

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO COUNCIL OF REGENTS FOR THE COLLEGES
OF APPLIED ARTS AND TECHNOLOGY
(SAULT COLLEGE)

(the College)

- AND -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(the Union)

AND IN THE MATTER OF GRIEVANCES
OF MS LYNDA LAMOTHE AND LAURIE BARBEAU

(the Grievors)

BEFORE:

C. Gordon Simmons, Chairperson
Mr. David Cameletti, College Nominee
Mr. John McManus, Union Nominee

APPEARANCES ON BEHALF OF THE COLLEGE:

Mr. Michael Hines, Counsel
Ms Kitty DeRosario, VP, Human Resources & Student Services
Ms Judy Morris, Dean, School of Arts & General Education
Ms Rhonda Wright, Manager, Employee Relations

APPEARANCES ON BEHALF OF THE UNION:

Ms Susan Philpot, Counsel
Mr. Joe Lucchetti, Local President
Mr. John Giguere, Chief Steward
Ms Lynda Lamothe, Grievor
Ms Laurie Barbeau, Grievor

Hearings into this matter were held in Sault Ste. Marie, Ontario on January 21 and November 11, 1997; and in Toronto on October 26, 1999, followed by written submissions.

Ms Lynda Lamothe originally claimed "unjust dismissal" and sought "reinstatement" (Ex. 1, Tab 1). However, at the commencement of these proceedings the union informed the board that essentially the issue involves a claim of improper layoff and if successful in its grievance the board is to remain seized of its jurisdiction as to remedy and implementation of the award.

Additional grievances were filed by Ms Lamothe and Ms Barbeau claiming they had been improperly displaced from their positions as Special Needs Counsellors. While the grievances may be somewhat interrelated it was agreed by the parties that the board would hear evidence and submissions on the improper layoff grievance and render its decision before proceeding to the displacement grievances.

BACKGROUND

Ms Barbeau was first employed in November 1984 and was appointed chair to an ad hoc advisory committee in the Fall of 1985 to investigate ways the college might respond to an increasing number of student demands for assistance who were encumbered with various disabilities. Out of this Ms Barbeau became a counsellor to "special needs students" as well as performing other duties. By 1989-90 she was assigned counselling duties full time due to the growing caseload of student needs. In 1992 the special needs program was expanded to the point where a second counsellor was appointed. This person was Ms Lamothe. There is

agreement between the parties the special needs counselling was a demanding requirement of both counsellors and they incurred considerable overtime in order to meet the job requirements.

The college receives funding from the province to carry out its varied programs. The funding provided by the province is commonly referred to as the "provincial operating grant". The province has specified certain funds be devoted to the special needs program referred to as "special needs allocation". These funds must not be used in the overall operating grant allocations but are to be used specifically for accommodating persons with disabilities. This is set out in a memorandum to the presidents of the colleges dated June 21, 1994 relating to the 1994-95 fiscal year and issued by Mr. James Mackay, director of student affairs in the Ministry of Education and Training (Ex. 7). The memorandum outlines, *inter alia*, the Ministry's views with respect to special needs allocation. It reads in part:

MEMORANDUM TO: Presidents, Colleges of Applied Arts
and Technology
FROM: B. James Mackay
DATE: June 21, 1994
SUBJECT: **1994-95 Special Needs Allocation**

On May 20, 1994, Mariette Carrier-Fraser, ADM, Elementary, Secondary and Postsecondary Operations and French Language Education, announced that the special needs allocation for 1994-95 is \$6.3 million. As indicated in her memo to the college system, the allocation is being distributed according to the same formula used in 1993-94. Individual colleges' 1994-95 special needs allocation are shown on the attached table.

Accommodation of Persons With Disabilities

I would like to emphasize that the college is a direct provider of postsecondary educational services and, as such, has a legal

responsibility to accommodate persons with disabilities under the Ontario Human Rights Code. This special needs grant is intended to supplement any expenditures the college makes from its general revenues to meet such legal obligations.

...

