

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GEORGE BROWN COLLEGE
(Hereinafter referred to as the College)

AND

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION
(Hereinafter referred to as the Union)

AND IN THE MATTER OF THE GRIEVANCE OF KEVIN P. DESRUES
(OPSEU FILE No. 9610287)

BOARD OF ARBITRATION:

Gail Brent
Hugh John Cook, College Nominee
Pamela Munt-Madill, Union Nominee

APPEARANCES:

FOR THE COLLEGE:

E. C. Carla Zabek, counsel
David Ivany, Employee Relations

FOR THE UNION:

George A. Richards, Sr. Grievance Officer
Kevin DesRues, Grievor

Hearing held at Toronto, Ontario on April 17, 2000.

DECISION

The grievance before us (Ex. 1) is dated October 17, 1996 and alleges that the College has not complied with the Letter of Understanding regarding cumulative sick leave plans. There were

no preliminary objections raised concerning arbitrability or our jurisdiction to hear and determine the matter.

The parties elected to call no witnesses. They presented the facts by means of documents and by stating facts that they both agreed to. These then are the facts which were presented to us. The grievor was employed by the College as a full-time Professor in the Academic bargaining unit by letter dated July 31, 1986 (Ex. 2). The effective date of his appointment was September 1, 1986, and the offer was conditional upon his successful completion of the "Instructional Effectiveness Program" which ran for two weeks commencing August 18, 1986 (see Ex. 3). The grievor commenced his teaching duties on September 1, 1986. In February, 1996 he received a surplus notice (Ex. 4) that he was to be laid off on May 27, 1996. This triggered the Article 27 procedure and eventually led to the grievor being assigned for retraining. The retraining kept the grievor on the College's payroll until August 8, 1996, when he was laid off without further notice, pursuant to the collective agreement.

Article 27.10A and B provides for severance. Under Article 27.10B severance payments are calculated on the basis of "full years of continual service at date of lay-off". The grievor was treated as having 10 "full years of continual service at date of lay-off" for the purposes of Article 27.10B and received 25% of his annual salary. There were a large number of employees all laid off at the same time, and all were treated in the same manner for the purpose of severance; that is, they all had their "full years of continual service at date of lay-off" calculated by rounding up. It is agreed that there was an agreement between the College and the local Union about how to calculate severance payments. Neither party was able to inform us whether that agreement was in writing or just a one

time deal struck for 1996.

When the grievor was hired the parties had a cumulative sick leave plan. This plan was in effect until March 31, 1991 (see letter of understanding in collective agreement). By letter of understanding the parties agreed “that the right of employees hired before April 1, 1991, to be paid a lump sum gratuity on retirement, termination of employment, or layoff will be protected and will be maintained in perpetuity, and any amendment to the right of such employees to the gratuity shall be subject to ratification by majority vote of such employees”. They also provided the following in Articles 17.01G and H of the collective agreement:

17.01G Subject to 17.01H, upon retirement, layoff or termination of employment, any credits standing in the name of the employee shall be cancelled and shall be of no effect.

17.01H Notwithstanding 17.01G, employees hired before April 1, 1991, shall be entitled to utilize available credits (or portions thereof) at the time of retirement, termination of employment or layoff as lump-sum gratuity calculated in accordance with the terms of the pre-existing Cumulative Sick Leave Plans, where applicable and where the employee is eligible and shall not exceed the amount of one-half the employee’s annual salary as of the date of separation.

Neither the letter of understanding nor the collective agreement provides us with any details regarding the cumulative sick leave plan. The parties produced two versions of extracts from employee handbooks produced by the College. Ex. 6A is undated but is the earlier of the two. It contains the following:

On completion of ten year’s service with the College, employees are eligible to receive, on resignation, or retirement, a cash gratuity. This will amount to half a day’s pay for each day of accumulated credits, (based on your final salary), up to a maximum of half a year’s salary.

Exhibit 6B is dated April 1, 1991. It reads as follows:

A member of the Academic Bargaining Unit employed by the College on a full-time basis

prior to April 1, 1991, will accumulate sick leave credits at the rate of 20 days per year of continuous service, or a pro-ratio thereof.

Unused sick leave credits will be accumulated. After ten years of continuous service at a single College, any unused sick leave credits are payable upon death, termination or retirement.

The formula for calculating payment is:

$$\text{credits}/2 \times 1/200 \times \text{Salary}$$

subject to a maximum of 50% of annual salary.

