

IN THE MATTER OF AN ARBITRATION

BETWEEN:

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

- and -

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

GRIEVANCE OF DAVID GRIGHTMIRE  
OPSEU #241713

BOARD OF ARBITRATION:

Richard H. McLaren, Chairman  
Ron Kelly, Union Nominee  
Richard O'Connor, College Nominee

COUNSEL FOR COLLEGE:

Pat Brethour

COUNSEL FOR THE UNION:

Andrew K. Lokan

A HEARING IN RELATION TO THIS MATTER WAS HELD AT KINGSTON, ONTARIO,  
ON NOVEMBER 25, 2003. AN EXECUTIVE SESSION BY CONFERENCE CALL WAS  
HELD ON 29 MARCH 2004.

## PRELIMINARY AWARD

At the time of the hearing in Kingston, Ontario, the parties agreed that the Arbitration Board was properly appointed. There were no objections as to the composition of the Board of Arbitration nor as to their authority to issue a final and binding decision in this matter. The College raised a preliminary objection as to the arbitrability of the matter. This Preliminary Award deals with that objection.

The Grievor had been a full-time employee of the College. He suffered from a spinal tumour which required an operation which very unfortunately left him a paraplegic. As a consequence, his medical needs included a special mattress to relieve and dissipate pain build up. The mattress relieves pressure so that a person does not feel their skin pinched while it supports you. The claim for the purchase of the mattress was denied by the insurance carrier for the extended health plan. A grievance was filed on the 18<sup>th</sup> of December, 2002, alleging:

That Article (5) 19/6 specifically but not exclusively and the extended health care plan in that I have not been adequately reimbursed for required prescribed items.

The settlement requested was for a declaration that the Collective Agreement had been violated and an order for full compensation for the cost of the medical mattress.

In order for the parties Counsel to make argument to the Board of Arbitration they filed as Exhibit #3 an Agreed Statement of Facts for the purposes of the preliminary determination. The facts as agreed by Counsel are set out below.

1. The grievance concerns the alleged failure of the Employer to reimburse the Grievor for required prescribed items pursuant to the Extended Health Plan.
2. The Extended Health Plan is established pursuant to Article 19.01 of the Collective Agreement, which provides as follows:

19.01 The College shall pay 100% of the billed premium of the Extended Health Plan for

employees covered thereby and subject to the eligibility requirements of the Plan. Effective October 1, 2002, the Extended Health Plan shall be amended to provide for a combined maximum annual coverage for all covered paramedical services of \$1,500.

3. Under Appendix 4 of the Collective Agreement, a Joint Insurance Committee is established with equal representation from the Union and the College Compensation and Appointments Council. The duties of the committee include:
  - Development of the Specifications for the public tendering of any negotiated benefits which may be included in the Group Insurance Plan (to cover the bargaining unit only); and
  - Review of contentious claims and recommendations thereon, when such claim problems have not been resolved through existing administrative procedures.
4. The current carrier for group insurance benefits is Sun Life. Sun Life was selected pursuant to the "Request for Proposal - Specifications for Group Insurance Benefits" dated April 4, 1996, attached to this Agreed Statement of Facts as Appendix A. The roles of the JIC and Council of Regents (presently known as the College Compensation and Appointments Council) with respect to this document are set out in Appendix IV to the Collective Agreement.
5. Benefits are described in a booklet entitled "Employee Benefits for Academic Employees of the Ontario Colleges of Applied Arts and Technology" effective January 1, 2002,, which is attached to this Agreed Statement of Facts as Appendix B. This document was developed by the Joint Insurance Committee.
6. Premiums for the Extended Health Plan are paid by the employer, and are based upon actual experience. Premiums are set in advance based upon an estimate of the cost of paying claims, plus an administration fee to be paid to Sun Life. The amounts paid in premiums are subsequently reconciled against actual claims

experience, so that the employer takes the benefit of any surplus and must make up any deficit.

