

IN THE MATTER OF AN ARBITRATION

CAAT (A)
LOCAL 110

BETWEEN:

FANSHAWE COLLEGE

(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

**AND IN THE MATTER OF THE GRIEVANCE OF CANDICE LAWRENCE, ET AL. -
96C149-156**

BOARD OF ARBITRATION:

Kenneth P. Swan, Chairman
Kevin Mailloux, College Nominee
Jon McManus, Union Nominee

APPEARANCES:

For the College:

R.J. Atkinson, Counsel
H. Rundle, President
G. Rozell, Manager, Human Resources

For the Union:

A. Ryder, Counsel
Paddy Musson, President, Local 110
G. Fordyce

AWARD

A hearing in this matter was held in London, Ontario on September 30, 1998, at which time the parties were agreed that the board of arbitration had been properly appointed, and that we had jurisdiction to hear and determine the matters at issue between them.

Those matters arise from eight grievances, Nos. 96C149 to 96C156, filed between December 7 and December 12, 1995, against the refusal of the College to grant various kinds of leave with pay to five members of the Counselling and Student Life Department for December 11, 1995.

The following provisions of the collective agreement are relevant to the issues before us:

11.01 G 1 Where preparation, evaluation, feedback to students and complementary functions can be appropriately performed outside the College, scheduling shall be at the discretion of the teacher, subject to the requirement to meet appropriate deadlines established by the College.

...

15.02 In scheduling vacations, the College will take into consideration the maintenance of proper and efficient staffing of College programs and operations and the requests of employees. The College will notify employees of their vacation period at least four weeks prior to the commencement of the vacation period concerned. It is understood that following notification of vacation periods, vacation schedules may be changed in circumstances beyond the College's control or by mutual agreement. The College agrees that seniority shall be given consideration in resolving conflicting vacation requests.

...

21.02 Leave of absence for personal reasons, religious leave and special leave in extenuating personal circumstances may be granted at the discretion of the College without loss of pay. Where leave of absence for personal reasons is denied, reasons shall be given in writing to the applicant where requested.

The facts on which this matter must be decided are not generally in issue. In November, 1995, the labour movement in Ontario announced that it would begin a series of "Days of Protest", planned to take place across the province, with a one-day protest in London on December 11, 1995. The "Days of Protest" were intended to be political manifestations and demonstrations in selected cities to protest against the Ontario government's policies in a number of areas, including labour relations and funding of public services. The expectation was that those who supported the protest would not report to work for the day, and would participate instead in pickets, parades and similar demonstrations.

When this announcement reached the College, it immediately attracted the attention both of the Unions on campus, including OPSEU, Local 110, which represents academic employees, and the College administration. Ms. Paddy Musson, at all material times President of Local 110, testified that there was a great deal of interest among members of the Local in participating in the "Day of Protest", particularly because of the opposition of Local members to government funding policies as they applied to the Colleges of Applied Arts and Technology.

From the point of view of the College administration, Dr. Howard Rundle, the Acting President at the time of these events and now President of the College, testified that there was immediate concern as to the impact this event would have on the operation of the College and its programs. Both through consultation with the campus Unions and through contact with other employers in the city, Mr. Rundle concluded that, while the impact of such an unprecedented event could not readily be predicted in advance, it was certain to cause significant disruption on campus, particularly because it appeared that there was significant support among employees for the aims of

the protest, and because of the possibility that many of them might join in it.

Also of significant concern was the fact that London Transit would likely suffer, at the very least, a significant reduction in service on that day. Apparently, the collective agreement which covers operating staff at London Transit does not oblige them to cross picket lines, and it was anticipated that there would be such lines around the city in locations where disruption could be caused to bus routes. There was also the significant possibility that employees of London Transit would also decide to participate in the protest. Because the College is on the edge of the city, and a substantial proportion of the student body relies on public transportation to reach the campus, access to the College on December 11, 1995 would be, at the very least, problematic.

The College took the position that, even if there might be some sympathy for the aims of the protest to the extent that they related to funding for the CAAT system, as a public institution it could not countenance the means, the withdrawal of services by employees. The flavour of its position is set out in a memorandum from Dr. Rundle to all employees located in London dated November 29, 1995:

The College has reason to believe that some College employees may withdraw their services and not show up for work on December 11th, 1995. Although you may have been asked to participate in what is being called a "day of protest", you should know that any participation in a stoppage of work or withdrawal of services would be considered an illegal strike under both the *Colleges' Collective Bargaining Act* and the collective agreements applicable to College employees.

We believe that it is not in your interest or in the College's interest to jeopardize the services provided to our students and community by engaging in this illegal action

We therefore wish to advise you that employees who are scheduled to work on December 11, 1995 will be expected to attend work on that day. Those employees who do not come to work will not be paid for the day and the only disciplinary action

will be a letter to that effect placed on their personnel file.

