

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALGONGUIN COLLEGE

(the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(the "Union")

**AND IN THE MATTER OF THE GRIEVANCE OF ROY HYLAND
FILE NO. 02D022**

AWARD

PAULA KNOPF – SOLE ARBITRATOR

APPEARANCES

For the College

**Jock Climie, Counsel
Jane McCutcheon, Manager Employee
Relations
Vicky Satta, Articling Student
Connie Powers, Manager, Pensions and
Benefits
Luc Presseau, Director of Human
Resources**

For the Union

**Gavin Leeb, Student-at-Law
Pat Kennedy, Local Steward**

The hearing in this matter was held in Ottawa, Ontario on September 25, 2002

This is a grievance seeking sick pay. The College asserts that there is no basis for entitlement. The factual background of this case is not in dispute.

The grievor had a distinguished career with the College for over thirty years as a Professor and Co-ordinator in the Transportation and Building Trades Department. He was also involved in imported projects with the Ministry of Colleges and Universities as well as the Apprenticeship Programme with his trade union. Unfortunately, over the last number of years, he has experienced progressive pain from arthritis in his knees. His medical condition was treated by his family doctor and he has been seen by the College's doctor. By the spring of 2001, the grievor's pain had progressed to the point that he was concerned about his ability to continue working on a full-time basis. He was awaiting the advice of a specialist and contemplating knee replacement surgery. He discussed this with the Dean of his Department in late April. The grievor's summer vacation period commenced June 11, 2001. Shortly thereafter, he decided to retire and tendered a resignation letter dated June 27, 2001 effective August 31, 2001.

The factual and legal dispute between the parties involves whether the grievor has any entitlement to sick pay from the end of April through to the end of August 2001. The resolution of that dispute depends on findings of fact regarding whether or if the grievor asked to receive sick pay, whether the College knew or ought to have known that he should have been in receipt of sick pay and/or whether the Collective Agreement entitles the grievor to sick pay during the vacation period following June 11

The grievor testified to explain his situation. He described how his arthritis gave him nagging pain and made it difficult to work on his feet all day which

is required in his trades programme. His pain has worsened over the past few years despite being on medication. By the end of April, the grievor's doctor said he would provide a recommendation that the grievor should withdraw from work until the condition was "under control." At this point, the grievor said that he formed the "intention" to go on sick leave because of his worsening medical condition. He simply felt that he "could not keep up the pace" with all the College and related duties facing him. Therefore, he met with his Dean, John Tapp, on April 25, 2001. The grievor's idea at that point was to go on sick leave until he "could get this condition under control." They discussed arthritis because they both share the disease. The grievor also told Dean Tapp that he was about to see an orthopedic specialist and was considering knee replacement surgery. Dean Tapp revealed that his father had experience with such surgery. Dean Tapp also talked about his own hip replacement surgery and how he had been denied sick pay after being discharged from the hospital because this occurred during the vacation period.

It is evident that the grievor and Dean Tapp left this meeting with very different impressions. Dean Tapp left the meeting with the impression that the grievor would be seeking further medical advice and that the two of them would discuss the situation again to decide when and if the grievor would take sick leave. Accordingly, the Dean took no further action regarding the grievor's status and the grievor continued to receive his regular pay. However, the grievor left the meeting believing that the discussions would result in Dean Tapp placing the grievor on sick leave. The grievor concedes that he never directly asked to be placed on sick leave, either at that meeting or at any other time. He simply understood that the Dean had the authority to direct that the grievor be placed on leave. The way attendance matters were dealt with in this department, it was up to the secretarial staff to record people absent and the reason. Accordingly, the grievor assumed that Dean Tapp would instruct the appropriate staff person to place the grievor on sick leave. The grievor explained that he had little experience with requesting or receiving sick

leave. He has only accessed sick leave once in his career at the College, over ten years ago. By this time he had 470 sick days accumulated in his leave bank.

Classes were virtually complete by the end of April. There were still duties left for the grievor to perform. Despite his pain, he did continue to perform some limited college duties throughout May and June. He appeared occasionally at the College and continued with his responsibilities of overseeing a project for the Ministry. The vacation period then commenced June 11. He was away from the College after that time.

