

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Algonquin College,

College

- and -

Ontario Public Service Employees Union,

Union.

(DANIELSON, ANNA)

BEFORE: Michael Bendel, Chair  
Andrew Shields, College Nominee  
Terry Kearney, Union Nominee

APPEARANCES: For the Union:

Michael Lynk, Counsel  
Mary Lou Annable, Chief Steward, Local 415  
Jack Wilson, Secretary, Local 415  
Anna Danielson, grievor

For the College:

Ann E. Burke, Counsel  
Zonya Johnstone, Director, Human Resources

Heard in Ottawa, Ontario, on March 11 and May 3, 1993.

92H015  
CAAT (A)  
Local 415

INTERIM ARBITRAL AWARD

I

The grievance of Anna Danielson challenges the College's decision not to renew her contract as a partial-load professor in the Quantitative Studies Department.

The College's decision, which was conveyed to the grievor orally at a meeting, was confirmed on June 29, 1992, in a letter from the Chairperson of the Department, which reads, in part, as follows:

Further to our meeting on Friday, June 26, 1992, I would like to inform you that I am unable to renew your contract as a partial-load professor for September 1992 because of financial constraints. I want to reiterate that this decision is certainly no reflection of your teaching ability; it is a financial decision which I discussed at our meeting.

...

If there is any change in the current status, I'll be in contact with you.

The grievor responded on June 30 with a grievance. The grievance is drafted as follows:

Statement of grievance

I have been terminated as a partial-load employee notwithstanding my seniority within the department. The reason for termination is economic, not related to my performance. The College has failed to uphold the principle of seniority even though the Collective

Agreement recognizes the seniority rights enjoyed by a partial-load employee particularly but not exclusively under Articles 8.05 and 8.07.

Settlement Desired

Re-instatement of my status as a partial-load teacher without loss of seniority retroactive to September 1992.

A few days before the hearing was scheduled to start, counsel for the Union caused a summons to be issued and served on an official of the College's Human Resources Department, whereby the official was required to testify at the hearing and to bring with her the following documents:

A list of all partial-load teachers employed by Algonquin College in the following semesters: January to April 1990, summer 1990, September to December 1990, January to April 1991, summer 1991, September to December 1991, January to April 1992, summer 1992, September to December 1992, January to April 1993, together with each teacher's gender, each teacher's pay rate as of that semester, each teacher's classification level, and each teacher's start year of instruction at Algonquin College.

In advance of the hearing, counsel for the College gave notice that she would seek to quash this summons on the basis that the information requested was not relevant to the grievance and that the union was engaged in a fishing expedition. As a result, the hearing so far has been limited to evidence and submissions on the propriety of the summons.

II

The theory of the union's case, as it appeared from the submissions of counsel and from the evidence of Jack Wilson, secretary of the local union, can be summarized as follows. The union believes that the College's decision not to renew the grievor's contract flows directly from the implementation of the Pay Equity Act, R.S.O. 1990, c. P.7. As a result of this legislation, the rate of pay of the grievor, and of other partial-load professors with several years of seniority, has been significantly increased. The College, it is alleged, has responded by not renewing the contracts of female partial-load professors with several years of seniority. Male professors in this category, on the other hand, even if highly paid, have had their contracts renewed. According to counsel, the grievor was offered a new contract for September 1992 if she accepted a lower rate of pay, an offer she refused. Although the College would enjoy the same savings by not renewing the contracts of similarly situated male professors, its targeting of the female professors, according to the union, likely flows from a stereotypical belief that women do not have the same income needs as men.

The union's belief that the College has been acting in this way is supported (it is alleged) by its own investigations and by the incomplete and imprecise data supplied by the College

pursuant to the collective agreement. However, the union, according to counsel, needs accurate data from the College to prove its case. The pattern of conduct complained of, which led to the non-renewal of the grievor's contract, would, according to counsel, be a violation of Article 27.01 (a) of the collective agreement, which reads as follows:

#### **NO DISCRIMINATION**

**27.01** (a) The parties agree that, in accordance with the provisions of the Ontario Human Rights Code, there shall be no discrimination against any employee by the Union or the Colleges, by reason of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin.

Counsel for the College advanced several reasons for setting aside the summons.

