

H E A D N O T E

GSB #

OPSEU # 87Z604

OPSEU LOCAL 125

ARTICLE (S) Probationary
Release

██████████ D. (OPSEU) vs. Lambton (A) College
Award dated July 14, 1988 (E. Palmer)

The College dismissed from employment, without reasons, the grievor who was classified as a Partial Load Employee under the Collective Agreement. The Collective Agreement provided that Partial Load Teachers could be released upon two weeks written notice by the employer. It did not provide an explicit probationary period for Partial Load Employees, nor did it exclude the Partial Load Employees from access to the grievance procedure in the event of dismissal.

The Employer argued that the explicit reference in the Collective Agreement to the release of Partial Load Employees constituted a complete code of their rights and privileges regarding dismissal from employment. It also argued that it would be anomalous to exempt Partial Load Employees from the restrictions on the grievance procedure which apply to probationary employees.

The Board found that the recognition clause covered Partial Load Employees and that these employees did have access to the grievance procedure in the event of dismissal from employment. However, it also found that the "complete code" arguments succeeded in part: the college was entitled to "release" the grievor without reasons. It found this treatment of Partial Load Employees to be consistent with the treatment of probationary employees.

Grievance dismissed.

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IN THE MATTER OF AN ARBITRATION

BETWEEN :

LAMBTON COLLEGE
(hereinafter called the "College")

- and -

THE ONTARIO PUBLIC SERVICE
EMPLOYEES' UNION (for Academic
Employees)
(hereinafter called the "Union")

Grievance of D. McIntyre
#87Z604

BOARD OF ARBITRATION:

E. E. Palmer, Q.C.
Chairman

R. J. Hubert

L. Robbins

APPEARANCES FOR THE COLLEGE:

R. W. Little & Others

APPEARANCES FOR THE UNION:

R. R. Wells & Others

The present arbitration arises out of a grievance filed by Mr. D. McIntyre on 4 November 1987, alleging he was improperly dismissed from employment and requesting appropriate relief. This matter was not settled during the grievance procedure and so forms the basis of the present arbitration, a hearing in relation to which was held in Sarnia, Ontario, on 5 April 1988. At that time the parties were given an opportunity to present evidence and argument.

It might be noted initially that the College took the view that the present Board of Arbitration had no jurisdiction to hear this matter. Accordingly, this question was argued at the hearing on the basis of certain agreed facts. These were that the grievor was classified as a Partial Load Employee, being appointed for a period from 8 September 1987 to 24 December 1987. In fact, this contract was terminated on 19 October 1987 and the grievor was given two weeks' pay in lieu of notice. The reason given by the College for this termination was "poor performance".

Before turning to argument in this matter, it is useful to set out certain clauses in the collective agreement which the parties used in relation to their argument. These are [see Exhibit II]:

**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 (including teachers of Physical Education), counsellors and librarians, all as more particularly set out in Appendix 1 hereto save and except Chairmen, Department Heads and Directors, persons above the rank of Chairman, Department Head or Director, persons covered by the Memorandum of Agreement with the Ontario Public Service Employees Union in the support staff bargaining unit, and other persons excluded by the

legislation and teachers, counsellors and librarians employed on a part-time or sessional basis.

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Article 3
SALARIES

3.03 (2) Persons who teach over six (6) and up to and including twelve (12) hours per week on a regular basis shall be referred to as "partial-load" employees and shall not receive salary, vacations, holidays or fringe benefits (except for coverage of Worker's Compensation and liability insurance) under this Memorandum and Appendix 1 but shall be paid for the performance of each teaching hour at an hourly rate within the range of hourly rates set out in Appendix II and in accordance with the other provisions of Appendix II.

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Article 8
SENIORITY

(c) During the probationary period an employee will be informed in writing of the employee's progress at intervals of four (4) months continuous employment or four (4) full months of accumulated non-continuous employment and a copy given to the employee. Also, it is understood that an employee may be released during the first five (5) months of continuous or non-continuous accumulated employment following the commencement date of the employee's employment upon at least thirty (30) calendar days' written notice and during the remainder of the employee's probationary period upon at least ninety (90) calendar days' written notice. If requested by the employee, the reason for such release will be given in writing.