All employees who had scheduled vacation or leaves of absences prior to November 13th will have those arrangements honoured; however, no one will be allowed to schedule vacation or leaves beyond November 13th. Any employee who calls in sick on December 11, 1995 may be required to produce a medical certificate to verify his or her illness.

The College understands that a picket line may be formed outside the College property on December 11th. The College would not have an objection to employees wishing to participate during their break times or lunch hour.

If the picket line occurs, this may cause some delays in arriving at work on time and therefore employees are encouraged to find alternate means of transportation in order to avoid any possible delays in arriving at work. If driving through a picket line, this should be done slowly and with care to ensure the safety of all involved.

December 11, 1995 was a Monday, and as it happens it was the first day of the examination week for post-secondary programs. This meant that, for the vast majority of teachers at the College, classes were over, and scheduled duties on December 11 would be limited to those related to examinations, duties which would affect only a small number of faculty members in the post-secondary programs. For faculty members involved in teaching non-post-secondary programs, classes would continue during this week.

Initially, the College's intention was to attempt to provide all services as usual. After meeting with student representatives, however, it decided to reconsider this intention. The academic consequences of even a few students being unable to reach the campus to write a scheduled exam were sufficiently serious to lead the College to reschedule all of the exams from December 11 to another day. The result of this was that, for all of the 90% of the teaching faculty in the post-secondary programs, there were no scheduled duties on December 11.

Similarly, consideration was given to cancelling classes in the non-post-secondary programs for that day. It appears that the impetus to do so came at least partly from the Union and the teachers, although the College's evidence is that its consideration was based solely on the interests of the students. The difficulty in respect of these programs is that many of them are courses purchased by governmental agencies for adult students who are supported by government benefits while they attend the programs. There was some concern that there might be penalties for non-attendance on the part of the students, or for not offering the program on a contracted day on the part of the College. The evidence is that the College attempted to get a ruling on whether they could cancel classes on December 11 without penalty, but could not get a definitive answer. In the result, it was decided not to cancel classes for most of these programs.

There is some uncertainty in the evidence, but it appears that some classes were cancelled in the Learning Centres/Academic Access Division of the School of Continuing Education. The classes at issue seem to have been in a program called Basic Training for Skills Development, a program that permitted students to upgrade to Grade 12 level their secondary school education. The course had at one time been purchased by the government for academic upgrading, but by December 11, 1995 funding had been cancelled, and the course was being offered by the College on a tuition basis. Courses in this program therefore did not carry the possibility of a financial penalty for students if classes were cancelled. The Chair of the Division therefore permitted those classes to be rescheduled, but only if the students were agreeable.

The grievors are all Counsellors, and not teachers. While also part of the academic bargaining unit, they have somewhat different terms and conditions of employment from teachers.

Pursuant to paragraph 11.04 A, Counsellors work a 35 hour week, with no provision for overtime. The practice is to accumulate overtime as it is worked, and then take time off in lieu at a time mutually convenient to the employee and his or her manager. In addition, while Counsellors also receive a two month vacation for each full academic year's service pursuant to paragraph 15.01 A, it is customary for Counsellors to take this time off at approved times throughout the year, and not just in a single two month block in the summer, as is normally the case for teachers.

At the material time, there were 11 Counsellors at the London campus. In keeping with the College's decision to keep the College open to the greatest extent possible, all of the Counsellors were expected to be available to perform counselling that day. Similarly, all of the Librarians were scheduled for work, as were all support staff and all non-Union managers and staff. Dr. Rundle testified that the College was concerned that there might be a demand for counselling services, given the examination schedule and the cancellation of some exams, and that similarly the library and other College services might attract more demand than usual. Dr. Rundle admitted that this demand did not materialize, but testified that it was only in hindsight that one could conclude that the preparations made by the College were unnecessary. Prior to December 11, he insisted, no one could have predicted what would occur on what would be an unprecedented event.

It is uncontested that none of the Librarians either sought leave to be absent, or were absent on December 11. Of the 11 Counsellors, two did not seek to be absent and reported for work as usual, and one, who had been off on sick leave, continued to be absent on December 11th and was paid sick pay for the day. The other eight applied for leave for the day, either as vacation, as a day in lieu of accumulated overtime, or as a day of leave without pay for personal reasons. Some

requested the day off under more than one of these options. All were denied leave, in every case in reliance on Dr. Rundle's letter of November 29.

One of these employees, upon being refused leave, attended work on December 11; the other seven did not. All seven received a letter of discipline imposing a penalty of one day's pay. Two of those so penalized did not grieve; the remaining five are the present grievors.

The Union contrasts this with what happened to the teaching faculty. As already observed, 90% or more of the teachers had no assigned duties on December 11, and a very substantial number of them turned out to participate in the picket lines which were established around the campus, and in other meetings and demonstrations throughout the day. While there is no complete count of who participated in this fashion, it is obvious that a large number of teachers, who either did not apply for leave of absence for the day of any kind, nor would have been granted it if they had applied, directly participated in the protest activities.