Firstly, counsel contends that the union's theory about discrimination on the basis of sex is not alluded to in the grievance as presented to the College. There were no meetings concerning this grievance between the union and the College before it was referred to arbitration; and so its scope could not have been expanded beyond what was contained on the grievance document. The grievance alleges a denial of the grievor's seniority rights under the collective agreement, not a violation of Article 27. The union, it is argued, cannot amend the grievance in this way. The collective agreement requires that the "reasons supporting the

grievance...be set out in the grievance and on the document referring it to the next step" (Article 11.03) and that it set forth "the nature of the grievance, the surrounding circumstances and the remedy sought" (ibid.). The new allegation of discrimination would change the nature of the grievance. This amounted to the presentation of a new grievance after the expiration of the mandatory time-limits set by the collective agreement. Moreover, an allegation of discrimination should always be put forward in a grievance with great particularity so that the employer can know the case it has to meet. Since the grievance, properly construed, does not allege discrimination, the data requested by the union are not relevant to the grievance. In the course of her submissions on this point, counsel referred to the following authorities: Re United Steelworkers and TMX Watches of Canada Ltd. (1970), 22 L.A.C. 92 (Schiff); Re Atlas Steels and Canadian Steelworkers Union, Atlas Division (1978), 18 L.A.C. (2d) 363 (Weatherill); and Re Algonquin College and Ontario Public Service Employees Union (unreported award of arbitrator Samuels, dated March 18, 1988).

Counsel for the College also argued that the union, by diligent investigation, could have found out all the information requested in the summons; that the summons was overly broad and amounted to a fishing expedition; and that the summons would require the College to examine over 1,000 documents and to create new documents, since the list requested did not exist. Moreover,

the grievance essentially alleged a violation of the Pay Equity Act, which it was beyond the jurisdiction of the arbitration board to remedy and which, in any event, had already been made the subject of a complaint to the Pay Equity Tribunal by the union.

Counsel for the union replied to all of these arguments.

As regards the scope of the grievance presented by the grievor, counsel suggested there were two ways of looking at the union's allegation of discrimination. In the first place, counsel maintained that Mr. Wilson, who drafted the grievance for the grievor, had intended, according to his evidence, to allude to this allegation of discrimination in his use of the word "economic" in the statement of grievance. Mr. Wilson, according to the evidence, drafted the grievance before the grievor had received the letter of June 29 from the College. His use of the word "economic" was therefore not in response to the letter. In the alternative, the union's allegation of discrimination could be regarded as the formulation of a new argument in support of the contention that the non-renewal of the grievor's contract was in violation of the collective agreement. The role of a board of arbitration was to resolve the real issue in dispute between the parties. The collective agreement provisions relied on by the College did not preclude new arguments being advanced for the first time at arbitration. Moreover, the collective agreement provisions were directory and

not mandatory. In addition, section 84 (2) of the Colleges Collective Bargaining Act, R.S.O. 1990, c. C.15, empowered a board of arbitration to cure defects of form or technical irregularities. Counsel referred, in the course of these submissions, to: Re United Electrical Workers, Local 504, and Canadian Westinghouse Co. Ltd. (1964), 14 L.A.C. 279 (Reville); Blouin Drywall Contractors Limited v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975), 75 CLLC para. 14,295 (Ontario Court of Appeal); Re Bell Canada, supra; Re Liquid Carbonic Inc. and United Steelworkers (1992), 25 L.A.C. (4th) 144 (Stanley); and Re Steel Co. of Canada Ltd. (Swansea Works) and United Steelworkers, Local 3767 (1976), 12 L.A.C. (2d) 245 (O'Shea).

Counsel for the union also maintained that the union could not reasonably have acquired, by its own efforts, the data it sought. It had conducted its own diligent investigations, as shown by Mr. Wilson's evidence, but it now needed the summons to complete the information it required to support its case. Counsel also contended that the board of arbitration has the authority, in an appropriate situation, to remedy a violation of the Pay Equity Act. However, the argument it wished to present to the board was that there had been a violation of the collective agreement by the College.

III

Various provisions of the collective agreement were referred to in argument on the question of the scope of the grievance. They are as follows:

**Article 11  
GRIEVANCE PROCEDURES**

...

**11.02 Complaints**

It is the mutual desire of the parties hereto 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 twenty (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...

**11.03 Grievances**

Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under Article 11.12 (c) in the following manner and sequence provided it is presented within seven (7) days of the immediate Supervisor's reply to the complaint. It is the intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College written decisions at each step shall contain reasons supporting the decision.

**Step No. 1**

An employee shall present a signed grievance in writing to the employee's immediate Supervisor setting forth the nature of the grievance, the surrounding circumstances and the remedy sought...

...

**11.04**

...