In the first week of June the grievor saw the orthopedic specialist who ran a series of X-rays and tests. The specialist concluded that the grievor was not a suitable candidate for knee replacement surgery and advised a continued course of medication.

After the grievor's meeting with Dean Tapp and his visit with the specialist, the grievor asked his family doctor to supply a letter to the College in support of a claim for sick leave. The grievor understood correctly and knew that he was required to supply a medical certificate to support the sick leave after three days of absence. There was then a several week delay on the doctor's part in providing this letter. The grievor was told that the delay was caused by a "computer breakdown" and staffing problems in the medical office. The grievor recalls that he checked every week for the letter and eventually received it on or around June 20 or 21. That letter reads:

Mr. Roy Hyland suffers from a number of chronic medical problems over the past few years, but he has been able to cope with them and continue to work.

Recently, things deteriorated to the point where he was unable to continue working.

He has not been able to work since April 30, 2001 and this will continue for at least six months.
If more information is required please let me know.

The grievor's recollection is that as soon as he got the doctor's letter, he took it to his Dean's office and left it with a secretary. The grievor explained that he knew that the letter should be "in the College's hands as soon as possible."

The grievor explained that some time after his meeting with Dean Tapp in late April and before the end of June, he decided to retire. The report from medical specialists had shown him that he could not expect a "quick fix" for his condition. Seeing no hope of the situation improving, he evaluated the situation and concluded:

It was a case of being able to do an adequate job. I did contemplate staying on sick leave and riding it out. But that is not part of my makeup.

This quotation reveals the grievor believed that he was on sick leave at the time he tendered his resignation in late June. The evidence also reveals his strong work ethic, believing that he should either work at a full pace or retire.

However, the grievor was never placed on sick leave. He was paid his regular salary through to June 11 and thereafter was considered to be on vacation. The College's undisputed evidence is that the first notice it had of this doctor's letter was when it was delivered by the grievor's wife to Human Resources on August 29 with a yellow "sticky note" attached asking if the grievor needed to be seen about the matter. The grievor testified that while he does not dispute the College's evidence, he knows nothing about his wife delivering a copy of the doctor's letter in August. The grievor simply recalls delivering a copy of the letter himself to his Dean's office on or around June 20 and 21. He retains the original

doctor's letter to this day. He asks rhetorically, "why would I supply a medical note a few days before I was set to retire?" The College's position is that it could not know before August 29 that the grievor was seeking medical leave because the College had received no request for leave or supporting medical documentation. It appears that no one even realized that the grievor was absent before the vacation period began.

During the summer of 2001, the grievor spent time with his family at his vacation property. He assisted his wife in the development of a nursery farm and otherwise carried on as he usually did during the summer months. He was not under medical attention during that period, but his arthritic condition obviously did not disappear.

The grievor testified that he simply assumed throughout the summer of 2001 that he was receiving sick pay. He says that he did not check his pay stubs to see if his status had changed. His only concern was the total amount on each cheque. He only found out that he had not been put on sick leave when he received the computation of his retirement payout. Sick days are not redeemable under this Collective Agreement, but vacation days are. The grievor had expected a cash value of the vacation period from June 11 through to August 31, 2001 because he thought he was on sick leave during that time. But the College had not received any of the normal medical information or release forms from the grievor or his Department that are required to trigger sick leave status. Therefore, the College paid the grievor throughout the vacation period as was the norm and deducted that period from the vacation credits upon his retirement. Therefore, the payout did not include the June 11 to August 31 vacation period for the grievor.

It should also be noted that the College tried to discourage the grievor from electing to retire if he was ill. The College's Manager of Pensions and

Benefits, Connie Powers, met with the grievor on June 27 regarding his decision to retire. During that meeting, the grievor raised the issue of his medical condition. Ms. Powers recalls no discussions about the grievor being on sick pay at the time. However, she did counsel the grievor to file a LTD claim rather than to retire. However, the grievor had decided to retire by that point because he realized he could not continue to work at the College if he received LTD. He says, "I've always loved my job." Since September 1, he receives a pension as well as income from part-time teaching duties on a one day a week contractual basis at this College. This enables him to remain as a teacher and also receive his pension. He also receives income from consulting and some residual Ministry work. Therefore, he has not been financially disadvantaged by his decision to retire and he continues to enjoy teaching on a reduced level. This is consistent with the grievor's work ethic and sense of personal worth.