8.02 (a) It being understood that the release of an employee during the probationary period shall not be the subject of a grievance under the Grievance Procedure, an employee who has completed the probationary period and is discharged for cause may lodge a grievance in the manner and to the extent provided in the Grievance Procedure.

(b) An employee being discharged who has completed the probationary period shall be notified in writing by the College President or the person(s) the College President designates for that purpose. When the reasons for discharge of the employee are not such as to warrant immediate discharge, the College will give ninety (90) calendar days' written notification. Any vacation entitlement of an employee shall be paid in addition to the ninety (90) days' notice period or to any payment in lieu thereof.

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Article 11
GRIEVANCE PROCEDURES

11.01 Sections 11.01 to 11.05 inclusive apply to an employee covered by this Agreement who has been employed continuously for at least the preceding four (4) months.

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11.06 Dismissal

It is being understood that the dismissal of an employee during the probationary period shall not be the subject of a grievance, an employee who has completed the probationary period may lodge a grievance in the manner set out in Sections 11.07 and 11.08.

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Appendix II
PARTIAL-LOAD EMPLOYEES

2. It is agreed that Article 8 has no application to partial-load teachers except as referred to in Section 8.05 (d) and Section 8.15 (b). Such partial-load teachers may be released upon two (2) weeks' written notice.

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Appendix III
SESSIONAL EMPLOYEES

1(a) A sessional employee is defined as a full-time employee appointed on a sessional basis for up to twelve (12) full months of continuous or non-continuous accumulated employment in a twenty-four (24) calendar month period. Such sessional employee may

be released upon two (2) weeks' written notice and shall resign by giving two (2) weeks' written notice.

In support of their position the College put forward four arguments. The first of these is that Appendix II to the collective agreement constitutes a complete codification of the rights and privileges of Partial Load Employees. Only where specific reference is made to other provisions in the collective agreement do such apply to these types of employees. Consequently, as there is no reference to the grievance procedure in Appendix II, Partial Load Employees do not have access to this mechanism. In this regard, it is noted that probationary employees, by virtue of Article 11.01, are in the same position.

The second argument of the College leads on from the latter point. Thus, reference is made to Article 11.06 which specifically precludes employees in their probationary period from grieving their dismissal. The extent of the probationary period itself is set out in Article 8. As it is clear a Partial Load does not have a probationary period, the College urges that it would be anomalous to allow Partial Load Employees to grieve their dismissal when probationers could not. Certain authority with respect to the meaning of Article 11.06 was cited: viz., Re Sault College, unreported (Palmer, 18 October 1985); and Re Mohawk College, 23 L.A.C. (3d) 347 (Samuels, 1986).

The third argument is that to permit Partial Load Employees to grieve their dismissal would be inconsistent with the rights conferred on management by clause 2 of Appendix II. There it states that management can "release" such employees, as was done here, on two weeks' written notice. Comparing the provisions of Article 8, and especially 8.02 (b), the College urges that it has a right to so

act and that "release" is the same as "dismissal for cause". To this end reference is made to: Re Ontario Council of Regents and Colleges of Applied Arts and Technology, 13 L.A.C. (2d) 82 (Weatherill, 1976); adopted in Re Sheridan College, unreported (Brunner, 8 May 1985).

Finally, the College argued that consistency is a virtue. Consequently, as in their opinion, it is clear that Sessional Employees cannot grieve dismissal, the same language as Appendix II.2 being found in Appendix III.1(a), and probationary employees cannot grieve dismissal, it should follow that Partial Load Employees should be treated in the same manner.

Accordingly, the College requests that this grievance be dismissed.

