

HEADNOTE

OPSEU(Grogan) vs. Humber College
L. 562 OPSEU file#

91F805

CAAT 1A)

The issue in dispute arose out of the College's decision to remove a special two-step salary allowance paid to the grievor continuously for 7 years after he had been removed from job entitling him to the allowance in the first place.

The grievor was transferred from a Senior Co-ordinator position which received the two-step allowance in 1984 to a regular teaching position for which, under the Collective Agreement, the allowance would not normally be paid.

The union argued that the timing of the discontinuance of the allowance was suspect as it coincided with certain union activities engaged in by the grievor. It was further argued that as the College had relied on the fact that the grievor did not suffer any loss of compensation as a result of the reassignment in 1984 to succeed in a previous arbitration involving the reassignment, removing the salary allowance now is punishment for engaging in union activities contrary to the Collective Agreement.

HELD: The grievor has not the performed the duties deserving of the two-step allowance for 7 years, the grievor has been a union activist throughout the period and the employer gave considerable notice that payment of the allowance would be terminated. LOST.

GL

IN THE MATTER OF AN ARBITRATION

BETWEEN:

HUMBER COLLEGE

The Employer

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

The Union

AND IN THE MATTER OF THE GRIEVANCE OF J. GROGAN — OPSEU FILE NO. 915805

91F805

Board of Arbitration:

D.D. Carter, Chair
J.G. Campbell, Employer Nominee
B. Switzman, Union Nominee

Appearances for the Union:

G. Leeb, Grievance Officer
J. Grogan, Grievor

Appearances for the Employer:

D.L. Hewat, Counsel
R. Hook, Vice-President, Instruction
T. Fletcher, Chair, Business Administration
H. James, Consultant, Human Resources

A hearing in this matter was held at Toronto on September 29, 1992.

↓
A W A R D

This grievance alleges that the employer improperly withdrew the two-step SPC salary allowance that the grievor had been receiving for some years. The union asks that this allowance be reinstated retroactive to September 1, 1991, and that the grievor be awarded interest on any monies owing since that date. Prior to the hearing the parties were able to agree upon the following facts:

1. The grievor, Joe Grogan, has been employed in an instructional capacity at Humber College continuously since September 1969.
2. Effective 1 January 1975, the grievor was assigned the duties of a Co-ordinator at the Centre for Labour Studies for which the grievor received a Co-ordinator's allowance pursuant to the Collective Agreement in effect at that time.
3. Effective 1 June 1976, the grievor was appointed to the position of Director for the Centre of Labour Studies. The Director position was excluded from the bargaining unit due to its managerial duties.
4. The grievor was never comfortable with the exclusion from the bargaining unit and persisted in arguing that his position and his work with the trade union movement in connection with the Centre made it imperative that he too be a member of a trade union.
5. Discussions between the grievor and the College regarding his return to the bargaining unit ensued. The President of the College was involved in the discussions and agreed on September 10, 1981, to recognize the grievor's academic bargaining unit status.
6. Eventually, a grievance was filed, the matter proceeded to arbitration on September 28, 1982, and an award was issued on November 24, 1982, by a Board chaired by Mr. McLaren. By the time of the hearing the College had agreed to return Mr. Grogan to the bargaining unit. The real dispute between the parties dealt with in that award concerned other matters.
7. Effective 1 September 1982, the grievor returned to the bargaining unit as a Senior Programme Co-ordinator (SPC) at the Centre for Labour Studies. The grievor's appointment and acceptance of the duties assigned were confirmed in a letter dated January 5, 1983 from the College.
8. As a Senior Programme Co-ordinator with specific responsibility for organization of the Centre, the grievor received a special salary allowance equivalent to two (2) steps of the salary grid as provided by the Collective Agreement - see for example the current Collective Agreement - Appendix 1 Guidelines 5(b).
9. Effective 19 April 1984, the College removed the grievor from the Senior Programme Co-ordinator position. The grievor grieved the College's actions.
10. The grievor assumed regular teaching duties as of August 1984, with no additional Co-ordinator duties.

