

**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**

**SUPPLEMENTARY 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 December 18, 2002**

Article 17.01 F 1 of the parties' collective agreement provides for benefits during absences due to illness or injury for employees who would "otherwise be scheduled to work." Accordingly, employees who are on scheduled vacation and who become sick do not receive such benefits. This was negotiated by the parties and confirmed in arbitral jurisprudence.<sup>1</sup> However, this College has a policy of allowing vacation days to be rescheduled in the event of hospitalization due to illness. This enables sick employees who are hospitalized during their vacations to receive benefits for the period of their hospital stay. The policy relieves against the strict terms of the collective agreement. The Union alleges that denial of the same benefit to employees who are disabled, yet not hospitalized, during their vacation amounts to discrimination. This Supplementary Award concerns that allegation.

The facts which give rise to this issue are undisputed and to a large extent recorded in the original award between the parties. To summarize, the grievor taught at the College for over 30 years. He suffers from arthritis and was under a doctor's care in the latter years of his tenure. By September 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 contemplating the possibility of taking sick leave and having surgery. The original award made a finding of fact that the grievor had not directly asked to be placed on sick leave prior to June 11, 2001 when his summer vacation period began. The original award left undecided the question of whether the grievor had communicated a desire to go on sick leave by delivering a doctor's letter to the College on or shortly after June 20 as the grievor alleged, or on August 29 as the College alleged. That factual issue did not have to be resolved because the original award concluded that the grievor was not entitled to sick pay under the collective agreement during his vacation because he was not "otherwise scheduled to work." At the parties' request, I retained jurisdiction over the issue of whether there was any discrimination

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<sup>1</sup> See *Niagara College and OPSEU*, unreported decision of Maureen Saltman dated July 2, 1999. See also the earlier award by this arbitrator concerning this grievance and this College dated October 11, 2002 (hereinafter referred to as "the original award").

with respect to the "Sick Days While on Vacation" Policy and its application to the grievor's circumstances.

The College's policy or practice for academic staff who are on vacation reads:

**SICK DAYS WHILE ON VACATION - ACADEMICS**

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, these 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.

[Hereinafter referred to as "the Policy"]

The Employer agrees that the grievor's arthritic condition in the summer of 2001 qualifies as a disability under the *Human Rights Code*. The Union's position is that when an employee is sick because of a disability that qualifies as a handicap under the *Human Rights Code*, R.S.O. 1990, c.H.19 [hereinafter referred to as "the Code"], the employee should be entitled to the benefit of the College's Policy with regard to sickness while on vacation, regardless of whether hospitalization is required. The Union asserts that denying the benefit of being able to reschedule vacations to employees who are disabled but not hospitalized amounts to discrimination and is contrary to both the Code and the collective agreement.

The collective agreement provides in Article 4.01(A)

**The parties agree that, in accordance with the provisions of the *Ontario Human Rights Code* there shall be no discrimination or harassment against the employee by the Union or the Colleges, by**

**reason of race, ancestry, place of origin, ethnic origin, citizenship, creed sexual orientation, age, record of offences, marital status, family status or handicap. [emphasis added]**

The relevant provisions of the *Human Right Code* provide:

**5. - (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap. 1982, c. 53, s. 4(1), 1986, c. 64, s. 18(5).**

10 – (1) In Part 1 and in this Part.

.....

**“Because of handicap” means for the reason that the person has or has had, or is believed to have or have had,**

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,**

.....  
[emphasis added]

At the outset of this phase of the hearing, the Employer argued that the Union's assertion of discrimination is moot because of the findings and effects of the original award. It was also argued that an arbitrator only has jurisdiction pertaining to matters under the collective agreement and has no jurisdiction to rule on the applicability of a Policy developed voluntarily and outside of the collective agreement. The Union answered the objection by arguing that the issue is not moot because an arbitrator has jurisdiction to require an employer to treat employees in a non-discriminatory manner. Further, the Union asserted that the retention of

jurisdiction in the original award preserves the question of the discriminatory effect of the Policy. Accordingly, the Union argued that there are remaining issues of contract administration and remedy raised by these allegations.

I declined to rule that the case was moot at the outset of these proceedings and called for submissions on the merits of the claim of discrimination.

