

1987
FANSHAW
DONALDSON

CAAT GRIEVANCE AWARDS

Headnote 83553

Cover Page IN THE MATTER OF AN ARBITRATION

BETWEEN FANSHAW COLLEGE
(The College)

AND ONTARIO PUBLIC SERVICE
EMPLOYEES UNION
(The Union)

AND IN THE MATTER OF THE GRIEVANCES OF DONALDSON
& BUCEK, #83553

BOARD OF ARBITRATION H.D. BROWN, CHAIRMAN
G. BEAULIEU, UNION NOMINEE
F. R. HODDLE, COLLEGE NOMINEE

APPEARANCES FOR THE COLLEGE W.J. HAYTER, COUNSEL
AND OTHERS

APPEARANCES FOR THE UNION R. ANAND, COUNSEL
AND OTHERS

HEARINGS IN THIS MATTER WERE HELD AT LONDON
ON MAY 1, 1984, MARCH 20 and MAY 7, 1985,
AND SEPTEMBER 15, 1986.

Decision

AWARD

The grievance is dated April 6, 1983 and was filed by the Union under the provisions of the collective agreement in effect between the parties at all material times and is a claim that two employees of the College, Mr. Bucek and Mrs. Donaldson were improperly appointed as sessional employees and should have been hired as full-time staff members and included in the bargaining unit. It was the contention of the Union that there was no justification for the replacement of Mr. Higgins and Mrs. Bulsza who were full-time staff members with employees who are excluded from the bargaining unit. The Union seeks recognition of the grievors as full-time employees retroactively with compensation and the deduction of union dues. On May 9, the College responded to the grievance, denying a violation of the collective agreement in classifying these two employees as sessional and denied the grievance. It was thereafter referred to arbitration and came on

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for hearing as set out above. There is no dispute between the parties as to the composition of the Board, nor as to its jurisdiction in this matter.

It is the Union's position in brief that sessional employees cannot be used by the College to occupy complement positions formerly occupied by bargaining unit members and by doing so, there was a breach of Article 4.05 and Appendix #3 which are as follows;

4.05 The parties agree that no college shall circumvent the provision of this Article by arranging for unreasonable teaching loads on the part of persons who are excluded from or not included in the academic bargaining unit.

Appendix III

SESSIONAL EMPLOYEES

1(a) A sessional employee is defined as a full-time employee appointed on a sessional basis for up to twelve (12) full months of continuous or non-continuous accumulated employment in a twenty-four (24) calendar month period. Such sessional employee may be released upon two (2) weeks' written notice and shall resign by giving two (2) weeks' written notice.

(b) In determining the employment and calendar periods under paragraph (a) above, only the period after January 1, 1976 shall be considered and no prior employment or calendar period shall be taken into account. Also, an employee's continuous service acquired in accordance with the provisions of the previous Agreement, dated the 17th day of September 1975, as at August 31, 1976, for the period back to January 1, 1976, shall count as continuous employment or months of non-continuous accumulated employment for the purpose of such paragraph.

(c) If a sessional employee is continued in employment for more than the period set out in paragraph (a) above, he shall be considered as having completed the first year of his two (2) year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be twelve (12) full months of continuous or non-continuous accumulated employment during the immediately following twenty-four (24) calendar month period.

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

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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 (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 11 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.

Mrs. Donaldson was hired to replace Mrs. Bulsza a nursing teacher who resigned and Mr. Bucek was hired to replace Mr. Higgins in the Electronics Division who had deceased. Both Donaldson and Bucek were hired as sessional employees, rather than full-time employees which the Union asserts should have occurred to fill full-time positions. The Union further asserted that the College was estopped from denying the status of having a full-time teacher filling an ongoing full-time complement position through statements made during negotiations of the previous two collective agreements and at Union/Management Committee meetings. The Union asserts that the hiring by the College of sessional employees to replace full-time employees has been an ongoing concern, not as to the propriety of the appointments, but as the method of filling complement positions. In its position the Union had been assured through the Ministry representatives that such appointments were improper and the Union relied on those assurances in negotiations.

At the outset of this matter the Employer raised a preliminary objection that this was not a proper union grievance under Article 11.10 of the collective agreement, as the employee could grieve the issue and the remedy, if any, breach of Article 4.05 would not have any significance. It was further submitted that reference to Article 4 and Appendix 3 was an expansion of the scope of the grievance from the document filed as the grievance. It was also its position that evidence of estoppel was an attempt to create a new position in the collective agreement by alternate means, in order to modify the express words of Appendix 3 and objected to that evidence. A concern was also raised as to the particulars required.

