPENSATION AND APPOINTMENTS COUNCIL FOR THE
COLLEGES OF APPLIED ARTS AND TECHNOLOGY and ONTARIO PUBLIC
SERVICE EMPLOYEES UNION ACADEMIC EMPLOYEES**

Between:

FANSHAWE COLLEGE
(the Employer)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, Local 110
(the Union)

Re: Health and Safety Grievance of D.G.; 1998-0110-0023

A W A R D

Board of Arbitration: Paula Knopf, Chair
Carla Zabek, Employer Nominee
Sherril Murray, Union Nominee

Appearances: For the Employer: Robert Atkinson, Counsel
Shelia Wilson

For the Union: Muneeza Sheikh, Counsel
Darryl Bedford
~~██████████~~ *Grievor*

The hearing of this matter was conducted in London, Ontario, on April 11, 2008,
May 5 and June 24, 2009.

The Grievor commenced teaching as a full-time professor at this College in 1972. In September 1998, he alleged that he had been assaulted by a student, resulting in significant physical injuries and "pain and suffering". In October 1998, he filed a grievance alleging the College had failed to provide him with a "safe workplace", and that it had violated both the Collective Agreement and the "Health and Safety Act". For reasons that will be explained below, the grievance was not processed through the Grievance Step procedure until 2007. The Employer has raised several objections to the arbitrability of this grievance at this time and to the jurisdiction of this Board of Arbitration to issue the kinds of remedies that the Grievor is now seeking. The Union asserts that the arbitrability issue can and should only be determined after it has had the opportunities to call a great deal of medical evidence that would explain the events over the last decade and substantiate the claim for damages. Therefore, the Union suggested that a ruling on the arbitrability issue should be reserved and dealt with together with the merits, while the jurisdictional objections should be dismissed in an Interim Award. The Employer has sought a ruling on all its preliminary objections, asserting that it is "too late" for the Union to adduce evidence on even the preliminary issues at this point.

Having taken all these positions into consideration, the Board of Arbitration has concluded that we are able to resolve all the necessary preliminary issues by accepting, without deciding, all the Union's factual assertions about the reasons why the grievance was not processed until 2007. Therefore, there is no need to hear the medical evidence that may be available because the preliminary matters can be addressed and resolved on the assumption of the "best case" that the Union would want to establish if it were to present medical evidence.

The Board of Arbitration recognizes that there are still many factual differences between the parties about the events that gave rise to the grievance and their aftermath. However, aside from the Grievor's medical history, there is little in dispute about the essential issues that form the basis for the preliminary issues

under consideration at this time. Further, where there is any dispute of any significance, we have accepted the Union's assertions as operative. The case began with the events referred to in the grievance that was filed on October 13, 1998. It reads, in part:

I grieve that Fanshawe College has violated the Collective Agreement and the Health and Safety Act by not providing me with a safe workplace. On September 15, 1998 I was assaulted by [S.M.], a student enrolled in the Behavioural Science Foundation Program, who had behaved inappropriately on at least three previous occasions for which the College never disciplined her. Following the incident I have experienced the following medical problems: "hemi retinal vein occlusion" resulting in the loss of vision in my right eye, inability to successfully read, severe headaches, and pain and suffering. When I spoke to my doctors they thought that these problems may be related to the assault. . . .

By way of remedy I request that the College provide me with an immediate paid leave of absence on medical grounds, a safe environment in which to work upon my return, and a monetary settlement for pain and suffering and loss of vision. I also request that my sick days not be debited as a result of this incident.

Following the September 1998 incident, the Grievor was absent from work and he applied for, and received, Short-Term Disability payments. Shortly after the filing of the grievance, the Chair of the Grievor's department attempted to convene the Step One grievance meeting. The Grievor asked that the meeting be delayed because he was absent and on "sick leave." The College agreed to the delay and requested that "the grievance be put on hold until his return to work." An email dated October 29, 1998 between the Union's Chief Steward and the College's Human Resources Department confirms receipt of a voice message from the Union in which it was "agreed to put the . . . grievance on hold until [the Grievor's] return to work."

No one addressed the Grievance for the next nine years. The Union asserted that following the incident in September 1998, the Grievor's medical conditions worsened, resulting in severe depression, the effects of post-traumatic stress syndrome and significant eye problems requiring several surgeries. Further,

these conditions required extensive treatments and medications that made the Grievor completely unable to work or to process this grievance. While the Employer does not accept these assertions and they were not proven, for purposes of this Award, the Board of Arbitration is treating them as if they had been proven.