The evidence also shows that his colleagues miss the grievor. One message filed in evidence indicates that the grievor's illness had caused delays in a project. Alternate plans had to be prepared to deal with his absence in September.

There are two College policies which are relevant to this case. The Leave of Absence policy provides that in the event of sickness, employees may be required to provide evidence of the "disabling condition from the appropriate professional" in order to qualify for a continuation of salary. The policy also provides as follows:

Absences of up to three working days duration do not normally require medical evidence to ensure the continuation of salary and benefits. However, the College reserves the right to request medical evidence in these circumstances without incurring any related costs.

The College also has a policy with regard to sick days while on vacation. That policy provides:

When an academic employee becomes ill and is given in-patient treatment in a hospital during one (1) or more full days of the employee's vacation, at the request of the employee, those vacation days may be rescheduled at a time convenient to the College.

If the employee is not hospitalized, the sick days must be taken as vacation. [emphasis added]

This policy is operates as an exception to Article 17.01 F 1 of the Collective Agreement which reads as follows:

During absences due to illness or injury, participating employees who would otherwise be scheduled to work shall receive 100% of regular pay for up to and including 20 working days in any one benefit year, plus any unused credits carried forward from previous years. Days not utilized in any year shall be considered to be credits (on the basis that one credit represents 100% of regular pay for one working day) and shall be carried forward to the next benefit year. Debits shall be made from the total assigned benefit on a day-to-day basis. [emphasis added]

Insofar as the hospitalization during vacation policy is concerned, the Union raised an alternative argument, submitting that the policy offends the *Human Rights Code* by discriminating on the basis of the level of disability. This argument had never been raised with the College prior to the arbitration hearing. When the argument arose, the parties agreed to proceed with the hearing to address all the other factual and legal matters. However, they agreed to reserve their rights relating to the Human Rights issue, allowing the College to consider its position. The parties asked the arbitrator to retain jurisdiction over the issue in order to receive further submissions in the event the Union decided to pursue this argument after a ruling on

the merits of the other aspects of the case. Therefore, that jurisdiction has been reserved and this issue shall not be addressed further in this Award.

The Submissions of the Parties

The Union submits that there are two issues:

1. Whether the evidence supports a claim that the grievor was ill and entitled to sick leave for any of the periods in dispute
2. If yes, whether the grievor should have been put on sick leave, i.e. whether there was a request to be put on sick leave or whether the Employer was informed of the grievor's health status and therefore should have known that the grievor should have been placed on sick leave

The Union argues that the grievor's health status should not be in dispute. It was submitted that the evidence shows that he worked for over thirty years and showed dedication to his professional responsibilities throughout. It was argued that the evidence establishes that he was suffering from severe arthritis. Therefore, it was reasonable for him to conclude that he could not continue working at the end of the academic term in 2001 and for him to take advantage of the sick credits that he had built up over the years. The Union asked the arbitrator to be respectful and sensitive to the difficulty the grievor must have had in coming to this conclusion to give up the work that he loved. Therefore, it was argued that the objective evidence supports a finding that the grievor was "sick" and entitled to sick pay. The Union submits that one does not need to show total disability in order to be entitled to sick leave. It was stressed that the unchallenged evidence is that he could not perform the full range of teaching and related duties required of a full-time

academic position. Therefore, it was said that he should be considered "sick" and entitled to leave within the meaning of Article 17.01.

The Union also argues that the College was on notice of the grievor's intention to seek medical leave as of the conversation with Dean Tapp. The Union asserts that the Dean "ought reasonably" to have concluded that the grievor was ill, was unable to work, would be seeking surgery and should be placed on sick leave. In the context of the grievor's career and personality, it was submitted that he found it too difficult to directly request sick leave or state that he was unable to perform his job. However, the Union suggests that the Dean ought to have realized that the grievor should have been put on sick pay as of that point. The Union further submitted that the grievor's colleagues were aware of his condition. His few appearances in the Department throughout May and June should also have signaled to the Department that the grievor needed to be placed on sick leave. The Union also argues that all the evidence is consistent with the grievor believing that he was on sick pay as of late April or early May 2001.

