

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND
TECHNOLOGY IN THE FORM OF SENECA COLLEGE
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(hereinafter called the "Union")

GRIEVANCE OF ENID GOSSIN
OPSEU FILE NO. 97B194
(hereinafter called the "Grievor")

BOARD OF ARBITRATION:

Richard H. McLaren, C. Arb., Chair

Sherril Murray, Union Nominee

Peter Hetz, College Nominee

COUNSEL FOR THE COLLEGE:

E. C. Carla Zabek

COUNSEL FOR THE UNION:

George Richards

A HEARING IN RELATION TO THIS MATTER WAS HELD AT TORONTO, ONTARIO, ON
MAY 20, 1998.

A W A R D

The facts in this matter are agreed. Ms. Gossin is employed by the College and holds both a B.Ed. degree and an Ontario Teacher's Certificate. Her employment at the College commenced as a sessional teacher for September through December, 1990. She held a subsequent sessional position from January to May of 1991. She became a full-time Teaching Master in August of 1991, a position she has continued to occupy to the date of the hearing.

The Grievor's qualifications entitled her to serve a one year probationary period under Article 27.02.A2 (ii). In February of 1993, the College confirmed that she had completed her probationary period and advised her that her seniority date was the day she started full-time employment, August 19, 1991, {Exhibit #3}. This seniority date is shown continuously for the seniority lists posted as of January 26, 1993 and those posted subsequently through 1997 {Exhibit #4}.

Following the posting of the seniority list of January 30, 1996, Ms. Gossin began to question her seniority date and why it did not include her sessional experience. The failure to resolve her concerns caused the grievance in this matter. Counsel agree that the Board is properly appointed and has the jurisdiction to determine the matter on a final and binding basis subject only to the resolution of the preliminary objection of the College.

PRELIMINARY OBJECTION OF THE COLLEGE

It is submitted by the College that the Board is without jurisdiction to determine the grievance because it was not filed in a timely fashion. It was argued that the Grievor knew her status and the date of her seniority when she received the College memo filed as Exhibit #3 dated August 27, 1991, which stated amongst other things that:

Upon completion of the probationary period, each employee is credited with seniority within the academic bargaining unit. In your case, you will complete the probationary period on August 18, 1992 and, at that time, will be credited with seniority from August 19, 1991.

It is submitted that the time to have grieved the absence of the counting of any sessional employment was at this time. Even if the time for grieving was to be a later date, then the memo confirming her full-time status dated February 26, 1993 was clear in stating that "...your seniority date is August 19, 1991" and ought to have been the point at which the grievance was launched. There was also the opportunity to grieve the matter on the posting of the seniority list after she completed her probationary period which would have been in January of 1994. Instead the grievance is not launched until two years later, after the posting of the seniority list in 1996. It is submitted by the College that it is simply too late to challenge the seniority list. Therefore, the grievance is out of time and ought to be dismissed because the mandatory time limits for the grievance procedure in Articles 32.02 & 32.03 have been violated. Thus, the Board is without jurisdiction to hear the merits of the case. In support of its argument the College relied upon the following cases:

An unreported decision between Cambrian College and Ontario Public Service Employees Union, a decision by Arbitrator Swan dated November 19, 1990; An unreported decision between

Cambrian College and Ontario Public Service Employees Union, a decision by a Board of Arbitration chaired by Arbitrator Simmons, dated July 9, 1997; An unreported decision between Fanshawe College and Ontario Public Service Employees Union, a decision by a Board of Arbitration chaired by Arbitrator Swan, dated November 26, 1991; An unreported decision between George Brown College and Ontario Public Services Employees' Union, a decision by a Board of Arbitration chaired by Arbitrator Mitchnik, dated June 19, 1997; An unreported decision between Mohawk College and Ontario Public Service Employees Union, a decision by a Board of Arbitration chaired by Arbitrator Brown, dated March 3, 1978.

The response of the Grievor and the Union is to argue that the grievance was timely in that it was a continuing one which did not result in the application of the time limits of Articles 32.02 & 32.03. The incorrect calculation of seniority is a type of breach which is continuously occurring, resulting in the breach of the collective agreement.

The relevant provisions of the Collective Agreement read as follows:

Article 32
GRIEVANCE PROCEDURES

...

Complaints

32.02 It is the mutual desire of the parties that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the employee and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the employee.