On September 3, 1996 the grievor wrote to the College (Ex. 5, part) with a copy to the Union. The parts of that letter relating to the accumulated sick leave gratuity are reproduced below:

I am planning to submit my severance letter stating that I do not want to be kept on recall by Sept. 27, 1996 but require written responses to some questions which are still outstanding.

So far, I have not been able to get consistent answers from those individuals I have contacted within the Union and the College.

1. My full time start-date is listed in the College records (and the record of employment) as Sept. 1, 1986. How is the College defining the two weeks of training prior to this date (the weeks of Aug. 18 and Aug. 25, 1986)? These two weeks represented Phase 1 of the Instructional Effectiveness Program (your records will show that I successfully completed all parts of the in-house training). In a letter from then-Dean R. Santin, dated July 31, 1986, he states that "completion of the College's "Instructional Effectiveness Programme" is a condition of employment for all Faculty". I have tried to locate pay forms for this period but they are not in my personnel file. This training was attended by approx. 75 newly hired teachers and teachers who had, until then, been hired on a sessional basis for the previous academic year.
2. Does the College recognize, for the Academic year from Sept. 1995 to June 1996 that I have earned 200 seniority points? This would bring my total as of Aug. 31, 1996 to 2000 points. As there have been no breaks in my service up to the layoff date, this total represents 10 full years of service.
3. Could you confirm that the total number of sick day credits I have accumulated as of my layoff date is 157, the number my records show? A copy of my last Summary of Sick and Vacation Credits, dated October 27, 1995 was not available in my personnel

file.

4. In conversations with Ms. Hofweller, Manager of Compensation and Benefits, she repeatedly stated that Faculty salary is paid for 10 months of work. This is also the interpretation a union representative has given me. However, faculty defer a portion of pay to be paid out over a 2-month vacation period. Until recently, Faculty were paid a lump sum payment with their last pay in June. This sum represented the difference between total salary and accumulate (sic) salary to that pay date. Thus, vacation pay is not a part of the salary although it appears as such on my last payslip. She also stated that I had not completed a full year of service although my attendance sheets show a total of 216 days plus 29 extra days of work in the months of July and August. If salary is only paid for ten months of work and I have exceeded this period (as shown by the more than \$6000 paid out above my contracted salary), how would I have been able to perform any more service to the College for the year to be recognized?
5. Will the College be honouring a verbal agreement between the Union and the College to recognize the last Academic year as a year of service for the purposes of the severance rate. The Collective Agreement states for "10 years of continuous service" a rate of 25% of the income level at the time of layoff be paid out to the Faculty member not electing recall. Does the College recognize "ten years of continuous service" in my case?
8. In the Cumulative Sick Leave pamphlet within the Benefits folders provided by the College for employees hired before April 1, 1991, sick leave credits are payable upon termination provided employees have completed "ten years of continuous service". Does the College recognize (in view of points #1 to 5 inclusive) that I have ten years of continuous service. If so, how does the College intend to transmit this information to the Ontario Council of Regents given that the application form mentions only start and end dates and not "years of service"?
9. Who handles the processing of the "Cumulative Sick Leave Gratuity Claim" at the Council of Regents and, if a claim is rejected, what is the course of appeal?
10. Would the College be prepared to extend my layoff date (without pay) to Aug. 31, 1996 so that I may be able to collect my Sick Leave Gratuity with a minimum of discussion?

On October 2, 1996 the College responded as follows to the grievor's questions (Ex. 5, part):

1. Enclosed is a copy of a letter from your personnel file outlining the conditions for your participation in the Instructional Effectiveness Program. You will note that it

states that you would be paid a per diem rate for the two (2) week period. You did not become full time until September 1, 1986.

2. The seniority point system is unique to George Brown and Local 556. No decision has been made regarding calculation of seniority points for laid off faculty. Irregardless (sic), seniority points have nothing to do with credit for full years service for sick leave buyout purposes.
3. As of June 30, 1996, you have 160 sick days credited.
4. The 29 days during July and August were for retraining not work.
5. The agreement between the College and Local 556 is for severance purposes only.
8. The College does not recognize ten (10) years of continuous service in your case.
9. The course of appeal is through the grievance procedure through Local 556. I would point out however, that the qualifications for sick leave gratuity were determined by the Council of Regents and not George Brown College.
10. As per the enclosed information about Sick Leave Gratuity, unpaid leave does not count.

