

CAAT-A-
98C176
L.110

IN THE MATTER OF the grievance of Oscar Naylor
AND IN THE MATTER OF the arbitration of **the** grievance
BETWEEN:

Fanshawe College of Applied Arts and Technology

-and-

Ontario Public Service Employees Union

PLACE & DATE OF HEARING: London, Ontario, October 2, 1998.

BOARD OF ARBITRATION:

R. J. **Gallivan**
Michael Sullivan
Stanley Schiff, chairman

APPEARANCES FOR THE EMPLOYER:

Gail **Rozelle**
Mike **Hanwell**
Barry Brown, counsel

APPEARANCES FOR THE UNION:

Paddy **Musson**, union president
Maureen Doyle, counsel,

AWARD AND REASONS

Oscar Naylor has been a member of the College's permanent academic staff since 1985. Until January **of** 1989 he taught a full course load of eighteen hours a week. Then he learned he had multiple sclerosis. He went on sick leave **for** some months and, beginning in July 1989, began to get long-term disability benefits. These have continued to the present. In June of 1990 Naylor gave the College a letter from his doctor stating that his medical condition allowed him to teach up to four hours a week. Since then and to the present, under arrangements with me College, **he** has taught a selection of courses, with hours totalling between two and six hours a week in most semesters.

At the beginning of each semester Naylor and the division chairman have discussed his physical capacity to work during that semester. Once a decision has been made, the assignment has been confirmed in a letter from the chairman, a copy of which Naylor has signed as his acceptance of the terms set out. Each letter has said that Naylor was employed as a "Part-time professor" for a stated time **period** and number of hours per week at the rate of \$88 per hour including vacation pay. The letter has also contained the sentence, "**This** employment will be temporary and will not be **cov-**ered by the collective agreement for academic employees."

On June **7th**, 1997, Naylor formally grieved that "the College has violated the collective agreement, especially Article 14, when they paid [him] as a part-time teacher rather than according to the rates set out in Article 14.08." At the hearing the union said that the situation was governed by arts. 14.02 C 1 and 14.02 C 2:

14.02 C 1 A full-time employee may request and, with the approval of the College, may undertake a less than full-load assignment for a mutually agreed period.

14.02 C 2 Such employee shall be paid on the basis of pro-rata salary rather than on an hourly rate. Seniority shall accumulate on a pro-rata basis. The method of calculating pro-rata salary and benefits under this section shall be established by mutual agreement between the employee and the College. The request of the employee shall be in writing and a copy provided to the Union Local **Presi-**dent.

The union argues that Naylor was entitled, as art. 14.02 C 2 says, to **be** "paid on the basis of pro-rata salary rather than on an hourly rate." But, the union concedes, he should get the pro-rated salary only from the date of the grievance. To exclude him from

art. 14.02 because he is on LTD due to his illness while allowing teachers who are well to use the provisions would violate the Ontario Human Rights Code prohibition against discrimination on the ground of disability.

The College says that, since Naylor was doing part-time work not covered by the collective agreement, art. 14.02 C 1 is not available to him. There is no discrimination under **the** Human Rights Code because he gets the same compensation as any other part-time teacher. in any event, because someone getting LTD benefits stops **having** a full-time position, art. 14.02 C 1 cannot apply to that person.

Shortly after the hearing, the chairman on behalf of the board wrote to counsel asking how the parties wanted us to proceed in the light of an outcome that seemed plausible to us at that stage of our deliberations. We have now received written responses from both parties. We find that, in the circumstances, it will not be necessary for us to comment on or determine the issues they raise.

As we read arts. 14.02 C 1 and C 2 in their context immediately following arts. 14.01 and 14.02 A and B, we are inclined to think that they are intended to apply only to a teacher who has been carrying a full course load immediately before the request **is** made under art. 14.02 C 1. On this reading, since a teacher who makes the request while on LTD due to a disabling illness would not qualify, Naylor would be excluded. But that reading violates the Ontario Human Rights Code and is therefore not admissible. See **Re OPSEU and Ontario, Pezuk** grievance (1994), unreported (Grievance Settlement Bd.). To satisfy the Code's bar against discrimination on the ground of a disability, **Naylor** must be given the same coverage by arts. 14.02 C 1 and C2 as any employee within the bargaining unit who requests a lighter assignment for a reason unconnected to a disability.

As we understand the agreed facts, **Naylor's** discussions with the division chairman culminating in the appointment letters incorporated his "requests" and the College's "approvals" for the purpose of art. 14.02 C 1. **The** requests were not, as far as we know, in writing nor were copies provided to the union local president as required by the last sentence of art. 14.02 C 2. However, since we see these requirements as directory and not mandatory, the claim is barred only if we find that the College was prejudiced by

the failure here. Since there is no evidence of any such prejudice, the claim is not barred.

After getting the approvals, Naylor always did the teaching for the hours agreed on. Doing that, he was not simply performing part-time work not covered by the collective agreement, as the College would have it. He was instead teaching the "less than full load" that art. 14.02 C 1 then contemplates. Articles 14.02 C 1 and C2 apply although Naylor gets LTD benefits because, as we have said, the disabling illness bot-toming the **benefits** invokes the Human Rights Code provisions barring discrimination because of his disability.

