

94A754 ALGONQUIN VS HANCOCK

IN THE MATTER OF AN ARBITRATION

BETWEEN:

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

- and -

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

GRIEVANCE OF GEORGINA HANCOCK
OPSEU FILE NO. 94A754
(hereinafter called the "Grievor")

BOARD OF ARBITRATION:

Richard H. McLaren, C. Arb.

Jean-Claude Laniel, Union Nominee

Rene St. Onge, Employer Nominee

COUNSEL FOR THE EMPLOYER:

Doug Gray (first day of hearings)

Wallace M. Kenny (second day of hearings)

COUNSEL FOR THE UNION:

David Jewitt

A HEARING IN RELATION TO THIS MATTER WAS HELD AT OTTAWA, ONTARIO, ON
FEBRUARY 2, 1995, UNANIMOUS PRELIMINARY AWARD DATED FEBRUARY 21, 1995,
FURTHER HEARING AT OTTAWA, ONTARIO ON OCTOBER 5, 1995.

A W A R D

This Board of Arbitration issued a Preliminary Award on February 21, 1995 in which it unanimously concluded that it had jurisdiction to deal with the balance of the Grievance set out in that Award at pages 10 and 11. It reads:

Given the foregoing determinations as to absence of jurisdiction the Board would conclude that the following elements of the grievance are within its jurisdiction to determine and are not barred by s. 33(2).

1. The calculations of monies to be deducted and the formula for that calculation.
2. The characterization of the Professional - Development Leave as wholly a paid leave or partially an unpaid leave to which other provisions of the Program may apply.
3. Whether an individual who is on such a leave is at work so as to be required to suffer an unpaid leave day pursuant to the program on December 24, 1993.

The Board rules based on all of the foregoing that it does not have the jurisdiction to deal with paragraph #3 and #6 of the grievance as set out above. That jurisdiction rests with the Adjudicator in so far as the grievance raises issues related to point 4 of s. 27(2) of the Act as to the program being "fair and equitable in its application to all employees." Beyond this specific holding and the other matters dealt with above, this Board does have some jurisdiction to hear this matter.

The parties are directed to take this award and determine if they wish to proceed with the grievance on the basis of it. Counsel are to advise the chair person of the Board in writing of their desire to proceed with the hearing on the merits within 30 days of the date herein. The Board will proceed to fix a date for the continuation of these matters if written notice of a desire to do so is received within thirty days.

It is pursuant to the foregoing determinations of the Preliminary Award determining our jurisdiction that the matter proceeded before us on October 5, 1995. At that hearing, the parties stipulated the facts on which they based their argument and filed an additional set of Exhibits with us, being Exhibits 9 through 16. It is the primary submission of the Union that the calculation of the monies deducted from the Grievor is incorrect as is set out in item 1 of the Preliminary Award quoted above. In connection with that submission it was argued that the Grievor while away from the regular work place on a professional development leave was not "at work" as set out in item 3 above.

On November 16, 1992, the Grievor made an application for professional development leave on the standard form used by the College filed as Exhibit 9. The application was made pursuant to the College's Leave Policy filed as Exhibit 10. The grant of the leave was sent in a letter from the President of the College to the Grievor dated March 11, 1993 and filed as Exhibit 11. It was after all of these events had taken place that the Social Contract Act, 1993 ("the Act") which was the subject of the Preliminary Jurisdictional Award came into force. It was a consequence of that legislation and the development of the College's Failsafe Program which was filed as Exhibit 3, the Grievor received a memorandum filed as Exhibit 12 indicating that the College would be required to recover the

equivalent of six days pay from employees on the College's payroll as at March 31, 1994. It was stated in that memo:

"Your deduction is to be pro-rated based on the percentage of earnings you are receiving during your Professional Development Leave of Absence."

(Exhibit 12)

It is the application of this memorandum to the Grievor's circumstances which is at the nub of the current dispute. The Union filed its calculations in Exhibit 14.

