

H E A D N O T E

OPSEU #88A629

GOODHUE, DOUGLAS (OPSEU) v. Centennial College of Applied Arts and Technology, Award dated:

Grievance: The grievor was a probationary employee who grieved that he had been dismissed in bad faith. There was a preliminary decision in which the arbitrator found that the employer was required to exercise good faith in the termination of probationary employees.

Grievance Dismissed: The arbitrator finds that there was "little of substance" in the grievor's supervisors concerns about his performance and that those substanceless concerns were the basis for the termination of the grievor's employment. However, the arbitrator did not accept the union's claim that the real reason the grievor was dismissed was anti-union animus. The arbitrator found that it did not matter that there was no real reason to terminate the grievor, it was sufficient that the grievor's supervisor seemed to think that there was. There is a strong dissent which finds that the grievor must have been dismissed for anti-union reasons.

88A629
L558

Concerning an arbitration

Between:

Centennial College

and

Ontario Public Service Employees Union

Grievance of D. Goodhue, release of a probationary employee

Board of Arbitration

J. W. Samuels, Chairman
R. J. Gallivan, College Nominee
L. Robbins, Union Nominee

For the Parties

Union

L. Trachuk, Counsel
D. Goodhue, Grievor
H. King

College

D. K. Gray, Counsel
H. Carson, Director of Personnel
S. Ciuciura, Associate Dean, Administration

Hearing in Toronto, July 10, 1989

The grievor was released after serving four months of his two-year probationary period as a teaching master. He grieves that the College acted in bad faith in releasing him.

At the outset of our hearing, the College raised a preliminary objection. It was argued that we did not have jurisdiction to hear the grievor's complaint on its merits because Articles 8.02(a) and 11.06 of the collective agreement provide that the release of a probationary employee cannot be grieved. In a preliminary award dated December 8, 1988, we held that, in its release of the grievor, the College did have to act in good faith. And we decided that we had jurisdiction to hear and determine the grievor's allegation that the College acted in bad faith in its decision to dismiss him. We said, at pages 12-13:

Articles 8.02(a) and 11.06 of the collective agreement are very clear. Probationary employees do not have the right to grieve their "release" or "dismissal". Management does not have to be "fair" or "reasonable" in the exercise of its decision to release or dismiss a probationary employee. Management does not have to show just cause or any satisfactory reason for the release or dismissal.

But all of this only applies if management has acted in good faith. There is an implied term that the parties to the collective agreement will act in good faith. There may be circumstances which are so egregious that one can say that management is not meeting its core obligations under the collective agreement. Management is not acting entirely in a vacuum. There is a contractual relationship which must be abided by.

In the *Municipality of Metropolitan Toronto* case (unreported decision, dated July 3, 1981), Mr. Justice Callaghan said that the employer's decision could not stand if it "was motivated by unlawful considerations or resulted from management actions which precluded the probationary employee from doing his best".

This has been referred to as the "illegality or obstruction" definition of "bad faith".

We appreciate the College's concern that, if probationary employees can grieve dismissal on the grounds of bad faith, this may simply invite employees and the Union to characterize the situation as one involving bad faith, though in reality the situation is not nearly so serious. It does not appear that there have in fact been many cases where bad faith was alleged by a probationary employee who had been dismissed, though boards of arbitration have been accepting jurisdiction in such cases for some time now. We note that, in the two cases to which we have referred in this award where the merits of the allegation of bad faith were considered, the grievors were not successful in proving bad faith {*Cambrian College* (grievance of Best, unreported decision of Brent, dated April 7, 1986); and *St. Lawrence College* (1987), 32 LAC (3d) 322 (Brent)}. "Bad faith" is not simply "unfairness" or "unreasonableness", but is conduct which goes beyond these two circumstances. Bad faith involves conduct which is inimical to the contractual relationship itself. It involves illegality or obstruction.

Finally, we should say a word concerning onus. Pursuant to the collective agreement, the College does not have to show just cause for the release or dismissal of a probationary employee. If the employee alleges bad faith, the onus is on the grievor to prove the allegation.

We turn now to a consideration of the merits of the grievance.

The grievor was hired as a teaching master on probation in August 1987. He came to the College with long experience in accounting in the private sector and in the use of computers in accounting. He had done some teaching at the Toronto School of Business. He started teaching at the College in September, doing four sections of an introductory course in data processing.

