

IN THE MATTER OF AN ARBITRATION

BETWEEN

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

Employer

- AND -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)

Union

AND IN THE MATTER OF
A GRIEVANCE OF MR. BARRY LEAHY

Grievor

BEFORE:

Prof. C. Gordon Simmons, Chairperson
Mr. Hugh John Cook, Employer Nominee
Mr. Jim Flynn, Union Nominee

APPEARANCES ON BEHALF OF THE EMPLOYER:

Ms. Ted J. Kovacs, Counsel
Ms. Beth Ada, Director, Human Resources
Mr. Glen Pevere

APPEARANCES ON BEHALF OF THE UNION:

Ms. Rebecca Murdock, In-house Counsel
Mr. Barry Leahy, Grievor
Ms. Mary Lou Annable, Steward

A hearing into this matter was held in Ottawa, Ontario on March 26, 1996.

INTERIM DECISION

The grievor claims that his annual leave and sick leave credits have been improperly calculated and he seeks to have an adjustment to the calculation to reflect the correct balance to his credit (Exhibit 1).

At the commencement of these proceedings the Employer raised a preliminary objection over the timeliness of the filing of the grievance. The Employer pointed out to the panel that Article 32.02 requires that certain procedures must be followed when an employee has a complaint. That article reads (Exhibit 8):

Complaints

32.02 It is the mutual desire of the parties that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the employee and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the employee.

The Employer takes the position that the grievor did not act in a timely fashion and it is agreed between the parties that the time limits are mandatory pursuant to Article 32.05 A and that under the Ontario Colleges of Applied Arts & Technology legislation the panel does not have jurisdiction to extend the time limits.

The parties submitted an Agreed Statement of Facts on the timeliness issue only. This statement reads as follows

Vacation or Annual Leave

- (1) The grievor was paid out his existing vacation balance of 42.5 days in July, 1994. Additionally, the grievor was paid the Step difference between Step 16 and 17 on that amount in September, 1994.
- (2) 42.5 days reflects the balance as of July, 1992.
- (3) 43 days is the yearly vacation amount.

Short Term Disability

- (1) The grievor sought a buyout of the existing balance of 123.917 days in July, 1994.
- (2) The grievor was offered the buyout initially at Step 16 in July, 1994. He did not dispute the 123.917 days – he did dispute the level of the Step payout.
- (3) 123.917 days reflects the sick leave credit balance as of July, 1992.
- (4) The grievor grieves on December 8, 1994 and the issue is the calculation of the buyout, specifically Step 16 or Step 17. Additionally, the College at that time disputed the grievor's ability to access the sick leave bank buyout.

The Employer elected to call no evidence. The Union called the grievor to testify. The evidence establishes that as of March 31, 1992 the grievor had 193.92 days in his sick leave bank (Exhibit 2). As of September, 1994 his sick leave credits totalled 123.917 days. As we understand it the grievor had to dip into his sick leave credits during some hiatus point between short term disability and long term disability benefits being paid.

Sick leave credits are deposited to the employee's bank on September 1 of each year. Vacation entitlements are deposited in the employee's bank as of December 31 in each year. It is acknowledged by the grievor that it was his belief that his sick pay credits and vacation credits were not being accumulated since he left work in July, 1992. He was not aware that it was possible to accumulate these benefits while on long term disability. However, sometime in March, 1995 he received a copy of a newsletter that came out of Fanshawe College which reads as follows (Exhibit 5):

The accrual of sick leave credits

A faculty member at Fanshawe College was on LTD for seven years, and when he returned to work he was given 140 days in sick leave credits. After a few years he was advised by Human Resources that they had made a mistake and wiped out the credits earned while he was on LTD.

He brought his problem to the local and a grievance was launched.

The College argued that it is their practice not to give credits while someone is on LTD. They claimed that they had made a mistake and that they were just fixing that mistake when they removed 140 days from his bank.

The Collective Agreement and the yellow booklet put out by Sun Life says that sick leave credits accumulate when college employees are full-time members of the Academic Bargaining Unit. The Collective Agreement sets out a few exceptions. LTD is not an exception.

The union argued that he was a full time member of the Bargaining Unit and therefore entitled to receive 20 credits for each year he was on LTD. This position is supported by an arbitration award at Confederation that found that an employee on maternity leave continues to be a full-time employee and is entitled to full sick leave credits.

Further, the union local was prepared to argue that the employer discriminates against the disabled when they deny sick leave credits to them.