The Union, not unnaturally, opposes these conclusions. Their argument starts from an analysis of Article 1.01. Here they claim that there exists four types of teachers. The first is the full-time Teaching Master. These are clearly covered by the collective agreement. The second group is the part-time Teachers. These are excluded by both Article 1.01 and relevant legislation. Sessional Teachers are dealt with similarly. In the case of Partial Load Employees, however, they are included under the collective agreement as they are full-time and not specifically excluded. This result, they urge, is strengthened by Article 3.03(2). In short, putting Articles 1.01 and 3.03(2) together, it must be concluded that Partial Load Employees are covered by the collective agreement.

To further bolster their position they refer to the language of Appendix II.2 itself. There, because it states that there is agreement that Article 8 of the collective agreement has no application to Partial Load Employees, it must be inferred that other

aspects of the collective agreement do. The Union compares this to the thrust of Appendix III which they claim is to protect the bargaining unit from the excessive use of Sessional Employees by the College. On this point, special emphasis was placed on Appendix III.1(c and d).

Having dealt with coverage, the Union argument then turned to the meaning of the word "release" which they claim is not synonymous with "dismissal for cause." In support of this distinction, the Union referred the Board to: Re The Crown in Right of Ontario (Ministry of the Attorney General) and OPSEU (Ambrey Grievances #429/84), unreported (Knopf, 15 January 85); rev'd Ont. Div. Ct., 31 March 84; and Re The Crown in Right of Ontario (Ministry of Correctional Services) and OPSEU (Miller and MacPhail Grievances #530-531/82), unreported (Verity, 7 April 83). Accordingly, they claim the grievor, as a Partial Load Employee covered by the collective agreement, has a prima facie right to grieve under Article 11.06 and that such right should not and has not been excluded by implication. In the same vein, accepting that a Partial Load Employee does not have a probationary period, such would make Article 11.06 inapplicable to them and so they could grieve as a matter of general right. On this point, reference was made to Article 8.02.

In response to the Colleges arguments, briefly, the Union urged the first was incorrect as Partial Load Employees are covered by the collective agreement and so must have the right to grieve. On the second College argument, they emphasized the point made above that such a right should only be removed by clear and explicit language. With respect to the third point raised by the College they argued that no such inconsistency exists, emphasizing that "release"

and "dismissal for cause" are different matters and citing Board of Education for Scarborough v. Picher, 37 O.R. (2d) 348 (H.C.J., 1982). A similar approach to the final College argument was made, stressing that Sessional Employees and Partial Load Employees are "as different as apples and oranges" and so comparisons are improper.

Therefore, the Union requested that this grievance succeed.

In resolving this matter, this Board would note initially that we accept two propositions put forward by the Union. First, in our opinion, it is clear that the Recognition Clause, Article 1.01 covers Partial Load Employees: they are academic employees, for whom the Union is the exclusive bargaining agent, and they do not fall within the specific exclusions set out in that provision of the collective agreement. In the same vein and supportive of this conclusion, it is equally obvious that Appendix II forms part of the instant collective agreement. If no where else, Article 29.01 incorporates this Appendix by reference.

The second proposition advanced by the Union with which we agree, in part at least, is that the "release" of an employee is not identical with "discharge" or "dismissal" of an employee. The former, in our view, relates to the termination of the employment relationship by the employer without the necessity of ascription of reasons for the act and usually with appropriate notice or payment of salary in lieu thereof. The latter terms, again in our opinion, relate to termination of the employment relationship for reasons based in "cause", i.e., where the employee involved has committed acts which justify the severing of the bond between employer and employee. Here notice or payment instead are not necessary.

With these thoughts in mind, then, it seems clear that the actions of the College with respect to Partial Load Employees can be the subject of arbitration. The success or failure of such, however, depends on the language of the collective agreement. It is trite arbitral law, of course, that the grievor (whether Union, Company or individual) must show that there has been treatment in violation of the provisions of the collective agreement.