The special needs allocation from the province grant money for the fiscal year April 1, 1995-March 31, 1996 was \$200,848.00 (Ex. 9). There was, in addition, \$41,332.00 that was received from other outside sources such as the Vocational & Rehabilitation Division of Workers' Compensation; insurance companies; and, OSAP bursaries which paid for some of the student costs. But in addition to these sources of revenues the overall expenditures exceeded revenues by \$45,869.00. This excess expenditure came from the college's general operating revenue. So the actual cost for providing the special needs program during the fiscal year 1995-96 was \$288,049.00. That is made up as follows:

Special Needs Allocation contained in the Provincial Operating Grant	\$200,848
Various Agencies	\$41,332
Expenditure from General Operations by the College	\$45,869
Total Cost of Special Needs Program for 1995-96	\$288,049

It was during the Fall of 1995 rumours began to circulate that provincial grants were expected to be cut from 14% to 17% overall for the fiscal year

commencing April 1, 1996. This information was coming from Ms Kitty DeRosario, Vice President, Academic-Human, Health and Liberal Programs to coordinating committees in the service areas. It was known at the end of September 1995 (six months into the fiscal year) the special needs program was operating at a deficit of \$92, 877.00. Various departments were informed at that time that if a 17% cut was to be forthcoming this meant \$15,789.00 would be cut from the special needs program. The deficit of approximately \$93,000.00 would, if the figure remained constant to fiscal year end, come out of the college's general operating revenues.

Ms DeRosario testified on behalf of the college. She confirmed much of what Ms Barbeau had testified to and agreed she had discussed with Ms Barbeau possible ways and means of cutting 17% of the approximately \$93,000.00 (which equals \$15,789.00). They discussed potential savings sources such as full-time salary and benefits, accommodation lines such as part-time employees, tutors, note takers, etc. According to Ms DeRosario, Ms Barbeau suggested the \$15,000+ could probably be taken out of the accommodation lines and leave the operations in tact. However, by mid-December as senior management began to really wrestle with cutting 17% in costs across the board, the realities became more clear that certain programs would have to be eliminated such as the three year architectural program which would require no new intakes of students but would have to be maintained until the first year students graduated at the conclusion of their third year. Also, placement offices which were used to help graduates find jobs would

have to be eliminated. Other services such as in the support staff area involving typing and secretarial services would feel the various cuts being contemplated. So by mid-December 1995 senior management was facing the realization that certain programs would have to be cut entirely while others would have to be reduced. In February 1996 the college issued a notice it was undergoing an extreme financial exigency and this required putting into place art. 27.05. Once art. 27.05 is invoked a procedure is put in place. The article reads in part as follows:

Layoff and Involuntary Transfer

27.05 When a College plans to lay-off or to reduce the number of full-time employees who have completed the probationary period, or plans the involuntary transfer of such employees to other positions than those previously held as a result of such a planned lay-off or reduction of employees the following procedure shall apply:

- (i) The College will notify the Union Local President and the College Employment Stability Committee (CESC) of the planned staff reduction and the courses, programs or services affected.

- (ii) Within seven calendar days of the receipt of such notification, the CESC shall meet for the purpose of the College advising of the circumstances giving rise to the planned staff reduction and the employees affected.

- ...

- (iv) The CESC and the parties shall maintain the confidentiality of the meetings and the identity of all employees discussed ***except as specifically waived by mutual consent of the Union Local and the College..***

Once art. 27.05 was invoked Ms DeRosario stopped all communications with Ms Barbeau and others pursuant to art. 27.05 (iv).

The impact on the special needs program by invoking art. 27.05 meant spending for special needs would be reduced to live within the provincial grant. That is, the college made it known it was not willing to go along with a reduction of \$15,000.00 but instead had decided to cut the entire excess cost of the program over the special needs allocation portion of the provincial grant. Ms DeRosario was aware of the need to accommodate disability students by the Human Rights legislation but was comfortable the college remained compliant with the Human Rights requirements by providing services within the special needs funds provided by the provincial grant.