The Union took the position that none of the teachers who participated was disciplined; this is not, however, strictly accurate. Two non-post-secondary teachers who were scheduled to teach on that day but did not report to their assigned classes were disciplined in the same way as the present grievors. It appears that two post-secondary teachers in the Nursing Program were also initially disciplined, but those letters of discipline were ultimately withdrawn.

The reason for this differential treatment, in the College's submission, is found in subparagraph 11.01 G 1. The College argues that this provision does not allow the College to control either where or when those duties of a teacher, which do not require his or her scheduled presence on campus, are to be performed. Thus, teachers who were not required to perform scheduled duties

on December 11 were entirely free to participate in the "Day of Protest" instead; they could reschedule any activities which they might have otherwise performed on that day to another day or time and place of their own choosing. The College's interpretation of the collective agreement is that, for those teachers, no discipline could be imposed for participation in the "Day of Protest", any more than could have been imposed for absence from campus for any other purpose not related to the performance of employment obligations. It was on that basis that discipline against the two nursing teachers was withdrawn.

On the other hand, the non-post-secondary teachers who were scheduled to teach and did not do so could not rely on subparagraph 11.01 G 1 because the functions assigned had to be performed at the time scheduled and on campus. As to the Counsellors, including the present grievors, 11.01 G 1 applies only to teachers, and the Counsellors cannot rely upon the provision to protect them from discipline for absence on December 11.

The Union does not argue that the College was wrong in insisting on keeping the London campus open during the strike, and on ordering all employees to perform their legal obligations on that day or face a disciplinary penalty of a loss of earnings. It does argue, however, that there was a basic unfairness in the way in which the collective agreement was administered in relation to the Counsellors in contradistinction to the teachers. The Union argues that the leave provisions of the collective agreement confer a discretion on the College which must be exercised reasonably and fairly: see *Re Meadow Park Nursing Home and Service Employees International Union, Local 220* (1983), 9 L.A.C. (3d) 137 (Swan). The Union argues that it would have been possible to handle all of the counselling which was actually required on that date with those

Counsellors who were willing to come to work, and that all of the others could reasonably have been granted leave under one or another of the provisions which the College must administer fairly and reasonably.

The hallmark of the unreasonableness, in the Union's submission, is the differential treatment received by the teachers, who the Union argues were accommodated by the cancellation of examinations on December 11 and by the cancellation of some classes, and were thus put in a position where, pursuant to subparagraph 11.01 G 1, they were able to attend the day of protest without penalty. Such differential treatment, the Union says, is invidious and discriminatory, and therefore that discriminatory treatment renders the exercise of the College's discretion to refuse any kind of leave to the Counsellors unfair and unreasonable.

Without going into the jurisprudence on the fair and reasonable exercise of discretion and of management's rights under the collective agreement, we simply accept for the purposes of argument that the leave provisions of the collective agreement must be administered fairly and reasonably. We also accept that the mere existence of the "Day of Protest" does not nullify an obligation to exercise such discretion fairly. It may very well be that an employee who sought vacation or other leave on December 11 for reasons demonstrably unrelated to the "Day of Protest" could succeed in challenging the blanket denial set out in Dr. Rundle's letter of November 29, 1995.

But that is not the case here. The evidence is that all of these Counsellors wished to participate in the "Day of Protest", and the argument is made by the Union that the College was obliged, in acting fairly, to accommodate their wishes so to do, all the more particularly because circumstances permitted the vast majority of teachers to do so with impunity. In our view, that is

quite a different situation.

The College characterizes this as an illegal strike, but it is not necessary for our present purposes for us to adopt that characterization. It is clear, however, that the leaves of absences were sought solely for the purpose of preventing the College from doing what it had every right to do: to keep those parts of its program that were still in operation available to the students, and to continue to offer the full range of services on a normal basis, despite the extraordinary events which were happening across the city. Since the College was entitled to decide to respond to the day of protest in that way, it was surely entitled to deny leave to employees for the sole purpose of frustrating or weakening that decision. Whatever might have been the case had an employee been refused leave validly requested for other reasons, the College was under no obligation to grant leave solely to undermine its efforts to keep the College open.

As to the differential treatment between teachers and Counsellors, we accept that the decisions to cancel examinations and some classes on December 11 were taken for valid academic reasons, and were not in any way intended to accommodate the teachers in participating in the "Day of Protest". The fact that teachers were able to participate and continue to receive full pay is a function of the different working conditions applicable to teachers and Counsellors, and is sanctioned by the collective agreement, rather than resulting from any discriminatory treatment by the College.

In the result, therefore, the grievances must be denied.

DATED AT TORONTO this 25th day of November, 1998.



Kenneth P. Swan, Chairman

I concur

“Kevin Mailloux”

Kevin Mailloux, College Nominee

I dissent

“Jon McManus”

Jon McManus, Union Nominee