

16

CA87025

IN THE MATTER OF AN ARBITRATION

/87

BETWEEN

SHERIDAN COLLEGE OF APPLIED
ARTS AND TECHNOLOGY
(The Employer)

(A)

AND

ONTARIO PUBLIC SERVICE
EMPLOYEES UNION, LOCAL 244
(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF RICHARD GERSON

BOARD OF ARBITRATION

H.D. BROWN, CHAIRMAN
R. NABI, UNION MONINEE
G.I. CAMPBELL, EMPLOYER NOMINEE

APPEARANCES FOR
THE EMPLOYER

D.K. GRAY, COUNSEL
P.M. MATTHEWS, DIR. H.R.
D. COLE, DEAN

APPEARANCES FOR
THE UNION

I. ROLAND, COUNSEL
R. MARTIN
R. GERSON, GRIEVOR

A HEARING IN THIS MATTER WAS HELD AT OAKVILLE
ON APRIL 24, 1987

AWARD

The grievance dated May 12, 1986, is a claim that the grievor, a teaching master at the College, was released without just cause. At the time of his discharge, the grievor was a probationary faculty member at the College. A preliminary objection was raised by the College, as to the Board's jurisdiction to determine this case, which was the issue dealt with by the parties at this hearing. The Board reserved its decision on the preliminary objection to which this award is restricted.

It is agreed by the parties that the grievor did not complete his probationary period at the time of his dismissal. The right of a probationary employee to grieve a discharge, under the provisions of the collective agreement applicable to community colleges and the union throughout the Province, has been the subject of considerable litigation and a number of arbitration awards. By Article 7.01, it is recognized that it is the exclusive function of the Employer, to among other things, discharge employees "subject to the right to lodge a grievance in the manner and to the extent provided in this agreement." By Article 8.01 (a) "a full-time employee will be on probation until the completion of the probationary period which shall be two years continuous employment."

Article 8.02 (a) is the key clause to the issue under the agreement and is as follow;

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.

Under that clause, the discharge shall not be subject to the grievance procedure. Therefore it has been held at arbitration that there is not a substantive right to a probationary employee to grieve his termination of employment and it is only an employee who has completed the probationary period who may grieve, which is set out in Article 11.06;

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.

Article 11.12 (c) defines "grievance" as "a complaint in writing arising from the interpretation, application, administration or alleged contravention of this agreement." By Article 11.04 (d), the Arbitration

Board is not authorized to amend or alter any of the terms of the agreement. Those are the contractual underpinnings of the objection to this form of grievance.

It is the Employer's position that unless the right to grieve such discharge is found in the terms of the collective agreement, no such right exists and the contrary, regardless of an allegation of bad faith, cannot be supported. A further allegation such as bad faith, would expand the grievance which cannot be permitted, although it would make no difference as under the applicable jurisprudence in this area. It was argued that there being no substantive right to grieve under the agreement, the grievance cannot be dealt with by the Board, where the grievance on its face does not allege bad faith, nor did the Employer give consent to the expansion of the cause of action. The Employer argued that the Union was proceeding with an indirect complaint concerning its administration of Article 8.01 (c) which provides for progress reports at 4 month intervals during the probation period, which is not an issue raised in the grievance and cannot now be raised by the employee who does not have the right to grieve. There is a lengthy list of cases referred to the Board by the Employer in support of its position, that the grievance is not arbitrable as applied to a probationary

employee, nor on the basis that the dismissal was motivated or acted upon by the Employer in bad faith. As there is no substantive right to grieve, the Union cannot in its submission, either expand the grievance to add an issue, or in any event without clear language in the collective agreement, to allege a breach of an implied duty of the Employer to proceed fairly and without bad faith in the dismissal of a probationary employee. Re: the Queen in Right of New Brunswick and Leeming et al, 118 D.L.R. (3d) 202, Re: Ontario Hydro and Ontario Hydro Employee Union, Local 1000, 41 O.R. (2d) 669; Re: The Municipality of Metropolitan Toronto and C.U.P.E., Local 43, (Division Court S.C.O. July 1981); Re: Algonquin College and C.S.A.O. (Rayner - March, 1976); Re: C.S.A.O. and Ontario Council of Regents (Weatherill - July, 1976) and the decision of S.C.O., March 7, 1977; Re: George Brown College and C.S.A.O. (Rayner - March, 1976); Re: Durham College and O.P.S.E.U. (Weatherill - December 1982); Re: Sheridan College and O.P.S.E.U. (O'Shea - January, 1982); Re: Georgian College and O.P.S.E.U., 10 L.A.C. (3) 359 (Brown); Re: Algonquin College and O.P.S.E.U. (Kates - October, 1984); Re: Seneca College and O.P.S.E.U. (Samuels - September, 1985); Re: Sault Ste. Marie College and O.P.S.E.U. (Palmer - October, 1985); Re: Sheridan College and O.P.S.E.U. (Brunner - May, 1985); Re: Algonquin College and O.P.S.E.U. (Brown -