According to the grievor, there were no serious problems in his first term of teaching. He was evaluated by his students in all four sections, and the College acknowledges that his ratings were in the upper part of the range one would expect for probationary teachers.

At the beginning of the term, Mr. Goodhue's supervisor was Ms. S. Ciuciura, the Acting Dean of the School of Business. Then, in October, Mr. K. Y. Cheng came in as the Chairman of Accounting, and he was Mr. Goodhue's supervisor.

When the grievor's performance was evaluated by Mr. Cheng in late-November/early-December, the evaluation summary was discussed with the grievor. The commentary in the evaluation does not disclose any serious concerns with the grievor's performance—there is mention of need for improvement in organization and presentation of classes, but nothing more than one might expect for a new teacher. However, Mr. Cheng rated the grievor's "overall effectiveness" as 5 out of 10. This is "borderline", and Mr. Cheng used this word in summing up his discussions with the grievor. Mr. Cheng did not point to any specific problems, though he was asked for clarification by the grievor.

The grievor was scheduled to teach four sections of accounting in the coming January to May 1988 term. But on January 7, he received a letter from Mr. A. R. Devlin, the Vice-President Academic of the College, informing him that his contract with the College was being terminated. He would do no more work, but he would be paid to February 7.

When the grievor asked Mr. Devlin for some explanation for the termination, Mr. Devlin replied by letter on January 15, saying that there were three "major concerns....identified and discussed:—classroom management, technical errors in subject matter, and the dichotomy between your course preferences and the college needs". Mr. Devlin had had no dealings with the grievor during the term, so we have to look to others for an explanation of these concerns.

We did not hear from Mr. Cheng.

It appeared from the testimony of Ms. S. Ciuciura, who was the Acting Dean of the School of Business, and Mr. Cheng's supervisor, that the grievor's employment was terminated because of the concerns raised by Mr. Cheng in a memorandum to Ms. Ciuciura of December 23, 1987. That memorandum reads:

During the evaluation interviews I had with Doug Goodhue, the negative and defensive reactions he exhibited gave rise to doubts relative to his ability to fit in and work at the productivity level expected by the College.

Some of the concerns are:

- . Doug does not exhibit a positive working relationship with the administration.

- . When the SWF was first discussed with Doug, he said that had he not been a probationer, he would have filed a grievance as he was hired in August 1987 to teach accounting and not accounting information systems.

- . When the issue of office hours was first discussed at the interview, Doug relied on a letter of understanding between the College and the Union he said the Chief Steward had mentioned to him, wherein it was agreed that faculty members need only be present at the College during class time and other pre-arranged office hours.

- . Doug is not prepared for his class.

- . The classroom presentation was not well organized.

- . The class presentation contained gross errors.

Doug lacks classroom management skills nor provides good learning environment.

- . The class started 10 minutes late in order to facilitate the "rounding up" of students from the cafeteria.

- . Students were having food and drinks in class, albeit a "No Food/Drinks" sign was clearly visible at the front of the class.

. The two-hour class was adjourned after 65 minutes instead of the normal standard 100 minutes.

I consider Doug to be less than average as a faculty member and a liability to the School of Business in our endeavour to build and maintain an excellent team of dedicated, loyal professionals. I recommend that we facilitate an early parting of Doug, on terms as per Collective Agreement.

Let us look at the points raised in this memorandum one by one.

With respect to "the negative and defensive reactions" exhibited by Mr. Goodhue during the evaluation interviews, we have no idea what this means.

With respect to a possible grievance concerning the SWF (Standard Workload Form), in October, Mr. Goodhue had submitted his list of preferences for his teaching assignment in the coming winter term, and he had been assigned his second preference (AC318, accounting information systems). A sessional teacher was assigned the course which was Mr. Goodhue's first preference (FI203, finance with microcomputer applications). Mr. Goodhue had consulted with his Union steward, and had been told that he had a right to challenge the assignment to the sessional teacher. When the grievor returned the SWF form to Mr. Cheng, he said that he knew his rights, but he would not challenge the SWF.