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The Board ruled orally at the hearing that the preliminary objections raised by the College were dismissed and found that reference to Appendix 3 could be made in this case, as well as it would receive the evidence concerning the Union's allegation of estoppel. The Board further found that the grievance was appropriate for the Union to bring and was not in violation of Article 11.01 of the collective agreement. As counsel for the College was taken by surprise with regard to the evidence concerning the estoppel sought to be led by the Union, the Board adjourned the hearing and gave directions to the parties to exchange particulars prior to the next hearing. Difficulties arose with regard to the exchanging of particulars and the Board ruled at the next hearing that it would not disregard the evidence and submissions as to the allegation of estoppel raised by the Union, but would not deal with that aspect of the case at that hearing, but would defer the issue until the next hearing date. The Board then proceeded to receive the evidence of the Union.

Mr. Grunwell was the President of the Local Union when he filed the grievance dated April 6, 1983 and had held this position and other positions with the Local Union since certification. This grievance was filed concerning the status of Mrs. Donaldson in the Nursing Department and Mr. Bucek who taught in the Electronics Division, following receipt of a list supplied by the College to the Union pursuant to article 8.15 of the agreement, setting out the names and classifications of persons recalled by employment and to notify the Union of all appointments including sessional. That list indicates that Mr. Bucek was hired as a sessional employee to replace Mr. Higgins who had been a bargaining unit member in the Electronics Department and a full-time teaching master, but who died in the previous October. The list dated January 31, 1984 which he received, indicated both Donaldson and Bucek were hired as full-time faculty. He said that he was aware of the enrollment patterns at the College and that in the 1982 - 1983 academic year there was a steady increase in enrollment in post-secondary areas of the College and was not aware of any decrease in the electronics area. Mr. Grunwell produced notations of extra work assignments in the voluntary agreement for teaching hours in excess of the maxima required under Article 4.01 for members in the Electronics Division from March 1982 through December 1983 and a voluntary agreement with Mr. Bucek dated June 28, 1983 which was the same form used for the full-time faculty members, but while Mr. Bucek was classified as a sessional employee and outside the bargaining unit at that time.

Mr. Grunwell also received a copy of the time table for the teaching hours of Mrs. Donaldson who worked in the Nursing Division at the Woodstock Campus for the winter semester in 1983, on which it is noted that she was a "sessional for Bulsza" who had been employed for about six years but was on maternity leave until December and had applied for an extension but then resigned at that time. The student enrollment in the nursing area was reasonably

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stable. He said the Union was not notified by the College that fewer full-time positions were necessary to trigger a layoff of full-time staff under Article 8. He acknowledged however that there was concern in the College about budget restrictions and of layoffs, but while he was President there was nothing specific and those layoffs which had been announced were rescinded because the financial crisis was not as serious as had been believed, so that he was not aware of any particular crisis in 1982 - 1983. When he received the teaching schedule for Mrs. Donaldson he complained to the College that as Mrs. Bulsza had resigned from a regular full-time position and that the Union had received assurances from the College that it would not replace full-time staff with sessionals, that this was improper. Dean White agreed to respond to him after that complaint, but did not do so, but Mr. Grunwell said that the Dean had agreed with him that the College had given that understanding and that he had a legitimate concern. A sessional employee is excluded from the bargaining unit and is paid in amount similar to what a full-time staff member would be paid but without fringe benefits, so that the cost of such an employee to the College is less than a full-time staff member.

Mr. Grunwell's position was that these two positions should have been filled by full-time employees and not by sessionals who can be used to cover situation where a staff member would be away from teaching for one or more terms on a sabbatical leave, on union business, special course or in circumstances where there is a specific terms for the use of that individual.

Mr. Grunwell agreed that upon the death of Mr. Higgins there was an immediate adjustment required with the other staff members in the Electronics Division until the College could obtain a replacement and a number of voluntary agreements resulted from that situation and other such agreements resulted for replacement of employees on sick leave or from splitting the courses which is the fastest way to respond to an unanticipated problem. He agreed that the College had declared a financial exigency pursuant to the collective agreement in February 1982, but before that there had been concerns of the budget restrictions for the 1982 - 1983 academic year. Mr. Bucek was hired in January 1983 to April 30, 1983 to replace Mr. Higgins and continued to work after that date as the courses in the Electronics Division continued and subsequently became a full-time employee as of January 4, 1984 when 12 extra programs were added which required additional staff. However, he had been teaching full-time for a year by that time as a result of the vacancy through the death of Mr. Higgins. Mr. Grunwell said that it had been stated in meetings of the College Committee, that while there would be no guarantee that a full-time employee would remain as such for all time, as long as the position existed it would be filled by a full-time staff member not a sessional employee where the work exists for the courses for the students.