November, 1985);

Re: Algonquin College and O.P.S.E.U. (Brent - January, 1986); Re: Cambrian College and O.P.S.E.U. (Brent - April, 1986); Re: Mowhawk College and O.P.S.E.U. (Samuels - March, 1986); Re: Northern College and O.P.S.E.U. (Samuels - October 10, 1986); Re: Seneca College and O.P.S.E.U. (Swan - September, 1986); Re: Humber College and O.P.S.E.U. (Brown - February, 1987); Re: I.C.W.U. and Dupont of Canada, 21 L.A.C. 376 (Brown); Re: Town of Kapuskasing, 14 L.A.C. 60 (Reville); Re: Atlas Steels and Canadian Steel Workers Union, 18 L.A.C. (2d) 363 (Weatherill).

It was the allegation of the Union that the College was in breach of the collective agreement, in that the release of the grievor resulted from bad faith actions of the representatives of the Employers. The issues therefore arising from the grievance are two-fold, whether the grievance encompasses an allegation of bad faith, or should the Board permit the amendment of the grievance to that effect. The Union does not argue in this case that probationary employees have the right to grieve their dismissal for cause, or on a reasonable or fair basis, as the previous cases referred to have dealt completely with that issue and consistently upheld that probationary employees were not

entitled to have their release from employment adjudicated. The issue in this case is different in its submission, in that there is a challenge to the fundamental reasons for the release which was brought about by bad faith action, which heading can be distinguished from others. It referred in that regard to The Municipality of Metropolitan Toronto set out in the Seneca College case (Swan) at page 19.

In the Algonquin College award (Brent), the grievance alleged unfair dismissal and the college raised an objection concerning the jurisdiction to hear a grievance of a probationary employee, including the question, "if there is no substantive right incorporating just cause, then does the arbitrator have jurisdiction to consider an allegation that the dismissal was in bad faith." The College in that case as here, took the position that there was no reference to bad faith allegation in the grievance and that it had not been characterized that way. The Board found that it was possible within the allegation of "unfair dismissal" to read the grievance "as alleging something other than just cause. As a probationary employee, the grievor had no right to grieve his discharge under Article 18.7.2, however the collective agreement does not say he has no right to grieve under any other provisions if the College acted contrary to the

anti-discrimination provisions in Article 2, or if the College acted in bad faith, as defined by the Divisional Court." At page 17 of that award the Board said;

"It is also reasonable and consistent with both the general purpose of collective bargaining and good labour relations to expect that the College will not act so as to treat individual probationary employees in an unlawful manner, or to obstruct their progress, so as to make it impossible for a probationary employee to be evaluated on his performance or other valid work-related criteria. Indeed if the College acted in such a manner and I were to decline jurisdiction, then the probationary would usually have no recourse against the College, even where he could show that the College had acted in bad faith. Such a result would not be advantageous to good labour relations. For that reason I cannot accept the argument that the decision of the Divisional Court was intended to be specific to the collective agreement that was before it rather than to be a general statement of the limitation on management's right to discharge probationary employees..."

That Board followed the Metro Toronto case and found that there was an obligation on the College not to act in bad faith in the dismissal of a probationary employee and stated at page 18, "I consider that the breach of

such an obligation represents a difference between the parties which must be settled by arbitration pursuant to Section 46 (1) of the College's Collective Bargaining Act", and found that the Board had jurisdiction to consider the allegation of bad faith.

It was argued that where there was an alleged intention to do something improper in the process of dismissal of an employee, then there is a distinction in the collective agreement from the general rule as to the exclusion of grievances of probationary employees, but the onus is on the grievor to prove that allegation. It was submitted that it would be overly technical to deny the grievor the opportunity to put his case before the Board, based on a release which has been challenged on the basis of bad faith actions and where there is no evidence of prejudice by the College in the discharge.