Accordingly, the Employer put forward the College's Director of Human Resources, Luc Pressau, to explain the Policy. He testified that the Policy was designed to provide an opportunity for someone who is hospitalized to have that time given back as vacation. This is done because of the seriousness of illness that is connoted by a hospital admission. The Policy tries to provide relief for someone who is incapacitated to the point of "losing certain freedoms" when they are hospitalized. The Policy is meant to recognize that hospitalization keeps a person away from his/her home and therefore has a serious impact on vacation time.

### **Submissions of the Parties**

The Union's claim is very specific in this case. It argues that when a person qualifies for sick leave by virtue of a disability as recognized by the *Human Rights Code*, that person should have the benefit of the "Sick Days While on Vacation" Policy and be able to have his/her vacation days replaced with sick benefits. The Union was clear that it does not claim similar treatment for vacationing employees who become ill, hurt or inconvenienced, but who are not disabled within the meaning of the *Human Rights Code*. Specifically, the Union asserts that it does not claim that an employee who falls ill with the flu or who incurs some injuries would be able to convert vacation days to sick benefits simply because of a loss of enjoyment of his/her holiday time. The Union's claim deals only with employees who are disabled within the meaning of the Code and who would also be entitled to sick

leave benefits by virtue of that disability if they had not been on vacation. The Union argues that the grievor fits within the College's stated purpose of the Policy because his disability was "serious," it involved a severe arthritic condition, it would have entitled him to sick pay if he had been scheduled to work and it interfered with his vacation. The Union relies on the grievor's doctor's letter of June 20, 2001 stating that the grievor had been "unable to work" since April 30, 2001. This is partly why the grievor decided to retire effective the end of August of that year. Therefore, the Union argues that the grievor would have qualified for sick pay as of April 30, 2001 because of his medical condition and disability, regardless of whether he gave his notice of desire to go on sick leave in late June or late August. The Union argues that the purpose of the Sick Days While on Vacation Policy is to ensure that people are not deprived of the vacation entitlements that are negotiated terms of employment. It is also said that the Policy ensures that proper credits are utilized in the case of sickness. It is argued that once the College implemented this Policy, it had to be applied to all individuals who were sick or incapacitated due to handicap within the meaning of the Code. The Union submits that the Employer cannot discriminate by providing different levels of benefits for medical conditions that have the same consequences. The Union relies on the following cases: *Hotel Employees, Restaurant Employees Union, Local 75 and The Ontario Jockey Club*, unreported decision of The Honourable George W. Adams, Q.C, dated September 11, 2000; *Service Employees International Union, Local 528, AFL, CIO, CLC and The Ontario Jockey Club and Ron Ellis, Arbitrator and The Ontario Jockey Club and Hotel Employees Restaurant Employees Union Local 75, The Honourable George W. Adams, QC., Clive Girvan and Renuka Satchithanathan*, oral reasons for Judgment of the Ontario Court of Appeal released November 5, 2001 [hereinafter referred to as "The Jockey Club" case]; *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. 4<sup>th</sup> 321 S.C.C. [hereinafter referred to as "the Brooks" decision], *Battlefords and District Corporation Ltd.v. Gibbs et al* [hereinafter referred to as "the Gibbs case"]; *Council of Canadians with Disabilities et al. Interveners*, (1996), 140

D.L.R. (4<sup>th</sup>)1, *Ontario Human Rights Commission et al. and Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4<sup>th</sup>) 321 S.C.C and *Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79* (1994), 41 L.A.C. (4<sup>th</sup>) 24 (Knopf) .

The Union urges this arbitrator to analyze the facts of this case by comparing employees who are sick, disabled and unable to enjoy their vacations with hospitalized employees who are unable to utilize their vacations. The Union argues that since the College was prepared to extend the benefits to hospitalized employees who are unable to engage in normal vacation activities, it must also do so for other disabled employees like the grievor. The Union submits that the College should not be entitled to assess the "quality of the illness" to see how much it prevents someone from doing anything. The Union argues that the grievor is being treated differently here because of the nature or degree of his disability. Therefore, the Union asserts that the College has violated the collective agreement and the *Human Rights Code*.