Grievances

32.03 Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under 32.13 C) in the following manner and sequence provided it is presented within seven days of the immediate supervisor's reply to the complaint. It is the intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College's written decisions at each step shall contain reasons supporting the decision.

...

Step Two

The grievor shall present the grievance to the College President.

The College President or the President's designee shall convene a meeting concerning the grievance, at which the grievor shall have an opportunity to be present, within 20 days of the presentation, and shall give the grievor and a Union Steward designated by the Union Local the President's decision in writing within 15 days following the meeting. In addition to the Union Steward, a representative designated by the Union Local shall be present at the meeting if requested by the employee, the Union Local or the College. The College President or the President's designee may have such persons or counsel attend as the College President or the President's designee deems necessary.

In the event that any difference arising from the interpretation, application, administration or alleged contravention of this Agreement has not been satisfactorily settled under the foregoing Grievance Procedure, the matter shall then, by notice in writing given to the other party within 15 days of the date of receipt by the grievor of the decision of the College official at Step Two, be referred to arbitration.

...

RULING

There is no dispute between the parties that the time limits contained in this Collective Agreement are mandatory. The cases are legion on this point and do not require citing in this award. The cases cited by College counsel of *Cambrian College, supra* by Arbitrator Simmons of July 9, 1997 and *Mohawk College, supra* are examples of such cases. The nub of the issue is whether these facts are within the continuing grievance exception to mandatory time limits.

Two cases are cited which support the College position. Otherwise the preponderance of case law would support the continuing grievance characterization of the facts. The *Cambrian College* case, *supra* by Arbitrator Swan is, in his own words at p. 4, a "remarkable case". The facts are what make it so because two employees hired on the same day did not have the same seniority date because one was allowed to count a week of preparation prior to commencing employment. The other employee learned of this fact and asked to be treated on the same basis for the same reasons. The request was granted thereby making both their seniority dates one week before the hiring date. The employee who had obtained this seniority treatment first, grieved that the relative seniority established by the second employee having his record adjusted was invalid. That case is not about status or seniority but, about the relative seniority given that the second employee had his seniority adjusted for an identical reason some several years after the first employee who was trying to block that adjustment. Enough is said about the facts to illustrate that this case must be, and is, distinguished from the main stream of arbitration decisions by its highly unusual facts. In this Board's view it does not stand for any proposition

with respect to continuing grievances as the first employee's grievance is allowed. The case is distinguishable from the present case.

The College also relied upon *Re Fanshawe College, supra* {Dobos}, a unanimous decision by a Board of Arbitration chaired by Arbitrator Swan. In that case the Board, in response to a preliminary objection, made a decision that the "grievance is not arbitrable". In 1988, the grievor had been hired into a position "...classified as Full-Time Probationary Teaching Master...", but advised "Please note the limited term of this appointment". No appointments, prior or subsequent, of which there were many, were ever grieved. The Board found the clear implication of the letter to be that the person

...would be reverting to some other status at the end of that limited term. {p.6}

This proposition was found to have been stated twice in the letter. On this basis the Board found at p. 7 that:

...the grievance is out of time, since there was a clear triggering event which occurred at the earliest when the grievor had the opportunity to absorb the implications of the letter of April 9, 1988, and at the latest when he had the College's intentions confirmed to him by a letter of May 27, 1988 appointing him to a partial-load position as opposed to a continuing full-time probationary position.

The one time triggering event which caused the Collective Agreement mandatory time limits to render the dispute inarbitrable, was the switch from full-time probationary Teaching Master to another status, thereby failing to continue the former status.

Once again that is a very different case from the one before this Board. There is no triggering event such as a change from one category of employment to another. Here the grievance is one about an incorrect calculation of seniority by failure to include prior appointments. An incorrect calculation may be corrected without regard to time limits, because it is a continuing problem. It is like an incorrect calculation of wages or other matters. The error of calculation may occur only once but it is not a triggering event which begins the time limits running as the error makes seniority potentially incorrect under the agreement and thus is continuous until it is corrected. This is the very essence of a continuing grievance. This Board finds the matter before it to be a continuing one to which the time limits are not applicable. It is in principle similar to the case of *Re Fanshawe College, infra*, {Hafue} an unreported decision of Arbitrator Brunner dated October 19, 1983.