The document referred to in paragraph 10 is a memo from the Council of Regents to all of the colleges dated May 25, 1973. It purports to clarify what happens to benefit programs during a “Leave of Absence or Sabbatical Leave”. In relation to “Leaves without Salary” it says the following regarding sick leave credits:

- (j) Sick Leave Credits - accumulated credits are frozen; no accrual; the period is not credited as continuous service for vesting purposes.

The Union argued that the College should interpret the severance pay and sick leave gratuity provisions in the same way regarding the calculation of ten years of continuous service because annual salary is paid on the basis of ten months of work and the grievor has done ten full years of work. In the alternative it argued that the College has acted in bad faith by artificially terminating

the grievor's employment before he could complete ten full years of employment after he has completed ten full years of work based on a ten month academic year. It asserted that, knowing the grievor's situation regarding the vesting of the sick leave gratuity, the College should have allowed him to maintain his employment relationship until August 31st even though he would be on unpaid leave during part of that period.

The College asserted that this case is identical in all material respects to an earlier decision between the parties where Arbitrator Swan decided that the employee did not have ten years of continuous service. It also asserted that the College's interpretation of service for severance pay purposes was acknowledged to be as the result of an agreement between the local and the College and does not apply to the vesting requirements of the sick leave gratuity, a decision which cannot be made by the College in any event. The College further asserted that the onus is on the Union to prove bad faith and there is no evidence to support the allegation. It argued that in view of the large number of layoffs it would not make sense to pick those who were close to meeting the ten year vesting requirement so that the gratuity would not have to be paid. It also pointed out that there is nothing in the collective agreement which excludes those who are close to vesting from being given a normal effective date of layoff.

The parties referred us to the following decisions: *George Brown College and OPSEU (Triger #96D994)*, (1998) unreported (Swan); *Fanshawe College and OPSEU (Kinsella #96A489)*, (1999) unreported (Swan); and *Fanshawe College and OPSEU (Sorge)*, (1997) unreported (M. G. Picher).

In deciding this case we have referred only to the facts as given to us, the submissions of

counsel and the authorities cited. As in the *George Brown* case decided by Arbitrator Swan, the grievor here has taught for ten academic years but is only days short of ten calendar years of employment. In that case the majority of the board decided that continuous employment terminated “at the end of the notice period, whenever that might arise”. The board noted that it was a harsh result but one that was dictated by the collective agreement. In Arbitrator Picher’s *Fanshawe* decision it was also found that “the employee’s rights in relation to the layoff crystallize as of the date of the notice of layoff, if the employee is then at work” (page 9).

It was accepted by Arbitrator Swan in both his *George Brown* and *Fanshawe* decisions that the test to be applied was that of “ten years of continuous service” as in Exhibit 6B and the parties had apparently agreed that it was the proper test in those cases. That would indeed appear to be the proper test because Article 17.01H refers to the pre-existing plan for employees hired before April 1, 1991, and Exhibit 6B specifically addresses the terms of the plan as of that date. Clearly Arbitrator Swan interpreted that as requiring ten calendar years of service. Having read his *George Brown* award we can see no basis for distinguishing it from the case before us, nor can we fault its reasoning in relation to the interpretation of the collective agreement.

The only difference between the two cases is that in this case the Union alleged bad faith. Bad faith is a serious allegation and the Union has the onus of establishing it. We can agree that the College’s decision is a harsh one and that reasonable people could regard it as being inequitable. However, there is no evidence before us that the College acted improperly in laying the grievor off, or that it decided to lay him off because he was about to have his sick leave credits vest. There is no evidence before us to even suggest that the College’s motivation in laying the grievor off was

improper or that it chose the effective date of layoff based on any improper consideration, like preventing the vesting of the benefit. There is no doubt that the grievor did everything in his power to fulfill the vesting requirement. The one thing that was out of his hands was the passage of time. If, as here, a proper layoff prevented the time from passing, then that is not bad faith but an unfortunate result which flows from a legitimate action.

This is a harsh consequence. The loss to the grievor is substantial and the amount of time he needed to have the benefit vest was indeed short. However, if the result is to be reversed it is something that is beyond our powers given the terms of the collective agreement.

For all of the reasons set out above, the grievance is dismissed.

DATED AT LONDON, ONTARIO THIS 26TH DAY OF JUNE, 2000.

Gail Brent

I concur

Hugh John Cook, College Nominee

I dissent

Pamela Munt-Madill, Union Nominee