Secondly, the Union's position was that the allegation of bad faith does not make the grievance different or totally opposed in issue, but rather narrows the issue of the challenge to the grievor's release and is included in the grievance filed. There is an obligation in Article 8.01 (c) for the College to proceed in good faith to assess the progress of the probationary employee in the review procedure, to determine whether that employee's employment would

continue past the probationary period. If that is administered in the manner of a sham, the intent of the parties in that article has not been carried out. That is bad faith in the administration of the collective agreement which can be challenged through the grievance procedure by an probationary employee who has been released through alleged dishonest acts. Reference was made to the Seneca College award at page 22 where the Board, after reviewing the Municipality of Metropolitan Toronto, Consolidated Bathurst and Council of Printing Industries cases stated,

"it is the function and obligation of Boards of Arbitration to inquire where the issue is raised where a particular set of facts establishing bad faith, or the absence of good faith, constitutes a breach of a particular clause in the collective agreement. As it happens, it is not here that the management right's clause that is asserted to connote a requirement not to act in bad faith, but a provision setting out affirmative obligations upon the Employer in respect of its conduct in relation to probationary employees' clause 8.01 (c). While matters of this nature ought not to be decided in the abstract, in the absence of the facts we think it is a reasonable interpretation of this provision that conduct in bad faith intended to subvert the protections given to probationary employees by this clause, or to avoid the obvious

obligations of the Employer under this clause, could be a breach of the clause. Since the grievor has alleged in her grievance, bad faith in respect of her release on probation, and her counsel has identified in the course of argument that the bad faith was in relation to the Employer's obligations under Article 8.01 (c), we think that the grievor is entitled to offer her proof of this allegation so that we can assess, in light of all the evidence and in light of the clear words of that clause, whether or not there has been a breach of that clause...As a matter of contractual interpretation therefore, we have found that the grievor's is entitled to pursue her grievance to the extent that it alleges bad faith in the administration of her probationary employment and to the extent that it alleges discrimination."

That this grievance does not include an allegation of bad faith, the issue is put in the context of reasonableness and just cause and should be related to Article 8.01 (c), which is a substantive right to the probationary employee to have an honest evaluation. In the Union's position, there is at least a limited right to proceed with the allegation of bad faith by the College in the dismissal of the grievor, as well, with the obligation under the Act for the Employer to bargain and administer the agreement in good faith. The remedy requested by the Union in this case is a proper

assessment to reinstate the grievor as a probationary employee, or in the discretion of the Board, as a full-time teaching master, with the appropriate monetary compensation.

It is now well established through the majority of the cases referred to above, that a probationary employee under this collective agreement does not have a right to lodge a grievance concerning his release during the probationary period, with reference to Articles 7.01 (b), 8.01 (a), 8.02 (a) and 11.06. It is not necessary for this Board to repeat the conclusions of other Boards which dealt with this issue as indeed, that is not the thrust of the Union's submission to this Board on this grievance. In essence what the Union has argued in support of the arbitrability of this grievance, is that a release of employment obtained through bad faith applications by the Employer, of substantive rights in the collective agreement, can be dealt with as a fundamental dispute concerning the very act of dismissal. Secondly, that the grievance is broad enough to cover that form of allegation and therefore the Board should hear the merits of the grievance.

A probationary employee does have the right to the information required from the Employer under Article 8.01 (c);

(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

As we understand the argument, there is an allegation of difficiency on the basis of dishonesty in that information system, as it was applied to the grievor by the Employer, which then affected or caused the grievor's release from employment. Therefore the Union ought to be allowed to put in its evidence in support of its allegation that there was bad faith in the Employer's dealings with the grievor's substantive right, which is a claim within the statement of the grievance, that he was released with "without just or sufficient cause." In any event, the Board in the Union's submission should in the alternative, allow an amendment to the grievance to permit a hearing on that issue.

The end result, assuming that the Union's allegation was proven and we accept that the onus would lie with the Union to establish that claim and would be required to lead evidence first in that regard in these proceedings, would be a finding that a substantive clause applicable to the probationary employee was violated, with appropriate directions for remedy to properly apply that term of the agreement. That conclusion might affect the Employer's decision to terminate the grievor's employment, when forced with gathering and administering proper information under Article 8.01 (c), but if the discharge was not amended, the grievor would not have any further right to grieve his release from employment, for the reasons stated above and referred to the Algonquin College award (Brown).