The College began its submissions by reiterating the argument that the issue is moot, emphasizing that no remedy should be available to the grievor if the evidence demonstrates that he did not even apply for sick benefits until a few days before his retirement. The College suggested that there might have to be a ruling on the question of when the grievor gave actual notice to the College of his desire to go on sick leave. The grievor's evidence had been that he delivered the doctor's note at the end of June, but the College's evidence was that it only received this document at the end of August. The College argued that if its evidence is accepted, the grievor would have no entitlement to sick benefits before he put the College on notice of his desire to go on sick leave by delivering the doctor's note at the end of August. The College argues that otherwise it would be prejudiced because it would not be able to assess retroactively any issues of accommodation or suitability for the two-month period before the note was received. However, one was reminded that

the grievor retired as of that date. Accordingly, the College argued that the Union's case is moot because there would be no effective remedy for the situation.

After these submissions, both parties indicated to the arbitrator that they wanted a ruling on the discrimination issue even if the facts lead to a conclusion that the grievor's individual case is moot or would result in no remedy. Therefore, submissions proceeded on both aspects of the case.

The College cited the *Gibbs* case, *supra*, in support of the concept that Human Rights legislation is designed to protect "the most vulnerable." The College argues that the Union is improperly attempting to capitalize on benefits being voluntarily provided to hospitalized employees by extending such benefits to less vulnerable employees who do not require hospitalization. Thus, it was said that the Union's position would operate contrary to the intentions of the Human Rights legislation.

The Employer does not dispute that the grievor has a disability within the meaning of the Code because of his arthritic condition. But the Employer stresses that the evidence establishes that the grievor's "degree" of disability did not prevent him from enjoying his normal vacation activities. The College relies upon the evidence that the grievor spent the summer "hanging out at his boat" and participating in family activities, such as starting a gardening business. Nor did the grievor see a doctor over the same vacation period. The College stresses that the evidence shows that the grievor experienced the same chronic pain during the summer vacation of 2001 that he had endured while he worked before the start of his vacation period. Further, it was said that his medical situation was the same as it is now when he is in retirement, but teaching on a part-time basis. Therefore, the Employer argues that the grievor was not "completely disabled" and could therefore

enjoy most of his vacation unlike a hospitalized employee who loses his/her freedom to be at home during an illness.

The College argues that the Sick Days While on Vacation Policy does not discriminate on the basis of the nature of the condition or on any other prohibited grounds. The College asserts that the purpose of the Policy is simply to give relief to those whose freedoms are restricted due to hospitalization. The College submits that it makes perfect sense to provide a benefit or relief to someone who is hospitalized rather than to someone who is able to be with his family on a boat during the vacation period. Therefore the College asserts that there is an appropriate justification for the way it treats hospitalized employees and that this is recognized as legitimate in the *Gibbs* decision, *supra*. The College also asserts that the Union is effectively trying to obtain a benefit that it failed to obtain in collective bargaining as was disallowed in the *ONA v. Orillia Soldiers Memorial Hospital* decision, 1999 Carswell Ont. 28, [1999] L.V.I. 3005-1, 40 C.C.E.L., (2d) 263 (sub nom, *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital*) 99 C.L.L.C. 230 007, 169 D.L.R. (4<sup>th</sup>) 489, (sub nom, *Ontario Nurses' Association v. Orillia Soldiers Memorial Hospital*) 117 O.A.C. 146, (sub nom. *Ontario Nurses' Assn. v. Orillia Soldiers Memorial Hospital*) 42 O.R. (3d) 692, 20 C.C.P.B. 195. 36 C.H.H.R. D/202.R. D/202, [1999] O.J No. 44.

The Employer also relies upon *Northern Alberta Institute of Technology and AIT Academic Staff Association*, (2001) AGAA No. 52 decision of D.P. Jones dated June 22, 2001. The Employer argues that it is similar factually and supports its position in this case. The Employer submits that the *Jockey Club* case, *supra*, can be distinguished because it deals with differences based on types of disability, whereas the case at hand deals with degree of injury or disability. The College contends it is common and acceptable to differentiate on this basis. Alternatively, the College asserts that the *Jockey Club* decisions of the Hon. George W. Adams

and the Court of Appeal are wrongly decided and contrary to the *Gibbs* decision, *supra*.

In reply, the Union argues that the grievor is entitled to sick pay even if his doctor's note was not received until the end of August because the grievor raised the issue within a reasonable time and that the College has not been prejudiced by any delay. The Unions stresses that the medical condition was easily confirmed and could have been processed in the same way as a claim under the Sick Days While on Vacation Policy.

The Union also argues there is no evidence to support a comparison argument based on degree or extent of disability because there is no evidence about the extent of disability of those who are hospitalized. Nor is there any evidence about hospital admission policies. Therefore, the Union reverts to the argument that anyone who is sick and disabled within the meaning of the Code should have the benefit of the Policy. It was also argued that the grievor was deprived of his vacation because he was never free from pain.

