

91C399
Local 110
CAAT(A)

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

FANSHAWE COLLEGE

(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF E. LEDWELL - #91C399

BOARD OF ARBITRATION: Kenneth P. Swan, Chairman
 Andrew Shields, College Nominee
 Jane Grimwood, Union Nominee

APPEARANCES:

For the College: C.G. Riggs, Counsel
 Gayle White-Malloy

For the Union: Peter Lukasiewicz, Counsel
 Gary Fordyce, Chief Steward
 Elizabeth Ledwell, Grievor

03-10-93

A W A R D

This arbitration concerns the grievance of Ms. Elizabeth Ledwell, a Professor in the Nursing Faculty at the College. At the outset of the arbitration, 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.

Ms. Ledwell's grievance, which is dated December 21, 1990, relates to her salary from the period August 19, 1985 to October 31, 1990. It is common ground between the parties that, because of an error in calculating the credit to which she was entitled because of her formal educational qualifications, she was paid too little between the dates set out above. When she raised the matter with the College in 1990, the error was corrected effective November 1, 1990, and she has been paid correctly since that time. Her current claim is only for a further adjustment retroactive to her date of hire, and payment of the amount that that calculation yields, plus interest.

There is no dispute between the parties as to the facts upon which this matter is to be decided. When Ms. Ledwell was hired, her starting salary was calculated, purportedly in accordance with the classification system agreed between the parties, on a work sheet used by the Personnel Department for that purpose. She was not a party to these calculations, but was informed of the result in a Staff Appointment Form and a covering letter dated August 15, 1985. The covering letter states that her terms and conditions of employment are to be in accordance with the collec-

tive agreement, a copy of which is said to be enclosed. The grievor cannot now remember whether a copy of the collective agreement was enclosed or not, but in any case she took her starting salary as advised at face value, and made no inquiries until those which led to the correction of the error on November 1, 1990.

The obligation to credit employees covered by the academic collective agreement with formal education requirements comes from clause 3.02 of the collective agreement. When the grievor was hired, that clause referred to the "College's Classification Plans dated August 1975", but that document, while incorporated by reference, was not included in the printed collective agreement.

In the 1989-91 collective agreement, a new College's Classification Plans dated November 28, 1989 is referred to in this clause, and that document is in fact included in the printed collective agreement for reference. It is not clear whether this factor resulted in the discovery by the grievor of the error in calculating her own starting salary.

The difficulty for the grievor is that there is a line of arbitration cases under this collective agreement and its predecessors which have established fairly clearly that there are limitations on the retroactive compensation which can be claimed under the grievance procedure. We were referred to a number of cases, but the one which is clearly directly relevant to the situation before us is Re Conestoga College and Ontario Public

Service Employees' Union (Hopkins 86R18), unreported, August 15, 1987 (Kates). That case also involved a Nursing Professor whose starting salary had been incorrectly determined, as the Board found after analysis of the Classification Plan. The Board then turned its attention to the question of the availability of retroactive compensation, at pp. 8-9:

The remaining issue to be resolved pertains to the extent the Board is permitted under the instant collective agreement (September 1, 1985 to August 31, 1987) to grant the grievor compensation as of her date of hire in September 1981.

The College's position throughout has been that compensation should be computed as of the date the grievance was filed on or about September 17, 1986. This position appears consistent with the established arbitral jurisprudence as summarised in Re St. Raphael's Nursing Home Ltd. and District Service Workers' Union, Local 220 (1985) 18 LAC (3d) 430 (Roberts) at pp. 432-3:

The usual rule with respect to continuing breaches of a collective agreement is that:

. . .the relief or damages awarded retroactively in such circumstances may be limited by the time limit. Thus, where a grievance claimed improper payment and the grievance was allowed, the award limited the damages recovered to five full working days prior to the filing of the grievance, which was the applicable time limit for initiating the grievance.

Brown and Beatty, Canadian Labour Arbitration, 2nd ed. (1984), para. 2:3128, at p. 96. In short, the time-limit for filing the grievance bars any recovery for that part of the continuing breach which occurred before the commencement of that time-limit.