In any event, the college issued a notice to Ms Lamothe dated February 12, 1996 that due to the financial position of the college her position as special needs counsellor had become surplus to requirements and she would be laid off.

The position advanced by the union was the declaration of the special needs counsellor being surplus was improper. The layoff decision did not result in any benefit to the college insofar as spending is concerned and there has been an overload of work experienced by the two counsellors for a number of years and the decision to reduce the service was an act of arbitrariness, unreasonableness, bad faith, and was without any sound legitimate business reasons. When asked by counsel for the college to articulate more clearly what portion of the collective agreement had been violated counsel for the union responded there was no specific article and, further, there was no allegation the layoff had been taken out

of seniority but the college had acted in bad faith which is captured in the allegation of unreasonableness, arbitrariness, unfairness, and no legitimate business reason.

As an aside, the displacement grievances filed by both Misses Lamothe and Barbeau relate to what subsequently transpired. At this juncture it is a fair comment, we believe, to say that through student urging more funds for counselling were later made available to the special needs program after the college found additional money for the program. That is, later in 1996 through student protestations the college was able to find additional money to re-establish .6 of the special needs counsellor position and appointed someone to fill that requirement. Ms Lamothe was not appointed to fill the .6 counsellor position and filed another grievance claiming improper displacement by the person who was appointed to the position. Ms Barbeau had also been performing coordinating duties but these were assigned to someone else later in 1996. The someone else was allegedly not a non-union bargaining member but rather an employee in management. Ms Barbeau likewise filed a grievance claiming to have been improperly displaced by the non-union employee to perform the coordinating duties.

These subsequent grievances therefore deal with displacement issues and will be dealt with in subsequent proceedings. The comments respecting the displacement grievances are based on the limited information which was provided

to the board and are subject to correction when the matter is explored more fully upon presentation of the facts relating to the displacement grievances.

As stated earlier the union disagrees with the college's decision to layoff Ms Lamothe. To elaborate on its reasons for its disagreement with the college's decision, the union asserts special needs is met by the use of a special department program which is funded in a manner that is other than usual and is a program targetted at disabled students. It was impossible to meet the needs of this program with one counsellor so the college's decision to eliminate one position was unreasonable. The special needs office is not an ordinary department but is one specifically funded by the Ministry and is intended to be supplemented by the college to provide a mandated service to students of the college and there is a legal obligation on the college to accommodate such disabled students with a requirement that both the Ministry and the college dedicate resources to such a program. Counsel for the union pointed out the evidence of Ms DeRosario supported the union's position that the workload prior to the layoff was more than the two counsellors could handle which required overtime and extra help for up to 80% over the normal work hours during a one year span. The college acted unreasonably when, combining these factors of overtime work together with the obligations on the Ministry and the college to provide such a program, the college decided to cut two counsellors to one. Therefore, according to the union, the

decision of the college was unreasonable and there was no indication on the evidence the goals of saving money the college set out to meet were met.

The union also claimed the process followed was tainted. There were discussions between Misses DeRosario and Barbeau prior to and during December as to possible ways and means to cut costs with approximately \$15,000.00 in mind but there were no discussions about removing one position. Moreover, it would have made more sense to have made other alterations such as reducing part-time staff as well as other services instead of the special needs counsellor position. In doing so there was no business benefit resulting to the college and when one realizes a portion of the position was reinstated later in the summer reinforces the union's position it was not a sound business decision in attempting to reduce costs. The college had some other ulterior motive in laying off the grievor which is evidenced by the sudden termination of discussions between Misses DeRosario and Barbeau in their search to reduce costs in the department.

Therefore, the union requests the board find the layoff was improper and unreasonable and the layoff be revoked.

