

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

CAMBRIAN COLLEGE

(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF J. MURASKA - #90C161

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the College: R.J. Drmaj, Counsel  
R. Hurley, Director of Personnel

For the Union: Ian Roland, Counsel  
Mike Lamb  
Jim Muraska, Grievor

## A W A R D

A hearing in this matter was held in Sudbury, Ontario on November 6, 1990. Because of unexpected inclement weather, and the consequent effect on airline schedules, the Union nominee was unable to reach Sudbury at the scheduled time. Accordingly, the parties agreed to confer jurisdiction upon the undersigned as sole arbitrator to resolve this particular case, rather than waste the day and the not inconsiderable travel expenses involved.

The matter to be resolved is the grievance of Professor Jim Muraska of the School of Business, dated April 5, 1990. The grievance alleges an improper lay-off, but it is common ground that the lay-off then contemplated did not take place, and that issue was abandoned before me. The grievance also raises, however, the issue of the relative seniority of Professor Muraska and Professor Rodney Smith, also of the School of Business.

The history of this matter is not really in dispute, and may be briefly stated. The two individuals whose seniority is involved in this matter were both hired by the College first as sessional teachers, with their service in that capacity beginning on the same day. In August 1988, they were both hired as full-time Teaching Masters. Originally, recommendations for appointment were prepared by the School of Business which specified the date of appointment for each of them as August 15, 1988. Late in July, Mr. Muraska had a conversation with Mr. William Broucek, Chairman of the Department, who apparently indicated at some point in the discussion that Mr. Muraska should go away and take some vacation, and return on August 8 to do the course preparation which it

appears Mr. Muraska had already begun.

Mr. Muraska did return on August 8, and at some point raised with the Personnel Department the question of when his salary would begin. He was apparently told that would depend upon the decision of his Chairman, and he passed this information on to Mr. Broucek. It appears that Mr. Broucek then informed Personnel to start the grievor's pay from August 8, 1988, and such change was made in pen on his recommendation form. As a result, the formal appointment letters, which were sent to Mr. Smith on August 11, 1988 and to Mr. Muraska on August 17, 1988, specified a start date of August 15 for Mr. Smith and of August 8 for Mr. Muraska.

Mr. Muraska testified to conversations between him and Mr. Smith which appear to indicate that Mr. Smith was aware of this differentiation in their start dates. Indeed the next seniority list was prepared on that basis, and posted for consideration by all members of faculty. Mr. Smith appears to have done nothing about the difference, and appears to have acknowledged it to Mr. Muraska without really challenging it until early in 1990.

At that time, rumours of impending lay-offs were rife, and Mr. Muraska testified that he and Mr. Smith had several conversations about the possibility of lay-offs, with their attention concentrated no doubt by the fact that they were among the junior members of the Department. On January 29, 1990, Mr. Muraska was called into Dean Fraser Wilson's office and informed that he would be laid off. At that time, Mr. Muraska apparently told Dean Wilson that he would fight the lay-off as hard as he

could. No doubt this could have included an intention to bump Mr. Smith, whose relative seniority Mr. Muraska apparently discussed with the Dean on this occasion.

Mr. Muraska returned to see the Dean some two weeks later. In the meantime, however, Mr. Smith had written to the Chairman, Mr. Broucek, by letter dated February 8, 1990, in the following terms:

This letter is to inform you of a situation I have recently become aware of; and I feel it needs to be addressed immediately.

The current budgetary situation at the College and the resulting layoffs prompted me to inquire about my position on the seniority list. I was very surprised to discover that one of my colleagues, Mr. James Muraska, had been granted one more week seniority than myself. We were both hired on the same date, and our sessional contract periods prior to our permanent appointments were also identical. After making several inquiries about the discrepancy, I discovered that Mr. Muraska had been performing preparatory work for his courses during the week of August 8-12, 1988, and had requested to be compensated for this period. I was also in the College during this period preparing for my course load, but since our official starting date was not until August 15, 1988, I did not feel at the time it would be appropriate to request remuneration.

In light of the facts presented above, I feel that I should be entitled to the same privileges which were granted to Mr. Muraska, and ask that you compensate me for the week involved and grant me an additional week of seniority.

Please consider this letter as a formal complaint under section 11.02 of our collective agreement.

Thank you for your consideration.

When Mr. Muraska had his second interview with Dean Wilson, the Dean indicated that he had responded to the letter from

Mr. Smith by, in effect, granting his "formal complaint" and re-adjusting his seniority so that he and Mr. Muraska now held the same seniority. This would of course have the effect of preventing Mr. Muraska from bumping Mr. Smith when a lay-off took place, and thus the present grievance was filed.