The Union seeks to litigate the grievor's release on the basis of the allegation that is was brought about by bad faith action of the Employer. Reliance is placed on the Municipality of Metropolitan Toronto case referred to in the Seneca College award. That the statement of the Court, relied on by that award was obiter, as argued by the Employer in this

case, means that the statement of the Court, not being part of the ratio of the case, does not have precedential value, but was not in fact repudiated in the context of the City of Toronto case. However, as an opinion of a Court, that the statement can be persuasive in subsequent matters which deal with that particular issue. In that regard we concur with the findings of arbitrators' Brent and Swan, that if the Employer's motivation in the release of a probationary employee was made in bad faith or by unlawful considerations, which may have had a direct effect on the ability of that employee to complete the probationary period under the terms of the collective agreement, that is an issue concerning a probationary employee which is arbitrable. It is separate and distinct heading of complaint from that of unfairness or unreasonableness, as it relates to a dishonest application of a term of a contract affecting a right given to the complainant in that agreement. As indicated in the Cambrian award, if there was no intention on the part of the Employer to give the employee a chance to complete the probationary period and that the application of the information requirements of Article 8.01 (c) was a sham, the Employer's actions can be challenged by such employee through the grievance procedure to arbitration as a separate issue. Consequently, we find that an allegation of bad faith or unlawful conduct of the Employer, in its dealing with a

probationary employee during the probationary employment which led to his release of employment, concerning the application of Article 8.01 (c), is an arbitrable issue. In that regard, we have specific reference to the definition of grievance and reference to the "complaint" set out in Articles 11.02 and 11.03. At Step 1, the employee "shall present a signed grievance in writing to the employee's immediate supervisor, setting forth the nature of the grievance, the surrounding circumstances and the remedy sought." These provisions setting out the procedure for grievance actions, must be followed and impact on the Union's alternative argument concerning the amendment of the grievance.

In order in this case for the Union to be allowed to proceed with that arbitrable issue, it must be found by the Board that there was such an allegation by the grievor, or that he should be allowed to amend his grievance to include that issue, so as to have it determined by this Board. The Employer has objected to the expansion of the grievance. In both the Cambrian College and Seneca College awards referred to above, there was an allegation of bad faith by the grievors in the grievances which is made particularly clear by Arbitrator Swan in the paragraph of that award cited above and in the Cambrian College, the parties had agreed to proceed with the bad faith argument. Here the

grievance statement is, "release without just or sufficient cause" with a claim for reinstatement with compensation and no reference in the agreement is made to any allegation of bad faith or unlawful conduct by the Employer in that release. We must conclude, having considered the seriousness of the allegation itself and of the consequence should it be proven by the Union, that it is a separate and distinct issue from the release of a probationary employee, which is not referable to the grievance procedure under the agreement and which is not part of the general terms of release for lack of just or sufficient cause.

To permit the allegation to be heard under that claim as set out in this grievance, would in our opinion, expand the grievance by requiring the Board to hear and decide an issue which has not been made an allegation by the employee when the grievance was filed. Whether there were any meetings of the parties following the grievance, because of the objections to the arbitrability of the grievance under the collective agreement, there is in our view, an obvious prejudice to the Employer in preparing a defence to the action when that action has not been precisely or completely given in the grievance as defined by Article 11.12 in this agreement and in reference as above to Articles 11.01 11.02 and 11.03.

The concept of the application of bad faith with regard to the probationary sections of this agreement and particularly Article 8.01 (c), is different than the issue dealt with in Re: City of Toronto and Civic Employees Union, Local 43 in the decision of the S.C.O., June 12, 1986 referred to the Board. In our view, in the context of these provisions, a bad faith issue could arise, as the reason for probationary employment is to provide a period of assessment by the Employer to determine whether that employee should become full-time and if that assessment is based on improperly obtained information, or other dishonest activities which could have a substantive effect on the employee's entitlement and requirement to establish his suitability for the job, the terms are broad enough to bring into consideration that form of allegation. In our opinion, on that conclusion, it is clearly a separate issue arising from a separate allegation of wrong doing, as opposed to insufficient cause for the release and therefore must be included in the claim of the grievance to be given effect by a Board of Arbitration.