In the alternative, it was argued that even if the College did not know as of April 25 that the grievor intended to go on sick leave, the College should be deemed to have had notice as of June 20 when the grievor says he delivered the medical letter. The Union suggested that the delivery date of the letter should not be treated as a credibility issue. It was argued that the evidence could support a finding that the grievor did in fact provide the doctor's letter as of June 21 or thereabouts to his department and that the grievor's wife also provided another letter at the end of August to Human Resources. It was argued that it "defies commonsense" to say that the grievor would have waited until August to deliver the doctor's letter when he knew it was required after three days' absence to support a claim for sick pay. On the basis of all this evidence, the Union argued that there should be a finding that

the grievor was ill and that the College was aware of the situation at least as of June 20.

The Union then addressed Article 17.01. It was acknowledged that the Award in *Niagara College and OPSEU*, unreported decision of Maureen Saltman dated July 2, 1999, does not support the Union's case. On the contrary, that decision held that employees are not entitled to sick pay during a period of scheduled vacation. However, the Union argues that the *Niagara College* decision is "wrong and distinguishable." It was submitted that the fact that this College provides for sick pay in the event of hospitalization means that the Algonguin situation is factually different and that the grievor should be deemed to be "scheduled at work" when he is sick. The Union asks that the arbitrator follow the line of cases that look at the fundamental reason for the absence to decide whether sick benefits are triggered. The Union suggests that the decision in *City of Halifax and International Association of Firefighters* (1991), 23 L.A.C. (4th) 20 (DeMont) should be followed instead of the *Niagara College* decision. The Union also relies on *Nova Scotia (Department of Human Resources) and N.S.G.E.U.* (1998), 81 L.A.C. (4th) 236 (Archibald).

The Employer responded by arguing that the grievor's claim is inconsistent with the College's policy, the Collective Agreement, the facts and the case law. It was submitted that the College is entitled to provide benefits above and beyond the Collective Agreement and does so in its policy providing for the payment of sick benefits during vacation for the period that an employee is hospitalized. However, the grievor was not hospitalized during any of the relevant periods. Therefore it was submitted that he cannot claim the benefit of this policy. Further, the College argues that the benefits under Article 17.01 F 1 are only triggered when a person is "scheduled to work," not during the scheduled vacation period. It was argued that the College is entitled under the Collective Agreement to establish a

process for a person applying for sick leave. It was submitted that the College's process complies with the Collective Agreement and is consistent with Article 17.01 F 6 which provides:

Application for benefits under the plan shall be made at such time and in such manner as the College shall determine and shall be supported by such medical evidence, if any, as the College may require.

It was stressed that the grievor's evidence shows that he understood there was a process in place to apply for and receive sick benefits that included providing a medical certificate in the event of more than three days' absence. It was argued that the grievor did not comply with the College's policies or procedure and is therefore not entitled to sick pay.

The College argued that there has to be an application for sick leave so that the College can consider the application and process the claim. Accordingly, there is an obligation on the employee to take reasonable steps to signal to the College that s/he wants to be on sick leave. It was submitted that the grievor's evidence was "vague at best, unclear and very indefinite" about how he signaled that he wanted to go on sick leave. In contrast, Dean Tapp's unchallenged evidence was that he expected to have further conversations with the grievor about the possibility of sick leave being taken and did not understand that the grievor had signaled a desire to go on sick leave as of the end of April. Further, it was stressed that the grievor did not act like someone who was on sick leave because he carried on his regular responsibilities throughout May and June. Further, the College argued that its evidence demonstrates that the College only received the medical documentation in August, not in June. It was argued that there is no evidence that two medical certificates ever existed. It was suggested that the grievor might now be confusing his delivery of his retirement notice with his handing in the medical certificate.