The College submitted through this witness a memorandum

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of understanding between the parties dated January 24, 1985, concerning the use of sessional appointments which the Board received subject to the objections of its relevancy in this action. The Board finds that while the parties have come to an agreement on this subject, which would affect the conditions of employment following the date of that agreement, it does not bear on the issue raised by the grievance before this Board upon which the Union is entitled to a decision from the Board. We therefore find that this agreement is not relevant to the issue and the grievance to be determined by this Board and is not admissible.

Mr. Martin is a Teaching Master at Sheridan College and had been President of Local 244 for 14 years. He has been a member of the Union's bargaining team since 1971, the Committee of which he was Chairman in 1981, which resulted in the collective agreement from September 1, 1981 to August 31, 1982. He had equally been involved in the immediately preceding collective agreement negotiations.

In the 1982 collective agreement an Employee/Employer Relations Committee (E.E.R.C.) was set up of which he was Co-chairman with Mr. Pesce for the College. He said that prior to 1981 there had been some difficulties in the use of sessionals and the Union's position had always been that they could not be used to undercut the bargaining unit so that full-time jobs should not be lost due to the unwarranted use of sessional employees, which problem arose at various colleges in the system. Specific circumstances had been discussed by the parties where a sessional employee could be used to replace a full-time member on sabbatical or in cases of a major illness or a Maternity leave, where the full-time employee was returning. Where a new program was started, the Employer took the position that this was cause to use a sessional employee, but the Union's position was that a full-time faculty member should be hired and if the program did not continue, that employee would be terminated pursuant to the provisions of the collective agreement. There is no question that a regular ongoing full-time position constitutes a full-time faculty position. In 1978 there had been a difficulty on this issue at Algonquin College which was brought to the attention of the negotiating committees. A letter was sent by Mr. Lynch, Manager of the Student Relations to Mr. Donely, Vice President of Administration, indicating that in the position of the Ministry of Colleges, there should be no abuse of the sessional situation, as in that letter by Mr. Lynch for the Ministry said;

"It would be very much against the intent of the contract to use either sessional or part-time employees to fill continuing full-time positions and such action would not be supportable."

This was referred to in their negotiations at that time. In the 1981 negotiations the sessional issue was put on the table by the union committee and its concern was that the use of sessionals

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might be abused by utilizing them to fill ongoing full-time positions and that appointments to sessionals should not be rolled over at the end to partial-load and then returned to sessional, so that they could not obtain a full-time status. At a meeting at the Sutton Place Hotel this subject was dealt with to the point of drafting language to meet the Union's concern on this issue and he said there was a reiteration by Mr. Pesce of the Employer's promise that it would not be their intent to abuse the sessional situation, where a continuing position existed. There was an agreement that there were instances where sessional employees could legitimately be used, but they had a difference of opinion on the status for a new program and the use of sessionals. If the circumstances did not fall within the categories where sessionals could be used, then it would be a full-time job and where a full-time employee left an ongoing position, it would be filled by a full-time appointment. As a result of those conversations at that time, with the assurance of Mr. Pesce and the obligation of the Employer, the Union was satisfied and the issue was left on the basis that it believed the issue had been concluded appropriately. The EERC was assigned to study the use of non full-time employees which included the utilization of sessionals and partial-load employees and became aware of a major problem in that area at Algonquin College in the summer of 1982. After discussions, the situation was resolved to the satisfaction of the Union.

Mr. Pesce is the Director of Human Resources at Ryerson College, which position he had held since March 1985. He had been involved in negotiations as a representative of the Ministry with regard to the 1981-1982 collective agreement. He recalled that the issue of the use of sessional employees arose during those negotiations and that the Union's concern was generally that of abuse. He said they discussed several examples, the most significant of which was rolling over a sessional appointment preventing the employee from becoming full-time. There was no systematic data at that time about the issue which they wanted to put before the EERC. At that level they discussed mostly work load and the need for further data on the usage of non full-time faculty, including the use of sessionals. The Employer's position was no different at the Committee level than during negotiations. He agreed that they had discussed the language concerning the use of sessionals and there was no disagreement that the use of sessionals was not to be abused and the language was attempted to be put together to meet the operational requirements and to spell out the legitimate uses of sessional employees. He said that he had seen the letter from Mr. Lynch many times, but said they never repudiated what was set out in the letter and it was put forward as the Employer's position because of Appendix 3.