Limiting the recovery of relief in this way where the violation of the agreement is of a continuing nature, seems to be in line with the acknowledged policies underlying the application in a similar manner of statutes of limitations in civil

actions. These policies

. . .are designed to safeguard the interests of the defendant in two ways. Firstly, they seek to protect his interest in at some time being able to rely on the fact that he no longer will have to preserve or seek out evidence to defend the claim against him. Secondly, they grant him protection "from insecurity, which may be economic or psychological, or both"; at some point in time he ought to be made secure in his reasonable expectation that contingent liabilities will no longer be asserted by legal action to disrupt his finances and affect his business and social relations.

G.D. Watson, "Amendment of Proceedings after Limitation Periods", 53 Can. Bar Rev. 237 (1975), at pp. 272-3.

Barring the existence of circumstances which would make it inequitable for a party to rely upon this rule, boards of arbitration have consistently limited the right to recovery for a continuing breach of a collective agreement to the period of time within which it was permissible to file the grievance: See Re Union Gas Co. of Canada Ltd. and Int'l. Chemical Workers, Local 741 (1972), 2 L.A.C. (2d) 45 (Weatherill); Re U.S.W., Local 7105 and Automatic Screw Machine Products Ltd. (1972), 23 L.A.C. 396 (Johnston); Re U.A.W. and National Auto Radiator Manufacturing Co. (1967), 18 L.A.C. 326 (Palmer). The two cases which the union relied upon to support its argument for full retroactivity do not seem to be inconsistent with this principle. It appears that in both cases, there were circumstances giving rise to an equity preventing the employer from relying upon the usual rule. So, for example, in Re Leisure World Nursing Homes Ltd., North Bay and Service Employees Union, Local 478 (1983), 12 L.A.C. (3d) 345 (Langille), full retroactivity was allowed because the delay in filing the grievance was caused by the employer. In Re Clarke Institute of Psychiatry and Ontario Nurses' Assoc. (1982), 5 L.A.C. (3d) 155 (Beck) [and 6 L.A.C. (3d) 131 (O'Byrne) (dissenting)], the filing of the grievance was delayed because of a unilateral assurance by management which made it unfair for the employer to rely upon the usual rule.

After a brief review of the facts, the award returns to the legal issue on pp. 10-11:

The trade union appeared to accept the proposition established in the case in Re Goodyear Canada Inc. and United Rubber Workers' Local 232 (1980), 28 LAC (2d) 196 (Picher, M.) to the effect that an arbitration board's jurisdiction or remedial authority is confined or restricted to the period of the collective agreement under which it was appointed. After reviewing the arbitral precedent the arbitrator in the Goodyear case writes as follows at pp. 202-3:

In our view the foregoing passages correctly state the law, reflecting as they do the fundamental principle that a board of arbitration can have no jurisdiction beyond the collective agreement under which it is constituted. The conclusion would dispose of the first two issues raised before us. Any grievances that arose under the 1971 collective agreement and the 1974 collective agreement may find their way before a board of arbitration either by the agreement of the parties or by an order of the Minister. In view of the company's refusal to consent to the constitution of this board to hear these grievances, however, we must conclude that they are not properly before this board, constituted as it is only under the 1977 collective agreement.

There are arbitral precedents, however, where the legal restrictions of retrospectively providing full compensation are overridden in circumstances where a Board's "equitable" remedial powers permit. That is to say, remedies that are instrumental in overriding legal strictures are appliede [sic] where, having regard to the particular circumstances, it would be patently unfair or unjust to forebear providing appropriate relief.

The award then deals with two "exceptional" cases, both of which were accepted as not applicable in the case before the Board in the Conestoga College case, and were not advanced by the Union before us as affecting the present situation. At page 13-16, the award returns to the one case advanced before us as applicable,

Re Clarke Institute of Psychiatry and Ontario Nurses' Assoc.