**SOCIAL CONTRACT
PAY SUMMARY**

Georgina Hancock:

September 1, 1993	- Annual Salary	<u>\$63,097.00</u>
	- Daily Salary @ 261 working days per year	<u>\$ 241.75</u>
	Value of 6 unpaid "Rae " days	<u>\$ 1,450.50</u>
	Social Contract deductions actually made September 1, 1993 to December 31, 1993	\$ 487.41
	Social Contract deductions actually made January 1, 1994 to March 31, 1994	<u>\$ 580.20</u>
	Total Social Contract Deductions	<u>\$ 1,067.61</u>
	September 1, 1993 to December 31, 1993	2.02
	Number of days "recovered" from January 1, 1994 to March 31, 1994	2.40
	Total days recovered	<u>4.42</u>

Calculation of days and dollars which should have been recovered on a proper pro-rata basis:

6 days were allotted over 7 months (September 1993 to March 1994)

Only 3 months where Georgina was at work

Pro-rated calculation of days and dollars owing:

$$3/7 \times 6 \text{ days} = 2.57 \text{ days}$$

@ \$241.75/day the total dollar value is:

2.57 x \$241.75 =	\$ 621.30
Actual deductions per Pay Stubs	<u>\$1,067.61</u>
Net Difference	<u>\$ 446.31</u>

(Exhibit 14)

The College filed its calculation in Exhibit 16.

GEORGINA HANCOCK #09274

Social Contract Unpaid Leave Days

24 December 1993 \$63,097 x 1 = 241.75 x 55% 261

TOTAL \$132.96 - Professional Development @ 55%

Study Week - 28 February to 04 March, 1994 - 5 days

Returned from Professional Development - January 01, 1994

\$63,097 x <u>.5</u> =	\$1,208.75
	261

TOTAL for Unpaid Leave Days <u>should be</u>	\$ 132.96
	<u>1,208.75</u>
	\$1,341.71

TOTAL <u>Deducted</u> by Payroll - Sept to Dec, 1993 =	\$ 487.41
Jan to Mar, 1994 =	580.20
	\$ 1,067.61

(Exhibit 16)

It can be seen by the foregoing calculations that the Grievor was on her Professional Development Leave for the period between September 1 and December 31, 1993. During that period a Social Contract day was assigned to be taken on December 24, 1993. The Grievor returned to her regular teaching activities at the College as of January 1, 1994 and taught during the semester running through to March 31, 1994. In that period five "Rae" days were assigned. During the period of the Professional Development Leave, the Grievor was paid 55 % of her salary pursuant to the provisions of Article 20 of the Collective Agreement. On her return to regular teaching duties on January 1, 1994 she was paid 100% of her salary.

In support of its position, it was argued on behalf of the Union and the Grievor that the issue is one as to what "pro-rata" means as it is discussed in the memorandum and as provided for in the College's Plan. It was submitted that fundamental to its position was that the Professional Development Leave meant that this employee was on a leave from work. As a consequence no work was being performed and the Grievor could not be assigned a "Rae" day on December 24, 1993. Therefore, the calculation of the pro-rata deduction printed in Exhibit 12 is incorrect and the Grievor is entitled to compensation in the amount of \$446.31 as shown on Exhibit 14.

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

An unreported decision between Trent University & Canadian Union of Educational Workers Local 8 a decision by Arbitrator Starkman dated May 16, 1994; An unreported decision between The Victorian Order of Nurses Ottawa Carleton Branch & Ontario Nurses' Association a decision by a Board of Arbitration chaired by Arbitrator Brown dated October 11, 1994.

In support of its position, it was argued on behalf of the College that the only proration which was required was as a result of the fact that the salary paid to the Employee was only 55 % of the salary for the period of the Professional Development Leave. It was submitted that there was no need to refer to the provisions of the Fair Safe Agreement. What was required was a characterization of the nature of a Professional Development Leave as found in Article 20 of the Collective Agreement. It was submitted that the proper characterization of that provision was that it was not a leave from work but a leave from teaching and the activity was paid at only 55 % of the teaching activity. It followed that if the Employee was at work then the College had done the pro-rata calculation of the appropriate deductions for the "Rae" days reflecting the lower income for the September to December period correctly as set out in Exhibit

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

Re Toronto Electric Commissioners, 41 L.A.C. (4th) 80 (Schiff, 1994); An unreported decision between Northern College & Ontario Public Service Employees Union a decision by a Board of Arbitration chaired by Arbitrator Mitchnick dated February 17, 1995; An unreported decision between Cambrian College & Ontario Public Service Employees Union a decision by a Board of Arbitration chaired by Arbitrator Burkett dated January 31, 1995; An unreported decision between Algonquin College and Ontario Public Service Employees Union, Local 415 a decision by Arbitrator O'Neil dated June 13, 1994.