Following the exhaustion of his Short Term Disability (S.T.D.) benefits, the Grievor applied for and received Long-Term Disability (L.T.D.) benefits in 1999. He also filed for and received a substantial sum of money for the loss of vision in his right eye under the Colleges' Accidental Death and Dismemberment insurance policy. In addition, both the College and the Grievor completed reports about the incident with the Workplace Safety and Insurance Board (W.S.I.B.), although the Grievor elected to process his claim through the "non-occupational" S.T.D. and L.T.D. routes at the time, rather than through the W.S.I.B.

The Union asserts that the Grievor always maintained a hope and an expectation that he would return to work. However, he never did return to work. For purposes of this decision, we are accepting that the Grievor's physical and psychological difficulties did affect him to the extent that they explain why he did not ask or direct that the grievance be processed at any point between 1998 and June 12, 2007. At that point he wrote to the College saying, "I wish to resume my grievance . . . which was postponed by mutual consent." He requested that a Step One Meeting be convened. He also listed "additional" remedies and "specific awards" that he was seeking for "permanent disability, diminished income, missed step level progressions, medical and dental benefits additional premiums, general damages, punitive damages, interest on all of the above and any other award which might reasonably be expected to emanate from this grievance." Thereafter, the Union particularized and clarified the remedial requests to include damages for discrimination on the basis of disability, emotional pain and suffering, medical and travel expenses, legal expenses, and diminished pension. Union counsel made it clear that the Grievor is willing and

able to provide appropriate evidence to support each of these claims. The total amount being claimed is \$137,644.47.

Meanwhile, in the summer of 2007, the Grievor turned to the Workplace Safety and Insurance Board, asking for compensation, including for his "non-economic losses". He was allowed to process that claim and in June 2008 the W.S.I.B. allowed his claim, on the basis of two disabilities: the right eye injury and Post Traumatic Stress Disorder for the period 1998 - 2007. This has been appealed by the Employer, but it has also resulted in the off-set of the payments of L.T.D. benefits which have been recovered by the benefit provider.

In August 2007, the Grievor turned 65. This meant that he was no longer able to receive L.T.D. benefits, but that he was eligible to retire. He has elected to do so and is now in receipt of the C.A.A.T. pension.

This brings us to this arbitration proceeding where the Union is seeking to have the original grievance heard on its merits so that the Grievor can seek the remedies listed above. The College has raised several objections to this Board of Arbitration hearing this grievance. They can be summarized as follows:

1. The parties' agreement to put this grievance "on hold" until the Grievor returns to work should be respected and serve as a bar against this grievance being heard on its merits because the Grievor never did return to work.
2. The grievance is "moot" because of the specific nature of the incident and because of the Grievor's retirement.
3. There is no jurisdiction to award monetary damages for injuries that have been compensated by the S.T.D., L.T.D., Accidental Death and Dismemberment Policy and/or the W.S.I.B.
4. The additional remedies and Human Rights claims that were brought forward by the Grievor in 2007 and thereafter amount to an improper expansion of the original grievance.

The Union responded to each of these objections, stressing that this Board of Arbitration has both the jurisdiction and the responsibility to consider and allow a claim for damages arising out of the Collective Agreement. It was also stressed that there are several "live" and important issues raised by the grievance that must be resolved. The arguments from both counsel regarding the jurisdictional and the "mootness" issues were thorough and included extensive references to relevant statutory and arbitral authorities. However, given our decision regarding the issue of arbitrability, only submissions on that subject shall be addressed in this Award.

Submissions of the Employer

The Employer argues that when the Grievor requested that his grievance be put on hold in 1998 pending his return to work, it "made sense" for the Union and the College to agree to this request. Since the grievance was alleging an "unsafe workplace" and it related to a specific incident and/or series of events, it was said that the parties acted reasonably in deciding to await the Grievor's return to work to address the issues that gave rise to his complaint. The Employer asserts that although this agreement to put the grievance "on hold" did not amount to a settlement, it was a rational agreement that should be honoured. It was stressed that it is important to labour relations for parties to be able to make agreements about how they will process grievances and that their mutual agreements should not be interfered with by boards of arbitration. The Employer's counsel underlined, "A deal is a deal." Accordingly, it was said that it would be improper to allow the grievance to proceed now since the condition precedent to the case going forward never materialized, that being the Grievor's return to work. In support of these submissions, the Employer relied upon the following cases: *Maple Leaf Consumer Foods and Schneider Employees Association*, (2007) 160 L.A.C. (4th) 173 (Newman); *Suburban Motors Ltd. and International Association of Machinists and Aerospace Workers Automotive Lodge 219*, [1999] B.C.C.A.A. No. 539 (Orr); *St. Clair College and OPSEU*, unreported decision of O.B. Shime,

dated July 13, 1992; *Sudbury District Roman Catholic Separate School Board and OECTA*, [1997] 61 L.A.C. (4th) 223 (Kaplan).