Related to this, in December, Mr. Goodhue had also asked Ms. Ciuciura why he was assigned to teach AC318, and she had replied that it was because he was an accountant. Mr. Goodhue accepted this reply. But Ms. Ciuciura testified that she was troubled that he had asked her about it, given that he had been assigned his second choice.

With respect to the matter of office hours, we know little more than appears in Mr. Cheng's memorandum. Ms. Ciuciura said that she was concerned about Mr. Goodhue's cooperation.

With respect to the evaluation of Mr. Goodhue's classroom, Mr. Cheng made one visit during the fall term, at a time when he was expected by Mr. Goodhue. It is true that the students had to be rounded up, that the grievor permitted the students to bring in food and drink, and that the class ended after 65 minutes. The grievor says that these occurrences were not the norm during the term. In any event, it would be unusual to terminate a teacher's contract because of these matters. This is the kind of thing about which one would expect comment and the teacher could correct the situation.

Mr. Cheng's reference to lack of organization appears to be related to the fact that Mr. Goodhue did not begin his class with a summary of the last day's lecture. It seems to us that this is not a fatal problem. A teacher may or may not begin with a summary of previous material, depending on what is most appropriate at the time.

With respect to the "gross errors" in the grievor's class presentation, after the class, Mr. Cheng did mention to Mr. Goodhue that he saw an error in the computer programming language which the grievor suggested to the students. The grievor later tried out his commands, in the presence of Mr. H. King, who is his Union steward and a computer expert, and the grievor's program worked as it was intended. Mr. Cheng appears to have been wrong.

In sum, there appears to have been little of substance in Mr. Cheng's concerns. And these concerns were the basis for the termination of the grievor's contract.

Counsel for the Union argues that the reasons given by the College are so flimsy that the real reason for the grievor's termination was Mr. Cheng's anti-Union bias. The grievor had mentioned that he knew his rights under the collective agreement and Mr. Cheng was determined to get rid of him. This was bad faith.

In our view, though Mr. Cheng's reasons were not very substantial, the evidence suggests that he thought they were important and his stated reasons were his real reasons. He was concerned about an apparent lack of cooperation by Mr. Goodhue after the grievor had been assigned his second preference and was unhappy. Mr. Cheng was bothered by what he saw during the class visit, and he did think there was an error in the grievor's computer program.

We are not satisfied that the real reason for the grievor's dismissal was an anti-Union bias on the part of Mr. Cheng or anyone else at the College.

The parties have left it to management to judge the probationary employee's performance. The matter is entirely within management's discretion unless there is bad faith. As we said in our earlier award,

Management does not have to be "fair" or "reasonable" in the exercise of its decision to release or dismiss a probationary employee. Management does not have to show just cause or any satisfactory reason for the release or dismissal.

.....

"Bad faith" is not simply "unfairness" or "unreasonableness", but is conduct which goes beyond these two circumstances. Bad faith involves conduct which is inimical to the contractual relationship itself. It involves illegality or obstruction.

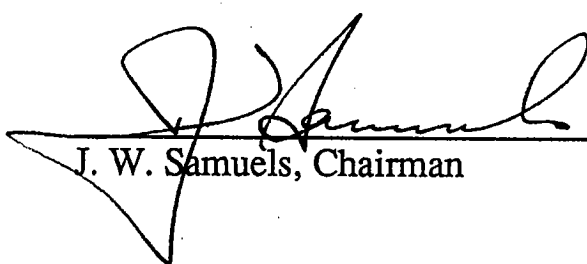
The Union had the onus to demonstrate bad faith in this sense, and this onus has not been discharged.

Counsel for the Union also suggested that the College acted in bad faith by relying on Mr. Cheng's evaluation of the grievor, given that Mr. Cheng was so new to the College. Mr. Cheng came to the College after 27 years in the field of business administration, in the private sector and as an

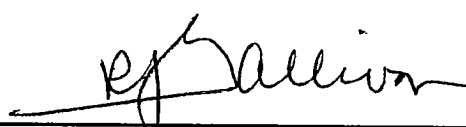
academic. His last service had been four years at Lakeland College, with one year as Chairman of the Division of Business Studies. In our view, it was reasonable for the College to rely on this man's judgment. There was no bad faith here.

For these reasons, the grievance is dismissed.