(1982), 5 L.A.C. (3d) 155 (Beck). The award deals with the Clarke Institute case in the following terms:

Finally, the trade union referred to Re Clarke Institutes of Psychiatry and Ontario Nurses' Association (1982) 5 LAC (3d) 155 (Beck) for the proposition that arbitration boards can and indeed have traversed previous collective agreements in order to assert jurisdiction to grant retrospective remedial relief emanating from the date of the original breach by the employer of the collective agreement. In that case a head nurse reverted back to the bargaining unit from her excluded position. As a condition for accepting that reversion the employer undertook to continue to pay the grievor at the head nurse rate as the position's rate might increase from time to time. The employer during the course of negotiations attempted to withdraw from the arrangement and replace it with a "red circling" formula. When the trade union rejected the proposal, the employer withdrew it from the bargaining table. Nonetheless while the grievor was under the impression she was being paid at the head nurse's rate in fact she was paid at the regular rate of the bargaining unit position she occupied. And this practice continued for a period of approximately 9 years over several renewed collective agreements when a chance conversation with a colleague about her pay rate prompted the grievor to complain. The arbitrator disagreed with the Goodyear ratio insofar as the arbitrator concluded that he could not override the jurisdictional limitations of the collective agreement under which he was constituted in order to give retrospective effect to remedying the mistake of which the grievor was the victim. At pp. 163-4 the arbitrator wrote:

Finally it was argued that this board only had jurisdiction to make an award that covered the period of the current collective agreement, as the board was constituted under that agreement and is dealing with a breach of that agreement. In support of this, the decision in Re Goodyear Canada Inc. and United Rubber Workers, Local 232 (1980), 28 L.A.C. (2d) 196 (Picher), was cited. We do not agree and we do not read the Goodyear case as so limiting our award in this case. We read the jurisprudence, including Goodyear and the decision of the Ontario Labour Relations Board in Genstar Chemical Ltd. v. Int'l Chemical Workers Union, Local 721, [1978] O.L.R.B.R. 835, as well as the

policy of s. 44 of the Labour Relations Act, R.S.O. 1980, c. 228, as giving us jurisdiction to give a remedy for continuing breaches of collective agreements that date back to 1973. Moreover, the passage from the Goodyear case relied upon by counsel for the Institute is broader than that required by the Ontario Labour Relations Board's holding in Genestar and its brief quote from Re U.S.W. and Int'l Nickel Co. of Canada Ltd. (1970), 22 L.A.C. 286 (Weatherill), is not determinative of the issue in this case. This is a case of a continuing, uninterrupted breach of successive collective agreements, of which the current agreement is one. If Mr. Picher, in Goodyear, is to be taken as stating that in the case of such a continuing breach the remedial authority of an arbitration board can only extend to the period of the current agreement, then I respectfully disagree. I am of the opinion that the decision in Goodyear does not stand for that proposition and that the policy of s. 44 of the Labour Relations Act mandates a different result.

The arbitrator's reasoning in the above case appears to be in direct conflict to the more recent decision in Re London Tavern where it was pointed out that the Goodyear ratio was not only a sound law but it was suggested that it was a law that apparently had been endorsed by the Divisional Court. Accordingly, the proposition quoted by the Board in Re Clarke Nursing Homes [sic] appears to be of dubious legal weight.

In any event each party accepted the notion that the situation in the instant case differed dramatically from the circumstances in the Re Clarke Institute of Psychiatry case. It appears to me that the arbitrator's position in that case is sustainable on equitable grounds by virtue of the application of a promissory estoppel preventing the employer from reneging on its undertaking to pay the grievor at the head nurse rate and thereby enjoin reliance on its strict legal rights under the collective agreement. The grievor's pay situation, however unfortunate, was not the product of any alleged misrepresentation or nefarious strategy on the employer's part. Rather, the evidence indicated that the employer, however mistaken, applied its policy with respect to "double counting", to every employee in the bargaining unit. In other words, the grievor's predicament was not advanced as a situation in which an estoppel should be applied nor do the facts warrant such an approach.