The Submissions of the Union

The Union responded to the Employer's argument by saying that the situation in this case cannot and should not be characterized by saying "a deal is a deal." It was said that this case is "much more complicated than that." It was stressed that the Union is not trying to resile from an 'agreement.' It was said that if it had been known that the Grievor would never be able to return to work, the Union would never have entered into that agreement. Further, it was stressed that the Grievor has always assumed that his grievance would be heard when he returned to work. It was emphasized that the Grievor was physically and psychologically incapable of processing or addressing the grievance until 2007. It was suggested that once it became apparent that the Grievor would not be returning to work, the arrangement to put the grievance "on hold" should not have operated as a bar from the case proceeding when the Grievor chose to revive it. For all those reasons, the Union argued that the agreement should be considered "moot" or inoperative. Given the magnitude of his disabilities, the importance of this case to him and the reasons for the delay, the Union stressed that this Board of Arbitration should allow the hearing to progress to a determination of the merits of the case. Further, the Union emphasized that the Collective Agreement contains no time lines that would prohibit the processing of this grievance. In support of its position, the Union offered the following authorities: *Mount Sinai Hospital and ONA*, [2000] O.L.A.A. No 475 (L. Davie); *British Columbia Railway Co. and Canadian Union of Transportation Employees, Local 6*, (1987) 28 L.A.C. (3d) 314 (Hope); *Sault Area Hospitals and CAW, Local 1120 (Lane)*; (2003) 117 L.A.C. (4th) 406 (Knopf).

Employer's Reply Submissions

The Employer emphasized that it does not accept many of the factual assertions that were the basis of the Union's arguments. Further, it was suggested that there is an inconsistency in the Union's position because it is asserting that the Grievor was medically and psychologically unable to deal with this grievance for close to ten years because of his progressively deteriorating condition, yet two months before his retirement in 2007 he was capable of reviving this grievance and has since attended and participated in these hearings. Therefore, the Board of Arbitration was asked to draw an inference that the Grievor never intended to process this grievance over the last decade. Further, it was suggested that the Union had the responsibility to keep the Employer apprised of the Grievor's situation or intentions with regard to the processing of this grievance. It was suggested that it would be an "abuse of process" to allow a grievance to be revived after it had been left dormant or in abeyance for ten years on stipulated terms.

The Decision

In dealing with this preliminary objection to arbitrability, we must analyze it on the basis of the Union's best case. That means that it is assumed that the Grievor suffered physical and psychological injuries as a result of an incident at work in 1998. There is also no dispute that he filed a grievance alleging that the Employer had failed to abide by its contractual and statutory obligation to provide a safe workplace. At the Grievor's request and with the agreement of the Union and College management, that grievance was put on hold until the Grievor returned to work.

This arrangement made complete sense because the Grievor would be more capable of addressing and participating in the resolution of those issues when he

was well enough to attend to his workplace duties. Further, the relief being sought in the grievance was significantly tied to changes in the workplace that he felt were needed. It made perfect sense to hold off addressing those issues until the Grievor returned to the workplace so that if any changes were made, they could be tailored to his needs at the time. There were only two flaws in this otherwise excellent arrangement. First, neither the Grievor nor the parties foresaw that the Grievor would never return to work. Further, no one addressed the grievance in any way during the decade that followed.

Despite this, the Grievor has received compensation in the form of a substantial insurance payment, S.T.D., L.T.D. and now WSIB payments. Therefore, although he has had diminished income over this period, he has not been without compensation and revenue. The question now becomes whether this Board of Arbitration can or should allow this grievance to proceed to a hearing on its merits in order that the Grievor can pursue further damages claims and other declaratory relief. Both parties properly agree that this issue regarding arbitrability falls within the ambit of arbitral discretion and the Board's control over its process. For the following reasons, we have concluded that it would be inappropriate for this case to proceed further.