The Union acknowledges that it cannot seek a benefit that it failed to achieve at the bargaining table through a rights arbitration. The Union also acknowledges that the collective agreement does not allow for conversion of scheduled vacation time to sick benefits. Finally, the Union concedes that it would have no argument if the College had not implemented this Policy. However, the Union relies on the *Brooks* decision to assert that once an employer "enters the field" of providing certain benefits through a policy such as the one in question, the Employer cannot provide those benefits in a discriminatory fashion.

### **The Decision**

This case raises difficult and important collective bargaining, contract interpretation and human rights issues. This is a collective agreement negotiated by two very sophisticated parties. It covers all the Colleges of Applied Arts and Technology in this province. Article 17.01 F 1 is typical in providing income protection for employees in cases of illness or injury who would otherwise be scheduled to work. The parties chose not to extend those benefits to employees on vacation. This is a common provision because paid vacation periods ensure income continuance, even in the event of disabling accidents that happen during vacations. The parties' language reflects the realities, the priorities and the tradeoffs that occur in balanced and responsible collective bargaining.

Having reached this contractual arrangement, this College then voluntarily and unilaterally decided to provide some relief against the operation of the clause for vacationing employees who become hospitalized. The uncontradicted evidence from the College is that this was done to address the additional loss of freedoms and/or home comfort that result from hospital stays. Therefore, the College allows for the conversion of vacation time to sick leave for the period of a hospital stay, but not during any convalescence that may result at home, no matter what degree or extent of incapacity is associated with the remaining illness, recovery or rehabilitation.

The Union acknowledges that it would have no cause to allege discriminatory treatment against the grievor if the Policy did not exist. Article 17.01 F 1 is not discriminatory. The grievor has been treated in accordance with the collective agreement and without this Policy, the Union concedes that there could be no claim of discriminatory treatment. The basis of the Union's argument is that once the College allowed sick and hospitalized employees to convert vacation

days to sick days, this discriminates against employees who are disabled but not hospitalized and yet would otherwise qualify for sick leave if they had been scheduled to work.

This issue has an important impact on the parties' contractual rights. Employees in this bargaining unit can "bank" unused vacation time and take it later or it can be paid out upon retirement. The benefit provisions of Article 17 protect income during an illness that takes an employee away from work. Therefore, an employee whose vacation is disrupted by a disabling condition may well want to be able to convert the vacation days to sick days, not so much to protect immediate income, but to preserve vacation days or get the cash value upon retirement

The particular fact situation in this case may be fresh to arbitration, but the basic issues are not new. The development of the relevant law was crystallized in the decision of the Honourable George W. Adams, Q.C. in the *Ontario Jockey Club* case, *supra*, as affirmed by the Court of Appeal. His analysis of the history and application and the principles need not be reiterated here. I adopt them completely as being correct and applicable. The award instructs an adjudicator in a case like this to begin by keeping in mind the "nature and the purpose of human rights legislation" and then to define the purpose of the benefit plan in question. Thereafter, the appropriate comparative group must be determined.

The nature and purpose of human rights legislation is to advance the broad policy considerations that underline this "fundamental: and "quasi-constitutional" legislation (see *Ontario Human Rights Commission and Simpson Sears, supra*). Tribunals are told to interpret human rights codes in a "broad and purposive manner." As stated in *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321, at p. 339 which is cited in *Gibbs, supra*;

Human rights legislation is amongst the most pre-eminent category of legislation.... One of the reasons such legislation has been so described is that it is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed....

Defining the purpose of a benefit scheme is more problematic. Even the Supreme Court Justices in the *Gibbs* case differ in approaches to what they define as the “purposive test.” Mr. Justice Sopinka, writing for the majority at paragraph 33 said:

The first step is to determine in all the circumstances of the case, the purpose of the disability plan. Comparing the benefits allocated to employees pursuant to different purposes is not helpful in determining discrimination – it is understandable that insurance benefits designed for disparate purposes will differ. If, however, benefits are allocated pursuant to the same purpose, yet benefits differ as the result of characteristics that are not relevant to this purpose, discrimination may well exist.