The reasoning of the board of arbitration in the Conestoga College case has been approved subsequently by a unanimous award of a board of arbitration in Re George Brown College and Ontario Public Service Employees' Union (Gruchalla 88A083), unreported, December 12, 1988 (Carter). The interpretation placed on the language of the grievance procedure in the Conestoga College case has thus gained a certain permanence in the relationship between the parties, and is in fact referred to or acted upon in a number of other decisions, albeit in cases not so directly relevant to the one before us as the two cases cited. In our view, as a matter of good collective bargaining policy, we should not seek to change this interpretation between the parties unless we are satisfied that the earlier awards were manifestly wrong. Far from taking that view, we think that the logic of the earlier awards is unassailable.

We should point out, however, that we do not think that this is a question of our jurisdiction being limited to the collective agreement under which we were appointed. That concept seems to come from the Re Goodyear Canada Inc. case, discussed in the Conestoga College award, above. The Goodyear Canada award, however, is a very narrow response to special circumstances which do not apply here. Under the collective agreement which is before us, the limitation on our remedial authority comes squarely from the grievance procedure established in Article 11. That grievance procedure provides that an employee must set in motion the grievance procedure, pursuant to the complaint provision in clause

11.02, "within twenty (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". It may very well be, although we do not need to decide it in this case, that a breach of a long-expired collective agreement will not have come to the attention of an employee, and ought not reasonably to have come to the employee's attention, until a date just prior to filing a grievance. If an employee can fit himself or herself within the time limits of clause 11.02, it may well be that an employee may file a grievance against a breach of a previous collective agreement, for arbitration under the current collective agreement. But that is not the case before us.

The collective agreement requires of the parties and the employees covered by it a certain degree of diligence in enforcing their rights. The enforcement mechanism for that diligence is the grievance procedure, which considers any potential grievance in relation to a breach of the collective agreement to have been abandoned after twenty days after knowledge of the breach either came to the employee's attention, or ought reasonably to have done so. Nothing in the agreed facts before us suggests that there was anything to keep the grievor from learning of the mistake of which she first had knowledge in 1990 at any earlier time, and correcting it then. In the absence of any such evidence, therefore, we think that we are bound by the grievance procedure just as effectively as are the parties and the employees covered by the collective agreement. That grievance procedure is mandatory, and the

legislation under which it was negotiated gives us no discretion to relieve against its effects, even where it may appear to cause injustice.

In the result, therefore, the present grievance, insofar as it requests retroactive relief, must be denied.

DATED AT TORONTO this 10th day of March, 1993.



Kenneth P. Swan, Chairman

I concur

"Andrew Shields"

Andrew Shields, College Nominee

I dissent; see attached

"Jane Grimwood"

Jane Grimwood, Union Nominee

JANE C. GRIMWOOD

111 Richmond Street West
Suite 500
Toronto, Ontario
M5H 2H5
Tel: (416) 287-6372

I must respectfully dissent. This is why.

The Majority has resolved the issue before it, without explicitly stating so, by saying the Grievor has not discharged the onus on her to establish that:

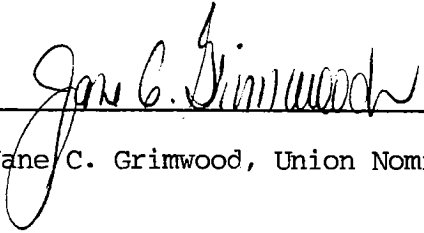
"there was anything to keep the Grievor from learning of the mistake of which she first had knowledge in 1990 at any earlier time, and correcting it then. In the absence of any such evidence, therefore, we think that we are bound by the grievance procedure just as effectively as are the parties and the employees covered by the collective agreement."

Put another way, the Majority has chosen not to draw what I believe are logical inferences from the agreed facts clearly shifting the onus back to the Employer. This is not unusual in cases of this type -- the concept of the discharge of onus is a fluid and dynamic one -- and in the instant case it is much more equitable to suggest that the Employer adduce evidence to show that its mistake did come to the Grievor's attention, or ought reasonably to have, at an earlier date.

Wages are a fundamental reason why people work. The error here was the Employer's. No bad faith is attributable either to the Grievor or the Union. The Employer has no evidentiary problems -- the calculations are simple and straightforward.

It is the Employer who has been unjustly enriched at the expense of the Grievor -- of that there can be no doubt.

The grievance should be allowed, plus interest on the sum due.



Jane C. Grimwood, Union Nominee