The relevant provisions of the Collective Agreement read as follows:

Article 20

PROFESSIONAL DEVELOPMENT LEAVE

- 20.01 The College recognizes that it is in the interests of employees, students and the College that employees are given the opportunity by the College to pursue College-approved professional development activities outside the College through further academic or technical studies or in industry where such activities will enhance the ability of the employee upon return to the College to fulfil professional responsibilities.
- 20.02 To that end, each College will grant a minimum of two percent of full-time members of the academic bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than six years, and an additional one percent of full-time members of the academic bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than 15 years, to be absent on professional development leave at any one time in accordance with the following conditions:

- (i) the purpose of the leave is for College-approved academic, technical, industrial or other pursuits where such activities will enhance the ability of the teacher, counsellor or librarian upon return to the College;
- (ii) a suitable substitute can be obtained;
- (iii) the leave will normally be for a period of from one to 12 months;
- (iv) the employee, upon termination of the professional development leave, will return to the College granting the leave for a period of at least one year, failing which the employee shall repay the College all salaries and fringe benefits received by the employee while on professional development leave;
- (v) the salary paid to the employee will be based on the following scale: 55% of the employee's normal salary increasing by five percent per year after six years of employment with the College concerned to a maximum of 70% of the employee's normal salary after nine years. It is understood that the College's payment is subject to reduction if the aggregate of the College's payment and compensation or payments from other sources during the period exceeds the amount of the employee's normal salary. The amount and conditions of payment will be pro-rated for shorter leaves;
- (vi) Applications for professional development leave will be submitted in writing containing a detailed statement of the nature of the proposed leave and its perceived benefit to the College and the employee; to the Chair of the Department at least six months prior to the commencement date;
- (vii) All applicants will be notified in writing by the College President as to the disposition of their application for professional development leave;
- (viii) The College may on its own initiative propose plans of professional development leave to employees; however no employee shall be under obligation to accept such a proposal;
- (ix) This Article shall not preclude the College from permitting greater numbers of employees to be absent on professional development leave.
- (x) The fulfilment of the minimum of two percent of full-time employees on professional development leave (arising out of employee-initiated leaves) will depend upon the receipt and approval by the College of a sufficient number of qualified applications in accordance with the criteria set out above;
- (xi) In the event that more eligible employees apply for professional development leave than will be approved, preference shall be given to the applicants with greater length of service since their last professional development or sabbatical leave under this Article of Article 18 of the preceding Agreements;

- (xii) An applicant who is denied professional development leave shall be notified in writing of the reasons for the denial. Approval of an application for professional development leave shall not be unreasonably withheld;
- (xiii) For professional development leaves that are granted for a period of less than one year, the payment shall be pro-rated. The unused portion of the allowable earned leave shall be available to the teacher, counsellor or librarian subject to the application and approval processes of the college and those defined within this Article. Payment for the unused portions of leave when taken shall be paid at the same proportion of salary as established in 20.02 (v) when the first portion was taken;
- (xiv) The College shall provide to the Union Local, once each year, the names of all applicants and the names of all successful applicants and the duration of the leaves granted.

The provisions of the College's Fail-Safe program pursuant to part VII of the Act provided:

- 4.1 Subject to 4.4, 4.5, 4.6 and 4.7, employees covered by this Program, except employees referred to in 1.3, shall take 6 unpaid leave days during the period commencing with the day of posting under section 29 of the Act and ending March 31, 1994.
- 4.2 Subject to 4.3, 4.4, 4.5, 4.6, and 4.7, employees covered by this Program, except employees referred to in 1.3, may be required to take up to 12 unpaid leave days during each of the annual periods ending March 31, 1995 and March 31, 1996.
- 4.3 If unpaid leave days referred to in 4.2 are required, the number in each year will be specified in amendments to the Program to which sections 30 and 31 of the Act will apply.
- 4.4 Employees who are hired by the Colleges and work less than any of the periods ending March 31, 1994, 1995 and 1996, as referred to in 4.1 and 4.2, will be required to take a prorated number of relevant unpaid leave days.
- 4.5 Employees who regularly work less than a complete year will be required to take a prorated number of the relevant unpaid leave days.
- 4.6 For greater certainty, for the purpose of 4.4. and 4.5, the regular vacation period shall be considered time worked.
- 4.7 In the calculation of the number of unpaid leave days, in order to ensure that the annual earnings of an employee do not fall below \$30,000.00, the number of unpaid leave days required to be taken shall be reduced if necessary.

