

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
(hereinafter referred to as "the Union")

- and -

FANSHAWE COLLEGE  
(hereinafter referred to as "the College")

Grievance of K. Gibbs

Before: M. G. Mitchnick - Chair  
S. Murray - Union Nominee  
R. Hubert - College Nominee

Appearances:

For the Union:

D. Wright - Counsel  
G. Fordyce - Chief Steward, Local 110  
K. Gibbs - Grievor

For the College:

R. Atkinson - Counsel  
G. Rozell - Manager, Human Resources

Hearing held in London on March 19th, 1997

### **A W A R D**

This matter involves the lay-off of Kathy Gibbs from the faculty of the College's Health Sciences Division. To the point of her lay-off notice issued April 1996, Ms. Gibbs was a full-time professor in the Registered Nursing program. With the "re-training" period her lay-off ultimately was effective August 4th, 1996, and the grievor is pressing no claim that her "lay-off" for the four weeks prior to the commencement of the fall semester in September was improper. She does, however, assert that the College should have maintained her in full-time employment with the start of the new school year, based on the partial-load and part-time course loads that then were available. In the week prior to the hearing of this matter the Union for the first time indicated to the College that it intended to rely on the provisions of Article 27.09B ("Recall"). The College raises more than one preliminary objection in this matter, but the one that has been placed before the board for determination at this point is that the claim as now described above represents not a "lay-off" grievance (as originally filed) but an entirely new "recall" grievance that has never been filed or discussed with the College, and that is now out of time and ought not to proceed. The Union responds that this is not a "new" grievance at all, that it is the grievance that the parties have been talking about throughout, and that it has simply added a reference to a further section of the collective agreement in its argument.

By way of background, the present local parties had a "no lay-off" agreement running

from April 1, 1993, to March 31, 1996. Reflecting announced transfer cuts throughout the system, however, the College in November 1995 declared an "extraordinary financial exigency" under Article 29 of the collective agreement, with a view to effecting widespread lay-offs in the coming year. Article 29 provides:

**29.01** When a College plans to reduce the number of full-time regular employees who have completed the probationary period of lay-off of five percent or 20 employees whichever is less because of an extraordinary financial exigency the following provisions shall apply prior to the application of the procedures set out in 27.05 (vii) and 27.06.

**29.02** In the above circumstances the College shall give written notification to the Union Local President and the College Employment Stability Committee (CESC) of the College's plan to reduce the number of full-time regular employees who have completed the probationary period by lay-off of five percent or 20 employees whichever is less and indicate the courses, programs, and services to be reduced or eliminated and provide the Union Local and the CESC with the budgetary data used by the College in reaching its tentative decision for a planned staff reduction.

**29.03** During the 30 calendar day period following such notification, the CESC shall be given an opportunity to present its recommendations or advise on measures to deal with the extraordinary financial exigency that may include:

- (i) the budgetary measures other than, or in addition to, reduction in the full-time academic salary budget, which might be resorted to in order to prevent or minimize such salary budget reduction;
- (ii) whether the utilization of other means such as normal retirement, voluntary early retirements, leaves or transfers can postpone or alleviate the need to discontinue appointments;
- (iii) the size of the required reduction, if any, in the full-time academic salary budget;
- (iv) a set of priorities for meeting the exigency and a proposal on how any required reductions in the full-time academic salary budget could be accommodated within such priorities;

- (iv) whether or not, and to what extent, any required reductions could be accommodated, in whole or in part by:
  - (a) adjusting faculty instructional assignments;
  - (b) curtailing certain academic programs.

**29.04** The College shall not proceed with its plan to reduce the number of full-time employees referred to in 29.01 until the expiry of the 30 calendar day period referred to in 29.03 or receipt of the CESC's recommendations or advice, whichever should first occur...

That "CESC" process in fact was gone through from November to March, and at the end of it 83 notices of lay-off were issued by the College (and out of these, 55 staff members have since been laid off, with 18 of them being in the Nursing Program, including persons with greater seniority than the grievor). It might be added that the CESC as well plays a role in considering the placement options for individual employees targeted for potential lay-off, as set out in Article 27.05 of the collective agreement:

**27.05** When a College plans to lay-off or reduce the number of full-time employees who have completed the probationary period, or plans the involuntary transfer of such employees to other positions than those previously held as a result of such planned lay-off or reduction of employees the following procedure shall apply:

- (i) The College will notify the Union Local President and the College Employment Stability Committee (CESC) of the planned staff reduction and the course, programs or services affected.
- (ii) Within several calendar days of the receipt of such notification, the CESC shall meet for the purpose of the College advising of the circumstances giving rise to the planned staff reduction and the employees affected.