In this case there is an allegation that the sessional appointments, when followed by a full-time contract of employment means that seniority must be calculated to take account of the sessional appointments. In essence the issue before us is to determine the cumulative effect of the sessional appointments on the way in which the Collage chose to calculate seniority. The Board concludes that the matter is a continuing grievance. Thus, the Board has the jurisdiction to hear the matter and determine the merits of the dispute. The case of *George Brown College, supra* has no application to the case herein because it deals with an application process to have seniority recognised from a period of broken seniority because of a resignation and subsequent re-hiring. The time limits were applied strictly to that application process. No such application need be carried out in the case before the Board herein.

MERITS

In support of its position it is argued on behalf of the Union and the Grievor that Articles 27.03 F1 through F4 describes certain situations which may ultimately count towards seniority. It is submitted that F2 is the closest to the facts of this case and when F2 and F4 are read together they apply to the facts of this case. Article 1.01 excludes sessional from the bargaining unit. It is submitted that Appendix VIII enables the Grievor's two non-continuous periods of employment to be counted towards the seniority date. Appendix VIII recognises that people can enter full time employment through sessional employment and then, does not write a specific rule to deal with a person like the Grievor who merely requires one year of probationary employment because of prior teaching or other qualifications. An inequity is created for such a person which this Board ought to correct.

It is submitted on behalf of the College that everyone serves a probationary period which in most cases is two years but, as in the Grievor's case, can be one year. On completion of that probationary period, Article 27.01 defines the seniority date. It is inappropriate to consider the prior sessional employment because the only time Appendix VIII permits that, is when the person is a two year probationary employee, which is not the Grievor's situation. Even if it were to be counted there needs to be 12 months in a 24 month period. In this case, sessional employment was only nine months. If there is an anomalous situation it is rectified by the fact that an employee such as the Grievor achieves full-time seniority based on status after one year instead of the normal two, which in effect leaves the person in the identical situation to the two year

probationary employee. In support of its position reference was made to the following arbitration awards:

An unreported decision between The Board of Governors of Fanshawe College of Applied Arts and Technology & Ontario Public Service Employees Union, a decision by a Board of Arbitration chaired by Arbitrator Brunner, dated October 19, 1983; An unreported decision between St. Lawrence College and Ontario Public Service Employees Union, a decision by a Board of Arbitration chaired by Arbitrator Brent, dated November 16, 1982; An unreported decision between Cambrian College and Ontario Public Service Employees Union, a decision by a Board of Arbitration chaired by Arbitrator Brown, dated June 30, 1988; An unreported decision between Ontario Council of Regents for Colleges of Applied Arts and Technology - Humber College & Ontario Public Service Employees Union, a decision by a Board of Arbitration chaired by Arbitrator McLaren, dated October, 1982.

The relevant provisions of the Collective Agreement read as follows:

Article 27
JOB SECURITY

27.01 On successful completion of the probationary period, a full-time employee shall then be appointed to regular status and be credited with seniority equal to the probationary period served.

Probationary Period

...

27.03 F 1 A person who has been in a position that is now covered by the Agreement and has been or is assigned up to and including August 31, 1978, a position with the College outside the Agreement will be credited with and continue to accumulate seniority for the purpose of this Agreement while in the employ of the College.

27.03 F 2 Employment with the College in a position ordinarily outside the bargaining unit in the course of which teaching, counselling or library assignments have been undertaken in the College (other than on an unusual or isolated basis) shall count in

computing seniority of persons hired by the college in positions outside the Agreement. Such seniority shall be credited in the proportion that the teaching, counselling or library assignment is of a full-time assignment based on one-quarter, one-half or three-quarters of a month of seniority of [sic] each full month's employment.

27.03 F 3 A person who is covered by the Agreement and is assigned a position with the college outside the Agreement after August 31, 1978, will be credited with and maintain seniority as at the date of assignment for six years thereafter while in the employ of the College.

27.03 F 4 Seniority credited pursuant to this Article can only be exercised once the person concerned has entered or re-entered the bargaining unit as the case may be.

...

APPENDIX VIII SESSIONAL EMPLOYEES

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

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

3 If a sessional employee is continued in employment for more than the period set out in Appendix VIII, 1, such an employee shall be considered as having completed the first year of the two year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be 12 full months of continuous or non-continuous

accumulated employment during the immediately following 24 calendar month period.