DECISION

There is a threshold matter which must be determined before the relative merits of either parties' calculation of the deductions from salary to be made because of the "Rae" days which must be decided. What is the appropriate characterization of a professional development leave under Article 20. In order for the Union's

calculation to be considered the proposition must be accepted that the period of the Professional Development Leave between September 1 and December 31 of 1993 was a period in which the Employee was not at work. If the Employee were not a work then a "Rae" day could not be assigned to the Employee during that Professional Development Leave.

A Professional Development Leave will only arise if an Employee makes an application. The Grievor made an application. The College under Article 20.02 is obliged to grant a minimum number of leaves according to the provisions of the opening language of Article 20.02 for members of the Bargaining Unit who have been such for not less than six years and a different minimum number of leaves for those who have been members of the Bargaining Unit for a period of not less than 15 years. This contractual provision obliges the College to grant some professional development leaves, but not every one which is submitted to them. They decided that they would grant the application of the Grievor and she had a leave from September 1, 1993 until December 31, 1993. Article 20.02(i) provides that the leave is for College-approved, in this case, academic activities which would enhance the ability of the teacher upon their return to the College. The fundamental concept behind the developmental leave is that it will assist the employee to be better at their work as a teacher and that will be a benefit to the College. That such is the intention can be demonstrated from a reading of the entire Article and particularly the fact that if the person does not return from the Professional Development Leave and remain in the employ of the Employer for at least one year, they are to repay the monies paid to them during the period of the leave as is provided for by clause (iv). The Grievor is a teacher, and during the Professional Development Leave she was not required to teach courses at the College pursuant to her regular obligations. She was also not required to be at the College because of the nature of the leave and the activities associated with it in terms of professional educational upgrading. Thus, from her perspective she was not at work in the sense that she was not physically present in the building where she regularly performed her teaching duties. The location of the activities does not mean that there is no longer work being performed by the Grievor. The Grievor is merely engaged in a different activity in the course of her employment than the usual activity of teaching. It is an activity for which she made application under the provisions of the Collective Agreement and was granted the Professional Development Leave under those provisions. The activity in her case was as set out in her own application filed as Exhibit 9:

"To undertake continuing professional education activities sponsored or co-sponsored by the American Association of Sex Educators, Counsellors and Therapists (AASECT) in 1993 including Sexual Attitude Reassessment. To prepare my application to AASECT for re-certification as a Sex Educator (due December 1993), held now for over 10 years. To research & review newly available instructional resources in Human Sexuality education and to examine other teaching approaches. To update my knowledge in the area of AIDS education. To further develop my professional skills in the area of Sexual Harassment intervention.

(Exhibit 9)

The Board determines that the activity which the Grievor is engaged in during the period from September through to December 31 was one of professional upgrading. During the course of that activity she was receiving 55 % of her regular salary from her employer and was engaged in an activity which can be considered, and without doubt, is work of the Employer. Both the Employer and the Grievor agreed to the activity and that the activity would be in substitution for the regular activity of teaching. There was no leave from work, there was merely a relief from teaching in order to do other work which would have the future benefit of enhancing her teaching activities at the end of her leave and redeployment as a teacher. The Board concludes that the activities of the Grievor must be considered to be work which is being performed for the Employer; albeit, that there may also be direct benefits to the individual. This individual benefit is presumably

reflected in the fact that the amount of money paid to her is less than it would be when she is working doing the activity of teaching. She in effect was given leave from her teaching activities and assigned by mutual understanding through the leave application process different activities for a period of four months. This Board's characterization that she was at work during the period of the Professional Development Leave eliminates the plank upon which the Union calculation is based. That characterization does not support the calculation made by the Union which presupposes that there was no day during the period from September to December which could be assigned as a "Rae" day because there was no work being performed. Therefore, the calculation of the College being the only other alternative before us must be taken to be the correct one to be used in the circumstances.

On the basis of all of the foregoing the grievance is denied. It is ordered that it be dismissed.

DATED AT LONDON, ONTARIO THIS 16th DAY OF OCTOBER, 1995.

Richard H. McLaren, C.Arb.

I concur
Jean-Claude Laniel,
Union Nominee

I concur

Rene St. Onge,
Employer Nominee

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