

94A683 SHERIDAN VS HUGHES

94A683

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SHERIDAN COLLEGE
(Hereinafter referred to as the College)

AND

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION
(Hereinafter referred to as the Union)

AND IN THE MATTER OF THE GRIEVANCE OF D. HUGHES (OPSEU FILE 94A683)

BOARD OF ARBITRATION:

Gail Brent
Jacqueline Campbell, College Nominee
Michael Sullivan, Union Nominee

APPEARANCES:

FOR THE COLLEGE:

Larry G. Culver, Counsel
Damian Borrelli, Director Human Resources
Rosalie Spargo, Associate Dir. H. R.
Susan Bawden, Labour Relations Assistant
Kelly Karius, Mgr Creative Printing

Services

Terry Spearin, Dir. Corp. Communications

and Development

FOR THE UNION:

Andrew Lokan, Counsel
Debra Hughes, Grievor
Jay Jackson, Union President
Libby Waters, Union Vice-President

Hearing held in Toronto, Ontario on December 21, 1994.

DECISION

This decision deals only with the preliminary objections raised by the College. After the hearing concluded, the parties met to try to resolve the matter. By letters dated April 27 and May 3, 1995, from the College and the Union respectively, we were informed that no settlement could be reached and that an award would have to be issued on the preliminary objections.

We should also note that there is an interested third party whose rights could be affected by an award on the merits. That third party was identified to us as Patrick Kilbourn. Kilbourn was not given notice of the hearing until December 20, 1994 and did not appear. It was agreed by the parties that, should this matter proceed to a hearing on the merits, Kilbourn would be given adequate notice of his rights prior to that hearing date.

There are two grievances (Exs 1 & 2). The first (Ex. 1) is dated August 6, 1993 and reads as follows:

The college is in violation of section 35 of the Employment Equity Policy and Plan and article 2.5 of the collective agreement.

SETTLEMENT DESIRED:

The grievor would like equitable access to technology, training and assignments.

The second (Ex. 2) is dated March 14, 1994, and it reads as follows:

Based on gender bias, I grieve the College has violated Article 2.3 of the collective agreement for support staff.

SETTLEMENT DESIRED:

I request that the College provide an amount of technical skills adjustment equal to the job requirements needed to perform the Technologist C (computer graphic design technical support specialist) position in the Communications Department. I further request the College implement a policy that would ensure workplace practices not exclude females from skill adjustment opportunities.

Counsel for the Union informed us that the second grievance is essentially a restatement of the original issue set out in the first grievance. It informed us that the relief being sought in the two grievances together is: (a) the appointment of the grievor to the Graphic Design Specialist Support Position with appropriate training; (b) retroactive pay and benefits with interest; or in the alternative (c) such training and assignment as may be required to compensate for the previous history.

No evidence was called. The parties outlined the basic facts which we could rely on for the purposes of dealing with the preliminary objections. The grievor was a Graphic Designer at the College, classified as Technologist C (payband 4), and began employment with the College in 1982. From 1987 the grievor worked with a junior employee, Kilbourn, who was in the same classification and position as she was. The Union stated that in 1993 the College laid off both the grievor and Kilbourn, and purported to create a new position, Graphic Designer Technical Support Specialist, which was also a Technologist C position. The College gave notice to the Union on May 20, 1993 that the grievor's position would be eliminated.

The Union asserted that the new position was not posted and that Kilbourn was appointed to the position. It said that the College's reason for appointing Kilbourn rather than the grievor was that he had more exposure to and familiarity with certain technological aspects of the job, in particular working with computers. Kilbourn had received this training and exposure while he was working in the same position as the grievor. The grievor is alleging that there were inequitable work assignments and training while both she and Kilbourn were on the same job.

The first grievance (Ex.1) was then filed. Following that grievance, no final decision was taken by the College about who would fill the new position or how the matter would be handled. In accordance with Article 15 of the collective agreement, the issue was referred to a committee, and the Union and College representatives on the committee made separate recommendations to the President of the College. On October 6, 1993 the Acting President of the College decided to award the job to the grievor, provided she complete the required training.

An assessment of the training needed was done by the College, and it was concluded that the training would be either too long or too expensive, and the grievor was then given notice of layoff on January 24, 1994. In accordance with the procedure set out in Article 15 of the collective agreement, the grievor was placed in an unrelated job in the Futures program. The placement was accepted in February, 1994 and was effective in April, 1994.

The Article 15 procedure which was undertaken following the May 20, 1993 notice took approximately 10 or 11 months to lead to the ultimate placement of the grievor in a new position in April, 1994. During that period the grievor did not lose time from work and did not lose money. She is in the same payband which she occupied in May, 1993. There were no grievances and no complaints concerning the Article 15 procedure; the recommendation regarding the grievor s placement was "without prejudice" (Ex. 4, p. 75).

In January, 1994 when the grievor was given notice of layoff, three grievances were filed, one by the grievor and two by the Union. The grievor s grievance requested that she be given the training that had been discussed in the fall of 1993. One of the Union grievances alleged bad faith, the other alleged non-compliance with Article 15.2. All of the grievances were settled.

The College asserted that what had occurred in August, 1993 was that Kilbourn had grieved for reclassification of his position. That grievance was successful, and on September 24, 1993 the position was reclassified as Technologist Atypical retroactive to February, 1993. The position was called Computer Graphic Design Technologist effective December 24, 1993.