4 A person assigned to replace a full-time regular employee for up to 14 working days for unplanned absences in any month shall not have such period(s) considered as sessional employment for the purpose of the computation of the 12 months sessional employment. During such periods such a person shall be paid as if partial-load and within the range of partial-load hourly rates as set out in Article 14.

5 Other matters concerning the use of sessional appointments may be referred to the E.E.R.C. which shall deal with these matters as priority items.

The Grievor's qualifications entitled her to serve a one year probationary period under Article 27.02.A1 & A2 (ii). She successfully served that period and was appointed to a regular status under Article 27.01. That provision credits her with seniority "equal to the probationary period served". Thus, her seniority date became the day she started full-time employment on August 19, 1991. Does the Collective Agreement provide her with any earlier date based upon its provisions?

The Grievor's employment before she began her probationary period was as a sessional which is excluded from the bargaining unit by Article 1.01(v) and NOTE B. Article 27.03 F is directed at recognising some types of work "ordinarily outside" of the bargaining unit as justifying a modification of the seniority date. Thus, the Grievor is, as a threshold matter, one of the persons possibly contemplated by the Article at least at the outset of the analysis. In order to count this period of work outside of the bargaining unit, the Grievor's situation must fit the provisions of Article 27.03 F.

Article 27.03 F 2 may count work as a sessional "in computing seniority of persons hired by the College". Appendix VIII defines sessional employees to be someone who was a "full-time employee appointed on a sessional basis for up to 12 months of ... non-continuous accumulated employment ...". This definition is reflected in NOTE B to Article 1. The purpose of the Appendix is to determine the notice period for release by the College or, resignation by the employee as found in paragraph #1. Paragraphs #2 & #4 set out rules in various circumstances for determining how to calculate months or portions thereof of service. Paragraph #3 contemplates the circumstances where a full-time employee is appointed for more than the time limit of paragraph #1 of "up to 12 months of non-continuous accumulated employment". In that event, the "employee shall be considered as having completed the first year of the two year probationary period and thereafter covered by other provisions of the Agreement" {underlining that of the Board}. Employees in the situation described by Paragraph #3 are not sessionals, and are to be governed by other provisions of the Agreement outside of the Appendix which, amongst other things, changes the notice period for release or resignation. Such a person would be a probationary employee with the rights that status has under the Collective Agreement. The Grievor is not within Paragraph #3. Thus, the Appendix has nothing to do with her grievance except to note that she was a sessional for two non-continuous periods prior to full-time employment in August 1991.

The issue before us is to determine if 27.03 F 2 then requires a seniority date adjustment. The Collective Agreement is structured so that every full-time employee must serve a "probationary period". The length of that period is usually "two years continuous employment"

as provided for by Article 27.02 A 1. There are exceptions and the Grievor is within one of those as previously discussed. She had to serve a one year continuous employment period, which she successfully did. At the "successful completion of the probationary period" Article 27.01 enters the analysis by providing that the full-time employee is to be "appointed to regular status". Until that occurs the status of the individual is that of a probationary employee. On the appointment to regular status a seniority date must be calculated.

Article 27.01 does not calculate a seniority date but, directs that the full-time employee who now has regular status is to be "credited with seniority equal to the probationary period served" {underlining that of this Board}. Thus Article 27.01 speaks to crediting of seniority. The College gave that credit, thereby calculating and establishing a seniority date which was the date of full-time hire of August 19, 1991. The issue raised by this grievance is one of determining if there is to be any other **credits** applied to the calculation of seniority. It is at that point that the issue as to the interpretation and application of Article 27.03 F 2 arises.

The Grievor was employed by the College. She was in a position ordinarily outside the bargaining unit. She undertook teaching assignments in the College. Thus, she is within the opening parameters of Article 27.03 F 2. The time she did this work is to "...count in computing seniority of persons hired by the College in positions outside the Agreement". The balance of the Article then goes on to describe how the crediting of seniority is to be accomplished. The College argues that the provision is related to a management position outside the bargaining unit. The Union submits that it does not have to be interpreted in that fashion and, includes the Grievor.

The ambiguity arises because of the use of two different phrases to qualify the word "position". At the outset of the Article the position referred to is to be "ordinarily outside the bargaining unit". When it comes to crediting seniority, it is to go to a position "outside the Agreement".