Mr. Justice Sopinka continued by suggesting that the full evidentiary record may reveal different purposes of benefits. He suggested that if the “true character” of an insurance scheme is simply to insure against a specific injury, such as a hand injury, the proper comparative group to determine discrimination would be between those with hand injuries, not between those with hand injuries and those with other injuries. However, Madame Justice McLachlin (as she then was), while approving of Mr. Justice Sopinka’s application of the purposive test to the facts in the *Gibbs* case, wrote a concurring decision warning about taking too strict an approach to the purposive analysis:

[46] Under the purposive test, discrimination is determined by examining the true purpose of the insurance plan. **Discrimination will exist if benefits received for the same purpose differ on the basis of a characteristic not relevant to the purpose of the insurance scheme.** In the instant case, the defined purpose of the

scheme is to insure employees against the income-related consequences of becoming disabled and unable to work. By framing the purpose in this way, the nature of the disability becomes an irrelevant characteristic. Therefore, to distinguish benefits on the basis of disability constitutes discrimination.

**[47] So long as the purpose is formulated broadly with reference to the need which the plan seeks to address and without reference to specific injuries or specific groups of people, it functions well.** This is how Sopinka J. approaches the matter of purpose in this case.

[48] However, if the purpose is defined in terms of specific injuries or a specific target group, problems arise. Consider a scheme that provides treatment for people suffering from alcoholism. The purpose might be defined in various ways. The purpose might be seen as preventing or curing alcoholism. Under this purpose, denial of treatment to a cocaine addict would not be discriminatory under Sopinka J's test. Alternatively, the purpose might be defined as preventing addiction. Under this purpose, denial of benefits to a cocaine addict would be discriminatory, but a person suffering from another disability, for example, mental illness, would have no basis to claim discrimination. Finally, the provision of treatment for alcoholics might be seen as an aspect of the broader purpose of providing treatment for persons suffering from debilitating health problems. On this definition, the alcoholic, the cocaine addict and the mentally ill person would all be entitled to treatment free from discrimination.

[49] If it is open to the employer and employee to define the purpose of benefits narrowly by reference to a target group, like alcoholics, without discrimination, the result may be to condone exclusion of many valid claims and permit *de facto* discrimination against others similarly disabled from other causes. On the other hand, if the employer provides even a minimal benefit to a person other than the target group, the purpose expands and discrimination is established. For example, if an insurance scheme provided full treatment for alcoholics and also gave a \$5.00 treatment benefit to schizophrenics, the scheme would necessarily target disability more generally. The result would be a finding that the scheme discriminated against the schizophrenic denied equal benefits. This does not seem reasonable. The person who gets no money under the scheme should be able to argue discrimination on an equal basis to the person who gets \$5.00 under the scheme

[50] Consequences such as these lead me to conclude that in **defining the purpose of schemes, reference should not be made to specific disabilities and specific target groups.** To permit this is to permit the kind of reasoning which led tribunals and courts in the past to deny benefits to pregnant women, on the ground that the schemes in question were intended to compensate for illness only. The Court rejected such reasoning in *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4<sup>th</sup>) 321 (S.C.C.), by defining the purpose of the plan broadly as being to compensate persons who were unable to work for valid health-related reasons. **The focus of the inquiry was thus placed on the need being provided for – the loss of employment for health-related reasons – rather than on the class of person being compensated.**

[emphasis added]

These passages make it clear than when examining the purpose of the benefits in this case, one must look to the evidentiary record as a whole to determine the need that the plan “seeks to address . . . without reference to specific injuries or specific groups of people.”

The evidence establishes that the Sick Days While on Vacation Policy extends sick benefits during vacation to employees whose vacations were interrupted by hospitalization. The Policy provides no such extension for people who are not hospitalized but become seriously ill, incapacitated or who may be recovering from injuries or operations. Therefore, it cannot be said that the purpose of the Policy is to assist the seriously ill. The starkest example of this might be a cancer patient who becomes hospitalized during a scheduled vacation and then chooses to leave the hospital and receive palliative care at home for the final stages of the disease. The Policy would cover the period of hospitalization, not the final, most debilitating course of the illness. Accordingly, the College’s Policy cannot be said to have the purpose of extending sick pay benefits to those who become seriously ill during vacations. Nor can it be found that the Policy is designed to relieve against the impact of illness, injury or disease during vacations. Again, the

Policy entitles an employee to convert scheduled vacation to sick leave only for the period of the hospitalization. A sprained ankle can interrupt or ruin a skiing vacation more seriously than a two-day hospital stay requiring no recuperation. However, the Policy would not give access to sickness benefits to the disappointed skier.