Because the faculty member's health had deteriorated and because arbitration decisions can take so long, he chose to settle for 75 per cent of what was rightfully his. These negotiations concluded one day before his official retirement day.

The grievor, while believing that he had not had any accrual of these benefits to this time, set out to "investigate" the possibility of his accruing these benefits as well. He contacted the College and was informed by Ms. Beverley Allan, Benefits Administrator, that he would have to request the information in writing. Apparently he wrote the letter sometime in May but it was not entered as an exhibit because it could not be located. She replied on June 5 as follows (Exhibit 7):

I received your letter and was glad to hear from you.

You have asked for a current report on your sick leave credits and annual leave credits they are as follows. September 1994 you were paid out for your annual leave of 42.5 days leaving a 0 balance. Your sick leave credits are 123.917 days.

Hope this is what you wanted.

The grievor filed his grievance on June 7, 1995.

As stated earlier, at the commencement of these proceedings, Counsel for the Employer informed the panel that it was raising a preliminary objection to our

jurisdiction claiming that the grievor was out of time and the matter was inarbitrable. The grievor testified that it was not until he received a copy of the newsletter was he first aware that a possibility of entitlement to accruals was available. The Employer on the other hand takes the position that in July, 1994 he was aware that there were no accruals taking place.

The Union takes the position that the grievor is not barred from filing a claim if he was under the mistaken belief that there was no right to such a claim in the collective agreement. In those circumstances one does not waive entitlement if one is unaware of your rights. Moreover, this issue has not heretofore been litigated and there was no reason for the grievor to be aware of any possible rights in the collective agreement. The newsletter talks in terms of a settlement and that means there was no arbitration award so there is room in the grievor's mind for possible entitlement, the issue remains open. So between March and June, 1995 the grievor was seeking advice of union officials and others about pursuing his rights. According to the Union, the triggering event was a phone call to Ms. Beverley Allan in mid-May, 1995 which confirmed in writing on June 5 that there were no accrual benefits occurring to his credit.

The Union submitted in the alternative that the grievance is one of a continuing nature. There is no dispute that sick leave credits are paid out on September 1 of each year and vacation credits are paid out at the end of December of each year. Any time the Employer fails to put credits to the employees' benefit each year there is a new breach of the collective agreement. As an analogy, the Union asserted that an employee being improperly paid his/her salary and finding an error has occurred can go back to when the error first arose. In support of its position the Union referred the panel to two previous arbitration decisions. One involved *Seneca College of Applied Arts and Technology and Ontario Public Service Employees Union (Domenico Raimondo grievance)*, an unreported decision chaired by Arbitrator Stanley Schiff where it is acknowledged on page 1 of that decision that the time limits are mandatory. The issue

in that decision was whether or not the grievor was within the bargaining unit since 1985. When he was terminated in June, 1991 he filed his grievance. On p. 2 the panel has the following comment to make:

This is a dispute about whether the facts of the grievor's employment require categorizing him as an employee within the unit in the first place. Awards the union has shown us have held that a question like this is one involving a continuing grievance.

Perhaps of more relevance is *Re Religious Hospitallers of St. Joseph of Hotel Dieu of Kingston and Ontario Public Service Employees Union* (1992), 29 L.A.C. (4th) 326 (S.L. Stewart, Chair). In that case the board was required to determine whether the matter before it involved a continuing breach of the collective agreement. The grievance claimed that the Employer was not compensating a Registered Technologist according to the proper rate on the salary grid from the date of receipt of qualifying the certificate. The collective agreement contained a mandatory seven day period for filing a grievance but a grievance was not filed in that case for three months from the date the employee became aware of the circumstances of the alleged breach. The board in that case had to consider a distinction between a recurring breach and recurring damages from a single breach. The following comments appear on pp. 328-9:

The issue of whether a grievance is properly characterized as a continuing grievance is dealt with in *Re Port Colborne General Hospital and O.N.A.* (1986), 23 L.A.C. (3d) 323 (Burkett). In that case the grievance alleged that two newly created positions fell within the bargaining unit and must be compensated in accordance with the terms of the collective agreement and that union dues must be deducted and forwarded in connection with those positions. The board reviews the arbitral jurisprudence in some detail, at the outset dealing with *Re Dominion Glass Co. and United Glass & Ceramic Workers, Loc. 246* (1972), 1 L.A.C. (2d) 151 (Reville), where the arbitrator found that a grievance claiming improper assignment of work to an employee outside the bargaining unit was not of a continuing nature in that the transfer of job duties took place at a specific time and no further changes to the job duties occurred thereafter. This award was set aside by the Ontario Divisional Court, 34 D.L.R. (3d) 629, [1973] 2 O.R. 573, 73 C.L.L.C. ¶14,162, 5 L.A.C. (2d) 224*n*, on the basis that the proper characterization of the grievance was a

continuing violation of the union's security provisions. However, this decision was overturned by the Ontario Court of Appeal, 40 D.L.R. (3d) 496, 1 O.R. (2d) 408, 73 C.L.L.C. ¶14,023, where, at p. 499 the court states:

...we are all of the view that the board reached the right result and that this was not the subject-matter of a continuing violation. The grievance had to do with action taken by the company on a specific occasion and while the consequences may have been continuing, the violation was embraced in the particular action taken by the company in mid-October.

Mr. Burkett reviews a number of arbitration awards issued subsequent to the decision of the Court of Appeal in *Dominion Glass*. At pp. 327-8 the board states as follows:

While the cases are not consistent in their treatment of the subject-matter of this grievance as either a continuing or non-continuing grievance, they do provide a useful framework for deciding the issue. It is clear from a reading of the cases that the question that must be asked is whether or not the conduct that is complained of gives rise to a series of separately identifiable breaches, each one capable of supporting its own cause of action. Allegations concerning the unjust imposition of discipline, the *improper awarding of a promotion* or the failure to provide any premium or payment required under the collective agreement on a single occasion, while they may have ongoing consequences, constitute allegations of discrete non-continuing violations of the collective agreement. In contrast, an allegation of an ongoing failure to pay the wage rate or any benefit under the collective agreement or an ongoing concerted work stoppage constitute allegations of continuing breaches of the collective agreement. In these cases the party against whom the grievance is filed takes a series of fresh steps, each one giving rise to a separate breach. In this latter type of case the time-limits for the filing of a grievance, apart altogether from any question as to when damages commenced to run, must be found to be triggered by the breach closest in time to the filing of the grievance.

(Emphasis added.)

In applying those considerations to the case before it, the majority of that board concluded [at pp. 328-9] that:

Where the agreement stipulates that a payment is to be made on a monthly basis an allegation that the required payment has not been made for a number of months must be found to be an allegation of a series of individual breaches, each one capable of supporting its own grievance. In this regard an allegation of a failure

to pay union dues is no different than an allegation of a continuing failure to pay a benefit or to pay the wage rates under the agreement. An allegation of a continuing failure to pay union dues, where the collective agreement requires that such payments be made on a regular basis, constitutes a 'continuing grievance'.

What perhaps is most revealing is the quote from the Burkett award in *Re Port Colborne* which bears repeating.

...the failure to provide any premium or payment required under the collective agreement on a single occasion, while they may have ongoing consequences, constitute allegations of discrete non-continuing violations of the collective agreement. In contrast, an allegation of an ongoing failure to pay the wage rate **or any benefit** under the collective agreement or an ongoing concerted work stoppage constitute allegations of continuing breaches of the collective agreement.

(Emphasis added.)

What we have here is an assertion by the grievor that he is entitled to benefit accruals in sick pay and vacation entitlements. He left work in 1992 and the benefits would have been placed in his bank on September 1 and December 31, 1992; September 1 and December 31, 1993; and September 1 and December 31, 1994. These are not single occasions but the allegation is one of an ongoing failure to pay the benefit. As stated in the *Port Colborne* quote, the grievance is filed over a series of fresh steps each one giving rise to a separate breach. While one can relate very quickly to an alleged error in wages being paid on a weekly or bi-weekly basis, it perhaps becomes a little more difficult to relate to situations that occur on an annual basis. But notwithstanding the fact that they occur on an annual basis they constitute an alleged ongoing failure to pay the benefit and in our view constitute allegations of continuing breaches of the collective agreement.

Accordingly, for all of the foregoing reasons, the allegation of continuing breaches of the collective agreement versus discrete non-continuing violation has been

made out by the Union. The preliminary objection raised by the Employer is therefore dismissed. We hasten to add that the issue presently before us is one of whether the grievance ought to go forward on its merits and we make no determination with respect to the issue on its merits. We shall reconvene the hearing for consideration of the merits at a time to be arranged convenient for all.

Dated at Kingston, Ontario, this 15th day of May, 1996.

C. Gordon Simmons
Chairperson

I concur/~~dissent~~

"Hugh John Cook"

Hugh John Cook
Employer Nominee

I concur/~~dissent~~

"Jim Flynn"

Jim Flynn
Union Nominee