In the opinion of the Board in the present case Mr. McIntyre cannot do so. This is so because we accept the conclusion reached by the College, if not the total reasoning supporting it, that Partial Load Employees cannot grieve their loss of employment. This flows, in our opinion, from a reading of Appendix II.2. Here there can be no question but that the College can "release" the grievor upon giving the appropriate notice. Considering the earlier view of the meaning of release, the motive of the College for such action is irrelevant; they need not ascribe any reason for so doing. It seems to this Board that, if the College does divulge its reason such would make the matter arbitrable whereas if they remained silent it would not, is a rather absurd result. This view we take notwithstanding the authority advanced by the Union. In the same vein, we think the result reached here is supportable because it is consistent with the treatment of probationary employees pursuant to Article 8.02. In that clause such employees are "released" during the probationary period. After its completion they are "discharged". The former cannot be arbitrated; the latter can. This, of course, is consistent with the purpose of the probationary period which includes the right of an employee to terminate such short service

employees for a wide variety of reasons which would not provide justification for such an act when they had achieved seniority.

For the above reasons, then, this grievance is dismissed.

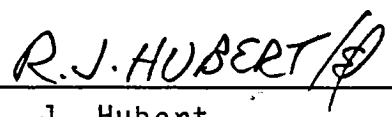
DATED at Lynden, Ontario, this 14th day of July

1988.



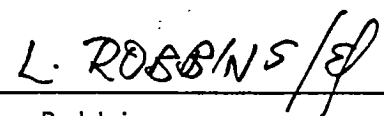
E. E. Palmer, Q.C.
Chairman

I concur/~~dissent~~



R. J. Hubert

I ~~concur~~/dissent



L. Robbins

IN THE MATTER OF THE ARBITRATION

BETWEEN: LAMBTON COLLEGE

- AND -

CANADIAN UNION OF PUBLIC EMPLOYEES
LOCAL 503

IN THE MATTER OF THE GRIEVANCE OF DONALD MCINTYRE

D I S S E N T

I have reviewed the Award of the Chairman in this matter and must dissent from it. The Chairman has basically found that the term "release" is a broad all-inclusive term which covers any reason for termination, and that "dismissal" is a narrower term based on "cause", involving some improper act by the employee.

In my view, the better conclusion, based on the terms of this collective agreement is that the two terms, "release" and "dismissal", are mutually exclusive. More specifically, I am not substantially in disagreement with the Chairman's definition of "dismissal". Rather it is the definition of "release", and the relationship of "release" to "dismissal" which I feel is in error. The Ambrey Award (Supra) deals with the same type of distinction very clearly, although the terms used in that Award are "termination" and "dismissal". In the Ambrey case, the Employer (the Ministry of the Attorney General), proposed the

very definition of "termination" which the Chairman has adopted in this case for the word "release", and it was expressly rejected. Note in particular the following comments from that Award:

"Counsel for the Ministry submitted that a termination occurs whenever there is a notice period or pay given in lieu thereof at the end of the employment relationship. Therefore, even if a person who has a right not to be terminated without notice in fact receives notice, she\he must be considered to be terminated, rather than dismissed. This makes the reasons for the employment ending irrelevant and would only elicit an enquiry into the question of whether notice or pay was given in lieu thereof. Counsel for the grievor argued that it is the reasons for the ending of the relationship that ought to govern. If culpable conduct has been alleged, then the circumstances would indicate dismissal. However if the reasons for ending the relationship are in fact non-culpable or "neutral", then the employment relationship must be regarded to have been "terminated."

"With great respect to both parties in this case we are not prepared to accept either of their definitions of the terms termination or dismissal. If the Ministry's definition was correct, then.....an employer could avoid its obligations to employees who are protected from unjust dismissal by simply giving some form of notice and thus trying to preclude employees from access to the grievance procedures and the remedies of reinstatements and/or back pay.....

"Thus, where an employer tries to bring an end to the employment by reason of a desire to react to conduct on the part of an employee, this must be viewed as a dismissal rather than a mere termination. Further, conduct can be non-culpable and legitimately warrant a dismissal in situations such as innocent absenteeism or inability to perform the job. Further, where no inappropriate or unsuitable conduct is alleged and the employment is ended, the onus is on the Employer to establish that there has been a bona fide termination. A termination can then be viewed as the ending of an employment relationship for reasons that are other than those resulting from the conduct of the employee."

