

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

SHERIDAN COLLEGE

(THE COLLEGE)

A N D :

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

LOCAL 244

(THE UNION)

AND IN THE MATTER OF THE GRIEVANCE OF MS. M. ELLIS - 94E133

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIRMAN

M.J. SULLIVAN, UNION NOMINEE

R. GALLIVAN, COLLEGE NOMINEE

APPEARANCES FOR THE COLLEGE:

D.K. GRAY, COUNSEL R. SPARGO, ASST. DIR. H.R.

APPEARANCES FOR THE UNION:

ODETTE SORIANO, COUNSEL

MARG ELLIS, GRIEVOR

N. SIBBICK

GRANT BRUCE

RON MARTIN

MIKE WALSH

A HEARING IN THIS MATTER WAS HELD AT OAKVILLE ON MAY 17, 1995.

## AWARD

The grievance dated April 18, 1994 was filed under the terms of the collective agreement in effect between these parties at all material times and is a claim that the dates of December 20, 21, 22, 23 and 24, 1993 and January 3, 1994 which were used by the College as Social Contract days should not be considered as unassigned development time. The Grievor stated in her grievance;

"It is my understanding that these six unpaid leave dates were to be deducted from my in-class days, thereby reducing my academic year to 37 teaching weeks (as opposed to six days being tagged on at the end of the year)."

The Grievor requests that her teaching year be reduced by six days or that she be remunerated at the overtime rate for six days.

The College is covered by a Fail-Safe Program developed under the Social Contract Act by the Ontario Council of Regents. Section 4.1 thereof requires that employees take six unpaid leave days in the period ending March 31, 1994. In addition, by Section 4.2, employees may be required to take up to twelve unpaid leave days during the periods ending March 31, 1995 and March 31, 1996. The Grievor is a Professor in the non-post secondary area at the College and was required in the 1993/94 period to take six unpaid days of absence but in the Union's submission, the Grievor did not get a commensurate reduction in her workload during her teaching period. The classes to which the Grievor would have been assigned in the week in which leave was taken were cancelled but these classes were added to the end of her teaching period so that the Grievor was required to teach an extra week at the end of her regular teaching period. That is set out in Article 11.03 as 10 months in duration extending from September 1st to the following June 30th. Article 16.01 B provides that an employee is granted a holiday period of December 25th to January 1st without loss of pay. By Article 11.01 B 1, the total workload assigned to a Professor shall not exceed 44 hours in a week up to 38 weeks "in which there are teaching contact hours in the case of teachers not in postsecondary programs". It is further stated in that Article that:

"The balance of the academic year shall be reserved for complementary functions and professional development."

The classes taught by the Grievor are continuous intake courses with no strict beginning or end and students start and complete their courses at different dates. The Grievor however, starts in the first week of September and ends 39 weeks later excluding the Christmas period. It is the time attributable to the Social Contract days of leave that the Grievor expected to be deducted from her workload to reduce her teaching period which would have ended in the third week of June 1994. The days of leave were however added to the end of that teaching period so that the Grievor's teaching period ended July 1st. After the end of classes, she was assigned non-teaching duties. In the Union's position, the Grievor's workload was not reduced in accordance with her loss of pay for the six days in the 1993/94 academic year.

The Grievor has been employed at the College in the Skills Development Division for 19 years as a Professor in the non-post secondary area teaching mostly computer-related courses which are continuous intake through the year subject to available space. Students work at their own speed and at any level in the program which is not structured. The Grievor's complaint is that the six days of unpaid leave of absence under the Social Contract Act which she took in December and January as charged to development time and tacked on to the end of her teaching period. It was her understanding that these were days out of the classroom and not assigned development time. Her duties as a Professor are described in the class definition in the collective agreement and there is no issue in this grievance that the workload has been assigned contrary to the collective agreement by the College. Her SWF covered the period September 6, 1993 to June 10, 1994 but was extended to June 17 because of the six days' leave of absence and because of vacation was further extended to June 30, 1994 which was the end of her teaching period. The non-

teaching period at the end of the teaching period in June usually involves faculty meetings to decide what will be worked on in that period and what courses to be taught and for preparation and development in the summer. This involves training on software, preparing course outlines, test materials, updating existing programs and currently was working on the new software package. She said that her teaching period taking into account the leave of absence and vacation should have ended June 30, 1994 but if her thirteen vacation days was included, her teaching period should have ended June 24th but because of the addition of the Social Contract days, it ended at the end of that month.