- (iii) If requested by a member of the CESC within three calendar days following the meeting under 27.05 (ii), the CESC shall meet within seven calendar days of receipt of such request for the purpose of discussing the planned staff reduction, the circumstances giving rise to the reduction, the basis for the selection of the employees affected and the availability of alternative assignments. It being understood that the College reserves the right to determine the number and composition of full-time, partial-load and part-time or sessional teaching positions, the College shall give preference to continuation of full-time positions over partial-load, part-time or sessional positions subject to such operational requirements as the quality of the programs, their economic viability, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students and the community. The CESC may require that further meetings be held.
- (iv) The CESC and the parties shall maintain the confidentiality of the meetings and the identity of all employees discussed except as specifically waived by mutual consent of the Union Local and the College.
- (v) Additional representatives of the College and the Union in equal numbers may attend CESC meetings under 27.05(ii) and 27.05(iii) where requested by the CESC to assist the committee. However, the attendance of additional persons pursuant to this paragraph shall not cause any delay in the meetings or the notice to individuals affected by the staff reduction.
- (vi) When a College decides, following such meetings, to proceed with a lay-off of one or more employees who have completed the probationary period written notice of lay-off of not less than 90 calendar days shall be given to employees being laid off. If requested by the employee a College representative will be available to meet with the employee within three calendar days to discuss the basis of the College selection of the employees affected.

Employees subject to lay-off under this collective agreement are entitled to, in particular, the following rights:

**27.06** When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntary full-time employees who have completed the probationary period to another position from that previously held as a result of such lay-off or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected. Where an employee has the competence, skill and experience to fulfil the requirements of the full-time position concerned, seniority shall apply consistent with the following ...

A series of options for displacement, in descending order, are then laid out. Failing placement under any of these options, Article 27.06 stipulates in the next subparagraph (viii):

- (viii)(a) Failing placement under 27.06 (vii) (a) [to displace a "sessional"], or where the employee has waived in writing the right in 27.06 (vii), such employee shall be reassigned to displace a part-time employee upon acceptance of the identical employment conditions as the part-time employee concerned provided that:
  - (i) the displacing employee has the competence, skill and experience to fulfill the requirements of the position concerned; and
  - (ii) the part-time employee being displaced has lesser months of service with the College as determined in Appendix IX than such displacing employee's months of seniority.
  
- (viii)(c) Failing placement under 27.06 (viii)(a), such employee shall be laid off with written notice of not less than 90 calendar days. Such employee shall be granted release from all or part of the normally assigned duties, for this period of notice, for the purpose of engaging in retraining activities, where such release is feasible given the normal operational requirements facing the College. Where such release is not possible, the notice period shall be extended by up to 90 days to permit retraining and the employee shall maintain current salary and benefits for the duration of the notice period.

- (viii)(d) At the termination of the period referred to in 27.06 (viii)(c), such employee shall be reassigned to a vacant full-time position, if the employee has the competence, skill and experience to perform the requirements of a vacant full-time position.
- (viii)(e) Failing placement under 27.06 (viii)(d), such employee shall be laid off without further notice.

The grievor, Kathy Gibbs, was one of those for whom no position was seen to be available beyond the then-current winter/spring term. Hence she received the following 90-day notice of lay-off on April 1, 1996 -- at the same time releasing her for "retraining activities" effective May 2nd (subsequently adjusted to a "lay-off" date of August 4th, and a release date of May 6th, 1996):

Dear Ms. Gibbs,

Confirming your discussion with Edith Davis, I very much regret to inform you that it will be necessary to lay you off effective 31st July, 1996. You will be granted release as of 2nd May, 1996 from all assigned duties for the purpose of engaging in retraining activities.

The College will continue to investigate the possibility of alternative assignments for you. I would encourage you to contact the Human Resources department to discuss your qualifications and experience and your rights under the Collective Agreement.

We wish you every success in your future endeavours and regret that circumstances have caused us to take this action.

Yours sincerely,

H.W. Rundle  
President.

Ms Gibbs grieved that notice of her pending lay-off as follows:

To: Pat Kirkby

From: Kathy Gibbs

Date: April 15, 1996

Regarding: Grievance - Improper Layoff

---

I grieve that my layoff is improper, issued in bad faith and is contrary to the provisions of the Collective Agreement.

I am entitled to displace full-time and non full-time positions within the following divisions:

Health Science Division	
Nursing Education	
Continuing Education Division	- RN
	- RPN
	- Health Care Aide

I contend that I have the competence, skill and experience to fulfil the requirements of these positions and that my seniority is greater than any persons occupying the above.