(d) The arbitration board shall not be authorized to alter, modify or amend any part of the terms of this Agreement nor to make any decision inconsistent therewith nor to deal with any matter that is not a proper matter for grievance under this Agreement.

**11.05        General**

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

...

We heard argument on whether various procedural requirements set out in the agreement were "mandatory" or "directory", but we do not believe it is necessary for us to express any opinion on this matter.

In Blouin Drywall Contractors Limited, supra, the Ontario Court of Appeal commented on the approach to be taken by a board of arbitration to the interpretation of a grievance. In passages which have been cited on numerous occasions, the Court said the following (at pages 15,354-5):

No doubt it is the practice that grievances be submitted in writing and that the dispute be clearly stated, but these cases should not be won or lost on the technicality of form, rather on the merits and as provided in the contract and so the dispute may be finally and fairly resolved with simplicity and dispatch.

...Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so

that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions...

As is apparent from this statement, there are several factors that a board of arbitration has to consider in deciding whether a grievance should be interpreted as including a particular allegation.

On the one hand, the board of arbitration "is bound by the grievance before it". The grievance, as referred to arbitration, establishes the parameters of the arbitrator's jurisdiction. Arbitrators have also often observed that it is in the interests of all concerned that grievances be thoroughly aired during the grievance process before being referred to arbitration, and that this requires that the grievance be articulated, either on the grievance document or at meetings during the grievance process, with some particularity.

On the other hand, the board of arbitration should not be overly concerned with technicalities, but should endeavour to resolve the real issue in dispute. Arbitrators have recognized that grievances are usually prepared at the work place and that, for this reason, it would be wrong to insist on a high standard of particularity or precision in the drafting of grievances.

For the purposes of this case, we are prepared to accept that these general considerations are unaffected by the provisions of the collective agreement relied on by the College.

Much was made in argument about what Mr. Wilson intended when he drafted the grievance on behalf of the grievor. In particular, there was some evidence that the grievor had not received the letter of June 29 when the grievance was filed. As a result, it was argued, the use of the word "economic" in the statement of grievance was not a reference to the "financial constraints" invoked by the College in the letter of June 29, but was intended to assert the argument that the grievor had been the victim of discrimination on the basis of sex. In our view, Mr. Wilson's intentions as he drafted the grievance are of little or no relevance. What is relevant is what was communicated to the College about this grievance. In the absence of any discussion between the union and the College about this grievance, we must look at the grievance as filed to determine its scope.

We fully endorse the admonition by the Court of Appeal in Blouin Drywall Contractors Limited, supra, that a grievance should be liberally construed. However, we have concluded that, upon the most liberal interpretation of this grievance, it cannot be understood as alluding to a complaint that the grievor has been the victim of discrimination on the basis of sex. As we read the

grievance, the position being advanced by the grievor is that her seniority, coupled with her performance, should have led the College to renew her contract, and that it was a violation of the collective agreement for the College, instead, to have based its decision solely on economic considerations. We cannot detect, in the use of the word "economic" in the statement of grievance, any allusion, however faint or oblique, to any discrimination argument. The violation of the agreement, according to the grievance, lies in the denial of the grievor's seniority rights. We can discern no suggestion on the face of the grievance that the grievor feels her right to be free from discrimination has been violated.

We are of the view that there is an essential difference between a grievance that alleges a violation of seniority rights and one that alleges discrimination. The addition of the discrimination allegation cannot be characterized as merely changing the focus of the grievance. It constitutes a change in the nature of the grievance.

Nor is this a case where the union is relying on a new argument in support of an allegation that comes within the four corners of the grievance. The union is seeking to change the basic allegation underlying the grievance. If the grievance had simply alleged that the grievor had been "denied a renewal of a contract in violation of the agreement", there would be more weight to the

contention that the discrimination argument was merely a new argument in support of the grievance. But since the grievance specifically and pointedly alleges a denial of seniority rights, the discrimination argument cannot properly be regarded as a new argument in support of the grievance.

None of the case-law relied on by counsel for the union, in our view, would support the conclusion that the union should be permitted to allege in this arbitration that the grievor has been the victim of discrimination on the basis of sex. We wish to comment briefly on that case-law.

Re Canadian Westinghouse, supra, was a very unusual case. The grievor there had been misled by the employer as to the true reason for the rejection of his request to bump. The true reason was revealed only after the grievance had been filed, and the board of arbitration allowed the grievor to amend the grievance.

As for Blouin Drywall Contractors Limited, supra, the Court's comments on the interpretation of a grievance, which we have already quoted and endorsed, appear to have been by way of obiter dictum.