Therefore, adopting the Supreme Court's direction to focus upon the "need being provided for" (as set out in the *Gibbs* case *supra*), the "need" this Policy addresses must be the provision of relief simply for the period of hospitalization that keeps an employee away from his/her home during a scheduled vacation. This analysis does not require the employer or an adjudicator to make reference to specific injuries, degree of incapacity or groups of people. It focuses only upon the specific need being addressed, i.e. the dislocation associated with hospitalization during a scheduled vacation because of illness.

Further, while the title of the Policy is not determinative or binding upon this arbitrator, it can be significant in discerning its purpose. The title and wording of the Policy reads:

#### **SICK DAYS WHILE ON VACATION**

**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, **these 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]

The Policy is directed only at the period of the hospital stay. It is not made conditional upon the type or degree of illness. Therefore, from the plain words of the Policy it is apparent that it was designed to deal with hospitalization, nothing

more. It was not designed to relieve against the financial or the practical consequences of becoming ill during a scheduled vacation. The wording indicates that the purpose is simply to provide relief from the collective agreement's effect for the period of the hospitalization. The Policy is available to all academic employees who are ill and hospitalized during their vacations. Therefore, in order to determine whether there has been any discrimination in this case, the appropriate comparative groups must be "*vacationing employees who have suffered an illness that requires hospitalization*" and "*vacationing employees who suffer an illness that does not require hospitalization.*" This is analogous to the mental/physical disability comparison used in the *Gibbs* case, *supra*. The College has treated the two groups of vacationing employees differently. The next question becomes whether any ground under the *Human Rights Code* prohibits this differential treatment.

Employers and unions are allowed to provide different benefits to employees. Indeed, this is why Mr. Justice Sopinka wrote in *Gibbs*, ". . . it is understandable that insurance benefits designed for disparate purposes will differ." Differences are allowed when they can be justified for *bona fide* occupational requirements. This is done all the time, such as differential compensation and benefits on the basis of seniority, full or part-time status and job skills. However, distinctions are not allowed when they are based on grounds that are prohibited by the *Human Rights Code*. To determine the existence of discrimination, the comparison must be made between the two identified groups and then it must be decided whether the distinction is based on a prohibited ground.

The *Human Rights Code* offers every person a right to equal treatment with respect to employment without discrimination because of handicap. The definition of handicap in section 10(1)(a) includes: "any degree of physical disability.... that is caused by.... illness....." Approaches that condone distinctions

based on the nature of the illness or the type of event that caused the injury have been rejected. See *The Ontario Jockey Club* and *Gibbs* decisions, *supra*.

The College's Sick Days While on Vacation Policy in this case extends a benefit only to employees with an illness for the period of any hospitalization during vacation, not to other conditions that could be included as disabilities under the *Human Rights Code*. Employees who are disabled by an illness or an injury may be more incapacitated and experience greater pain than a hospitalized patient. Such employees may have their vacations equally if not more disrupted. However, the Policy does not extend to them the relief from the collective agreement's disallowance of sick benefits on the grounds of their disability or because of the nature or degree of their handicap. The Policy does not provide them the extended benefit simply because they are not hospitalized. Thus the Policy differentiates between employees on the basis of where they are being treated, not on the basis of the nature or degree of their illness.

The *Brooks*, *Gibbs* and *Ontario Jockey Club* decisions establish that once an employer decides to provide a disability benefit, exclusions from such schemes cannot be made on the basis of prohibited grounds. Distinctions based on the degree or nature of disability are not permitted. That is why the causes of a disability could not be used as a basis to disentitle access to disability benefits in the *Jockey Club* case, *supra*. However, distinctions based on reasons outside of the Code do not offend it or the collective agreement. The distinction between ill employees on vacation who are hospitalized and those who are not is not a distinction between different types or degrees of disability. It is a distinction between the location where the illness is endured. Location is not a prohibited ground upon which to base a distinction in benefit entitlement.