I also contend that I have the competence, skill and experience to perform the requirements of the vacant positions in:

Health Science Division	
Nursing Education	
Continuing Education Division	- RN
	- RPN
	- Health Care Aide

As remedy, I request that the College rescind my layoff notice immediately and provide me with details of my workload assignment as outlined in Article 11 of the Collective Agreement. If this layoff notice creates any break in employment between now and the time that this grievance is resolved, then I also seek a retroactive payment for all salary plus interest, benefits, seniority, etc. that I should have been entitled to.

The College on May 31st responded to that grievance (amongst others of Ms. Gibbs) as follows:

FANSHAWE COLLEGE  
LONDON, ONTARIO

MEMO TO: Kathryn Gibbs  
cc: Local 110  
FROM: Gail Rozell  
DATE: May 31, 1996  
SUBJECT: Your Grievances

We are in receipt of your memo, dated May 22, 1996, referring the following grievances to Step 2:

<u>Our Ref#</u>	<u>Subject</u>
A96-153	Improper Training Period (Non Teaching Week)
A96-154	Improper Training Period (PD Days)
A96-155	Statutory Holidays
A96-156	Bad Faith
A96-157	Improper Layoff.

Would you please provide Linda Watson (extension 4656) in our office with dates and times that you would be available so that she can schedule a Step 2 meeting.

With regard to your grievance referring to improper layoff, your grievance does not state the positions occupied by full-time and non-full-time employees whom you feel you are entitled to displace, per Article 27.08A of the Collective Agreement. Would you please provide Human Resources, in writing, with the

positions before the Step 2 meeting.

Gail Rozell, Manager  
Human Resources

Article 27.08 provides:

**27.08A** An employee claiming improper lay-off, contrary to the provisions of this Agreement, shall state in the grievance the positions occupied by full-time and non-full-time employees whom the employee claims entitlement to displace. The time limit referred to in 32.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

**27.08B** If the grievance is processed through Step 2, the written referral to arbitration in 32.03 shall specify, from the positions originally designated in 27.08 A, two full-time positions, or positions occupied by two or more partial-load or part-time employees (the sum of whose duties will form one full-time position), who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the grievance thereafter under only one of (i), (ii), (iii), (iv), (v), (vi), (vii), or (viii) of 27.06.

There is, however, no indication of any further clarification by the grievor of her position at that stage (the persons carrying the various less-than-full-time assignments to which she was looking in the fall not having yet been determined by the College), and a Step 2 meeting presumably took place in the normal course. The particular grievance here in question is A96-157, and the College responded to the grievor's series of grievances sparked by her lay-off as follows:

TO: K. Gibbs cc: OPSEU, Local 110  
Terry Boyd  
Human Resources

FROM: John Smith

DATE: 96 07 18

SUBJECT: Your layoff grievances (our ref.#s A96-153-157 inclusive) - Step II responses

The College responses are as follows:

A96-153-156 (inclusive)

The College position remains in that these grievances do not raise any issues which could be the subject matter of a grievance under the Collective Agreement.

In any event, the College has followed the provisions of the Collective Agreement. The grievances are denied.

A96-157

You have challenged that several full-time faculty positions should be created from work assignments in various divisions to which the College responses are as follows:

Simcoe

Principal, Andy Newbery advises that your skill, competence and experience do not allow you to displace L. Purgret or to do the field placement.

Woodstock

Attached is an interoffice memorandum from Principal, Sheri Knott in which she notes that you are unable to deliver the courses identified.

Human Services

Attached is a copy of an interoffice memo from Chairperson, Michael Hoare, which outlines the teaching requirements for various programs within Human Services. He advises that you are unable to deliver the courses identified.

Health Sciences

Please find attached a memo outlining why full-time faculty positions will not be created concerning the courses identified.

Manufacturing Sciences

The Chairperson, Carl Zajc, advises you would be unable to displace the full-time staff assigned to the courses identified.

### General Studies

See attached memo in which Chairperson, Terry Boyd, indicates you are unable to deliver the courses identified.

### Information Technology

Attached is an interoffice memorandum from Chairperson, Dennis Dowker, which indicates you would be unable to deliver the courses identified.

### Tourism and Hospitality

Chairperson, Mike Hanwell, advises that NUTR203 is a course designed for hospitality students dealing mainly with menu planning for the industry and therefore experience both in the hospitality industry and some nutrition background are required. You would, therefore, be unable to deliver this course.