In the Algonquin College award (Brown), there was not an allegation of improper or bad faith actions of the Employer in the release of the probationary employee. The Board in that case however did indicate that,

"whatever occurred in the application of Article 8.01 (c), cannot condition the right of the College to apply its general right to discharge employees under Article 7.01 with regard to probationary employees. During the employment of a probationary employee, a difference could arise between the parties as to the application of Article 8.01 (c) which could proceed to arbitration, but that could not affect the right of the College to dismiss, under Article 7.01, which for a probationary employee, is not under the just cause test and shall not be the subject of grievance. There cannot be a difference between the parties on the release of a probationary employee in the terms of this agreement, under which this Board must find its jurisdiction in order to act on the grievance."

The same conclusion may be applicable in the present circumstance, although we have not heard any evidence on the issue raised, but that case and others in that context, do not deal with the specific

allegation now brought before this Board by the Union. The complaint in writing, within the definition of the grievance in this collective agreement, is as stated on the grievance form, which binds the parties and this Board as to the issue to be determined.

It is obvious from the above comments that the stated issue on the grievance is not arbitrable. The Board, although invited to do so by the Union, is not authorized under the agreement to alter or amend the grievance, or the collective agreement to provide the expansion or amendment of a grievance to permit the litigation of another separate issue arising at the time of the hearing, without consent of the other party to the agreement. Apart from any other consideration, there are time limit provisions in the collective agreement which are mandatory and therefore being a separate issue which should have been, if at all, alleged separately and dealt with by the parties prior to arbitration as a separate issue, would be out of time under Article 11, even accepting the conclusion that such an issue could be raised by a probationary employee during his probationary period. The bad faith claim was not brought by the grievance and was not an amendment agreed by the parties and there is no basis for this Board under the agreement to take jurisdiction, so as to deal with that issue. It is our conclusion that the

allegation of bad faith would convert this grievance into a different form of grievance which would require an expansion or an amendment to the grievance which is outside of the Board's authority. That conclusion is consistent with the Atlas Steel and Orenda Engines cases (supra). If the employee alleges that he has been prevented from completing his probationary period because of unlawful or other forms of improper conduct, that is a singular issue and different than a claim for unjust release as a probationary employee, which claim must be made, if at all, as part of the grievance which can be dealt with by the parties through the grievance procedure prior to arbitration. The avoidance of that procedure and the lack of timeliness of the claim, is contrary to provisions of the collective agreement and indicates the necessity for such a claim to be made in order for a Board of Arbitration to have jurisdiction to deal with such serious allegations.

For these reasons, the Board finds that in the circumstances of this case, the grievance cannot be amended or expanded to allow the inclusion of the claim of bad faith claim submitted by the Union and therefore lacks jurisdiction in that regard. Acknowledged in this

case is that a probationary employee cannot grieve the release from employment during the probationary period under the agreement and therefore it follows that this grievance is not arbitrable. Therefore it is the Board's award that the grievance must be dismissed.

DATED AT OAKVILLE THIS 8th DAY OF SEPTEMBER 1987.

H. D. Brown
H. D. BROWN, CHAIRMAN

R. Nabi
R. NABI, UNION NOMINEE

G. I. Campbell
G. I. CAMPBELL, EMPLOYER NOMINEE

In the matter of an arbitration

BETWEEN:

ONTARIO COUNCIL OF REGENTS FOR COLLEGES
OF APPLIED ARTS AND TECHNOLOGY
AND
SHERIDAN COLLEGE

(The Employer)

AND

ONTARIO PUBLIC SERVICE EMPLOYEES UNION,
LOCAL 244

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF RICHARD GERSON

DISSENT OF RICHARD A. NABI

It is with the greatest respect that I dissent from the majority's view in this case. My colleagues are very experienced in labour relations matters and quite learned in the law. One cannot help but have respect for their views. However, it is my considered opinion that they surely expect too much with this award, from those who have not spent their entire lives practising the art they have so carefully mastered.

The majority decision turns on the fact that the grievor failed to distinguish for the employer, at the time he first wrote out and filed his grievance, that he was not alleging that he had been discharged without just cause, but that he was alleging that the employer was failing to allow him to complete his probationary period through an act of bad faith.