The Grievor said the College decided how to reach the target as required under the Act and the particular days which she took were suggested to her in October and were accordingly scheduled and classes on those days were cancelled. She agreed to take those days as indicated on the memo dated October 26, 1993 to Ms. Adams. She understood that she would thereafter only be teaching 37 weeks in that the class days were reduced by six. At a staff meeting in November, she learned that the teaching period would be extended and not reduced from the assigned teaching days. It was explained that the Social Contract days were to be treated as unassigned development days. By memo dated April 13, 1994, in response to the Grievor's memo dated April 6th, it was stated:

"It is my understanding that those days have been taken on those indicated dates. As far as directing you as to how the time should be treated, those six (6) days will be taken from part of the normal unassigned development time."

She said there was no direction as to what was to be done in that non-development time. The teaching contact days however, were added on to the end of her teaching period. Each of the professors are assigned by the Chair to duties to be performed in the summer which is a separate period from vacation time but usually extends into their vacation. In that year, she was involved in a keyboard project and redid course outlines and testing materials as indicated in Ms. Newman's memo dated June 14th. Subsequently, in July, she was requested to prepare a proposal for the Peel Region Nurses for data entry which she felt she was obliged to do during her development period but worked mostly at home and that project took most of the summer to complete.

The Grievor agreed that as an employee in Group 2 she can be assigned up to 20 hours teaching in a week to a maximum of 38 weeks in a year and in each week can be assigned 44 workload hours including teaching contact hours and with complementary functions with a minimum of five hours. In addition to the teaching weeks, there are non-teaching hours in the academic year. She is entitled to a vacation of 45 days in the year normally in July and August. During non-teaching periods, the Grievor performs a number of things including course outlines, dealing with supplies, introductory and testing materials and other projects to update the needs in the department. She had read the posted Fail-Safe Program in the fall of 1993 and was advised by Mr. Matthews, Director of Human Resources by memo dated September 15, 1993 as to the implementation of the terms of the Act, part of which indicated that the employee was

"eligible to take six days of unpaid leave prior to March 31, 1994. They should be scheduled by mutual agreement between you and your supervisor."

It was agreed that the Grievor would take the six Social Contract days on December 20, 21, 22, 23, 24, 1993 and January 3, 1994. There were faculty meetings to discuss the Program but she did not have any clear recollection but knew that no work was to be performed on the days of these leaves of absence. No one said that there would be less than 38 teaching weeks in the academic year as a result but she knew that the six days of absence had to be taken before March 31, 1994.

Shirley Adams, who is now retired but at the time of the grievance was Chair of the Burlington Campus in the Retraining Division and the Grievor's Supervisor, said that the faculty in Group 2 which included seven full-time professors who reported to her had a teaching load of 38 weeks in the continuous in-take courses. If the dates were shortened, then there would be development or vacation time interspersed. The Fail-Safe Program was posted on

September 1, 1993, meetings were held with the faculty in the Main Campus when it stressed that no work would be asked of any of the faculty on the leaves taken under the Act and no work would be made up. All of the faculty had to take unpaid leave with agreement with the individual teachers as to when it would be taken. She did not suggest to any of the faculty in her division that there would be less than 38 weeks of teaching in the year and had discussed only the 38 weeks of teaching. The Grievor chose these particular dates in conjunction with a trip to Florida so that she had a block of time which was agreed between them she would take as unpaid leave. The memo of a faculty meeting on Tuesday, November 16, 1993 indicates that the Grievor was in attendance and that the Social Contract days were discussed and at which it was indicated that those days would be "outside the 38 teaching weeks". The minutes of the meeting were posted. Noone after November 16th complained to her about the 38-week teaching period nor was that subject raised with her by the Grievor. The faculty were instructed not to do work on their days of leave of absence taken under the Act and were told that those days would be suspended and classes cancelled for that period.

Marty Humphrey, Chair of the Burlington Campus since January 1994 was not aware before April in that year of any problem with the Grievor's days of absence under the Act and said that her complaint had been that she was not paid for the six days on which she worked. The Grievor taught until June 30th and as she had taken two weeks of vacation, the period was extended. By memo dated June 1st, the faculty was advised that any development time should focus on updating Windows applications for WordPerfect 5.2 and Lotus 4 and it was expected that they would be current to update those programs. There were no complaints from the faculty about that memo.

It is the submission of the Union that pursuant to Part 7 of the Act, the Employer may require its employees to take unpaid leave of absence to a maximum of 12 days in each of 3 periods commencing June 14, 1993 to March 31, 1994, then to March 31, 1995 and 1996. There is no dispute that these are required days to be taken off work and that there is no reference as to how the unpaid leave days are to allocated. The Grievor agreed to take the six Social Contract days in the December to January period during her regular teaching period and when the classes were cancelled on her understanding that these days would be deducted from her teaching period. The College added the six days to her teaching period in June. The note from Marty Humphrey dated April 13, 1994 indicated that the Grievor's 6 days of leave:

"will be taken from part of the normal unassigned development time".