### St. Thomas

Principal, Tom Pickard, advises that there is only a 5-hour part-time assignment in the HCA program, therefore there is no full-time position to be filled.

### Continuing Education Programs and Courses

It is the position of the College that CE courses are excluded from the application of Article 17 for all purposes (Article 27.16).

In summary, there does not appear to be a full-time faculty position available for which your skills, competence and experience would allow you to fill, therefore the grievances are denied.

John Sunseth  
Vice-President, Academic

Attachments

The memo relating to the Health Sciences Division in particular provided:

TO: Linda Watson  
Subject: Lay-off response

Health Sciences

- Nurs 179	-	13 sections	-	12 hours
- Nurs 422/479/480	-	3 sections	-	12 hours
- Nurs 171	-	4 sections	-	10 hours

**The above-mentioned courses will be covered by Instructors not Professors. However, the College will give consideration to laid off professors when filling.**

**Due to the changing admissions the theory courses are currently under review and may be assigned to FT faculty.**

(emphasis added)

To those Step II responses Ms. Gibbs reacted as follows:

Memo

To: Howard Rundle  
From: Kathryn Gibbs  
Date: July 31, 1996  
Regarding: Referral to Arbitration

---

I am in receipt of the College's response to my Step II meeting. I do not accept your position on any of my grievances.

Please consider this memo to be a referral of A96-157. In accordance with Article 27.08 B, I refer under Article 27.06(iv). There are several combinations of partial-load assignments in the Health Sciences division. I am not able to name individuals because this work has not been assigned.

Article 27.06(iv), as the ensuing sentence indicates, refers only to the combining of two "partial-

load" positions. However, the grievor continued her response in that memo as follows:

I would like to put the College on notice that I may change my election under Article 27.08 B, due to the failure of the College to give full and adequate information to the Union or me regarding the availability of teaching positions for the upcoming academic year and other information as required to be given to the Union under Article 27.05 of the Collective Agreement. The Union and I are not in possession of all information required to make an informed election under Article 27.08 B with respect to the positions being claimed by me.

In addition, I refer A96-153 to A96-156.

I am willing and would prefer to have all grievances consolidated and heard before the same arbitrator.

I hope that I shall be returning to the College soon.

"Kathryn Gibbs"

c.c. OPSEU Local 110

It is against that background of facts, therefore, that the parties have argued the present objection.

In assessing this matter, we agree with arbitrator Jane Devlin when she observes in York University (1985), 20 L.A.C. (3d) 187, at 191:

The purpose of the written grievance is to put the other party on notice of the nature of the complaint and to provide sufficient details so that the issue raised may be dealt with intelligently by the parties during the grievance procedure and at arbitration, in the event that this becomes necessary.

This is made particularly clear, as the College notes, under the grievance and arbitration provisions of the instant collective agreement. Article 32.03, for example, stipulates at "Step One":

An 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 .

The issue remains, however, as the Union suggests, whether notwithstanding the subsequent identification of any additional articles to buttress the argument, the grievance or dispute remains in essence what the parties thought it was in the first place, and have been addressing in the discussions and consideration that have taken place in the grievance procedure. As arbitrator

Devlin continued:

In these circumstances, much clearer language would be required in the collective agreement to support a finding that the written grievance was intended to operate as a straight-jacket, which is the effect of the university's contention in this case. It is also of note that the university's position would result in there being greater rigidity in the grievance form than is the case with pleadings in civil actions.

Grievances are generally prepared at the local level with counsel being involved only as the matter is processed to arbitration. At that time, however, it may become apparent that there are articles not specifically referred to in the grievance which could assist the arbitration board in determining the issue raised in the grievance. Absent clear language, neither party ought to be precluded from referring to such articles in order to ensure a considered and fully informed determination on the merits. In the event that the university is genuinely surprised by a position being advanced by the union, this can be dealt with by the board or the arbitrator, as the case may be, at the hearing. The

possibility of this occurring, however, is not sufficient to support the technical position being advanced with regard to the information to be contained on the written grievance. It is, of course, in the interests of both parties to provide as much detail and specificity as possible in order that there is no misunderstanding with respect to the issue raised and in order that the grievance procedure may be used to its fullest advantage.

With that perspective in mind, we have difficulty sustaining the College's objection, or at least do not come to the conclusion that the grievance as filed and currently understood by us must be dismissed. The grievor's claim, as the foregoing documentation makes clear, had always included an assertion of her right to displace "non full-time positions within ... Health

Services Division". As the Union notes, it is now limited to that. Her grievance of course talks about "rescinding any layoff notice" because it was filed in April, prior to the date when the lay-off was going to come into effect. That particular statement of the grievance is likely to be outdated by the time any of these College lay-off grievances get to a hearing (i.e., the lay-off date will have arrived, and the grievor will already have been laid off). But more importantly in the present case, it appears abundantly clear from the grievance correspondence that the College knew exactly what the nature of the grievor's concerns were, and investigated and gave its reply in full detail on that basis.