The college asserts that while the grievor is dedicated and she, along with Ms Barbeau, have a total commitment and a proper attitude for their work, the college found itself in a position that it could no longer justify continuing to employ two counsellors in the special needs program. Counsel referred to them as being "cadillacs" but the college could not afford cadillacs anymore. Counsel went on

to say the union proposes the functioning of the special needs program must be done its way and any other way is illegal. But the problem is that in late 1995 and early 1996 the needs of the special needs program were no longer able to be met with the available funds. In 1996 it was a matter of not just cutting classes but cutting entire programs. Insofar as whether the cut was legitimate or illegal against the *Human Rights Code* the union claims it is implicitly so and that an accommodation of the special needs students was a legal obligation of the college as well as the province. The college asserts this is not so. It is a management discretion and whether or not it was illegal one does not know until it is challenged in the appropriate forum. The college pointed out there are some colleges which have been living strictly within the provincial special needs allocation and as far as we are aware there have been no complaints where such situations exist. So the college suggests it could be the grievors who are wrong in their assertions. One of the requirements contained in the *Human Rights Code* is a requirement that the college provide accommodation for equal opportunity and the duty to accommodate is only to the point where it creates an equal opportunity. But, in the instant situation the college remained compliant with the *Human Rights Code* obligations even though it had to scale back because of lack of funds.

Further, the union's claim that the process was flawed because of a requirement for more consultation surrounding the \$15,000 cutback has no merit.

Ms DeRosario only stopped communicating when it was made public knowledge the college was going through a financial exigency and pursuant to art. 27.05 (iv) she was obligated to adhere to the confidentiality requirements contained in the article.

The college relies on its right to layoff employees by reference to the Management Rights Article, art. 6 and points out the collective agreement in no way inhibits its right. It maintains it can lay off employees in situations where there is a reduction in available funds but no reduction in work. In ***Re Corporation of the County of Huron (Huronview Home for the Aged) and Service Employees Union, Local 210*** (1996) 57 LAC (4th) 252 (Dissanayake) there was a management rights clause as in the instant situation without any qualifiers to layoffs. The employer's layoffs due to reduction in funds but no reduction in work were upheld. Once a layoff is in process then other provisions in the collective agreement such as bumping rights, etc. come in to play but there are no qualifiers placed on the right to lay off employees.

Further, management is given the right to reorganize the work force in the most efficient manner it deems feasible but this reorganization is subject to the collective agreement. See ***International Association of Machinists & Aerospace Workers, Local Lodge 1722 and Ferguson Supply Ltd.***, an unreported decision of Arbitrator Thomas W. Wakeling, September 14, 1982. The college also relies on ***Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto***

Police Association et al (1991), 33 O.R. (2d) 476 (C.A.) which holds the view that management rights provides the employer with the exclusive right to lay off employees without restriction unless restrictions are provided elsewhere in the collective agreement and to imply a term in the collective agreement that the management rights clause must be applied fairly and without discrimination cannot be imposed on the employer. Further, arbitrators are not managers and ought to stay out of the management of an enterprise. *Re Sisters of St. Joseph of the Diocese of London in Ontario, Operating St. Joseph's Hospital, Chatham and Service Employees Union, Local 210 et al* (1997), 35 O.R. (3d) 91 (C.A.). But, when an employer is confronted with cuts in funding the appropriate response is layoff. *The Algoma Steel District School Board and the Canadian Union of Public Employees, Local 4148 (Plant)*, Arbitrator Louisa M. Davie, April 13, 1999. So too *Re Board of Governors of University of Alberta and Non-Academic Staff Association (Barry)* (1993), 34 LAC (4th) 229 (Ponak). Accordingly, it is the college's position it had the right to lay off Ms Lamothe because of funding cuts and in doing so did not violate the collective agreement.

In reply, the union submitted that contrary to the college's position there is a growing tendency to place duties upon employers to act fairly and reasonably in laying off employees. The union relies in particular on *Re Council of Printing Industries of Canada and Toronto Printing Pressmen & Assistants' Union No. 10 et al* (1983), 149 D.L.R. (3d) 53 (ON C.A.). In that case there were in addition to the

management rights article several articles that dealt specifically with the issue of layoffs and how layoffs were to be accomplished. It was found in that case that an employer had to exercise its discretion in a reasonable manner without discrimination, bad faith, or arbitrariness. The union relies on the ***Council of Printing Industries*** case to insist the college was required to act in a *bona fide* fashion in exercising any discretion reserved to it under the collective agreement. In the instant situation the decision to reduce the work force clearly impacts on the employment and seniority rights of the grievor in a serious and fundamental way and by laying her off her rights have not only been impacted but have been truncated in circumstances that cried out for a continuation of her position. The union, in its written submission, states:

