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IN THE MATTER OF AN ARBITRATION

B E T W E E N :

NIAGARA COLLEGE OF APPLIED ARTS AND TECHNOLOGY

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

(DAS.)

BOARD OF ARBITRATION

JANE H. DEVLIN
RENE ST. ONGE
ISRAEL FREEDMAN

CHAIRMAN
COLLEGE NOMINEE
UNION NOMINEE

Appearances for the College

Nancy A. Eber
Glenn R. Pevere

Appearances for the Union:

Christopher M. Dassios
David Abraham
Winston Das
John Birney

The grievance which is dated December 15, 1987 was filed by Winston Das and alleges that the College violated appendix II, paragraph 5 and appendix III, paragraph 2 of the collective agreement by failing to assign the Grievor work to which he was entitled to preference, as a consequence of which he was improperly laid off. The Grievor seeks retraction of a letter from the College dated November 27, 1987 and the assignment of available work in accordance with the provisions of the collective agreement.

Paragraph 5 of appendix II and paragraph 2 of appendix III, to which reference is made in the grievance, are as follows:

"

...

Appendix II
PARTIAL-LOAD EMPLOYEES

5. The College will give preference to the designation of full-time positions as regular rather than partial-load teaching positions subject to such operational requirements as the quality of the programs, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community.

Appendix III
SESSIONAL EMPLOYEES

2. The College will give preference to the designation of full-time positions as regular continuing teaching positions rather than sessional teaching positions subject to such operational requirements as the quality of the programs, enrolment patterns and expectations, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students, and the community.

The College will not abuse the usage of sessional appointments by combining sessional with partial-load service and thereby maintaining an employment relationship with the College in order to circumvent the completion of the minimum twelve (12) months sessional employment in a twenty-four (24) month period.

A person assigned to replace a full-time regular employee for up to fourteen (14) working days for unplanned absences in any month shall not have such period(s) considered as sessional employment for the purpose of the computation of the twelve (12) months sessional employment. During such periods such a person shall be paid as if partial-load and within the range of partial-load hourly rates as set out in Appendix II hereof.

Other matters concerning the use of sessional appointments may be referred to the E.E.R.C. which shall deal with these matters as priority items.

..."

At the outset of the hearing, Ms. Eber, on behalf of the College, raised a preliminary objection to arbitrability and it is the determination of this preliminary objection which is the subject matter of this award.

The relevant facts are not in dispute and are as follows: the Grievor, Winston Das, was hired as a full-time Teaching Master in the Mathematics Department on August 25, 1986. On November 27, 1987, the Grievor was provided with the following letter:

"

...

1987-11-27

Mr. Winston Das,
4432 Idlewilde Crescent,
Mississauga, Ontario.
L5M 3S6

Dear Mr. Das:

I am sorry to advise that your employment with Niagara College will terminate 1987-12-31. To comply with the 90 day notice you will be paid for 56 days as lieu of notice pay. This action is necessitated by the reassignment of a regular full-time member of faculty with greater seniority and is in keeping with Section 8.01(c) of the Collective Agreement for CAAT Academic Employees.

The College regrets circumstances are such that this has become necessary.

Yours truly,

"Glenn R. Pevere"

GRP/gu
Glenn R. Pevere,
Director of Personnel.

c.c. I Noren
H. van der Slagt

..."

As a result of the release of the Grievor, there was no change in the complement of full-time Teaching Masters in the Mathematics Department.

The Grievor ceased full-time employment on December 31, 1987 and began work as a sessional employee on January 2, 1988. Confirmation of the Grievor's sessional appointment is contained in the following letter from the College dated January 11, 1988:

"

...

1988-01-11

Mr. Winston Das
4432 Idlewilde Crescent
Mississauga, Ontario
L5M 3S6

Dear Mr. Das:

This letter will confirm the terms of this specific employment arrangement with Niagara College. Due to the illness of a faculty member you are engaged as a Sessional Teacher in the Math, Office Admin. and Part-time Studies Division.

This Sessional appointment will terminate upon the return of the incumbent or in any event no later than the completion of the winter term. Your salary will be \$166.89 per working day (47,558./261 days). Please see attached salary schedule for pay dates. You will receive 4% of your gross pay as vacation allowance.

Would you please confirm your understanding and acceptance of this offer by signing the duplicate copy of this letter and returning it to us within 10 days.

Yours truly,

"Glenn R. Pevere"

Glenn R. Pevere,
Director of Personnel

GRP/db

Attachment
in duplicate

..."

Of relevance to the determination of the College's preliminary objection to arbitrability are the following provisions of the collective agreement:

"

...

ARTICLE 1
RECOGNITION

1.01 The Union is recognized as the exclusive collective bargaining agency for all academic employees of the Colleges engaged as teachers (including teachers of Physical Education), counsellors and librarians, all as more particularly set out in Appendix I hereto save and except Chairmen, Department Heads and Directors, persons above the rank of Chairman, Department Head or Director, persons covered by the Memorandum of Agreement with the Ontario Public Service Employees Union in the support staff bargaining unit, and other persons excluded by the legislation and teachers, counsellors and librarians employed on a part-time or sessional basis.