It was stressed that an employer would be prejudiced if it was required to place a person on sick leave without a clear signal that the person wanted such a thing. This would remove the College's ability to require timely medical information and/or look into the matter. Further, it removes the Employer's ability to explore accommodations in the event of a disability. It was argued that the grievor acted "unreasonably" in expecting to receive sick benefits despite the fact that he worked in May and June and came back on a part-time basis in September. It was submitted that the grievor is "attempting to get a windfall" by claiming vacation pay and also seeking sick pay for the summer months. It was stressed that the evidence shows that the grievor was able to enjoy his summer with his family and that there is no evidence that his vacation was diminished. Accordingly, it was argued that the grievor got the full benefit of his vacation and should not also receive sick benefits as well.

The Employer argued that the *Niagara College* case, *supra*, is a complete answer to the grievor's case. It was argued that the rationale behind the case is that sick leave is meant to indemnify an employee who would not otherwise be paid. If the grievor were to succeed in this case, it was said that he would be receiving a windfall contrary to the rationale in the *Niagara College* case. The Employer also relies on the following cases in support of its argument: *Cottage Hospital Uxbridge and O.P.S.E.U., Local 302* 1987 C.L.A.S.J. LEXIS 12375; 1987 C.L.A.S.J. 461232; 4 C.L.A.S. 40, *Public Utilities Commission of City of Scarborough and Utility Workers of Canada, Local 1, Unit 1* (1959), 6 L.A.C. (4th) 170 (Jolliffe), *Manitoba and M.G.E.A.* 1992 C.L.A.S.J. LEXIS 9916; 1992 C.L.A.S.J. 575529; 28 C.L.A.S. 359 (Hamilton), *Algoma District Homes and C.U.P.E., Local 268* (1994) C.L.A.S.J. LEXIS 9361, 1994 C.L.A.S.J. 412058, 35 C.L.A.S. 421 (Joyce), *Unisource Canada, Inc. and C.E.P. Local 1124* (1995), 47 L.A.C. (4th) 435, 1995 L.A.C. LEXIS 1200 (Biasina) and *University of Alberta and Non-Academic Staff Assn.* 2002 C.L.A.S.J. LEXIS 131; 2002 C.L.A.S.J. 2584; 68 C.L.A.S. 5 (Jones)

By way of reply, the Union argues that the grievor's conduct was reasonable throughout in securing a doctor's letter and attempting to enforce what he believes are his rights under the Collective Agreement.

The Union also takes issue with the allegation that the grievor is seeking a windfall, arguing that he is seeking to enforce what the Union believes is entitlement to unused vacation credits that should have been kept available to the grievor.

The Decision

This decision must begin with a determination and clarification of the facts. First it should be emphasized that the grievor presented himself at this hearing as a man of little words, great dignity and much pride. He has a strong work ethic. He worked for years with progressing pain and was unwilling to reap the earned LTD benefits once he knew his condition could not be improved. Instead, he chose to retire so that he could teach on a limited basis and obtain the pension benefits for his family. This reveals an admirable sense of values, strength of character and dedication to duty. The suggestions made by counsel for the College that disparaged the grievor's character were completely unwarranted and unfounded. The grievor has brought his full-time career with the College to a distinguished end. This grievance should only be treated as an honest claim to what he and Union believe is his entitlement under the Collective Agreement.

The first factual matter to determine is whether the grievor was or ought to have been put on sick leave after the meeting with Dean Tapp on April 25, 2001. It may be that the grievor's medical condition entitled the grievor to seek sick pay as of that day. The doctor's letter dated June 27 supports this. The grievor's

evidence spoke of a constant and nagging pain as well as his difficulties in physically meeting the College's needs. Sick leave is available for sickness and accident under Article 17.01 F 1. The Employer concedes that entitlement is not based on "total disability." Therefore, the evidence demonstrates that the grievor was "sick" within the meaning of Article 17.01 as of the end of April 2001. But that finding does not in and of itself trigger an entitlement to sick pay. As the College policy pursuant to Article 17.01 F 6 directs, medical evidence may be required to support a continuation of salary. This existence of this clause in the Collective Agreement indicates the parties' shared understanding that the College has an interest in assessing the validity of a claim for sick benefits. But even more fundamentally, absent unusual circumstances, an employee should not be able to receive sick pay without some steps being taken to clearly notify the College of a desire to take such a benefit. An employer cannot be expected to assume or even presume that a person wants to receive benefits in the event of an absence. Some employees may not even want to tap into a sick leave bank. Others may want a different type of leave status or to utilize vacation credits for personal reasons. Whatever is the case, there is an obligation on an employee or his/her family to give an employer clear notice that sick leave is required or being requested. Many employees who are "sick" still choose to come to work. An employer cannot be faulted for that or be expected to provide benefits retroactively. Only those who are absent and signal a desire to trigger such benefits can complain if such benefits are improperly withheld.