It seems incredible to me that an ordinary man should be expected to complete his grievance with such precision.

A prisoner in the dock, even one accused of the most minor of crimes is given a simple choice. Plead "guilty" or "not guilty". The trial judge or clerk of the court goes so far as to provide the prisoner with the exact words from which to choose. No accused ever has to face the Court without having a journeyman lawyer at his side and so, when the time arrives for a choice to be made between those immortal three words, the prisoner is additionally entitled to receive the coaching of his counsel. Once the words "not guilty" have been uttered from the accused's mouth the judicial process takes over and the true combatants are released from their restraints. These gladiators of the Courts know that words are their weapons and they spend many years in study and apprenticeship to hone their skills in wielding them.

An accused does not have to add adjectives to his plea. He is not required to explain to the judge and jurors the reason for his innocence. His lawyer will do all that and more. For the more difficult pleas such as *autrefois acquit* and *autrefois convict*, his lawyer will even say the words for him. It is my position that a parallel can be drawn between criminal pleas and grievances drawn up to contest a discharge.

The courts don't expect a layman to know precise, legal terminology and thusly allow proceedings to get underway with simple words. The most complicated and lengthy criminal trials in the world all started with the prisoner's expression of innocence regardless of how emotionally, quietly or angrily the words leave the prisoner's lips. The same should be true at an arbitration hearing. Arbitration boards are administrative tribunals created as an extension of the courts because of their expertise in a specialized area. It is my view that they are under the same obligation as the courts to safeguard fundamental rights of the parties and allow proceedings to commence with simple words.

Labour arbitration hearings aren't criminal trials, though. They are civil matters. Grievors are really plaintiffs. They are required to set out in their claim a precise statement of the allegations and material facts. I

hear these arguments in my mind and they do not go unnoticed. I cannot establish a firm relationship, however. Litigants in a civil action go to their lawyers to have a statement of claim drawn up. In many cases the law permits them years in order to do so. The precision required by my colleagues in the framing of a grievance would surely require the same thing. This would seem though, to unduly complicate and administratively overburden a system that was designed for simplicity and speed. It is in my opinion, simply too much to ask that a grievor be expected to retain a solicitor in order to have a grievance prepared for his or her signature.

Why must the plea or claim be so exact for a grievor? Why is the grievor faced with such an onerous responsibility when his job and his livelihood are at stake? If the employer is caught unprepared for an unexpected argument at arbitration why isn't the just and equitable remedy an adjournment, at the grievor's expense if necessary? Indeed, the grievor's inability to frame the issue correctly was not a bar to arbitration of the case in *Canadian Westinghouse Co. Ltd. (1964)*, 14 L.A.C. 279 (*Reville*). Direction that particulars be provided has been a cure to many vaguely worded grievances. See generally, *Canadian General Electric Co. Ltd. (1950)*, 2 L.A.C. 573 (*Laskin*) and cases referred to therein.

I We know nothing of the facts in this case except that the

grievor has been discharged. We know nothing about the grievor or how adept he might be at styling a grievance. We know nothing of the circumstances that lead to his termination of employment. We know only that the grievor, joined by his union, allege that this is a *sal fides* discharge. I join with the majority in finding that we are entitled to inquire about whether there has been in fact, an act of bad faith committed on the part of the employer, but I cannot agree that such an inquiry would broaden the scope of the grievance and infringe on the prohibited grounds of Article 11.04 (d), which prevents us from altering, modifying or amending the provisions of the collective agreement. To say on the grievance form what the majority would require the grievor to say, and what was actually said seem to me, to be the same thing. The grievor, in an honest and straightforward manner said he was released "without just and sufficient cause". The majority wanted the grievor to say "I was not allowed to complete my probationary period because of an act of bad faith on the part of the employer". Frankly, I fail to see the difference.

If an employee who had completed the probationary period was discharged by virtue of his alleged theft of company property, I maintain his grievance would be arbitrable if he merely scrawled "discharged without cause" on a grievance form. No further formalities would be required even though

the issue was theft rather than whether the administrative niceties of discipline had been meticulously followed. The grievor would not be put to the burden of placing on his grievance form his assertion that he did not commit an act of theft and his case would not go unheard simply because the employer came unprepared to prove he actually committed the theft as opposed to proving that discharge was an appropriate remedy for an act of theft. It seems trite to say that in the latter case, the employer would be allowed an adjournment so they could more adequately prepare their evidence and buttress their argument. So, why is this case any different?