It should be noted that this analysis and conclusion are consistent with the nature and purpose of human rights legislation and protections. As the

*Gibbs* case emphasizes, the laws prohibiting discrimination exist "as the last protection for the most vulnerable members of society." In the *Gibbs* case, the health plan offered greater protection to the physically disabled than it did to the mentally disabled. This was found to be discriminatory because it stigmatized people with mental disabilities as being less worthy than those with physical handicaps. In contrast, the Policy in the case at hand casts no stigma on ill employees who are not hospitalized. They may be being treated differently because the College views them as "better off" than hospitalized employees because they are able to remain at home. In the grievor's case, that may or may not be true. The evidence established that he spent his vacation with his family doing the things that he normally did on vacation, albeit suffering throughout from arthritic pain. Does that mean that he should be treated the same as sick employees who are hospitalized during their vacations? The evidence does not and probably could not show whether someone in the grievor's situation had his/her vacation more or less affected by his/her disability than someone who was hospitalized. However, the evidence clearly does not show that a person who is not hospitalized belongs to a group that is less fortunate or more vulnerable than those who are hospitalized. The purpose of the Code is to prevent discrimination by attributing stereotypical characteristics to individuals and to ameliorate the situation of those who suffer disadvantage from exclusion from the mainstream of society. The Sickness While on Vacation Policy extends a contractual benefit to those who are sick and hospitalized. It does not assist those who, in some cases, may be less vulnerable or even better off because they are not hospitalized. This is entirely different from the situation in *Gibbs* where disability benefits were offered, but limits were placed on claims by those suffering from mental disabilities. In that case, a historically disadvantaged group had a benefit withheld because of the nature of their disability. In the case at hand, the group claiming access to the additional benefit of the Policy cannot be said to be historically disadvantaged or more vulnerable in comparison to the other group.

Wise contract drafters and administrators may legitimately differ about when or to whom different benefits should be afforded, if at all. As Justice Sopinka advised in *Gibbs*,

. . . . it is understandable that insurance benefits designed for disparate purposes will differ. If, however, benefits are allocated pursuant to the same purpose, yet benefits differ as the result of characteristics that are not relevant to this purpose, discrimination may well exist.

The benefit extended to hospitalized and sick vacationing employees at this College is different and serves a different purpose than the general sick benefits afforded by the collective agreement. The sick pay provisions are designed to continue compensation when an employee is not able to attend his/her scheduled work due to illness. It is an income security provision. The Policy does not grant income security because the security already exists in Article 17. Instead, the Policy ameliorates the restrictions of access to benefits in the collective agreement for sicknesses that require hospital stays during vacations. Therefore, it cannot be concluded that the College violated the nature or the purpose of the Code by offering a benefit only to vacationing employees who are hospitalized.

This conclusion is consistent with the *Northern Alberta Institute of Technology* case where the arbitrator was called upon to determine whether discrimination occurred if an employee on vacation was not entitled to sick benefits. In that case, the grievor had undergone a triple bypass heart operation during his annual vacation. He asked his employer to convert his vacation to general illness leave. The employer agreed to do so in accordance with its Policy for the days on which he was in hospital and when he received home care. However, the employer would not do so with respect to the remaining days of his vacation. At the end of the vacation the employee went on general illness leave for nine more weeks and returned to modified duties. The grievance was dismissed on the basis that the "fundamental reason for absence" was the grievor's vacation and nothing in the collective agreement gave the employee the right to convert vacation leave to

general illness. The claim of discrimination was rejected because it was held that the basis of differential treatment was the fact that the employee was on vacation, not because he was ill. Being on vacation is not one of the prohibited grounds recognized in the Human Rights legislation in Alberta. Therefore, the distinction was not held to be contrary to law. In the case at hand, the basis of the differential treatment is not the fact that the employees are on vacation, but that they are hospitalized. Again, this is not a prohibited ground for a distinction.

The discrimination issue has been addressed first in this award because both parties stressed the importance of receiving direction in this area regardless of the particular merits of the individual grievance. Having determined that the Policy does not discriminate or violate the collective agreement, this aspect of the grievor's case is defeated.