The bona fides of the College's actions must be clear, and in the circumstances before you, they were not. It is the Union's submission that the College eliminated the Grievor's position and laid her off in the absence of any business plan (and certainly in the absence of a rational and sound one) for accommodating a 50% reduction of special needs counsellors positions. It was unrealistic and irresponsible to expect to function with such a reduction, and in fact, it was impossible. That amounts to an unreasonable exercise of management's discretion.

In further support of its position the union relies on ***Re Alcan Smelters & Chemicals Ltd. and Canadian Auto Workers, Local 2301*** (1998), 72 LAC (4th) 18 (Hope, QC).

DECISION

In reviewing the circumstances surrounding this case it is to be remembered the union does not claim any specific article to be in violation by the college. Rather, it claims the actions taken by the college were unreasonable and without having a sound business basis. The requirements of the work had not reduced and indeed could be said to have increased and were continuing to increase. The college had an obligation to provide services for the special needs students and this could not have been accomplished by cutting the program in half. The college was wrong in laying off Ms Lamothe and for reasons advanced by the union ought to be allowed.

The college maintains there was no impediment in its decision to layoff the grievor and no violation of the collective agreement in doing so. It was faced with a reduction in funds and had to look around for ways and means of cutting its costs. It gave notice to the union it was entering into a financial exigency and put art. 27.05 into operation. One of the results which flowed from this exercise was the layoff notice to the grievor for reasons explored above.

Insofar as the claim of a tainted process resulting from the withdrawal of discussions between Misses Barbeau and DeRosario is concerned, we cannot find fault with Ms DeRosario withdrawing from continuing her communications with Ms Barbeau because of art. 27.05 (iv). Had she continued to do otherwise she could have possibly violated art. 27.05 (iv).

Insofar as the claim of an unsound legitimate business decision to lay off the grievor goes, in face of the growing amount of work in the special needs program, the board is unable to conclude the college acted in an arbitrary and unreasonable fashion. It was faced with the cutting of funds it had normally received from provincial operating grant money and had to implement cutbacks in order to be financially viable. Certain programs were slated to be eliminated entirely while others were to be severely cut. The college decided it could no longer supplement the special needs allocation received in the provincial operating grant and concluded the special needs program would be operated within the special needs allocation plus whatever was received from various outside agencies. There is no evidence the college had to allocate funds from its overall operating revenues in addition to the money it received through the provincial special needs allocation. And, the statement of counsel for the college that certain other colleges do not supplement such provincial funds went unchallenged. While it is clear the college must provide a special needs program it has continued to do so albeit on a lessened scale.

Based on all of the evidence and submissions of the parties, the board is unable to conclude the college acted in an unreasonable manner in giving the layoff notice to Ms Lamothe. There were two employees in this program with Ms Lamothe having lower seniority than Ms Barbeau. The board does not turn its mind

in any way to bumping rights, etc. which may become material in the displacement grievances yet to be heard.

However, based on the available evidence and submissions of the parties the board must conclude the college did not violate the collective agreement nor can it be said it acted in an unreasonable manner for arriving at the decision it reached.

Accordingly, for all of the foregoing reasons the grievance must be and is hereby dismissed.

Having dismissed Ms Lamothe's layoff grievance her displacement grievance remains intact. It was agreed between the parties the displacement grievances of both Misses Lamothe and Barbeau would await the outcome of the layoff grievance before proceeding.

Hearing dates for the displacement grievances will now be arranged in the normal manner.

Dated at Kingston, Ontario, this 7th day of April, 2000.

C. Gordon Simmons
Chairperson

I concur/~~dissent~~

"David Cameletti"

David Cameletti
Employer Nominee

I concur/~~dissent~~

"John McManus"

John McManus
Union Nominee