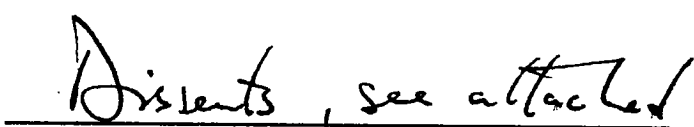
Done at London, Ontario, this 27th day of July, 1989.



J. W. Samuels, Chairman

I agree. 

R. J. Gallivan, College Nominee



L Robbins, Union Nominee

IN THE MATTER OF AN ARBITRATION

BETWEEN CENTENNIAL COLLEGE

AND

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

IN THE MATTER OF THE GRIEVANCE OF
D. GOODHUE #88A629

D I S S E N T

I have reviewed the Award in this matter and must dissent from it. The Chairperson has correctly stated the facts that formed the basis of Mr. Goodhue's termination. Where I must disagree is in the conclusion to be drawn from those facts.

At the very least, there is no doubt that Mr. Goodhue was dealt with in a cavalier fashion. He was essentially dismissed from his employment based on one classroom visit by his Department Chairperson, Mr. Cheng. As a result of that visit, Mr. Cheng had certain concerns which, as stated in the Award, appear to contain little of substance, and normally would not form the basis of any termination. It is also clear that no other member of Management had any direct contact with Mr. Goodhue. Both Mr. Devlin, Executive Vice President, Academic, and Ms. Ciuciura, the Associate Dean, were content to rely solely on Mr. Cheng's opinion. They made no attempt to discuss these concerns with Mr. Goodhue, or to become directly involved in any way in the evaluation process.

The Chairperson has concluded that even so, this is not enough to show bad faith. The fundamental problem is that Mr. Cheng was never called as a witness. The question of his motivation is obviously best known to him.

In my view, however, there was enough evidence there to suggest an improper motive on the part of Mr. Cheng to the extent that surely the onus shifted so that the College had an obligation to call him as a witness.

Mr. Cheng's confidential memo to Ms. Ciuciura is curious indeed. It specifically cites the grievor's reference to possibly filing a grievance on the issue of his course selection, and also his relying on a letter of understanding between the College and the Union which the Chief Steward had mentioned to him as examples of not exhibiting a positive working relationship with the Administration. This does come very close to using an employee's reliance on his Union rights as a reason for termination, something which would be in violation of the Labour Relations Act and clearly would meet the test of bad faith.

It is also troublesome that Mr. Cheng's so-called concerns about Mr. Goodhue do not appear to have been discussed with Mr. Goodhue in the meetings that were held in December/87 in a clear and forthright manner. The commentary in the evaluation itself (dated December 21/87), as the Award indicates, does not appear to show any serious concerns about Mr. Goodhue, and it is in striking contrast to the confidential memo sent by Mr. Cheng to Ms. Ciuciura only two days later.

If this had been filed as an unfair labour charge based on discrimination for Union activity before the O.L.R.B., the reverse onus rule would apply and the Employer would have proceeded first. This of course is not our case. The grievor does have the onus, and it is a difficult onus to meet. However, at some point the onus surely shifts, and in my view we were past that point, and as Mr. Cheng was not called as a witness, the grievance should have succeeded.


To the extent that there was bad faith on the part of the College, the key player was obviously Mr. Cheng. He was the "mover" behind the termination of Mr. Goodhue, and Ms. Ciuciura and Mr. Devlin simply acted on his recommendation. I agree that that does not constitute bad faith on

their part, however, if they rely on a recommendation of their subordinate, then they too are stuck with the consequences.

In any event, this case is a classic example of why much stronger protection is needed in the Colleges' collective agreement to protect probationary employees from improper discharge. Under the present language, Management is given almost complete discretion in terminating probationary employees, with the requirement of good faith being the only limitation. However one characterizes the evidence, in this case management has grossly abused that discretion. The grievor has ultimately lost his employment for reasons that make very little sense.

The right to some security in employment and protection from unjust discharge is a basic right in any collective agreement. Even a probationary employee is deserving of some protection in this regard, particularly in this case where the probationary period lasts for two years. Even a newly hired employee may have given up another job to seek employment with the College and the results of termination can still be devastating for those who are affected. This matter clearly needs to be addressed in negotiations.

Dated in Toronto, Ontario on the 24th day of July, 1989.



Larry Robbins, Union Nominee