The first phrase as used at the outset of Article 27.03 F 2 is to qualify "employment with the College" in a position. In this case, teaching as a sessional is within the scope of that phrase. The second phrase, "outside the Agreement" is to qualify persons hired by the College in a position. What position is it that receives crediting of seniority? It is one where the person is hired by the College in a position outside the Agreement. It is at this point that the Grievor does not fit the parameters of the Article. There must be a deliberate reason for changing the qualifiers to the word position. The person to be credited is one who is "hired by the College in positions outside the Agreement". The Grievor is hired in a position as a regular full-time Teaching Master, as they were called at that time. Therefore, she was not hired in a position outside the Agreement. She is thus, unable to claim credits for the sessional work outside the bargaining unit. If that phrase had been used in the second reference then the matter might have come out the way the Union counsel, so skilfully and adroitly, argued the case. However, the Article uses different qualifiers to the word "position" for a reason. We must provide an interpretation of the Article which reflects the difference in language. Employment with the College in a position ordinarily outside the bargaining unit is **not** equivalent to a person hired by the College in positions outside the Agreement. Such positions are not part of the bargaining unit but the phrase was intended to identify a group of persons who are totally unaffected by the Agreement. A sessional is not such a person as the analysis of this award indicates.

Based on the foregoing analysis there are no further credits to be added in the calculation of a seniority date beyond the credits extended by Article 27.01. Therefore, no further seniority date adjustment was acquired. Therefore, the seniority date is determined by Article 27.01. It was correctly determined by the College and the grievance must be denied. There being no violation of the Collective Agreement it is ordered that the grievance be dismissed.

DATED AT LONDON, ONTARIO THIS 27th JANUARY, 1999.
~~DAY OF JULY, 1998.~~



Richard H. McLaren, C.Arb.

I ~~concur~~/dissent
Dissent attached

"signed"
Sherril Murray, Union Nominee

I concur/dissent



Peter Hez, College Nominee

This member concurs with the majority regarding the timeliness issue and dissents from the majority view on the merits. The majority errs as follows;

Ms. Gossin was initially hired into a sessional teaching position, one which is ordinarily outside the bargaining unit. I stress the word **ordinarily** as the parties recognize that a sessional position continued more than 12 months etc invokes Article 2 and Appendix 8, paragraph 3 (amongst other Articles) which give rise to certain rights under the Collective Agreement. We agree that Note B excludes sessionals and " means an appointment not more than 12 mo." etc. The sessional positions that exceed the parameters and in violation of Article 2, are dealt with elsewhere in the Agreement. The difference in the language described by this Board should be interpreted to capture the service of the sessional position as described in Ms. Gossin's case, as a sessional position is ordinarily outside the bargaining unit until the parameters of Appendix 8 have been established, at which point they enjoy certain rights under the collective agreement. Thus in this case, the argument that Ms. Gossin's service completed outside the bargaining unit is valid. The college argued that Art. 27.02 F 3 applies only to an employee who had been previously hired as a manager or support staff etc. In fact, neither of these categories of positions argued by the college are "ordinarily " outside the bargaining unit. They are by virtue of the Recognition clause simply outside the bargaining unit, period.

The difference in language, "ordinarily outside the bargaining unit" and "outside the Agreement" reflects the differences between sessionals within the 12 month period and those who exceed the recognition provisions. In other words the difference in sessional positions as determined by length of service in sessional positions.

Further, the fact that a person is hired as a Professor does not make it a position. "Professor" is a classification, not a position (see page 144 etc..) Position is defined by the work associated with and the status of the position consistently throughout the Agreement, i.e. full-time position, partial load position, sessional teaching position, etc. In fact this panel describes in the third line, page one " She held a subsequent sessional position.....

In short a sessional position is ordinarily outside the bargaining unit (NOTE B), reinforced by the staffing provisions, until it exceeds Appendix 8.

As Ms. Gossin's position as a sessional was ordinarily outside the bargaining unit and continued to be outside the Agreement during her sessional appointment, (as opposed to those sessional positions continued beyond the 12 in 24 rule, and no longer "outside the Agreement") the facts of this grievance fall squarely within the parameters of Article 27.03 F 2. Thus Ms. Gossin's seniority credits should have been calculated as per the provision.