A similar approach was warranted in the case at hand. In other words, the term "release" should be viewed as the ending of an employment relationship for reasons other than those resulting from the conduct of the employee.

I would agree that words can have different meanings in different contexts and specifically in different collective agreements. However, the language of this collective agreement is "on all fours" with the situation existing in the Ontario Public Service (See Ambrey and Miller & MacPhail (Supra)), with the exception that all of the relevant clauses are found in the collective agreement rather than in outside legislation. Furthermore, the fact that this agreement uses the term "release" rather than "termination" (which is found in the Ontario Public Service agreement) is of no great significance.

It is true that partial-load employees are covered by Appendix II, Paragraph 2, which states that partial-load teachers may be released upon two weeks written notice. However, they are also covered by Article 11.06 which allows any employee other than a probationary employee to grieve a dismissal, and the Chairman has agreed that partial-load employees are in fact covered by the collective agreement.

Both of these terms in the collective agreement must be given meaning with respect to partial-load employees. If in fact the intent was that partial-load employees could not grieve a dismissal, it would have been very simple to state that, just as probationers have been clearly excluded from Article 11.06. It should not be indirectly inferred that partial-load employees are unable to grieve a dismissal "through the back door".

This does not in fact lead to any absurd result, if the definitions set out in the Ambrey Award are accepted here. Simply, it would be up to a Board of Arbitration to determine whether there was a bona fide release or a dismissal on the facts of each case. This is a type of assessment that Boards of Arbitration have to make all the time. If the Employer tries to disguise a dismissal as a release, that is an action which can be challenged based on appropriate evidence.

The Chairman also states that the result in the Award is consistent with the treatment of probationary employees. Once again, the collective agreement itself clearly differentiates partial-load employees from probationers, and it is a misreading of the collective agreement to say that there should be equal treatment for both. In the case of probationary employees, Article 8.02(a) states that the release of an employee during the probationary period shall not be the subject of a grievance.

However, in addition, Article 11.06 states that the dismissal of an employee during a probationary period also shall not be the subject of a grievance. If the term "release" was broad enough to cover any ending of the employment relationship, it would have been unnecessary and redundant to have included the above reference in Article 11.06.

Moreover, there is no logical reason why partial-load employees should be treated in a manner similar to probationers. The purpose of the probationary period is to assess an employee's suitability for employment at the commencement of the employment relationship. But the partial-load employee is simply an employee with less than a full teaching load. Such an employee could be employed for many years and retain his/her partial-load status. It is therefore difficult to understand any reason why such employees should be treated as probationers, when this is not supported by the language of the collective agreement.

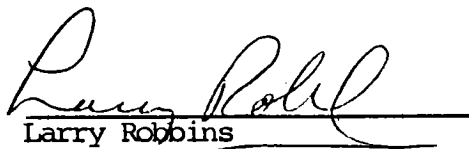
Finally, the right of the Employer to release a partial-load employee on two weeks written notice is consistent with the lack of seniority rights in Article 8, including layoff protection. Admittedly, an employee without seniority rights lacks some important benefits of the collective agreement. But that does not also remove the rights of these employees under Article 11.06.

The right to protection from dismissal unless there is just cause is another right altogether under the collective agreement separate and apart from protection from layoff. It is particularly important for an employee to have such protection. Not only are critical job interests at stake. In addition, an employee who loses his/her position for "cause" is also concerned about the employment record and may find it more difficult to obtain alternate employment in the future.

For all of these reasons, there is no conflict between the Employer right to release partial-load employees on two weeks notice, and the right of those same employees to grieve a dismissal for cause. The Chairman's Award unfortunately wipes out the application of the latter without express language in the collective agreement to warrant such a conclusion.

For all of the above reasons, I would have dismissed the College's preliminary objection.

Dated at Toronto, Ontario on the 6th day of July, 1988.


Larry Robbins