There is no direction given to the Grievor as to what duties not to perform but a number of duties were assigned to her in a non-teaching period which included a duty concerning Peel Nurses which did not refer to a duty of a professional nature. As well, as she was involved in the preparation of courses and a keyboarding program all of which took longer than the six hours provided in the non-teaching periods. It was alleged therefore, that there was no reduction in the Grievor's teaching or non-teaching period to allow for her loss of pay as a result of the Social Contract days of absence. The Grievor requests compensation in that there is no reduction in her teaching or non-teaching periods following the six days' loss of pay. Reference was made to Re Trent University and Canadian Union of Educational Workers, Local 8 (Starkman, May 16, 1994); Re Northern College of Applied Arts and Technology and Ontario Public Employees' Union, Local 653, (A Workload Resolution award of James Morrison dated September 28, 1994). In that case, the arbitrator stated:

"In summary, the College does not have the unilateral right under either the Collective Agreement or the Social Contract legislation to revise ratios and attribution formulas which are the product of the collective bargaining process. The College is entitled to meet its expenditure reduction targets by requiring its employees to take six days unpaid leave of absence. But those leaves must be genuine. That is to say, they must result in a measurable reduction in work performed. While some of the complainants have been assigned unpaid leave days during teaching periods, there has been no reduction in teaching contact hours. I find, therefore, that the College has violated Article 11.01 A of the Collective Agreement."

Arbitrator Starkman who dealt with an issue of whether the unpaid leave days identified in the Program under the Act are unpaid leave days within its meaning and stated:

"In the case however of teachers, administrators, support staff and other salaried personnel, it may not be clear that the taking of a leave day on a scheduled work day will necessarily result in a reduction in the amount of work to be performed, as the necessary work may just come to be compressed into the remaining available time...

If an employer were permitted to schedule unpaid leave days on days that an employee was not otherwise scheduled to work, then an employer could schedule these days on weekends, statutory holidays, regularly scheduled vacations or plant shutdowns with the result that employees would receive less money on an annual basis, but would still be required to do the same amount of work. In my opinion, by giving an employer the power to force employees to take unpaid leaves of absence, it was not the intention of the legislature to allow employers to continue business as usual. Rather, it was contemplated that there would be some reduction in the amount of work being performed by employees commensurate with the number of unpaid leave days such employees were required to take. Thus while employees would receive less money, less work would be performed. This was the trade-off for allowing employers to meet expenditure reduction targets by imposing unpaid leave days on employees many of whom may have previously negotiated rates of pay set out in the collective bargaining agreements."

It is the submission for the College that the Grievor was relieved from teaching on six regular work days on which she was given unpaid leave in accordance with the Act which included the normal scheduled work days and did not attend or do any work on those days. The parties treat non-teaching and teaching days differently under the collective agreement with regard to the ability of the College to assign work in non-teaching time. It was held at arbitration that the College did have the right to impose six days unpaid leave of absence in the first fiscal period and indeed the Grievor does not challenge those dates as being in accordance with the Act and were scheduled with mutual consent in accordance with Section 5.1 of the Program. Having done so, in its position, the enquiry as to a reduction of workload is not relevant under the Fail-Safe Program or by statute. Once the leave period was scheduled in accordance with that Section of the Program, the issue has ended. Nonetheless, it was submitted that in November, the Grievor knew that the College would require 38 weeks of teaching as a result of the staff meeting held at that time. By Article 11.01 F, complementary functions "appropriate to the professional role of the teacher may be assigned to a teach by the College" which are attributed on a hour for hour basis with a minimum of five hours or the 44 hour maximum weekly total. The teacher is allowed "at least ten working days of professional development in each academic year" which can be used to upgrade the teacher's skills and that time is not affected by the Act. The Grievor was not required to do work on the six days of her leave which she used for personal purposes but had to teach for 38 weeks. Reference was made to Re Ontario Public Sector Employees Union and Niagara College (Burkett, March 22, 1995); Re Cambrian College and Ontario Public Service Employees (Burkett, January 31, 1995); Re Algonquin College and O.P.S.E.U., Local 415 (K.G. O'Neil, June 13, 1994)

In the Niagara College award, the Board dealt with a claim that professors were required to take unpaid leaves of absence on days which they would not otherwise be teaching contrary to the Act and it was stated:

"Accordingly it is only if it is assumed that the equivalent of six days of non direct teaching related work have been or will be eliminated that a finding can be made that the imposition of six days of unpaid leave without a reduction in teaching contact hours is sanctioned. Having regard to both the undertaking of the College and to the self assigning nature of the working relationship, we are prepared to make the assumption in this case and with it the tentative finding that there has been no breach of the collective agreement..."