11. Following eleven (11) days of hearings, a Board of Arbitration chaired by Ms. Brent released a decision dated 8 April 1987, dismissing the grievance referred to in paragraph 9. ↓
12. A copy of the Brent decision is attached as Exhibit A.
13. Notwithstanding the reassignment of the grievor's duties in 1984, the grievor continued to be paid the two (2) step SPC salary allowance up until 31 August 1991. The grievor was advised by memo from the Dean of Business dated November 30, 1990, that the SPC allowance would cease prior to commencement of the 1991/92 academic year.
14. The grievor has not been assigned nor performed Senior Programme Co-ordinator duties since April 1984.
15. It is not alleged that the College in ceasing to pay the grievor a two (2) step salary allowance has disciplined the grievor.
16. Rather, the Union contends that the removal of the salary allowance is a form of punishment contrary to Article 2.01.

Article 2.01 of the collective agreement provides:

2.01 The Colleges and the Union agree that there will be no intimidation, discrimination, interference, restraint or coercion exercised or practised by either of them or their representatives or members because of an employee's membership or non-membership in the Union or because of an employee's activity or lack of activity in the Union or because of an employee's filing or not filing a grievance including participation in the workload complaint system.

At the hearing, additional evidence relating to the alleged violation of article 2.01 was introduced by both parties. The grievor testified that, over the years, he had come to regard the two-step allowance as an integral part of his basic salary and had counted upon this additional money in planning his personal budget. It came as an unpleasant surprise, therefore, when he received a memorandum from the College dated November 30, 1990, advising that the allowance would be terminated prior to the 1991-1992 academic year.

From the grievor's perspective the timing of this memorandum was suspect, since just three days earlier he had presented a brief to the College's Task Force on Violence that had been critical of the College's administration, both in respect of recent lay-offs of full-time faculty and in respect of what he regarded as the College's failure to address the cultural, racial, and ethnic diversity of Canadian society. On May 23, 1991, he received a further memorandum specifically advising that

the allowance would be discontinued as of September 1, 1991. This memorandum was received hard on the heels of his election as the union's health and safety representative.

The grievor further testified that he had been an active and vocal union member ever since he joined the college's faculty. Not only had he actively advised other union members of their rights, but over the years he had filed at least six personal grievances and taken three of these grievances as far as arbitration. The grievor testified that, in his opinion, the unexpected removal of the two-step allowance was not merely coincidental but had a direct connection to his union activism. Moreover, in his view, the removal of the allowance was inconsistent with understandings that had been reached after he had been removed as Senior Programme Co-ordinator at the Centre for Labour Studies in 1984.

The College witnesses painted a different picture of the removal of the allowance. Richard Hook, the College's Vice-President Instruction, testified that the removal of the grievor's allowance was the result of the application of a general policy to restrict the payment of such allowances to those faculty who were no longer performing the additional responsibilities for which these allowances were intended. The implementation of such a policy, according to Hook, had been discussed as early as 1988, but its actual application had been delayed by the faculty strike of 1989. In the spring of 1990, however, it was decided to proceed with the policy in order to correct certain anomalies that did not reflect to the College's present organizational structure. Hook testified that the grievor was only one of five faculty members affected by the policy and, being the last of the group to have his remuneration adjusted, had received as much, if not more, notice than the other members of this group.

Toby Fletcher, Chair of Business Administration, testified to much the same effect. As author of the May 23, 1991, memorandum, he explained that it was simply his intention at the time to provide the grievor with sufficient notice of the change in remuneration. He described the grievor as a dedicated faculty member and characterized his relationship with the grievor as good.

Our assessment of the totality of the evidence is that it does not support a conclusion that the removal of the allowance was in any way retribution or punishment for either the grievor's brief

to the Task Force on Violence or his election as a union health and safety representative. The grievor had a long history of union activism and there was no evidence that his past union activities had ever attracted improper employer interference. The grievor's brief to the Task Force on Violence and his election as a union health and safety representative appears to be just an extension of an existing pattern of union activism. Therefore, it is difficult for us to see how these more recent activities would be any more likely to attract employer retribution than any of his past union activities.

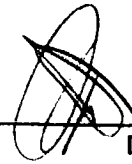
The thrust of the union's argument, however, was that the removal of the allowance had subverted the factual foundation of an earlier arbitration award dealing with a different grievance brought by the grievor. The effect, according to union counsel, was to interfere with the grievor's rights contrary to article 2.01 of the collective agreement. It was argued that the majority award that had dismissed the earlier grievance rested upon a factual finding that the grievor had not suffered a loss of any salary classification, rank, seniority or benefits. Based on this finding the majority had concluded that the College's actions amounted to a transfer of the grievor rather than disciplinary action. The removal of the allowance in September 1991, according to the union, had effectively subverted the factual foundation of this arbitration award contrary to article 2.01 of the collective agreement..

