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H E A D N O T E

Article(s): 11

OPSEU (Gruchalla) vs. George Brown College, Award dated December 12, 1988 (D. Carter)

Facts:

Grievor filed grievance claiming that he had been incorrectly placed on the salary grid at the time he was hired. Grievor was hired in September 1982 but did not grieve until November 1987. College allowed grievance retroactive to September 1987.

Issue:

Extent of College's retroactive liability.

Decision:

Grievance denied on the basis that the time limits in the collective agreement restrict the board's jurisdiction to grant a retroactive remedy. Reviews case law between the parties on the effect of time limits restricting the retroactivity of remedial relief. By allowing retroactivity to September 1987, College did not waive its right to invoke time limits to restrict its liability.

88A083  
LSSB

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GEORGE BROWN COLLEGE

The Employer

AND

ONTARIO PUBLIC SERVICE EMPLOYEES  
UNION

The Union

AND IN THE MATTER OF THE GRIEVANCE OF R. GRUCHALLA CLAIMING  
RETROACTIVE PAY. (OPSEU File No. 88A083).

BOARD OF ARBITRATION:

D.D. CARTER, CHAIR  
R.J. GALLIVAN, EMPLOYER NOMINEE  
J. McMANUS, UNION NOMINEE

APPEARANCES:

For The Employer:

A.E. Burke, Counsel  
S. Layton, Director of Human Resources  
J. Hague, Chairperson Math and  
Sciences

For The Union:

B. Herlich, Counsel  
E. Lord, President, OPSEU Local 556  
R. Gruchalla, Grievor

A hearing in this matter was held in Toronto on October 25, 1988.

AWARD

This grievance raises the issue of the extent of the College's liability where an employee has been incorrectly placed on the salary grid at the time of hiring. The grievor, Richard Gruchalla, was first hired in September of 1982 but did not grieve his original placement on the salary grid until November 6, 1987, at which time he claimed "the retroactive amount of monies owing resulting from the error, together with interest thereon." In its replies to this grievance the College accepted the grievor's claim that greater credit should have been given for his educational qualifications and prior working experience, but was only prepared to allow retroactivity to September 1, 1987.

The parties agreed that the applicable collective agreement was the one referring to the period September 1, 1985 to August 31, 1987, the terms of which had been extended by operation of the Crown Employees Collective Bargaining Act. The relevant provision of that collective agreement are set out below:

3.02 Determination of starting salaries and progression within the salary scales shall be in accordance with the College's Classification Plans dated August 1975 and as set out in the "Guidelines for the Implementaion of Salary Adjustments and the Classification Plans" and the application to certain present employees above the maximum scale shall continue as set out in the "Guidelines" attached hereto, which also sets out the terms of reference of the Joint Educational Qualifications Sub-Committee.

11.01 Sections 11.01 to 11.05 inclusive apply to an employee covered by this Agreement who has been employed continuously for at least the preceding four (4) months.

#### 11.02 Complaints

It is the mutual desire of the parties hereto that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employees shall discuss it with the employee's immediate Supervisor within twenty (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 (7) days after discussion with the employee.

#### 11.03 Grievances

Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under Section 11.12(c) in the following manner and sequence provided it is presented within seven (7) 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 written decisions at each step shall contain reasons supporting the decision.

##### Step No. 1

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 immediate Supervisor shall arrange a meeting within seven (7) days of the receipt of the grievance at which the employee, the Union steward, if the steward so requests, the Dean of the Division and the immediate Supervisor shall attend and discuss the grievance. The immediate Supervisor and Dean will give the grievor and the Union steward their decision in writing within seven (7) days following the meeting. If the grievor is not satisfied with the decision of the immediate

Supervisor and Dean, the grievor shall present the grievance in writing at Step 2 within fifteen (15) days of the day the grievor received such decision.

Step No. 2

The grievor shall present the grievance to the President of the College concerned. The 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 twenty (20) days of the presentation, and shall give the grievor and the Union steward the President's decision in writing within fifteen (15) days following the meeting. In addition to the Union steward, a Union staff representative shall be present at the meeting herein if requested by the employee, the Union or the College. The President or the President's designee may have such persons or counsel attend as the President or the President's designee deems necessary.

In the event 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 fifteen (15) days of the date of receipt by the grievor of the decision of the College official at Step No. 2, be referred to arbitration as hereinafter provide.

11.04 (d) The Arbitration Board shall not be authorized to alter, modify or amend any part of the terms of this Agreement nor to make any decision inconsistent therewith nor to deal with any matter that is not a proper matter for grievance under the Agreement.

11.05 (a) If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

11.12 (c) "grievance" means a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.

The union argued that, since the employer had allowed the grievance on its merits, our mandate was simply to determine the appropriate extent of damages to be awarded to the grievor.