7. The Joint Insurance Committee regularly reviews claims that are contentious between the parties. Sun Life also attends meetings of the Joint Insurance Committee. The Grievor's claim was discussed at meetings of the Joint Insurance Committee held December 18, 2001, February 1, 2002, March 1, 2002, May 21, 2002, September 6, 2002, October 3, 2002, November 8, 2002, December 5, 2002, January 23, 2003, and March 13, 2003. No agreement was reached as to the Grievor's claim for reimbursement. Minutes of the Joint Insurance Committee Meetings for these dates are attached as Appendix C

(Exhibit 3)

## ARGUMENT

It is argued on behalf of the College that the grievance is not one properly before the Arbitration Board as it is not capable of being arbitrated. The Board has no jurisdiction to hear the matter because the extended health plan and the contract of insurance are outside the scope of the Collective Agreement. Since 1972 the College has had a contract with Sun Life Insurance Company of Canada for the administration and provision of the extended health care benefits and long term care disability benefits required to be made available under the Collective Agreement. The claim by the Grievor was submitted to the plan carrier who denied the claim. The College submits that the only obligation it has under the Collective Agreement is to arrange for the coverage and pay 100% of the premiums. It is submitted that the only other reference to insurance is contained in Appendix 4 of the Collective Agreement where there is mention of a "Joint Insurance Committee". That provision sets up the purpose of the committee, which is to facilitate communication between the Council of Regents and OPSEU and to report their discussions to the plan carrier, Sun Life. Therefore, it is submitted that the only obligation of the College is to pay premiums and that grievances arising from the denial of claims are

not arbitrable unless the matter arises out of its failure to pay premiums which it does not in this case.

It is further submitted that Sun Life is not a party of the Collective Agreement and is not part of the arbitrable process contemplated by the Collective Agreement. There are a number of College cases holding that the insurance policies are not incorporated into the Collective Agreement and therefore not subject to a grievance.

In support of its position a reference was made to the following cases:

*London Life Insurance Company v. Dubreuil Brothers Employees Association, a Division of IWA Canada Local 2693 et al* (2000) 49 O.R. (3d) p. 766 (C.A.); a unanimous unreported decision of a Board of Arbitration chaired by Arbitrator Swinton between *Seneca College and OPSEU* involving the grievance of S. Shields dated March 4, 1983; an unreported majority decision of a Board of Arbitration chaired by Arbitrator Brent between *Algonquin College and OPSEU* involving the grievance of S. O'Farrell dated January 3, 1985; an unreported majority decision of a Board of Arbitration chaired by Arbitrator Palmer between *Mohawk College and OPSEU involving the grievance of V. MacKay* dated May 28, 1985; an unreported majority decision of a Board of Arbitration chaired by Arbitrator Brown between *Niagara College and OPSEU* involving a policy grievance dated July 21, 1998; an unreported decision of a Board of Arbitration chaired by Arbitrator Shime between *George Brown College and OPSEU* involving the grievance of W. Tevens dated June 7, 1999; an unreported unanimous decision of a Board of Arbitration chaired by Arbitrator Brent between *George Brown College and OPSEU* involving the grievance of B. Richmond dated June 14, 2001.

It is submitted on behalf of the Grievor and the Union that the Collective Agreement provides for an Extended Health Plan at the employer's cost and sets out benefits which are to be determined within a framework in which the Joint Committee is part of the process together with the insurance company. The specification for the public tendering

of insurance carriers sets the specific benefits to be provided by the insurance . This role of the Joint Committee brings the benefits of the insurance within the collective agreement language and makes the grievance arbitrable. The parties treat the Joint Committee as having more than an advisory role because they are negotiating benefits on hearing contentious claims and making recommendations thereon. Therefore, the grievance is arbitrable.

