

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

NIAGARA COLLEGE

(The College)

- and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF L. LeFAIVE - #93F226

BOARD OF ARBITRATION:

Kenneth P. Swan, Chairman  
R. Pirrie, College Nominee  
Ed Seymour, Union Nominee

APPEARANCES:

For the College:

C.G. Riggs, Counsel  
J.F. Garner  
D. Taylor  
G. Pevere

For the Union:

Maureen Doyle, Counsel  
Mary Lou-Orr  
Joan Natings Dove

## A W A R D

A hearing in this matter was held in St. Catharines on March 11, 1994, 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 matter at issue between them.

That matter is the grievance of Mr. Lawrence LeFaive to the effect that, having met the requirements for reclassification as a regular full-time employee under the collective agreement as of the end of April 1993, he was nevertheless denied that status by the College, and continued his employment only on the basis of partial-load assignments.

The following provisions of the collective agreement are those referred to by counsel in argument:

### **Article 1 RECOGNITION**

**1.01** The Union is recognized as the exclusive collective bargaining agency for all academic employees of the Colleges engaged as teachers, counsellors and librarians, all as more particularly set out in Article 14, Salaries, except for those listed below:

- (i) Chairs, Department Heads and Directors
- (ii) persons above the rank of Chair, Department Head or Director,
- (iii) persons covered by the Memorandum of Agreement with the Ontario Public Service Employees Union in the support staff bargaining unit,
- (iv) other persons excluded by the legislation, and
- (v) teachers, counsellors and librarians employed on a part-time or sessional basis.

NOTE A: Part-time in this context shall include persons who teach six hours per week or less.

NOTE B: Sessional in this context shall mean an appointment of not more than 12 months duration in any 24 month period.

### **Article 2 STAFFING**

2.03B The College will not abuse the usage of sessional appointments by combining sessional with partial-load service and thereby maintaining an employment relationship with the College in order to circumvent the completion of the minimum 12 months sessional employment in a 24 month period.

### **APPBNDIX VIII SESSIONAL EMPLOYEE8**

1 A sessional employee is defined as a full-time employee appointed on a sessional basis for up to 12 full months of continuous accumulated employment in a 24 calendar month period. Such sessional employee may be released upon two weeks' written notice and shall resign by giving two weeks' written notice.

2 In determining the employment and calendar periods under Appendix VIII, 1, only the period after January 1, 1976, shall be considered and no prior employment or calendar period shall be taken into account. Also, an employee's continuous service acquired in accordance with the provisions of the previous Agreement, dated September 17, 1975, as at August 31, 1976, for the period back to January 1, 1976, shall count as continuous employment or months of non-continuous accumulated employment for the purpose of such paragraph.

3 If a sessional employee is continued in employment for more than the period set out in Appendix VIII, 1, such an employee shall be considered as having completed the first year of the two year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be 12 full months of continuous or noncontinuous accumulated employment during the immediately following 24 calendar month period.

4 A person assigned to replace a full-time regular employee for up to 14 working days for unplanned absences in any month shall not have such period(s) considered as sessional employment for the purpose of the computation of the 12 months sessional employment. During such periods such a person shall be paid as if partial-load and within the range of partial-load hourly rates as set out in Article 14.

5 Other matters concerning the use of sessional appointments may be referred to the E.E.R.C. which shall deal with these matters as priority items.

There is no dispute between the parties that the grievor was employed as a sessional employee during the months of January, February, March, April, September, October and November 1992, and January, February, March and April, 1993. This is a total of 11 months, one month short of qualifying the grievor for probationary status as a regular full-time employee. The only period in dispute is the month of December 1992. If that month counts as a month of sessional employment, then the grievance must succeed; if it does not, then the grievance must fail.

The grievor's employment for the month of December 1992 was covered by a sessional contract dated September 23, 1992. That document specifies that the grievor is to be engaged as a sessional employee in the Business Studies Division from September 8, 1992 to December 18, 1992. It is common ground that December 18 was the end of classes in the autumn term prior to the Christmas break. It is also common ground that from December 1 to December 18, 1992, there are a total of 14 working days, thus putting the month apparently within paragraph 4 of Appendix VIII as a month of partial-load rather than sessional employment.

The grievor's evidence was, however, that he scheduled final tests during this last week, and was unable to complete all of the marking of the tests and other assignments by the end of the day on December 18. He therefore did some marking over the weekend, and returned to the office on December 21, 22 and 23 to complete the remainder of the evaluation portion of his teaching assignment.

He testified to a conversation he had with the secretary to the Director of the Division, in which he ascribes to her a statement that he would be paid for marking. Therefore, when he found at the end of the first pay period in January an additional three days pay on his pay stub, he understood that he had worked, and had been paid for, three extra days in December. The grievor also admits, however, that he has since been informed that the three additional days were paid in relation to statutory holidays on December 25, 26 and January 1.

There is no reason not to accept the grievor's version of events in their entirety, but to do so does not dispose of the matter in his favour. It will be obvious that the agreement between the grievor and the College is not a document which can be amended by casual conversations with another employee with no authority to bind the College. The grievor's sessional employment was agreed in September to terminate on December 18, and by the simple operation of the provisions of the collective agreement concluded by the parties, that date made December a month of partial-load employment for the grievor rather than a month of sessional employment. The **contract** of employment was clearly intended to provide complete remuneration for the grievor's preparation, teaching and evaluation of the

courses assigned to him, and like all professors in the College system he was undoubtedly given a significant amount of leeway as to how and when he did the various aspects of the assignment that **he had contracted to do**, subject only to staying within the College's timetables. Even if the grievor worked outside of the strict **time period set out in the** sessional contract, he cannot claim to add any such time to the duration of the contract for the purpose of achieving rights under the collective agreement except with the express approval of the College, and by an appropriate written amendment to his sessional contract. There is no suggestion that he acted improperly in working on December 21, 22 and 23, but there equally can be no suggestion that by doing so he somehow bound the College to some arrangement other than that to which it had previously agreed in writing.

While the actual nature of the additional three days of pay received in early January has not been completely resolved by the evidence, we are satisfied that the College's position that he had been paid for the three intervening statutory holidays between two sessional employment contracts was made known to the grievor, and there is simply no evidence to support his supposition that it constituted some ratification of an understanding that his sessional contract for December had been extended beyond the 15 day threshold for sessional status in that month.

In the alternative, the Union argues that there has been a breach of paragraph 2.03(b), in that the College has abused the usage of sessional appointments by combining sessional with partial-load service. There is no evidence to support this proposition. The grievor was employed until the last day of classes in December, and due to the vagaries of the calendar, that amounted to 14 working days. Had the grievor's employment been terminated some time before the last day of classes in order to restrict him to 14 days, there might be some basis for this complaint. In the circumstances, however, we are of the view that the interruption in sessional employment in the month of December arose purely as a result of the application of the collective agreement to the calendar and to the College's timetable, and not from any abuse, intentional or otherwise.

In the result, the grievance must be denied.

DATED AT TORONTO this 22nd day of June, 1995.

Keneth P. Swan, Chairman

I concur

"R. Pirrie"  
R. Pirrie, College Nominee

I dissent

"Ed Seymour"  
Ed Seymour, Union Nominee