This argument certainly stretches the scope of article 2.01, raising the issue of whether the subversion of an earlier arbitration award is the type of conduct prohibited by this provision. Given the facts before us, however, we need not resolve this issue of contract interpretation. More than seven years have passed between the events underlying the earlier arbitration award and the discontinuance of the allowance in September of 1991. Given the passage of this amount of time, it is reasonable to assume that, even if the incident underlying the earlier arbitration award had not occurred, changes in the College's organizational priorities, sources of financing, and management structure might well have resulted in the removal of the grievor's additional responsibilities at some point during this seven year period for reasons not connected to discipline. Therefore, in the absence of any clear and express agreement contemplating the indefinite continuance of this

allowance, it is reasonable to conclude that over the passage of time the grievor's situation had evolved into a true anomaly, placing him in the same situation as the other four faculty members who were not longer performing the additional duties for which the allowance was paid. The employer, having provided the grievor with substantial notice of its intentions to correct this anomaly, cannot in these circumstances be held to have violated article 2.01, assuming even the broadest interpretation of this provision.

Accordingly, for these reasons, this grievance is dismissed.

Dated at Kingston this 10th day of December, 1992.



D.D. Carter, Chair

"J. G. Campbell"

J.G. Campbell, Employer Nominee

"B. Switzman"

B. Switzman, Union Nominee

I concur

See addendum

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

HUNTER COLLEGE

(the "College")

- A N D -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(the "Union")

A D D E N D U M

On the whole, I cannot say that the decision of the Chair is unreasonable. However, I wish to comment on one aspect of the award.

Mr. Fletcher, Mr. Grogan's immediate supervisor, made the decision to demote the grievor. It is my concern that Mr. Fletcher's decision was based upon faulty information.

Mr. Fletcher stated that he became Chair of the Management Studies Department in September 1988. At that time, he thought he had three Programme Co-ordinators, but found out that he had a fourth - Joe Grogan, who was classified and paid as a Senior Programme Co-ordinator (S.P.C.).

When Mr. Fletcher discussed this matter with Human Resources and his supervisors, the only document he was provided was the letter of confirmation of the S.P.C. position for Mr. Grogan dated January 5, 1983, and signed by College President Robert Gordon. However, Mr. Fletcher testified that when he made the decision to demote Mr. Grogan, he was completely unaware of the Gail Brent arbitration decision involving Mr. Grogan dated April 8, 1987.

Yet, it is within that award that can be found the rationale for Grogan keeping his S.P.C. allowance for all of these years. It is in the Brent Award that can be found the College's commitment to maintain Grogan's wages, benefits and status. As found in Mr. Majesky's letter on page 25 of the Brent Award:

We did this with the full knowledge and assurances from the College that Joe Grogan would not be disciplined or demoted in any way and that he would be reassigned within Humber as a senior programme co-ordinator with no loss in seniority, wages or in past job classification. (emphasis added)

The College's undertaking was also confirmed in their reply to the grievance found on page 26 of the Brent Award. It was only because of these undertakings of the College that Arbitrator Brent dismissed Mr. Grogan's grievance.

Thus, in order to get a favourable result for the situation the College faced in 1984, it created an anomalous position for Mr. Grogan. While his classification, wages and benefits continued his actual S.P.C. duties were removed. No time limits were ever set by the College for how long this arrangement was to last.

Therefore, I would hope that Mr. Fletcher would review the commitments made by the College to Mr. Grogan in 1984. Surely, an honourable settlement of the College's 1984 undertakings ought to be carried out in a conscious and fair manner. I am confident that with full input of the union and the grievor, an appropriate accommodation can be reached.

3

In only one aspect do I differ from the Chair's award. I would have awarded that Mr. Grogan's S.P.C. wage allowance be continued until a proper review of this 1984 undertaking had been completed.

Respectfully submitted.

DATED AT TORONTO, this 10th day of December, 1992.



Brian Switsman
Union Nominee