In support of the position of the Union and the Grievor reference was made to the following cases:

*London Life Insurance Company v. Dubreuil Brothers Employees Association, a Division of IWA Canada Local 2693 et al, supra; City of Ottawa v. Ottawa-Carleton Public Employees Union, Local 50378 L.A.C. (4<sup>th</sup>) 225 (Ontario Keller 1999); Dimplex North America v. United Steelworkers of America, Local 8698 111 L.A.C. (4<sup>th</sup>) 443 (Ontario Mitchnick 2002); City of Toronto v. Canadian Union of Public Employees, Local 416 80 L.A.C. (4<sup>th</sup>) 385 (Ontario Beck 1999); City of Greater Sudbury v. Canadian Union of Public Employees, Local 4705 104 L.A.C. (4<sup>th</sup>) 124 (Ontario Marcotte 2002);*

## RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT AND RELATED DOCUMENTS

### **Article 17 SHORT TERM DISABILITY PLAN (STD)**

#### **Participation**

**17.01 A** Effective April 1, 1991, all full-time employees shall be covered by this plan.

#### **Funding**

**17.01 B** This plan shall be funded by the College.

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**Article 18**  
**LONG-TERM DISABILITY PLAN (LTD)**

**18.01** Employees shall pay the full premium of the present Long-Term Disability Plan, the benefit level to be 60% of monthly base salary in effect as of the date of disability reduced by:

- (i) any form of salary continuation from the employer or benefit from an employer sponsored retirement or pension plan;
- (ii) any basic disability benefits payable from government sponsored income security programs (e.g. C/QPP, W.S.I., E.I., or similar programs);

But this amount shall not be reduced by amounts payable under:

- (i) any privately sponsored group disability insurance plan;
- (ii) any increase in benefit arising from the C/QPP as a result of an adjustment in the Consumer Price Index.

**Article 19**  
**OTHER INSURANCE PLANS**

**Extended Health Plan**

**19.01** The College shall pay 100% of the billed premium of the Extended Health Plan for employees covered thereby and subject to the eligibility requirements of the Plan. Effective October 1<sup>st</sup>, 2001, the Extended Health Plan shall be amended to provide for a combined maximum annual coverage for all covered paramedical services of \$1,500.00.

...

**19.03 A** The College shall continue coverage of Extended Health (including Vision and Hearing Care) and Dental Plans for the dependent survivor of a deceased employee for six

months at no cost to the survivor. Thereafter, effective September 24, 1998, at the option of the dependent survivor, and subject to 19.03 A 2, the College shall continue such benefits as were in force for the deceased employee at the date of death, coverage continues until the end of the month the deceased employee would have reached age 65 at which point the survivor may elect to continue the normal retirement benefits.

...

## **APPENDIX IV JOINT INSURANCE COMMITTEE**

### **Purpose of the Committee**

**1 A** The purpose of the Joint Insurance Committee is to facilitate communication between the Council of Regents and OPSEU on the subject of group insurance applicable to the Academic Staff Bargaining Unit, including Basic Life, Supplementary Life Insurance, Extended Health Insurance, Long Term Disability Insurance, the Dental Plan and such other negotiated benefits that may, from time to time, be included in the group insurance plan.

**1 B** Nothing herein shall prevent this Committee from meeting jointly with any comparable committee, if established, concerning the Support Staff Bargaining Unit should it be mutually agreed between this Committee and such other Committee.

**1 C** It is understood that the group insurance benefits to be provided to employees and the cost sharing arrangements shall be as set out in the applicable Agreement and the matters for consideration by this Committee shall be only as set out in these terms of reference.

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### **Composition of the Committee**

**2** The Committee shall be composed of an equal number of representatives from the Council and OPSEU with not more than eight representatives in total. At meetings of the

Committee each party may be accompanied by up to two resource persons to provide actuarial or other technical advice. Additionally, when necessary, representatives of insurance carriers shall attend meetings to provide information but shall not act as resource persons for either party.

### **Duties of the Committee**

**3** The duties of the Committee shall consist of the following:

1. development of the specifications for the public tendering of any negotiated benefits which may be included in the Group Insurance Plan (to cover the bargaining unit only);
2. consideration and examination of all tenders submitted in response to the specifications for tender and preparation of a report thereon;
3. recommendation to the Council of Regents on the selection of the insurance carrier or carriers to underwrite the Group Insurance Plans;
4. consideration and recommendation to the Council of Regents on the renewal of existing contracts of insurance upon expiry;
5. review of the financial reports on the Group Insurance Plan; and
6. review of contentious claims and recommendations thereon, which such claim problems have not been resolved through the existing administrative procedures.