Needless to say, neither counsel was able to refer me to any precedent by which this remarkable case might be decided. There are, of course, numerous arbitral authorities for the proposition that seniority is one of the most important rights of employees under a collective agreement, and that it ought to be preserved and enhanced wherever possible. While I must in fairness observe that Dean Wilson and Mr. Broucek were not available to defend their decisions, what the evidence in this matter seems to demonstrate is that seniority was treated with a great deal of casualness both in respect of Mr. Muraska in 1988, and also in respect of Mr. Smith in 1990.

Quite frankly, were the matter entirely up to me, I would not have adjusted the seniority of either of them, and would have insisted upon the August 15 start date for both. There appears to be no reason whatsoever why employees who are hired for the same academic year should receive different seniority dates entirely on the basis of the whim of an administrator. The evidence does not disclose that Mr. Muraska was assigned any particular duties during the extra week for which he was given credit, and there is thus simply no reason for him to receive, almost out of the blue, an additional week of seniority, particularly when one considers the

very significant impact such additional seniority would have in any future staff reduction.

However that may be, what was done in 1988 is now done, and is certainly beyond any jurisdiction of mine to undo. The critical question is whether I should undo what was done in relation to Mr. Smith in 1990, and that requires a somewhat closer look at the circumstances of the case.

Mr. Muraska, in his evidence, referred to a number of conversations with Mr. Smith which gave him the impression that there might have been some favouritism involved in the decision to re-adjust Mr. Smith's seniority date. Mr. Smith did not in fact give evidence, but made a statement at the close of the hearing in the course of which he made certain assertions and certain admissions. Because Mr. Smith was not represented by counsel, and because the circumstances did not really offer the opportunity either for the arbitrator or counsel for the parties to advise him that he should put whatever facts he wished to have considered before the arbitrator under oath, I have decided simply to treat his statement as if it were sworn evidence for the purposes of this decision.

Mr. Smith stated that he in fact attended work on an intermittent basis during the week of August 8, 1988. He said that he did not spend the entire week at work, but that the Teaching Master position did not contemplate full-time attendance in the Department when no classroom teaching was actually scheduled. He stated that he had not expected at the time to be paid for this

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extra week, but that he used it to prepare himself for his upcoming course assignments. He also stated that he was probably still receiving unemployment insurance during this week, since he had taken no steps to have his teaching appointments advanced, as had Mr. Muraska.

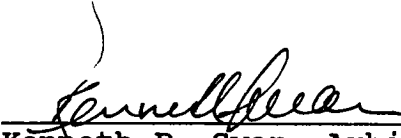
It really is not necessary to find that there was a conspiracy of favouritism in relation to Mr. Smith's seniority adjustment in order to find that it was improper. There had been no firm administrative decision at the time to have him begin a week early, and his continued receipt of unemployment insurance during that week would appear to make it actually illegal for him to be employed at the time. The resolution of his "formal complaint" of February 8, 1990 seems to have been in inordinate haste, and there is no suggestion that the Union was involved in any way in the resolution of the matter. While Article 11 does not strictly speaking give the Union any status at the complaint stage, a matter involving relative seniority of employees is one which, in my view, ought never to be resolved unilaterally between the Employer and one of the employees, no matter how compelling the facts might be, and here they were frankly not compelling at all.

Moreover, in January 1989, only a few months after hiring, a seniority list was posted pursuant to clause 8.07 setting out the differential seniority dates for these two teachers, and there is no suggestion that Mr. Smith raised any issue at that time as to his entitlement to an additional week's seniority. I recognize that clause 8.07 apparently does not suggest that an

error on the seniority list cannot be corrected even after a period of inaction, although the College is protected from any liability which might arise from any error until it is corrected. Nevertheless, it is at least one further sign of the relative capriciousness with which Mr. Smith's complaint was adjusted in February 1990.

As I have observed, it is my view that neither of these employees ought to have received seniority for the additional week in the summer of 1988. In the circumstances, however, the additional week's credit Mr. Muraska received was done openly and regularly, albeit for no apparent reason, and it is beyond my jurisdiction to repair. The adjustment for Mr. Smith was done under the shadow of a grievance from Mr. Muraska in relation to his lay-off, and for reasons that really lack plausibility. I do not propose to attempt to undo what the College did for Mr. Smith, but I think it is the appropriate remedy in this matter to declare that, whatever may appear on the seniority list, Mr. Muraska is senior to Mr. Smith for all purposes under the collective agreement. In the result, I so declare.

DATED AT TORONTO this 19th day of November, 1990.

  
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Kenneth P. Swan, Arbitrator