Mr. Rundle is the Director of Student Learning Resources, before which he was the Director of Planning for 10 years, in which position he held when these issues came up at the College. He was involved in forecasting the College's financial position for a number of years and in assisting the College in providing support

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for resource allocation. The budget system begins in late spring of one year, one and one half years ahead of the next fiscal year. A financial exigency was declared in 1982 for the 1982 - 1983 academic year under the terms of the collective agreement. The anticipated layoffs at the time of that declaration exceeded the actual requirements, but eight or nine staff were laid off. As a result of that declaration, Review Committees were set up and whenever a full-time position was vacated for any reason, the Hiring Review Committee dealt with the requirements of that position, which recommendations would be made to the Planning Committee comprised of the College Vice Presidents, who would determine if and how the position would be filled. Those recommendations were submitted to the faculty and support staff unions for their input prior to a decision being made. Because of the exigency in 1982, the planning projection was for a difficult year in 1983 - 1984 because of the corrective measures needed, unless the government grants increased. The projection showed a deficit position in the 1983 - 84 academic year. The Colleges receive guidelines from the Council of Regents for inflation and grant increases which was used for planning purposes. The deficit for that year would also use up the reserve position which the Board of Governors maintains at 25% of revenue however to maintain that reserve position would have been a million dollar problem in that year.

In October 1982, the Chairman of the Electronics Department made a recommendation to fill the vacant position with a full-time staff or as an alternative, with a full-time sessional and a copy of that recommendation was sent to the Union President and to the Planning Committee. They were made aware that this department could not absorb a reduction of teaching requirements in the work load or in the class size and had avoided a layoff in the division but there was no further scope because of the budget that would not have led to the layoff of a faculty member. The alternate recommendation was for a sessional employee with the essential experience in the high technology area to replace an unexpected vacancy through the death of Mr. Higgins. That was approved by the Planning Committee which indicated in the minutes that there had been no feedback from the Union. The Hiring Review Committee on December 15, 1982, recommended to fill the position with a full-time sessional and as an alternative to a partial-load employee and these documents were sent to the Unions. When this vacancy arose in view of the College's intent to avoid layoffs of full-time staff, the full-time sessional appointment was made. He said in the Nursing Department, the lack of work was a factor in hiring a sessional employee at that time, as there was an objective to reduce the number of teachers in that area. There are supplementary grants from the Government received during an academic year, but not operating funds for general use. He said it looked to management as these two positions would disappear in a few months, it was not necessary to bring in full-time employees and it would be unfair to hold out a full-time job for someone else to leave their present position when a layoff was risked in a few

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months in that position.

Mr. Prokos has been the Chairman of the Electronics Division of the College for over 14 years. He said that when Mr. Higgins died he arranged short-term voluntary agreements to have his classes taught and requisitioned a replacement to fill by way of a full-time staff member or alternatively as a full-time sessional. He was looking for a graduate electrical engineer or an electronics technologist with five years of industrial and teaching experience, who would be up to date in the technology to proceed with this position and he expected it would be difficult to obtain such a person as it is hard to entice qualified people from industry to teach. In that fall the voluntary overtime agreements were used to avoid team teaching and splitting courses and as well to filling in for illness of other teachers. There was an increase of enrollment that year which was handled with the same resources. Mr. Bucek was appointed as a full-time sessional position for the period January 1, 1983 to April 30, 1983, covering the winter semester as set out in the letter to him from the President dated December 17, 1982. As at April 30th they had a special industrial training contract and required teachers for the summer and therefore made another sessional appointment of Mr. Bucek from May 10 to July 15 as a sessional employee after which his employment would be terminated. Mr. Grunwell requested release for union business which required replacement for about 15 hours and additional part-time work. Mr. Bucek was then given a full-time sessional position from August 15 to December 21, 1983 covering the fall term. Had there not been a request for Mr. Grunwell to leave at that time, there would not have been work available for Mr. Bucek. Subsequently an on-going program commenced in January 1984 to which Mr. Bucek was given employment as a sessional from December 21, 1983 to April 30, 1984, but as of January 1, as he had been employed a total of 12 months, he would be considered a full-time probationary employee, after which he would be covered by the collective agreement. Mr. Prokos said that when he hired Mr. Bucek he told him that it was a position for four months only and did not hold out any career opportunity at that time. It was only after two 64 week programs from Canada Manpower came to the College that two positions in the division were advertised, one of which Mr. Bucek applied and again. Mr. Prokos told him that the position may not exist after May 1984, but Mr. Bucek accepted that job. There was a slight increase of student enrollment in 1983 - 1984.