### **RELATED DOCUMENTS**

Sun Life Assurance Company of Canada Policy

## DECISION

Counsel both agree that the *London Life*, case, *supra*, confines the earlier case of *Pilon v. International Minerals and Chemical Corp.* (1996), 31 O.R. (3d) 210 (C.A.). They also both agree that the case reaffirms the method of deciding the arbitrability of benefit entitlement claims by examining the language of the collective agreement to determine into which of four categories originally identified in Brown & Beatty<sup>1</sup> {B & B}, the particular language falls. The issue between them is the appropriate characterization of the collective agreement language. The College states that the only obligation of Article 19 is to pay the billed premium of the Extended Health Plan {the "Plan"}. The Union asserts that the role of the Joint Insurance Committee {the "JIC"} referred to in Appendix IV brings into play a negotiation of benefits process which changes the applicable B & B category and makes the matter arbitrable. This Board must determine which is the better characterization of the collective agreement. In so doing this Board distinguishes the *Niagara College*, case, *supra* because it is apparent that the board of arbitration misconstrued its obligations following the *Pilon* case, which with the benefit of the *London Life* case, it is now clearer that the particular board ought not to have taken jurisdiction over the matter.

The collective agreement in Article 19 provides for the Plan. The same Article stipulates that "100% of the billed premium" of the Plan is to be paid by the College. This language would tend to place the characterization of the collective agreement within the third category in B & B resulting in the grievance being inarbitrable. The Union asserts there is more to the characterization than merely examining Article 19.

Aside from the last sentence in Article 19.01 in regard to paramedical services; the Article also indicates that the Plan and the premium for it applies only to "employees covered thereby and *subject to the eligibility requirements of the Plan*". The italicized

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<sup>1</sup> *Canadian Labour Arbitration*, 3<sup>rd</sup> ed. (Carswell, Toronto 1988)

language while defining the scope of the billed premium also apparently incorporates more into the Article than merely the billed premium. That language refers to the Sun Life Assurance Company of Canada policy and the “*eligibility requirements*” therein. The italicized language is properly characterized as incorporating in part the insurance policy into the collective agreement. This suggests that the fourth category of B & B could have some application to the determination of arbitrability.

The next step in the analysis is to look at Appendix IV of the collective agreement. The Appendix creates the JIC. Its purpose is to “facilitate communication between the Council of Regents and OPSEU on the subject of group insurance”. It has been stated in *George Brown College, supra, at page 12*, that the above quoted sentence “... *denies any intent by the parties that by providing a Joint Insurance Committee they intended to incorporate by reference those groups of insurance plans into the Collective Agreement*”.

The duties of the JIC are set out in clause 3. The JIC is to develop the specifications for the public tendering of any negotiated benefits; consider and examine submitted tenders and recommend selection of a carrier for any particular group insurance plan. It also has jurisdiction to recommend on renewal of existing contracts of insurance and is to review the financial reports on the group insurance plans. All of the foregoing duties of the JIC are of a recommendation nature and are not binding upon the Council of Regents and therefore on the College in the context of the facts of this case. The binding obligation of the College is in Article 19. Therefore, the Board concludes that none of these functions of the JIC are relevant to the proper characterization of the collective agreement language in this matter.

Of greater significance is the sixth and final duty of the JIC. That is its role to review contentious claims and make recommendations thereon. It is the submission of the counsel for the Union that this makes the benefits provided under the Plan a creature of collective bargaining and makes the proper characterization of the language within category two of B & B and thus an arbitrable grievance. It is also submitted that the JIC

has *de facto* become a negotiation of benefit process between the College and the Union both of whom have equal representation on the JIC.