The collective agreement which applies in this case is the 1992 - 1994 support staff agreement.

The College has raised the following preliminary objections to the g Grievances:

First Grievance (Ex. 1)

- (1) The facts as outlined do not disclose a breach of Article 2.5. 5
- (2) The Employment Equity Plan is not incorporated into the collective agreement, and any breach of it is not a breach of the collective agreement.
- (3) If the grievance is amended to allege a breach of Article 15.4.2, the Union is estopped from asserting that Article 15.4.2 has been breached or that the grievor and Kilbourn are equally qualified.
- (4) If the grievance is amended to allege a breach of Article 15.4.3, the Union cannot claim a breach of Article 15.4.3 because the Union, College and grievor have all accepted the process.

Second Grievance (Ex. 2)

- (1) The alleged breach of Article 2.3 is untimely. The allegations regarding training and assignments refer to events that occurred between 1987 and 1992.
- (2) If the grievance is amended to allege a breach of Article 15.4.2, the Union is estopped from asserting that Article 15.4.2 has been breached or that the grievor and Kilbourn are equally qualified.
- (3) If the grievance is amended to allege a breach of Article 15.4.3, the Union cannot claim a breach of Article 15.4.3 because the Union, College and grievor have all accepted the process.

The College also asserted that, if the preliminary objections did not end the matter, it wanted the issue to be arbitrated to be clearly stated, the articles breached to be clearly identified, and particulars from the Union setting out the facts that the Union would be relying on.

The parties referred us to the following authorities: Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975), 57 D.L.R.(3d) 199 (Ont. C.A.); Re United Electrical Workers, Local 504 and Canadian Westinghouse Co. Ltd. (1964), 14 L.A.C. 279 (Reville); Re Vancouver General Hospital and British Columbia Nurses' Union (1985), 21 L.A.C.(3d) 275 (Hope, B.C.); Boeing of Canada Ltd. and Canadian Automobile Workers Local 2169 (1990), 12 L.A.C.(4th) 118 (Schulman, Man.); and Re Toronto Hydro and Canadian Union of Public Employees, Local 1 (1987), 28 L.A.C.(3d) 223 (Brown).

In reaching our decision we have considered only the facts outlined to us, the collective agreement, the authorities cited and the submissions of counsel.

Sorting out the preliminary issues in this case is a real challenge both for us and for the parties. Based on the submissions of counsel for the Union, we interpret the thrust of the two grievances before us to be that the College has discriminated against the grievor by reason of her sex, in that it made more favourable work assignments and/or gave more favourable access to training to a male employee, and we consider that the two grievances are for all intents and purposes identical. Based on the information put before us, we are satisfied that the College and the Union both understood this to be what the grievor was complaining about (see Ex. 5, for example). Even though only the second grievance refers to Article 2.3 of the collective agreement, it would appear that there was ample notice to the College that the grievor was making allegations of discrimination on the basis of sex in the first grievance. Blouin Drywall confirmed that grievances should not be so strictly construed as to obscure the real dispute.

There is no doubt that the parties engaged in the procedure contemplated by Article 15, and that as a result the grievor was placed in a position. However, Exhibit 4 page 75 makes it clear that the recommendation set out at pages 73 and 74 of Exhibit 4 is without prejudice. In the absence of any evidence to the contrary, we believe that we should read that phrase as specifically keeping alive whatever rights the grievor was asserting in her grievances. We accept the proposition that discrimination can be an ongoing and continuing process, and that allegations of discrimination can be allegations of what is regarded as a continuing violation of the collective agreement. However, one must distinguish between discriminatory acts and the effects of those acts. For example, if the College acted in a discriminatory manner in assigning work or making opportunities available to the grievor during a particular period, the discriminatory action would cease when the grievor was no longer in the position where she could be given assignments or have those opportunities made available to her. The effects of its failure to assign on an equitable basis may continue beyond the period. In our view, however, once the discriminatory action ceases, the time limits under the collective agreement start to operate. Be that as it may, there were never any timeliness objections raised in connection with the first grievance, and since the grievor was still in the position where she could allege that the discrimination was operating on her by virtue of the assignments and opportunities she was being given, the grievance must be considered to be timely.

Even though a grievance is timely, the usual practice is to limit monetary relief to the period encompassed by the time limits. Here that would mean that no claim for monetary relief could be made for any period beyond 15 days prior to August 6, 1993. That does not mean, though, that the Union is limited to that period in the evidence it can call. In order to establish discrimination, the Union should be given the opportunity, if it is relying on a pattern of behaviour, to adduce such evidence as is relevant to establish that pattern.

For all of the reasons set out above, we find that we have jurisdiction to deal with the grievances on their merits on the dates that have been set for that purpose. We also request that the Union supply the College with particulars of the discriminatory actions of which it has knowledge and on which it intends to rely.

We should also note that by finding that we have jurisdiction to determine the grievances on the merits we are specifically making no finding on whether any or all of the remedies sought by the Union would be appropriate should the grievances succeed .

DATED AT LONDON, ONTARIO THIS 11 DAY OF July, 1995.

Gail Brent

I / dissent
Jacqueline Campbell,
College Nominee

I concur
Michael Sullivan,
Union Nominee