I have no difficulty concluding that the grievor spoke with Dean Tapp on April 25 about the idea of taking a leave of absence due to arthritis. But the evidence also shows that the grievor never actually said that he intended or wanted to take sick leave at that point. It may have been his intention, but he did not clearly communicate it. On the contrary, the evidence shows that he was discussing alternative treatments with Dean Tapp and the grievor was hoping that his condition would improve. He is a man who has been reluctant about using sick leave benefits.

The evidence establishes that the grievor and Dean Tapp explored the concepts of medical treatment and the possibility of the grievor receiving sick benefits in the future if he had surgery. They even discussed Dean Tapp's personal difficulties over receiving benefits during the vacation period after his release from the hospital. However, the evidence is also clear that the grievor never signaled that he intended to be absent on sick leave immediately after the meeting. This may be because of his reticence over the matter or it may be because he simply assumed that Dean Tapp understood his intentions. But the fact remains that Dean Tapp reasonably understood that the grievor was thinking about going on sick leave, not that he would be absent from that day forward.

Indeed, the grievor did continue to come into the College throughout May and June. While classes were over, he did attend to other duties. Despite his obvious difficulties, nothing in his conduct ever signaled to the College that he was absent. Therefore, he received his regular pay up to June 11 when the vacation period began. Accordingly, I cannot find that the College knew or ought to have known that the grievor wanted to be placed on sick leave prior to June 11, 2001.

This leaves the question of whether the College knew or ought to have known that the grievor wanted to be placed on sick pay in late June once the doctor's letter may have been delivered. The answer to this could depend on the finding of whether the doctor's letter was indeed delivered in June. The College's undisputed evidence is that the Human Resources Department did not receive the medical letter until August 27. However, the grievor said he did deliver a copy of the letter himself to his own department in the last weeks of June. Theoretically both versions could be true because the grievor retains the original of the letter. It remains possible that two copies were delivered, one by the grievor to his department and one by his wife to Human Resources. It is tempting to accept the grievor's story because why would he wait until a few days prior to his retirement to

render a medical certificate when he knew one was required to support a claim for sick benefits. On the other hand, the Employer's undisputed evidence is that the only copy it received of the doctor's letter did not arrive until late August. Therefore, both the grievor and the Employer present compelling arguments on the facts. However, for the following reasons this is a factual issue that does not need to be determined.

Assuming for the moment that the grievor is correct and that he did deliver the doctor's letter in late June, where would this put him legally? Unfortunately for the grievor, even if this letter was delivered as he believes in late June, he would still not be entitled to sick benefits under the Collective Agreement. Article 17.01 F 1 provides salary continuance of sick pay for absences for employees "who would otherwise be scheduled to work." As of June 11, 2001, the grievor was on scheduled vacation, not "scheduled to work." Therefore, he had no entitlement to sick pay during that vacation period. This reading of the Collective Agreement is consistent with the interpretation placed in the same situation in *Niagara College, supra*. That was the case of a grievor who suffered a stroke prior to the normally scheduled summer vacation period. She received sick benefits up to the start of the scheduled vacation. However, they were suspended when she was deemed to have been on vacation. The Union presented very similar arguments to the ones cited. The *Niagara College* Board of arbitration unanimously concluded that the Collective Agreement provided for a ten-month academic year and a two-month vacation. Further, while the annual salary is earned over the ten-month academic year and paid over twelve months, the two-month vacation is unpaid. Despite the fact that the fundamental reason for the absence in the *Niagara College* case was undisputedly medical, the Collective Agreement did not entitle someone to sick benefits during the vacation period. The *Niagara College* board explained:

Article 17.01 F of the Collective Agreement provides for the payment of sick pay for an employee who "would otherwise be scheduled to work

in the amount of 100 percent of the employee's regular pay for up to and including 20 working days plus any unused credits carried forward from the previous year.....