NOTE A: "Part-time in this context shall include persons who teach six hours per week or less."

NOTE B: "Sessional in this context shall mean an appointment of not more than twelve months duration in any twenty-four month period."

ARTICLE 7
MANAGEMENT FUNCTIONS

7.01 It is the exclusive function of the Colleges to:

- (a) maintain order, discipline and efficiency;
- (b) hire, discharge, transfer, classify, assign, appoint, promote, demote, lay-off, recall and suspend or otherwise discipline employees subject to the right to lodge a grievance in the manner and to the extent provided in this Agreement.

- (c) to manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment, or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement.

7.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement.

ARTICLE 8 SENIORITY

8.01(a)(i) A full-time employee will be on probationary until the completion of the probationary period which shall be two (2) years' continuous employment.

8.01(c) During the probationary period an employee will be informed in writing of the employee's progress at intervals of four (4) months continuous employment or four (4) full months of accumulated non-continuous employment and a copy given to the employee. Also, it is understood that an employee may be released during the first five (5) months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment upon at least thirty (30) calendar days' written notice and during the remainder of the employee's probationary period upon at least ninety (90) calendar days' written notice. If requested by the employee, the reason for such release will be given in writing.

8.02(a) It being understood that the release of an employee during the probationary period shall not be the subject of a grievance under the Grievance Procedure, an employee who has completed the probationary period and is discharged for cause may lodge a grievance in the manner and to the extent provided in the Grievance Procedure.

8.04(c) ...

It being understood that the College reserves the right to determine the number and composition of full-time, partial load and part-time or sessional teaching positions, the College shall give preference to continuation of full-time positions over partial load, part-time or sessional positions subject to such operational requirements as the quality of the programs, their economic viability, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students and the community.

...

ARTICLE 11 GRIEVANCE PROCEDURES

11.01 Sections 11.01 to 11.05 inclusive apply to an employee covered by this Agreement who has been employed continuously for at least the preceding four (4) months.

(Articles 11.02 to 11.05 which have not been reproduced, set out the procedure for processing a grievance to arbitration).

11.06 Dismissal

It is being understood that the dismissal of an employee during the probationary period shall not be the subject of a grievance, an employee who has completed the probationary period may lodge a grievance in the manner set out in Sections 11.07 and 11.08.

11.12 Definitions

- (c) "grievance" means a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.
 ..."

It was the submission of Ms. Eber, on behalf of the College, that, as the Grievor was a probationary employee in December of 1987, he cannot grieve his dismissal unless it is alleged that the College was motivated by bad faith in severing the employment relationship. In support of this submission, Ms. Eber made reference to the following awards: Durham College of Applied Arts and Technology and Ontario Public Service Employees' Union, December 6, 1982 (Weatherill (unreported)), Seneca College and Ontario Public Service Employees' Union, September 18, 1985 (Samuels (unreported)), Algonquin College of Applied Arts & Technology and Ontario Public Service Employees' Union, November 21, 1985 (Brown (unreported)), Mohawk College and Ontario Public Service Employees' Union, March 26, 1986 (Samuels (unreported)), Cambrian College and Ontario Public Service Employees' Union, April 7, 1986 (Brent (unreported)), Seneca College and Ontario Public Service Employees' Union, September 17, 1986 (Swan (unreported)), Northern College and Ontario Public Service Employees' Union, October 10, 1986 (Samuels (unreported)); Sheridan College of Applied Arts and Technology and Ontario Public Service Employees' Union, Local 244, September 8, 1987 (Brown (unreported)), and St. Lawrence College and Ontario Public Service Employees' Union, December 21, 1987 (Brent (unreported)).

By alleging a breach of certain paragraphs of the appendices, Ms. Eber contended that the Grievor is endeavouring to do indirectly what he cannot do directly. In this regard, Ms. Eber pointed out that by way of relief, the Grievor is seeking an assignment of available work and retraction of the letter of November 27, 1987 by which he was advised of his release from employment. Ms. Eber further submitted that a breach of the appendices to the collective agreement cannot support an allegation of bad faith on the part of the College, nor can the Grievor allege that, but for a breach of the appendices, his full-time employment would have continued.

Ms. Eber referred to two awards which she contended address the meaning to be given to the paragraphs of the appendices of which a breach is alleged in this case. These consisted of Fanshawe College and Ontario Public Service Employees Union, January 26, 1987 (Brown (unreported)) and Fanshawe College and Ontario Public Service Employees Union, March 19, 1986 (Samuels (unreported)). Unlike the circumstances before those boards, Ms. Eber submitted that Mr. Das has not suggested that he was replaced by a partial-load or sessional employee but, in fact, Mr. Das is requesting that the College create a full-time position for him. In the result, Ms. Eber contended that Mr. Das has no substantive right to grieve a breach of either appendix and in the absence of any allegation of bad faith, she requested that we dismiss the grievance as inarbitrable.