In the circumstances of this case, according to counsel for the union, the grievor's right of recovery should not be limited by the time limits set out in the collective agreement as the conduct of the employer at the time of hiring had kept the grievor ignorant of his rights. The union, therefore, argued that the grievor was entitled to an adjustment retroactive to the date of his hiring or, alternatively, at least to the commencement of the collective agreement under which this grievance arose.

The union also sought to introduce evidence relating to retroactive adjustments made prior to hiring of the grievor. Counsel for the employer objected to this evidence as not being relevant to the resolution of the matter before us. A majority of the board ruled that, without receiving the evidence at this point in the proceedings, it was still appropriate to move on to argument to determine if such evidence might have any bearing on the outcome of this grievance. If the board should then decide that such evidence was relevant, a further hearing could be scheduled to receive these further facts.

In its argument the employer emphasized that by virtue of article 11 of the collective agreement this board only had jurisdiction to deal with a grievance arising under this particular collective agreement, and not any previous agreements between the parties. Moreover, because of the mandatory nature of the time limits in this collective agreement, our jurisdiction to grant a retroactive remedy was expressly restricted. In this

case, according to counsel for the employer, the grievance was only arbitrable because it could be treated as a continuing grievance in which case the time limits still operated to restrict the retroactivity of remedial relief.

A number of prior arbitration awards were cited by counsel for both parties. Greater weight, in our view, should be given to those awards arising out of the instant collective agreement, or other agreements between the colleges and the union. These awards are more persuasive because they better reflect the mutual expectations of the parties to this arbitration than do awards arising from different industrial relations contexts.

An award almost directly on point is Re Conestoga College and Ontario Public Service Employees Union, August 18, 1987 (Kates). In that case the board held that the grievor had been improperly credited under the classification plan when she was first hired in 1981, but still refused to provide the retroactive relief that was requested. That board made it clear that it was not prepared to treat the grievance before it as other than being filed under the then current collective agreement. In doing so, however, it did suggest that it might have some "equitable jurisdiction to override the strictures of the instant collective agreement in awarding retroactive relief..."

This suggestion must be examined in the light of other arbitration awards arising out of the colleges - OPSEU bargaining

relationship. These awards clearly contemplate that, in the case of a continuing grievance, the time limits set out in the collective agreement operate so as to limit the retroactive effect of remedial relief. See Fanshawe College, October 24, 1983 (Brunner); Fanshawe College, May 9, 1983 (Brent); Seneca College, November 23, 1983 (Delisle). From these awards we must conclude that, as a general rule, a retroactive remedy is not available in the case of a continuing grievance under this particular collective agreement.

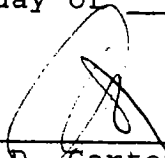
Counsel for the union submitted that, despite this general rule, we could still exercise some form of equitable jurisdiction to grant retrospective relief in the circumstances of this case. While this argument is intriguing, we find it unnecessary to make a decision as to whether we could exercise such a mandate. The facts of this case, even as alleged by counsel for the union, are simply not sufficient to support the exercise of such a jurisdiction. In particular we do not consider that there is sufficient evidence to establish that the employer misled the grievor about his rights to recourse under the collective agreement. At the time of hiring it is clear that the grievor did question his placement on the salary grid and was advised that the grievance procedure was available to him. While it is understandable that the grievor was reluctant to initiate a grievance while still in the probationary stage of his employment, there is no evidence that the employer in any way attempted to prevent him from asserting his rights under the

grievance procedure. Moreover, it is difficult to understand how the prior settlement of other claims prior to the hiring of the grievor, could mislead the grievor as to his recourse under the collective agreement. While we can understand that the grievor considers that he has been short changed by the employer's refusal of retroactive relief, this factor alone is not sufficient to support a claim for equitable relief in light of the clear time limits in the collective agreement.

A final issue to be addressed is whether the employer, when it conceded the merits of the grievance, waived its rights to rely upon the time limits to restrict remedial relief. A review of the employer's response to step I of the grievance indicates that at the very outset of the grievance procedure the employer was resisting the grievor's claim for retroactivity. While the employer did allow retroactivity to September 1, 1987, this limited concession, in our view, cannot be interpreted as expressing an intention to waive completely its right to invoke the time limits of the collective agreement to restrict its liability. The employer's reply states that "in accordance with College practice we cannot recommend the retroactivity demanded". This choice of language to us indicates that the employer was not prepared to waive its right to contest further retroactivity by invoking the time limits of the collective agreement.

Accordingly, it is our conclusion that the time limits in the collective agreement do restrict our jurisdiction to grant a retroactive remedy and so the grievance must be dismissed.

Dated at Kingston this 12th day of December, 1988.

  
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Donald D. Carter, Chair

I concur/~~dissent~~

"R. J. Gallivan"  
\_\_\_\_\_  
R.J. Gallivan, Employer Nominee

I concur/~~dissent~~

"J. McManus"  
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J. McManus, Union Nominee