In the 1982 - 83 period he identified a number of teachers who had been employed as partial-load or part-time sessional in his division, the details of which are not necessary to record. Mr. Higgins' courses are still being taught by teachers who were shifted to cover them and the class loads, so that none of the sections that Mr. Higgins had taught did not get taught and he used the partial-load and sessionals who had particular expertise in these areas for this purpose. He said in the fall of 1982 it would have taken some time to find a suitable replacement for Mr.

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Higgins and because of the budget requirements, it was possible they would have to layoff a person employed for that position who they had just attracted from another job which would have created ill-will. Therefore he felt the College could not offer a career opportunity at that time to anyone.

Mrs. McWilliam was in 1982 - 1983 the Chairman of three nursing campuses and acting Dean. In the summer of 1982 Mrs. Bulsza was on a maternity leave and was scheduled to return to the Woodstock Campus after the extension of her maternity leave to February 28, 1983. Mrs. Donaldson was given a full-time sessional position in the Nursing Education Division for the period September 1, 1982 to February 28, 1983 to cover the extended leave of Mrs. Bulsza. On December 9, 1982 Mrs. Bulsza resigned her employment effective February 28, 1983. There was then a request to the Hiring Review Committee to fill the vacant complement position by a sessional. Because of the financial situation, she was then planning for the next academic year when she anticipated a reduction in the staffing complement in the Nursing Division, when the budget was compiled for nursing and there would be a reduction of one full-time employee in Woodstock and in St. Thomas, a total of two in the division. Mrs. Donaldson was appointed to a full-time sessional position to March 31, 1983 to cover the rest of the fiscal year. There was then an extension of her sessional appointment to July 29, 1983. The division had used extra sessionals to cover the pre-graduate experience which is a clinical experience for students in the hospitals. Mrs. Donaldson was offered a partial-load position in the Nursing Division in the Woodstock Campus for the period of September 1, 1983 through September 30, 1983 to cover absences through vacations and in a period when their staffing needs are lower. Mrs. Donaldson was offered a limited term appointment to a probationary position in the Nursing Education Division for the periods of October 1, 1983 through to June 30, 1984. She was advised that her employment would cease at the end of that period. She was to replace Ms. Smith who was on her leave of absence without pay for a year for education purposes, but for her absence, Mrs. Donaldson would not have had employment unless other vacancies arose.

It is the submission for the Union that while it did not take issue with the College's decision to hire Mrs. Donaldson as a sessional employee to cover for the maternity leave and extension of that leave of Mrs. Bulsza, that when Mrs. Bulsza resigned, it was not open for the College to erode the bargaining unit by reducing the number of full-time teaching staff in the unit when there was no evidence that the work decreased. It was submitted that the evidence indicated that there was increasing enrollment in both nursing and electronics and that there was no notification of any layoffs in either division and no evidence that any of the courses previously taught by Bulsza or Higgins were eliminated at any of the relevant times.

The Union submitted that the declaration of financial

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exigency did not permit the College to hire sessional employees on the basis of lower costs involved in assessing by the Committee or otherwise whether the bargaining unit can be eroded, otherwise all benefits under the collective agreement, including job security would be in doubt after such a declaration is made by the College. The Union relies on Section 2 of Appendix 3 where preference must be given by the College to full-time positions and the operational departments do not include budgetary requirements, because those refer to the program and there is no evidence that there was any concern of the quality of the programs and the evidence indicated that the enrollment was up with no problem on the attainment of program objectives. That section does not include the cost projections of the College. It was submitted that the government which funds the Colleges, cannot decrease the effect of this section by reducing grants and therefore the financial exigency declared by the College is not relevant and is something which the Union cannot meet in terms of the deficit projected by the College. Those determinations are within management's discretion and the control of the government, as a funding agency, but it cannot intend that the College through its own priorities can reduce the assurance of full-time positions, otherwise this section would be meaningless as it would be used to effectively curtail the full-time complement. In circumstances where there has been a full-time continuing position ended because of cost considerations and where there is no reduction in work, then the College is required to apply Appendix 3 (2).

The Union further submitted that the College was estopped from the position asserted by the Union in that during negotiations, repeated assurances were given in discussions concerning Appendix 3 (2) by the management negotiators who confirmed that hiring sessional employees to replace full-time teachers would not take place. The sporadic violations within various colleges, such as at Algonquin College, were resolved individually. While there was contention between the parties as to the use of sessionals in the start-up of a new program, that was not the factual situation concerning the replacement of Higgins and Bulsza. The letter from the Ministry which indicated the management's position was never repudiated and on the basis of the assurances given during and at the EERC, the Union was satisfied and did not seek a further language change for the collective agreement. Mr. Grunwell testified that he had received assurances from this College that it would be improper to replace regular full-time teaching masters with sessional appointments. Therefore the College cannot assert a contrary interpretation of Appendix 3 (2).