Here we have a situation where the end result is that the grievor is discharged. Because he is a probationary employee, the employer does not need to prove that the discharge was for cause or even that there was any reason for discharge at all. However, the employer must, by operation of the principles of law, come to the hearing prepared to prove that they operated at all times in a proper and legal manner. The allegation made by the grievor is that they did not. In the case of the employee who is accused of theft, there is no expansion of the grievance by allowing the union insist that the employer prove that the employee actually stole. In fact, it would be inconceivable that an employer would come to a hearing unprepared to do so. I am somewhat confused therefore, at the suggestion that in this case there would be

an expansion of the grievance by allowing the grievor to assert that there had been bad faith exercised by the employer.

Employees who have been fired basically have two mutually exclusive defences. On the one hand they can admit that every act of wrongdoing of which they are accused is true. In that case they hope to persuade the arbitrators that discharge is not the appropriate remedy. On the other hand, the grievor can deny the truth of the accusations against him. In that case, he hopes to show that the employer had no proper and reasonable grounds upon which to base the discharge. No arbitration board is going to sit back and allow the employer to put in a case they simply assert is true. Every employer must prove what they say is true, on the *balance of probabilities*. The result is that no employer can simply come forward and allege the employee stole and then without further proof, argue that discharge is the only appropriate remedy. So, what is the difference in this case? The employer has come forward and said we have released the employee during his probationary period. You (members of the arbitration board) must believe that we acted in good faith at all times. You must not require us to prove that we did so.

That line of reasoning would certainly not prevail in a

theft case and I do not believe that it should prevail here either. The arbitral jurisprudence clearly allows us to probe behind a release when there is an allegation of bad faith and, in my opinion it is a fundamental mistake not to do so. Firstly because I am convinced that such an exploration would be well within our authority under the agreement and within the meaning and intent of the grievance as it is currently worded. Secondly, because our role is not limited to strictly construing the terms of the agreement for the parties.

Professor Paul Weiler discusses the parameters of the "add, delete or amend" clause in his noted work **RECONCILABLE DIFFERENCES** (1980, the Carswell Company Limited, Toronto, at pp. 101). He points out that the fallacy of the argument that the arbitrator's job is to simply interpret the contract was revealed in Professor Laskin's decision in *Re Polymer Corpn.* (1959), 10 L.A.C. 51 (upheld in the S.C.C. see [1962] S.C.R. 338 (sub nom. *Re Polymer Corpn. and O.C.A.M. Loc. 16 -14*) 33 D.L.R. (2d) 124 (S.C.C.)). Professor Weiler's view (at page 102) is that:

"... a labour arbitrator must be a full-fledged adjudicator of contract grievances, not simply an authoritative reader of contract provisions".

I tend to agree with the learned Professor. As he rightly

points out, labour arbitration is the *quid pro quo* for the ban on self-help and if we as arbitrators fail to allow employees to obtain even a hearing of their differences then, society should expect employees and their representative organizations to revert to more traditional and less peaceful methods of dispute resolution. I fully recognize the employer's argument and I agree that they should not have to defend themselves at every twist and turn and from every allegation regardless of how spurious. However, in serious cases such as this, they must at all times be prepared to prove they acted lawfully, within the parameters of the collective agreement and in good faith. This is especially true for an employer who relies totally on the the public purse for its funding. They must not only appear to have high regard for these principles. They must be beyond reproach.

For all these reasons I would have dismissed the preliminary objection, instructed the union to provide particulars to the employer and set the matter down for further hearings.

All of which is respectfully submitted,



Richard A. Nabi
Union Nominee

Re: Sheridan College and O.P.S.E.U.
Grievance of R. Gerson, #86 O 40

A D D E N D U M

I have read the award prepared by the Chairman, and I agree with him that the grievance does not raise a matter that is arbitrable under this collective agreement. I also agree that the grievance cannot be amended now to raise a new matter and that, accordingly, the grievance must be dismissed.

However, this should not be construed as an agreement on my part that the mere addition of the words "bad faith" can convert a matter that is not arbitrable into one that is arbitrable. It is obviously unnecessary to determine that question in this case, and I would reserve my opinion on that question until it is necessary to decide it.



George I. Campbell
August 10, 1987