The grievance and arbitration processes are critical aspects of labour relations and collective agreement administration. Together, they comprise a process of dispute identification and resolution that is designed to allow for the efficient solution of workplace issues by the parties themselves and, failing that, by neutral adjudicators who are experts in workplace disputes and collective agreement administration. This process allows the parties to a collective agreement to maintain the business of the workplace with the knowledge that their differences will be appropriately resolved with minimal delays or disruptions. In order for this system to work, the people responsible for collective agreement administration must be able to communicate with each other, cooperate regarding scheduling and managing of grievances and ensure that their

communications are clear and reliable. This is why there has to be extensive dialogue between Union officials and management personnel on a day-to-day level. Their ability to rely upon each other's word and the arrangements that they put in place are necessary and critical aspects of labour relations. Further, because of the volume of work upon the shoulders of union and management people, they must be able to make arrangements about how to process cases, schedule meetings and prioritize issues. Depending upon the parties and the nature of their operations, this can be done formally and/or informally. Those arrangements must be respected, honoured and protected. It would be catastrophic if anyone, including a board of arbitration, could interfere with the arrangements and agreements reached by the parties regarding the processing or resolution of grievances. It is true that interference might be necessary when there has been collusion, discrimination, a subversion of the grievance process or a breach of the duty of fair representation. But there have been no such allegations in this case.

The facts of this case reveal that the parties entered into a sensible arrangement at the Grievor's request to put a grievance "on hold" until he returned to work. While the grievance was on "hold", the Grievor was in receipt of S.T.D., L.T.D. and insurance monies. His other remedial requests regarding the allegations of an unsafe workplace could only properly be dealt with if he was able to participate properly in the discussions. His claim was a very personal one and dealt with an unusual and specific set of facts. It was reasonable, responsible and prudent for the parties and the Grievor to put his grievance on hold until he could return to work and/or participate in the resolution of the health and safety complaint.

If this case is allowed to proceed to a hearing on the merits now, several significant labour relations concerns would be triggered. First, it would negate the "deal" or the arrangement that the parties made in 1998. This would effectively be granting a license to the Union and the Grievor to ignore the

agreement they made in 1998. If they could do that, why would the Employer ever be willing to enter into an arrangement that the Union asks for in the future? Trust and reliability are critical components to collective bargaining and contract administration. If they reach an agreement about how a grievance should be processed or put on hold until a certain condition is met, then that agreement must be honoured.

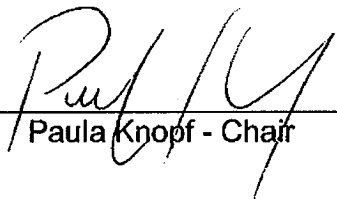
We are not suggesting that the Union is improperly trying to renege on its word in this case. The parties' submissions made it clear that there are unique circumstances that lead to the delays and to the Union's attempts to ensure a hearing of the merits at this time. But if an agreement to put a case "on hold" until someone returns to work is to have any meaning, it must be held to mean that the case would not be brought forward until and unless the Grievor returned to work. He never did return to work. Therefore, the "agreement" that the parties made at the Grievor's request dictates that the grievance would not be processed until he returned to work. Since he has not returned to work, the condition precedent to the processing of the grievance has not been met.

Further, it cannot be ignored that there are inherent difficulties with the concept that a grievance can be left dormant indefinitely and then be revived nine years later. This runs completely counter to the goal of expeditious dispute resolution. It also prejudices both parties in terms of their ability to present their respective cases. We are told that the issue surrounding the triggering incident would be in question if this case were heard on its full merits. Further, there is a great deal of controversy between the parties regarding the basis and the extent of the Grievor's medical claims from the outset and continuing until today. It is almost impossible to imagine how the parties could ever marshal the necessary evidence to present and/refute the factual components of these claims at this point. The prejudice to the process is self evident. Therefore, as a matter of fairness and practicality, it is very difficult to see how it would be appropriate to

allow a grievance to lie dormant for so many years and then be processed to a hearing under these circumstances.

We recognize the seriousness of this case to the Grievor and we accept, without deciding, that there were legitimate medical reasons why he could not or did not try to revive this grievance sooner. But there are also overriding labour relations concerns that relate to the importance of respecting the parties' ability to control and manage their grievance process. Parties to a Collective Agreement must be able to rely on the arrangements they make with each other and they must be able to trust that arbitrators will not interfere in those arrangements unless there are very compelling circumstances. Those circumstances do not exist in this case. Therefore, as a matter of arbitral discretion and pursuant to our jurisdiction over the administration of the Collective Agreement (Article 32.03C), we have determined that the parties' agreement in 1998 should be upheld. As a result, the grievance is not arbitrable.

Dated at Toronto this 6th day of July, 2009.



 Paula Knopf - Chair

"Carla Zabek"

I concur

 Carla Zabek - Employer Nominee

"Sherril Murray"

I concur

 Sherril Murray - Union Nominee