It was the submission of Mr. Dassios, on behalf of the Union, that at the time of the Grievor's release in December of 1987, there were courses which he could have taught which were being taught by partial-load employees. By failing to assign these courses to the Grievor, Mr. Dassios contended that the College breached the paragraphs of the appendices to which reference is made in the grievance. Mr. Dassios suggested that these paragraphs contain substantive rights and following four months of continuous employment, Mr. Das was entitled to grieve a violation of these paragraphs in accordance with Article 11.01 of the collective agreement. In support of the Union's position Mr. Dassios referred to Confederation College of Applied Arts and Technology and Ontario Public Service Employees Union, February 20, 1986 (Brown (unreported)) and Fanshawe College and Ontario Public Service Employees Union, January 26, 1987 (Brown (unreported)). To characterize the grievance, in this case, as one relating solely to the release of a probationary employee would, Mr. Dassios contended, be to consider form over substance.

Mr. Dassios further submitted that the grievance concerns Mr. Das' change in status from a full-time Teaching Master to a sessional employee in violation of the appendices to the collective agreement. Mr. Dassios suggested that management cannot violate the collective agreement with impunity and to the extent necessary, a breach of the appendices constitutes the necessary illegality upon which an allegation of bad faith may be founded. In the result, Mr. Dassios requested that we dismiss

the preliminary objection advanced by the College and proceed to hear the grievance of Mr. Das on its merits.

By way of reply, Ms. Eber expressed concern with any suggestion that the grievance relates to Mr. Das' change in status since his sessional appointment did not take effect until January 1988, some weeks after the grievance was filed.

On November 27, 1987 Mr. Das was notified that his employment was being terminated effective December 31, 1987 and there would appear to be no dispute that, at that time, Mr. Das was a probationary employee. Article 7.01(b) of the collective agreement provides that it is the exclusive function of the College to discipline employees subject to the right to lodge a grievance in the manner and to the extent provided in the agreement. Articles 8.02 and 11.06 then provide that the dismissal of an employee during the probationary period shall not be the subject of a grievance and as noted by Ms. Eber, these provisions have been interpreted by a number of boards of arbitration.

Although it appears that at one time, there was some disagreement among arbitrators as to the effect of the provisions of the collective agreement referred to, it now appears to be generally well settled that in dismissing a probationary employee, there is no requirement for the College to demonstrate just cause. A probationary employee can challenge his dismissal

only to the extent that he alleges bad faith in the sense that the College was motivated by illegal considerations or the dismissal resulted from action on the part of the College which precluded the employee from doing his best. It has also been held that the onus of demonstrating bad faith rests upon the Union. In our view, the jurisprudence referred to by Ms. Eber correctly interprets the rights of a probationary employee to challenge his dismissal and we find that the collective agreement affords no substantive right to a probationary employee to be discharged only for just cause.

It is equally apparent, however, that apart from a grievance in respect of dismissal, those who have been continuously employed for a period of four months have the right to grieve a violation of the collective agreement. In this case, Mr. Das is alleging that the College violated certain provisions of Appendix II and Appendix III to the collective agreement. The paragraphs relied upon contain substantive rights and whether Mr. Das is an employee to whom the benefit of these provisions applies, is a matter to be determined on the merits. At this point, the Board is concerned solely with the issue of arbitrability and not with whether, in the final result, Mr. Das will be successful in demonstrating the violation alleged. To find Mr. Das' grievance inarbitrable would, in our view, be to ignore the requirements of Article 11.01 of the collective agreement.

Given that there is a right to grieve, we leave to argument, whether in this case, a breach of the appendices could constitute bad faith upon which the dismissal of a probationary employee can be challenged. We also leave to argument the nature of the remedy which would be appropriate if a violation of the appendices were established as alleged in the grievance.

Although we have found Mr. Das' grievance to be arbitrable, nevertheless, we agree with Ms. Eber that the Union cannot rely upon the Grievor's change in status from a full-time Teaching Master to a sessional employee to support a violation of either paragraph 5 of Appendix II or paragraph 2 of Appendix III. The grievance was filed on December 15, 1987 and alleges that the Grievor was improperly laid off. The grievance makes no reference to the sessional appointment and there is nothing to indicate that this appointment was even contemplated at the time the grievance was filed. The Grievor, therefore, shall be confined to establishing a violation of the collective agreement on the basis of events as they existed on December 15, 1987 and in accordance with the allegations contained in the grievance.

In the result the Board finds that it has jurisdiction to hear and determine the grievance filed by Mr. Das in

accordance with the terms of this interim award.

DATED AT TORONTO this 17th of May, 1988.

Paul H. Deolive
Chairman

"Rene St. Onge"
College Nominee

"Israel Freedman"
Union Nominee