The submission for the College is that at the time when Mr. Higgins and Mrs. Bulsza were replaced by the College there was a financial exigency in effect which meant it was required to be concerned of its budget and that fewer people would be needed at the College. The Union was given notice of the adverse impact of this financial situation. There was a contemplation of a reduction

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of a staff members at the Woodstock Campus in the Nursing Department where a sessional was used until the budget was known and when that occurred there was one less nurse in that department. Mr. Higgins was replaced with a sessional Because of the budget restrictions which made staffing uncertain and it would have taken sometime to replace a full-time position in that division, so that the sessional was a stop-gap measure to give the College that time, but that position was not replaced and Mr. Bucek stayed because of unforeseeable events, including Mr. Grunwell's release for union duties. The evidence concerning estoppel showed that the parties were concerned with the use of sessionals as they considered it and both recognized their use for legitimate purposes, but there was no consensus on every fact situation. There is no difference in the evidence of the discussions at EERC end at negotiations. The College decided not to replace those position which negated any need for a future layoff and in its submission the evidence indicates that these were not on-going positions in that Donaldson replaced Smith, not Bulsza and Bucek did not replace Higgins but was used for the on-going work in the division because of other factors. It was argued that Appendix 3 (2) is not incorporated by reference into the body of the collective agreement and is not subject to Article 7.02 which is, "The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this agreement."

Alternatively to uphold the Union's position would mean that there would not be any circumstances which the College could layoff employees under Article 8, which is incorrect in that Section 2 of Appendix 3 applies only where other things are equal and does not affect the right of the College to reduce its workforce due to monetary constrains. The College argued that the positions involved in this matter were not continuing on-going at the time this decision was made by it.

Reference was made to Re: Fanshawe College and O.P.S.E.U. (unreported - Brent, May 1983); Re: Loyalist College and O.P.S.E.U. (unreported - O'Shea, March 1983); Re: Algonquin College and O.P.S.E.U. (unreported - Kates, October 1984). It was further submitted that Appendix 3 is a preference and not a right and therefore the declaration of financial exigency is relevant for the purposes of the College at the time the decision was made as to the complement. These individuals were replaced on an interim basis and their positions disappeared which was consistent with the College's consideration of redundancy. As Higgins and Bucek were not replaced, the Board cannot compel the College to increase the numbers of employees in the bargaining unit, which in the result was reduced by two which the Union seeks to restore in this action. It was the further submission of the College that there was disagreement during negotiations as to what would apply and took their chances on the interpretation of the provision which they put into the collective agreement. The assurances given there were no different than the provisions in the agreement and was never superceded according to Mr. Pesce because the agreement dealt

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with it. There is no provision existing in the collective agreement on which estoppel could arise. Reference in that regard was made to Re: Ellenzweig Bakery Limited and R.W.D.S.U., Local 461, 14 L.A.C. (3d) 336 (McLaren): Re: National Grocers and United Food and Commercial Workers Local 1000A 10 L.A.C. (3d) 300 (Little). A party cannot, through the application of estoppel, rectify the collective agreement by requiring a new provision. It was therefore argued that as this issue is not dealt with in the collective agreement, estoppel could not arise. Re: Sudbury District Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association, 15 L.A.C. (3d) 284 (Adams). The College acted in good faith in making sessional appointments in the circumstances of the financial constraints at the time the College made its decision.

Firstly the Board finds that Appendix 3 is part of the agreement between these parties and is relevant to the Board's consideration of the issue raised in the grievance. We have so concluded because all of the Appendices are included in the index to the collective agreement; that Article 1.01 refers to sessional appointments, the definition of which is included in Appendix 3 and thereby connected to the meaning of that Article. The terms of Article 4.05 by inference with sessional employees who are excluded from the academic bargaining unit and requires consideration therefore of Appendix 3 in dealing with Article 4 of the collective agreement. As part of the agreement the College is required to consider Article 7.02 in the application of provisions in the collective agreement which includes we find, Appendix 3 (2). Consideration of the above cited awards in the college system support this finding.