In the present case, the unpaid leave days were scheduled on what otherwise would have been the Grievor's regular schedule work days and which were scheduled by mutual consent pursuant to Section 5.1 of the Fail-Safe Program. The definition of unpaid leave for the purposes of the Act is "the whole of an employee's regular work day". The College did schedule unpaid leave of absence for the Grievor for six days on which she would normally have been required to teach and did not. That was the reduction required by the Act and applied by the College in accordance with the Fail-Safe Program. In our view, that does not affect the commitment under the collective agreement to allow for 38 teaching weeks. The Trent award dealt with part-time teachers who are paid only for the days of teaching but the College had designated other days than they would normally teach as unpaid leaves which was found not to be in conformity with the Act.

It is clear that the concept was to reduce payroll costs in the fiscal periods referred to in the Act during which the College was required to effect reductions. In the period ending March 31, 1994, during which the Grievor's leaves of absences were scheduled, there was a reduction by reason of an unpaid leave as designed for the purposes of the Act relating to the Grievor's regular working days which was consistent with the Program developed by the Council of Regents under the Act requiring six unpaid leave days at each College in the first year which applied to the Grievor. Once that had been achieved, and the unpaid leaves scheduled in accordance with Section 5.1, the purpose for which the unpaid leaves were assigned was met and no other claim arises against the College as a result.

The simple proposition is that the Grievor was required to teach six less days than regularly scheduled in the fiscal period ending December 31, 1994. That was the reduction of her workload commensurate with the reduction in her pay referred to in the awards referred to above. The Grievor was relieved of her duty to teach on each of the days of her leave assigned in accordance with the Act and covered what otherwise would have been regularly scheduled work days. The Grievor sought to extend that claim into the following fiscal year set out in the Act in order to assert a reduction of her teaching workload in the academic year based on the terms of the collective agreement but which continued into the next fiscal year under the Act. The effect of the teaching year had thereby been affected by the statutory terms and the Fail-Safe Program resulting therefrom. The six days of unpaid leaves of absence which were assigned by the Colleges pursuant to the Act in the first fiscal period ending March 31, 1994 was upheld at arbitration.

Having applied that provision in the Fail-Safe Program to the Grievor whose leave of absence was scheduled in place of her regular teaching days, we find that the College met its statutory requirements and accordingly was not in violation of either the collective agreement or the Act in completing this arrangement with the Grievor who signed the memo dated October 22, 1993 in that regard. The grievance cannot be allowed to extend the Grievor's claim to a reduction of workload as a result of the leave of absence taken in the fiscal period ending March 31, 1994 to the next fiscal period provided under the Act as the Grievor's workload was reduced in accordance with the Act in the fiscal period in which it applied. In that period, the leave of absence taken by the Grievor was scheduled on her regular work days on which she did not work. That constitutes compliance by the College with the Act.

The Grievor was aware in November that the College would require teaching for 38 weeks which is clear from the minutes of the staff meeting at which she was in attendance. The Grievor had signed the memo concerning the leave arrangement prior to that meeting. Those minutes clearly set out the College position that the Social Contract days are "outside the 38 teaching weeks" which was maintained with regard to the Grievor's claim. Complementary functions can be assigned to upgrade skills and course preparation.

Having the considered the evidence and the submissions of the parties and for the foregoing reasons, the Board finds that the Union did not establish a violation of the collective agreement or of the Social Contract Act by the College as alleged in the grievance. What the Grievor could expect as a result of the application of the Social Contract Act, was granted by the College. The requirements of the collective agreement with regard to the Grievor's teaching period was not affected in the manner alleged by the Grievor as a result of the Act. The Grievor agreed by which she was to take six unpaid leaves of absence days which were scheduled on consent in accordance with

Section 5.1 of the FailSafe Program prior to March 31, 1994. We find that the College was in compliance with its requirements under the collective agreement and the Act in the circumstances of the grievance.

Accordingly, the grievance must be dismissed and we so award.

DATED AT OAKVILLE THIS 8TH DAY OF JANUARY, 1996.

HOWARD . BROWN, CHAIRMAN

MICHAEL J. SULLIVAN, UNION NOMINEE

R. GALLIVAN, COLLEGE NOMINEE