We respectfully subscribe to what the board of arbitration in Re Bell Canada, supra, had to say (at p. 202) about the

union's right to articulate a new legal argument supporting its allegation of unjust dismissal. However, in the present case, as we have sought to explain, the union is not putting forward a new legal argument, but is trying to change the grievance's basic allegation.

Re Liquid Carbonic, supra, involved a claim by the grievors that they had not been recalled from lay-off in accordance with their seniority. The arbitrator allowed the union to prove that the employer had failed to post certain jobs, since this alleged failure to post resulted in the employer's failing to recall the grievors. The union was not seeking a remedy for the failure to post as such, but was permitted to allege that the failure to post had resulted in the grievors not being recalled. The grievance therefore remained squarely a grievance alleging a failure to recall. In addition, however, the arbitrator noted (at page 148) that, before the grievances were filed, the parties had discussed the alleged failure to post and how that related to the grievor's claims. Nothing in that case, in our view, would support the union's position in the present grievance, where the union seeks to change the basis for the grievance and where there was never any discussion between the union and the College of the alleged discrimination in the context of the grievor's case.

In Re Steel Co. of Canada Ltd., supra, the union, in referring the grievance to arbitration, alleged that the employer was in breach of "any or all" of the articles of the agreement. This was held to be sufficient compliance with a provision in the agreement which required the union to "specify the Agreement clauses involved". As such, this aspect of the award is not laying down any principles about the amendment of grievances or the interpretation of their scope, but is merely interpreting one provision of the agreement.

In addition to the cases cited by Mr. Lynk, we also wish to refer to the recent unreported award of a board chaired by arbitrator Brent in Re George Brown College and Ontario Public Service Employees Union (dated November 10, 1992), which bears some resemblance to the present case. The grievor in that case had been informed that she was to be laid off, and the grievance alleged that this decision was "an unjust application of Management Rights under Article 3.1 and any other applicable article of the collective agreement". At the hearing, union counsel asserted that "there was a racial element to the decision and that the grievor was being punished for filing other grievances about work in her department" (page 3). The College "replied that there was no hint in the grievance as it was filed that the basis on which the grievor says the action was unjust was improper racial or reprisal motives" (page 4). At pages 6 and 7, the board concluded that it would allow

the union to put forward the allegations of racial discrimination and reprisal:

Those allegations are not apparent from the face of the grievance. However, we were referred to nothing in the collective agreement which limits the parties to that which is stated on the face of the grievance. The College did not argue that the Union was precluded from raising the issues because of any failure to state them explicitly on the face of the grievance. The College did not assert that it was taken by surprise by the allegations. Had it done so, then clearly we would have had to consider whether we would allow the Union to make such new allegations at the hearing. We must therefore assume that the College was not taken by surprise and that the parties had some prior dealings with each other during the grievance procedure or earlier in which the Union made known to the College the substance of its claim.

Based on that assumption, we are faced with an entirely different situation than would have been the case had those allegations not been made...

Although we are very concerned about the grievance form's failure to set out clearly the matter in issue, and would have considered different alternatives had the College argued that it was taken by surprise or pointed out some provision of the agreement which prohibited the Union from raising the matter, we believe that in light of Article 2.3 we have no choice but to hear this case on the merits...

The approach taken by the board of arbitration in Re George Brown College in the passage we have just cited is not significantly different from ours. The assumption on which that board acted was that the allegations in dispute had been the subject of "some prior dealings [between the parties] during the grievance procedure or earlier". As we have indicated above, we would likely have come to a different conclusion if the evidence

had established that the allegation of a violation of Article 27.01 had been communicated to the College during the processing of this grievance.

IV

We have therefore concluded that the allegation in support of which the union wishes to obtain documents from the College does not come within the scope of the grievance. The documents are therefore of no relevance to the grievance, and the summons must be quashed.

This conclusion makes it unnecessary for us to examine the other arguments advanced by counsel.

We will leave it to the union to inform us whether, in light of our decision on this preliminary matter, it wishes us to schedule a further hearing on this grievance.

DATED at Thornhill, Ontario, this 18th day of June 1993.



Michael Bendel,  
Chair

I concur/~~I-dissent~~

"ANDREW SHIELDS" per A.B.  
Andrew Shields,  
College Nominee

~~I-concur~~/I dissent  
DISSENT TO FOLLOW

"TERRY KEARNEY" per A.B.  
Terry Kearney,  
Union Nominee