That included an awareness on the College's part that the grievor was claiming "that several full-time faculty positions should be created from work assignments in various divisions" [College Reply, dated July 18th, 1996], and the College proceeded to outline all of the various ways in which the grievor's qualifications failed to support her in any event. It appears obvious that that detailed investigation and reply by the College did not relate to the final four weeks of the summer (and if it did, we would have needed evidence of that surprising circumstance); rather, with the grievor gainfully employed in the spring of 1996, and (including training) on through most of the summer, the focus of everyone (right from the point of her lay-off notice) appears to have been on the availability of a position for her, or not, for the next school year commencing in September. That was the practical issue for the grievor raised by this particular grievance, and all parties, from the evidence that we have, appear to have dealt with it in that way. That is all that we need

to decide for the issue that has been raised before us, and is all that we do decide. We should add for completeness that at the end of the College's closing argument suggestion was made that, with the Union now trying to recast this as a "recall" grievance, the College may have been "lulled" by engaging in the kinds of discussions that it did. In response the board asked counsel whether, on the contrary, from the face of the documentation the College might not be said to have "waived" the kind of preliminary objection it was now seeking to make, in calling for a fresh grievance to have to be filed. After conferring with his advisors counsel advised the board that there had in fact been a letter to the Union making it clear that the College did not feel that under the instant grievance it had to consider the question of work opportunities for the grievor in September. At that point counsel for the Union noted that it had already been agreed that the board had before it all of the evidence that the parties thought was relevant, and the Chair indicated that since the Union itself was not advancing the argument of "waiver" in any event, that line of inquiry (the effect of which would be to prevent the employer from even raising the present form of objection) need not be pursued.

For the reasons given, however, the board does not find that the present grievance must be dismissed. In saying that, however, the board would note two further points. The first is that it is the nature of the College sector (and a large part of the difficulty in dealing with the application of its lay-off/ recall provisions) that the situation with respect to a College's needs is fluid, and constantly being altered, by

enrolment circumstances in particular. The critical point to our finding here is that the grievor in the present grievance from the outset was challenging the decisions that the College appears to have made regarding the availability of suitable work for her as of the beginning of the coming term in September.

The second point to note is that under this collective agreement it is the specific intention of the parties, as set out in Article 27.08, that all complaints of "improper lay-off" be clearly and narrowly focused, in particular by the point of the parties proceeding to arbitration on the "merits" of the grievance. Article 27.09B, dealing specifically with "Recall", provides:

**27.09 B** Before hiring full-time employees, an individual who has been laid off under 27.06 will be recalled to that individual's former or another full-time position, provided that the individual has the competence, skill and experience to fulfill the requirements of the position concerned. Such recall entitlement shall apply during the period of two years from the date of lay-off.

It is not entirely clear why counsel for the Union felt it appropriate to now cast the grievance of Ms. Gibbs technically as a "recall" grievance, but we presume it was simply out of an abundance of caution, in light of the lack of any dispute over the period between the grievor's "effective date" of lay-off (August 4th), and the commencement of the real term in question here, September 1996. But we would simply note that in proceeding with the

matter, we do view this, as we have said, as essentially the same grievance as initially filed (as the Union has urged), and the obligations of the grievor to comply with Article 27.08B are no different whether one puts the cast on it now of a "lay-off" grievance, or technically (being after the August 4th lay-off date) a "recall to work" grievance. That is, the claim of the grievor remains one properly made out through the vehicle of the enumerated heads under Article 27.06; not through the vehicle of Article 27.09B. And Article 27.08B must be complied with. In that latter regard the board would only add that the Union advised at the previous hearing that it intends to call evidence to support a "waiver" argument, and that it also will be advancing an argument on the applicability of Article 27.06(i) here (i.e., reassignment to a "full-time" position, on the basis that there ought to have been one created by the College). The parties appear to be in agreement that that is to be left to be dealt with in conjunction with the hearing on the "merits", however, and the case may now be scheduled to be heard in accordance with the ruling of the board rendered above.

Dated at Toronto this 19th day of September,

1997\

\_\_\_\_\_ G. Mitchnick

"S. Murray" \_\_\_\_\_ S. Murray

"R. Hubert" \_\_\_\_\_ R. Hubert (see Addendum)