..... Accordingly, as the Grievor was not otherwise scheduled to work during the period in question, she was not entitled to sick pay. Furthermore, as the College followed its usual practice of scheduling vacations during the summer months and treated the Grievor in the same manner as other employees, the Board finds that there was no impediment to scheduling her on vacation notwithstanding that she had been absent due to illness during the academic year.

If the Union's case is taken at its best, it is possible to conclude that despite the grievor's painful arthritic condition and the continuation of many of this College duties, he continued to work up to the point of the summer vacation and then was "sick" from June 11 onwards. I am not troubled by the fact that he worked before and after the summer vacation period to a limited extent or the fact that he enjoyed his summer holidays. He does not need to be totally disabled to be entitled to the short term sick benefits in this Collective Agreement. Accepting all this, it still cannot be concluded that he was entitled to sick pay under this collective agreement simply because he was not "otherwise scheduled to work."

The Union argues the *City of Halifax* case should be followed and that the *Niagara College* case was "wrong." Arbitrators are not bound by previous awards. But where the parties are bound by the same collective agreement, one arbitrator will not override another unless it can be shown that the first decision is manifestly or patently wrong. That is in the interest of consistency and good labour relations. It was not suggested that the *Niagara College* award was patently or manifestly wrong. But more importantly that decision is analytically clear, logically sound and correct. Moreover, it was a unanimous decision by three experienced and respected professionals in this field. Therefore, I do not conclude that the *Niagara College* decision is wrong.

The *City of Halifax* case, *supra*, does not dictate a different result. That case is distinguishable on the facts and its collective agreement. It involved a disabled firefighter who had been told that he could use his vacation and sick credits to the point that he qualified for retirement. After that, the employer then unilaterally placed the grievor on vacation at a time that he expected to be able to utilize sick credits. This resulted in a lesser payout on retirement. The Board of Arbitration in *the City of Halifax* concluded that the only reason the employer treated the grievor in this matter was to save the payment of a number of sick leave days. It was concluded that the grievor had earned vacation and sick leave but was entitled to be paid for unused vacation at the time of his retirement. This decision is not inconsistent with the *Niagara College* decision which concluded that so long as the vacation period is not being manipulated to deny a person an earned benefit, the vacation can remain scheduled even if an illness occurs before or during the vacation. Further, the Collective Agreement between the parties at hand and the language in Article 17.01 F are different from that governing the Firefighters and the City of Halifax.

Therefore, if I took the grievor's case in the best possible light, it could be concluded that the grievor delivered a medical letter in late June 2001 that certified his need for sick leave for six months. I could accept that this letter, together with the discussion with Dean Tapp, should have signaled the need for the grievor to be placed on sick leave because of his obvious arthritic condition. But even if all that is accepted the grievor suffered no losses before June 11 because he continued to receive full pay and come into the workplace only when he was able. He was then on scheduled vacation as of June 11, 2001. As such, he would not be entitled to sick pay under this collective agreement because he was not otherwise scheduled to work. Therefore, even if I find the facts in the grievor's favour as of late June 2001, his claim still fails under the Collective Agreement.

The Union argues that this case should succeed as a matter of "fairness." However, arbitrators have no jurisdiction to apply or impose their own personal notions of fairness. The parties define what is appropriate in the Collective Agreement. That is all an arbitrator can apply and interpret.

This conclusion still leaves open the issue the Union raised regarding the alleged discrimination with respect to the hospitalization policy and its application to Article 17.01 F. I shall remain seized with that issue should either party wish to pursue it. The proceedings would reconvene at the parties' mutual convenience.

For all the reasons set out above, the grievance is denied on the basis of the claim under Article 17.01 F 1. I reserve jurisdiction over the allegations concerning the breach of the *Human Rights Code* with respect to the grievor's application for sick pay.

DATED AT Toronto, Ontario this 11th day of October, 2002



Paula Knopf – Sole Arbitrator