In the Nursing Division, there is no dispute as to the appointment of Mrs. Donaldson as a sessional employee for the period of the absence of Mrs. Bulsza for maternity leave as extended to February 28, 1983. Had she returned to work at that time, it is understood that the sessional appointment for that period would not have been criticized by the Union, as this is one of the agreed purposes for the use of the term sessional appointments. The issue in this case however arose upon the resignation of Mrs. Bulsza on December 9, 1982, at which time the Union contends there was a vacant complement position which should have been filled by the College by a full-time employee, a member of the bargaining unit. It is the evidence of Mrs. McWilliams that because of the budget constraints of which she was aware, she anticipated a reduction in her division of two full-time employees at the Woodstock and St. Thomas campuses and on that basis Mrs. Donaldson was continued with sessional appointments through to March 31, 1983, and extended to cover the lengthened pre-graduate experience and vacation relief to September 30th. She became a probationary employee as of October 1st when she received a limited term appointment. Apart from the vacation relief and pre-graduate experience time, the evidence indicates to us that the work previously performed by Mrs. Bulsza continued. The extra time

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involved for the pre-graduate experience and for relief was usually covered by sessionals and is not part of the regular teaching requirements of the full-time position. In the manner of the coverage for the work required, there appeared to be a reduction of two full-time employees, but at no time, according to the evidence, was there notice of layoff or of a reduction in the number of full-time employees under Articles 8.04 or 8.05 of the collective agreement. If a layoff was required, the provisions for that action are contained in the collective agreement and could be applied by the College, but for the filling of the vacancy which existed as at the date of Mrs. Bulsza's resignation in a full-time complement position, we find Appendix 3 (2) clearly directs the College to act by way of preference for a full-time replacement.

To prefer something, is to put it ahead of something else or to take precedence over something else, such as a prior claim. The use of the word "preference" must be given meaning in relation to the designation of sessional teaching positions which under this Appendix becomes secondary to the requirement to give preference to a full-time position, subject to those considerations specifically set out in that clause. The operational requirements referred to are defined and on the evidence before us, none of those qualifications of the preference would apply to either the Nursing or Electronics Division. It must be noted that the qualifications of the preference do not include budget restraints or any other financial consideration of the College when these positions became vacant.

It is not that the College or Mrs. McWilliam's attempted to improperly circumvent the collective agreement, as in our opinion the evidence indicates that the decision was made in good faith by the administration of the College in difficult circumstances at that time, but it is exactly those kinds of circumstances where employees' rights arising under a collective agreement become particularly significant in the same context as the significance of the financial predicament faced by the College. Therefore to determine the interests in such circumstances, it is necessary to apply the strict terms of the collective agreement. Although such application might create an aspect of unfairness in hiring new employees for a full-time position in uncertain future employment circumstances, in our view that is what the parties have put into their collective agreement and by doing so and giving a preference to full-time positions, the secondary method of filling full-time vacancies by sessional employees can be used with the qualifications of Appendix 3 (2) as noted above. None of those qualifications apply with regard to the filling of the vacancy caused by the resignation of Mrs. Bulsza in December 1982. We find at that time there was a full-time position in the bargaining unit which was on-going and required the College to give preference to the filling of such vacancy by another full-time appointment. The considerations of a future layoff of such an individual who would be hired on that basis, while being a reasonable concern of attracting someone to fill the position, is

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Division (continued)

not the controlling factor, nor is the budget restraint or the declaration of a financial exigency by the College. As a result of those concerns the College might well have reduced the number of its full-time employees or laid off full-time employees, but that must follow another form under the collective agreement as set out in Article 8 which was not followed in the present circumstances.

In the Electronics Division it becomes even clearer than in the Nursing Division, that upon the death of Mr. Higgins, Mr. Bucek was appointed to cover the work which was continuing to be required, which would otherwise have been handled by Mr. Higgins. The College covered that work through a number of sessional and partial-load appointments, including Mr. Bucek and for the same concerns as expressed in the Nursing Division because of the financial constraint, chose not to fill the position with a full-time employee who would be difficult to find with the technical requirements of the job. However that may be, the College did have a vacant full-time position upon the death of Mr. Higgins, whose work was required to be continued to meet the course requirements in a division where at least the enrollment would be static, if not increasing under the forecast. This differs in our opinion from the finding in the Loyalist College case concerning enrollment. In passing, we also note in that case that the Board specifically dealt with Appendix 3 as part of the agreement. We differed however with that award where the Board made a determination that budgetary requirements justified the College in not hiring a regular full-time teaching master, but making a sessional appointment and we note that Board did not deal with Section 2 of the Appendix in that regard.