The Board finds that the language of the Appendix does not provide for benefits. It provides a recommendatory role to a committee while preserving the final decision to that of the Council of Regents and in that capacity the College. The JIC recommendation may be received but does not have to be accepted. Thus, the College is not obliged by this process to provide certain benefits. It is the case that recommendations of the JIC on contentious claims if accepted do ultimately affect the premium paid by the employer because the insurance is based on actual experience. Therefore, the actions of the JIC can have an impact on the amount of premium to be billed. That does not make their actions one of a negotiating body for benefits. It remains a body with jurisdiction to recommend payments on contentious claims. In the language of both the *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 and the *Regina Police Assn Inc v. Regina (City) Board of Police Commissioners* 9200), 183 D.L.R. (4<sup>th</sup>) 14 the activities of the JIC are not within the arbitrator's exclusive jurisdiction of disputes that arise expressly or inferentially out of the collective agreement. The dispute here is not rooted in the collective agreement.

Another way of recognizing that this matter is not inferentially in the collective agreement is to examine the claims process. The Grievor does not apply for benefits under the tender by insurance companies interested in providing the insurance. After the JIC has made a recommendation and an insurance company has been engaged to provide benefits; then the Grievor applies under the insurance policy for payment of the benefit. The policy is the governing document that determines payment and the decision of the Sun Life to pay or deny the claim. The JIC can review the denial of a claim but all it can do in that review is recommend the payment of the claim. Therefore, the matter is not within the Collective Agreement.

There is also an argument that the JIC has *de facto* become the body through whom negotiated benefits are achieved and thus the benefits are incorporated into the Collective

Agreement. The Request for Proposal referred to in paragraph 4 of the agreed facts does set out the "*Details of Benefits Program*" and the "*Benefit Details*". In part VII it refers to "*Future Benefit Changes*" where the Proposal states: "*benefit changes occur through the collective bargaining process for the Academic and Support Staff Groups ...*". That is a clear indication that benefits change through collective bargaining and not by the JIC.

A review of the Academic JIC meeting notes referred to in paragraph 7 of the agreed facts does not support the assertion that the JIC negotiated benefits. It does exactly what Appendix IV says it "[reviews] ... *contentious claims*" and makes recommendations. The JIC has not become a committee through which benefits are inferentially part of the collective bargaining process. It is a process which an employee through the Union may take advantage of rather than pursuing a law suit against the insurance company as is suggested in the *Seneca College*, case, *supra*. A process which has already taken place for this Grievor.

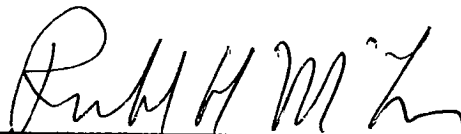
Based upon all of the foregoing analysis this Board must conclude that the proper characterization of Article 19 is that the collective agreement language ought to be characterized as the College argued as being an obligation to pay an insurance premium as set out in paragraph 3 of B & B. The extended references to Appendix IV and an analysis of the role of the JIC does not alter that conclusion. Therefore, this Board must conclude that the grievance is inarbitrable.

For all of the foregoing reasons the Board finds it is without jurisdiction to deal with the grievance. The grievance is not within the exclusive jurisdiction of the Board of Arbitration as comprising a dispute which arises expressly or inferentially out of the collective agreement. Therefore the Board orders the grievance be dismissed as being inarbitrable.

In making the foregoing determinations the Board does not reference the other College authorities submitted as they do not deal with the Extended Health Article 19. The

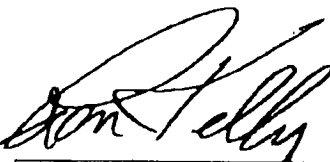
authorities submitted by the Union in each case deal with the appropriate characterization of collective agreements which are different than the one for the community colleges. In the view of the Board those cases do not assist it in the characterization it was required to undertake.

DATED AT LONDON, ONTARIO THIS <sup>th</sup> 29 DAY OF MARCH, 2004.



Richard H. McLaren, C.Arb.  
Chairman

I concur



Ron Kelly, Union Nominee

I concur ~~dissent~~



Richard O'Connor, College Nominee

MAR 9, 04