But even if I am wrong in reaching this conclusion, the grievor's claim for sick pay must be disallowed. As set out in the original award, the grievor was "sick" within the meaning of Article 17.01 as of the end of April 2001 (page 14). However, he continued to work and be paid his regular salary up to the point of his summer vacation commencing June 11, 2001. Therefore, he has no claim for compensation up to June 11<sup>th</sup>, 2001 on any basis. There is a factual issue remaining unresolved as to whether he actually submitted a doctor's note that would have alerted the College to his desire to receive sick benefits thereafter. The grievor believes he delivered the note in late June and thereby should have been placed on sick leave. However, the grievor's actions in continuing to come in to work and performing duties related to teaching up to the commencement of his vacation are inconsistent with the notion that he was on sick leave. The College's only record of receipt of the note is late August. It must also be remembered that the grievor retired effective August 31, 2001. The grievor seemed somewhat confused about the details concerning the delivery of the note and at best his

evidence was vague. While there is no reason to doubt his honesty, his evidence contains sufficient uncertainty as to render it less compelling than the College's evidence. This evidence includes a date stamp on the note dated August 29, 2001. Further, the College's subsequent actions are consistent only with the notion that it received the note as of that date. Therefore, it must be concluded that the request for sick leave was not communicated to the College until August 29, 2001 even though the doctor's note said that the grievor was unable to work since April 30<sup>th</sup>.

It was decided in the original Award that the grievor was not entitled to sick pay during the vacation period from June to August under this collective agreement because he was on vacation and therefore not scheduled to work. However, if the conclusion reached above regarding discrimination is wrong, then it could be said that the College discriminated against people in the grievor's circumstances by extending sick benefits to hospitalized employees during vacations but not to other employees who were disabled and otherwise entitled to sick pay. The Employer concedes that the grievor's medical condition rendered him disabled within the meaning of the *Human Rights Code* and "sick" within the meaning of Article 17 of the collective agreement. This could mean that the grievor might theoretically be entitled to the benefit of the Policy.

Under these circumstances, would this grievor succeed in a claim for entitlement to the sick leave provisions during his summer vacation period? The evidence demonstrates that he suffered "significant chronic pain at virtually all times." In other words, he suffered both when he was at work and when he was on vacation. Therefore, his disabling condition was no more or less serious in the summer of 2001 than it was before and after that time. He spent the vacation with his family on their vacation property and participated in family events as his condition allowed. Because of this, it is easy to see why the Employer argued that its Sick Days While on Vacation Policy was never designed to cover employees

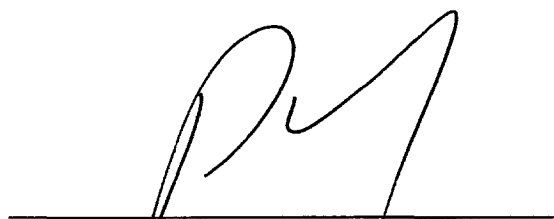
whose vacations were not as interrupted as employees who need to be hospitalized.

However, if the grievor's disability during the summer entitled him to claim sick pay during his scheduled vacation period, then he would have been entitled to claim sick benefits while he was sick and disabled from June 11 up to the point of his retirement on August 31. But he did not put the Employer on notice that he was making such a claim until the doctor's letter was delivered at the end of August. The late delivery deprived the College of the opportunity of reviewing and considering the request for benefits in a timely fashion. The Collective Agreement provides that "applications for benefits . . . 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" [Article 17.01 F 6]. The College's directives do reserve the College's right to request medical information in circumstances of absences due to sickness. This is reasonable and necessary to ensure the responsible administration of a costly benefit that must be provided only to those who legitimately qualify. The failure to provide the medical information and to clearly apply for benefits in this case were probably the result of oversight and confusion by the grievor. However, it means that the College cannot be faulted for failing to provide any sick benefits to the grievor during the summer period. To make the College do so retroactively would deprive it of the possibility of examining the propriety of the claim when the events were occurring. This is not to suggest that any aspersions should be cast upon the grievor's claim. However, the fact that the College's cross-examination of the grievor focused so strongly on his activities during vacation illustrates the employer's interest in knowing the circumstances of an employee who is claiming sick benefits. Absent a reasonable excuse or explanation, a claim for benefits filed months after the claimant wants it to take effect deprives an employer of a timely opportunity to examine its legitimacy.

Therefore, the lateness of the grievor's claim results in the fact that it would not have succeeded for the period June 11 to the end of August 2001 in any event.

For all these reasons, it has been concluded that the Union has not established that the existence or the application of the College's Sick Days While on Vacation Policy violates the Human Rights Code or the Collective Agreement. Further, or in the alternative, it has been concluded that the timing of the grievor's request for sick benefits was insufficient to sustain any entitlement for the period of the summer of 2001. Accordingly, the grievance is dismissed.

DATED at Toronto, Ontario this 3<sup>rd</sup> day of February, 2003



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Paula Knopf – Sole Arbitrator