Where there has been an extraordinary financial exigency determined, then the provisions of Article 9 must be applied in layoff of ten or more full-time regular employees. That was not applied and does not arise in this action and in any event does not determine how a full-time on-going teaching position is to be filled. It appears that while it is not the College's intent to erode the numbers of the bargaining unit employees by appointments outside of the bargaining unit for continuing full-time positions, the College at the same time maintained that its considerations in the management of its operations must first apply, so that in the budgetary restraint period, all new appointments to on-going positions become subject to that consideration through, in this case, its Hiring Review Committee. That practical objective however, is inconsistent with the terms of the collective agreement which the parties must apply and cannot take precedence over a preference which by agreement of the parties and not made subject to budgetary restrictions. The teaching load which had been required in this position continued and there was an incoming student enrollment which had to be met and which normally would have been covered by the teaching assignments to Mr. Higgins. There was also evidence of an increasing student enrollment in this division.

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Division (continued)

We find in those circumstances that the College was required to give preference, no matter of the difficulty in replacing Mr. Higgins with a qualified individual, to a full-time appointment pursuant to Appendix 3 (2) of the collective agreement. The question of cost in that procedure is not dealt with by the parties in the agreement and therefore is not relevant or determinative of this issue. As page 9 of the Algonquin College award (supra) the Board said;

"As was pointed out at the hearing we view Appendix 3 as a job security provision designed to enable sessional employees, upon the completion of 12 months service, to gain access to regular full-time status as probationary employees in accordance with paragraph 2 of Appendix 3. Its objective is to give preference to such sessional employees as regular continuing teaching positions subject to the various operational requirements of the College as described by the paragraph. The obvious design is to encourage the College, save where the operational requirements dictate to the contrary, to designate sessional employees as full-time members of the College teaching staff so that such employee need not face the continual uncertainty with respect to their employment status at the end of each college semester..."

We would go farther than the statement in that encourages the College in the designation of full-time positions as we find the College is required under Appendix 3 (2) to do so, subject to the operational requirements as set out in that section. The substance of the College case is that both regular full-time

positions

involved in the Electronics and Nursing Divisions were ended because of cost considerations of the College, but not in circumstances where there was a reduction in work or requirements for teaching services on a regular ongoing basis, such as would have been expected of the two previous full-time employees who were replaced by sessional appointments. In our opinion the collective agreement does not provide the College with that right as it must act in the application of its management's functions consistently with the other terms of the collective agreement and in this case

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Decision (continued)

it had to apply Appendix 3 within the conditions for the preference set out in Section 2 thereof. The College however did not do that and sought to defend its appointments on a basis which cannot be sustained in the application of Appendix 3.

In our view therefore, the terms of the collective agreement provide the answer to the issue raised in this grievance and it is not necessary for this Board to deal in length with the evidence and submissions of the parties on their estoppel positions. It would be the Board's position in the alternative however that the Union did establish a proper basis for the application of the principle of estoppel in that there were specific and clear representations made to the Union during negotiations of the intent of the Colleges not to use sessional or part-time employees to fill continuing full-time positions and on that basis, the Union did not proceed to negotiate with specific language to incorporate that condition in the agreement, but relied on the expression of intent and subsequently on the inclusion of Appendix 3, which sets forth the intent of the parties on this issue. The evidence seemed to indicate that there was substantial agreement as to the use of sessional appointments to replace full-time employees for periods of vacation, sickness, leaves of absence and such like, but there was an ongoing uncertainty between the parties on this application in starting up of new programs (which is not a consideration in the present case) but not in the filling of a continuing full-time complement position. The management's position was succinctly set out in the letter to Mr. Donnelly and which was never repudiated and which in our consideration of the evidence set forth the understanding on this between the parties. In 1981, Appendix 3 (2) was included in the collective agreement which does set out the parties' intent and is a specific provision of an agreement from which an estoppel can arise. In our view therefore the College would be estopped from asserting a contrary interpretation of Appendix 3 (2), than that asserted by the Union.

Having regard to all of the evidence and the submissions of the parties, the Board finds that the Union did establish that the College was in violation of the collective agreement as alleged in the appointment of Mrs. Donaldson and Mr. Bucek as sessional employees. As to the issue of remedy following the breach of the agreement as found in this case, the Board remits that issue to the parties, but failing settlement between them, the Board retains jurisdiction to determine that issue and in the application of its award.

DATED AT OAKVILLE THIS DAY OF JANUARY, 1987

"H.D. BROWN"
HOWARD D. BROWN, CHAIRMAN

"G. BEAULIEU"
G. BEAULIEU, UNION NOMINEE

"F.R. HODDLE" Concurs
F.R. HODDLE, COLLEGE NOMINEE