At the end, **Naylor** was entitled to pay "on the basis of pro-rata salary rather than on an hourly rate" under the first sentence of art. 14.02 C 2. But he and the College have never **"established...[t]he** method of calculating pro-rata salaries and **benefits...by** mutual agreement' under the third sentence of **art.** 14.02 C 2. That will have to be done before there can be payout of salary and amounts for benefits into the future and any additions covering the past.


We recognize that Naylor signed a series of appointment feters from the chair-man accepting that he was "a part-time professor" with **"temporary...employment...not** covered by the collective agreement...". But so denying his rights does not, under the awards, create any estoppel against him now nor derogate from what the collective agreement gives him. *E.g., Re London & District Ass'n for the, Mentally Retarded and OPSEU (1984)*, 16 L.A.C. (3d) **165, 169-71** (Saltman, chairman); *Re Wiresmith Ltd. and Steelworkers (1988)*, 34 L.A.C. (3d) 104, 112-14 (Brunner, **arbitrator**). He could not con-tract himself himself out of his rights under the collective agreement. *E.g., Re Maritime Telegraph & Telephone Co. and IBEW (1983)*, 12 L.A.C. (3d) **90, 95** (Outhouse, arbit-rator); *Laskin, Collective Bargaining and Individual Rights (1963)*, 6 CAN. B. J. 278, 280-81. Despite what he purported to accept by signing copies of the chairman's letters, he held on to all those rights including the rights under arts.14.02 C 1 and C2.

The grievance is allowed. For **Naylor's** less than full load assignments the Col-lege shall pay him according to the direction of art. 14.02 C 2 retroactive to June 4, 1997. As the second sentence of the provision says, the method of calculating his **pro-**

rata salary and benefits shall be established by mutual agreement between the College and him.

DATED at Toronto, Ontario, this 29th day of June, 1999.


Michael Sullivan


Stanley Schiff, chairman

DISSENT OF R.J. GALLIVAN

A recipient of Long Term Disability Plan benefits is not terminated from employment and **so** remains an "employee" within the bargaining unit in accordance with Article 1 of the collective agreement. As such, the employee is entitled to continue full coverage under other benefit plans including life insurance and extended/supplementary health plans. Full seniority credit continues to accumulate during the period of disability absence, and pension credits continue to accrue even though contributions by the disabled employee are waived.

Under Article 14 on the other hand, an employee who requests reduced hours is subject to a pro-rata reduction of both salary and benefits (and in some cases reduced seniority crediting) except that full (not pro-rated) pension contributions by the employee must continue during the period of reduced hours. **n**

The collective agreement is silent on the treatment of an LTD recipient with continuing full benefits coverage who works reduced hours while **on** LTD but who wants pay for those hours calculated under Article 14 even though that Article also requires reduced benefits coverage. That silence presumably **stems** from the well known fact that the degree of disablement required for entitlement to LTD benefits - total disability - normally precludes the employee doing any work. The contract simply does not contemplate a totally disabled employee being able to work without having that work terminate entitlement to disability benefits.

Thus a stark conflict arises under the collective agreement if an LTD recipient such as the grievor works reduced hours and requests application of Article 14. Can the grievor continue to claim "total disability" when his six teaching hours under that Article would be **n**

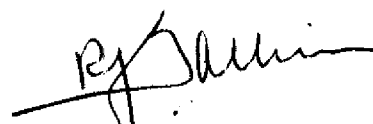
equivalent to almost half a normal work load under **the** Article 11 **contract** hours attribution rules? Does the grievor retain his full benefits/seniority coverage in accordance with Article 1 as a totally disabled employee or only pro-rated benefits similar to other employees when working reduced hours under Article **14**? Does he switch from full coverage to partial coverage and then back again between periods of work when, in the **grievor's** case, his part-time work does not extend even for a full **semester**? How are his pension contributions to be reconciled when as an **LTD** recipient his contributions are waived but when as an Article 14 **employee** he must make full contributions **regardless of** the proportionally reduced salary?

The sensible answer to these and similar questions is to conclude that the framers of the contract simply never put their minds to the possibility of a totally disabled employee doing any bargaining unit work. It is abundantly clear from the questions raised above that Article 14 could never have been intended to apply to an **employee** receiving **LTD** benefits. If such had been the intent anyone with even a modicum of practical **labour** relations experience would recognize that at least **some** of the obvious questions would have been addressed in the contract. Oversight of **some** obscure issue or administrative detail by the drafters might be understandable but **not** complete silence on fundamental and glaringly obvious **issues** such as full **versus** pro-rated benefits, full pension contributions by the employee versus a total waiver of contributions and so on.

The College's non-discriminatory solution to this dichotomy of treating the grievor as a recipient of LTD under the collective agreement with all the advantages therewith, and treating his **part-time** work as being outside the contract (as it is in accordance with Article 1 which excludes from the bargaining unit those who teach six hours or **less** per week,) gives the grievor the best of both worlds. It is a practical and logical solution which is not in any sense discriminatory.

In contrast, the decision of the Chair puts the parties in

the untenable position of trying to reconcile the irreconcilable, of trying to make the contract fit circumstances clearly not covered or contemplated by the agreement. This case is not the first and will not be the last where a collective **agreement** does not cover **all matters** which can arise in an employment relationship. The Board's award should be realistic and recognize that fact. Instead, the Chair's disruptive and ill-founded decision will create substantial and wasteful administrative problems for the College and puts the grievor (who appears to be receiving **some** poor advice) at risk of losing his LTD entitlement.


R.J. Gallivan