

93E565 NUTLEY VS ST LAWRENCE COLLEGE

IN THE MATTER OF AN ARBITRATION

BETWEEN

ST. LAWRENCE COLLEGE
(hereinafter referred to as "the College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(hereinafter referred to as "the Union")

GRIEVANCE OF R. NUTLEY

BEFORE: M.G. Mitchnick - Arbitrator

FOR THE COLLEGE:

S.C. Raymond - Counsel
C. Bleakney - Human Resources Assistant

FOR THE UNION:

G. Leeb - Counsel
M.A. White - Chief Steward, Local 417
R. Nutley - Grievor

Hearing held in Toronto, on August 8, 1994

SUPPLEMENTARY AWARD

The grievor, Roy Nutley, had been employed successively on a number of sessional contracts by the College, and the issue that the board had to decide in its original award was whether the grievor was employed

"as a full-time employee appointed on a sessional basis for up to 12 full months of continuous or non-continuous accumulated employment in a 24 calendar month period"

in the words of paragraph 1 of Appendix VIII. That question, of course, was critical because paragraph 3 of the Appendix provides:

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 ebbs and flows in a contract employee's workload can make that determination a less than straightforward one, and in the end the board was persuaded that the approach urged by the Union was a reasonable one, "in looking to see whether the contract employee on the whole demonstrates full-time hours (more than 12 a week) throughout the month, on a relatively consistent basis". The nature of the hours worked by the grievor in the various months was set out in Schedule II to the award, and for convenience is set out likewise as "Schedule II" to this award as well. The check-marks to the left in Schedule II show the months that had been "agreed to" as counting for the purposes of the original hearing, while the asterisks denoted the months in dispute (i.e., the months that only the Union was treating as "counting"). As can be seen, therefore, there were 8 months over the course of the grievor's employment that were, as the starting-point for the board at the hearing, accepted by both parties as counting, and not therefore the subject of consideration by the board. On that basis it was agreed and stated before us that what that meant was that the Union had to "win" on four of the remaining six months in dispute for the grievor to succeed, since the continuation of his employment into July of 1993 would then take him beyond the limit of "up to 12 months ... in 24" permitted by paragraph 1. Applying the Union's test to those 6 months in dispute, the majority of the board at page 11 of its award found:

the grievor to have been continued in employment in excess of 12 full months in 24, and the grievor accordingly is to be considered to have completed the first year of his probationary period.

Following release of that award, the employer on March 7, 1994 wrote to the board as follows:

Dear Sirs:

Re: Implementation of Arbitration Award dated February 7, 1994 Between St. Lawrence College and OPSEU Grievance of R. Nutley

We acted as counsel at the hearing into this matter. We have received and reviewed the Award of the majority of the Board of Arbitration.

St. Lawrence College requires a clarification of the Award in order to implement the Award for the Grievor and further requires clarification in order to apply the Award in similar circumstances. As we understand the Award, the Board ordered, at page 10 that:

"In our view, the Union's approach does that, in looking to see whether the contract employee on the whole demonstrates full-time hours (more than 12 a week) throughout the month, on a relatively consistent basis. That is the Union's claim, and is all in this case that we have to decide."

The Board attached two schedules to its Award. Schedule II listed the teaching assignments of the Grievor during the 24 month probationary period and those months were marked with a checkmark. Other months were in dispute and were marked with an asterisk. We attach for your reference a copy of Schedule II of the Award.

The issue that remains unclear and upon which the College seeks clarification, is which months were counted by the Board when it determined that the Grievor had completed twelve months of full-time employment in a twenty-four month period.

Given the test set out by the Board, and the importance placed by the Board on an individual working more than twelve hours per week, it is clear that all months where the Grievor was employed throughout the month as a sessional instructor should be counted toward the probationary period. This is because it is accepted that sessional instructors work more than twelve teaching hours per week. What is less clear is the determination as to whether months where job assignment is split between partial load and sessional assignments should be counted towards the completion of the probationary period. The Board stated that months where the employee works on a full-time basis (which the College takes to mean sessional assignments) on a relatively consistent basis then those months should be counted towards completion of the probationary period. The College has interpreted this to mean that months where there are three weeks of sessional assignment should be counted. On the other hand, in the College's view, a month with only one week of sessional appointment should not be counted. It is unclear what the interpretation of the Board was for months where two weeks were sessional and two weeks were partial load.

The distinction between a sessional and a partial load assignment is important, particularly because employees on partial load assignments do not accumulate service towards the completion of the probationary period (see Article 26.03 of the Collective Agreement). A partial load assignment is defined in section 26.01 of the Collective Agreement (attached) as one where an employee has more than six but twelve or less teaching contract hours in a week. Sessional assignments have greater than twelve hours per week of teaching contract hours.

Another problem presents itself. The argument of the College that certain months counted towards the probationary period was based on the College's interpretation of the Collective Agreement that fifteen or more days had to be worked pursuant to section 27 of the Collective Agreement. The Board rejected this view. As a result, any month where fifteen or more days were worked was considered previously by the College to be a full-time month, whether the assignments were sessional or partial load. This was consistent with the earlier Arsenault award. As a result, April 1992 was credited as a full month toward the completion of the probationary period for Mr. Nutley. However, under the decision of the Board, April 1992 was not a full-time month because the entire month was as a partial load employee (less than 12 hours per week) and the month should not have been counted.

It is left unclear to the College as to which months should be counted toward the completion of the probationary period. We would appreciate it if the Board would indicate which months on Schedule II count towards completion of the probationary period and which months do not. We have copied this letter to the solicitor for the Union in anticipation that he may wish to comment on this issue.

If you require any further information, please do not hesitate to contact me. And the Union responded as follows:

Dear Sirs:

Re: Nutley v. St. Lawrence College

I am in receipt of Mr. Richmond's correspondence dated 7 March, 1994, pertaining to the above.

It is my understanding of Mr. Raymond's comments that the Employer is unable to apply the Board's decision to the months of December, 1991, February, 1993, and April, 1992 as in these months Mr. Nutley worked less than 3 weeks as a sessional.

It is the Union's position that each of the above months should be counted towards the completion of Mr. Nutley's probation.

I will comment about each month in turn.

1. April, 1992: At the outset of the hearing and again in Mr. Raymond's correspondence at page 2 it was confirmed the parties did not dispute that this month counted. The Employer cannot now resile from its representation that April, 1992, should be counted.

In any event, the number of teaching contact hours worked by Mr. Nutley in April, 1992, has not been put before the Board. Only teaching contact hours for the months in dispute were put before the Board in Schedule I of the award. Therefore, it is respectfully submitted that the Board in not in a

position to rule on the inclusion of the month of April, 1992, if the Employer is able to resile from its agreement.

2. February 1993: As noted in the Board's award at page 10 the parties agreed that November, 1991, counts notwithstanding the even split between partial load and sessional weeks. It is respectfully submitted that February, 1993, should also count.

The Board's decision confirms the view that for the months Mr. Nutley performed the work of a "full-time" employee he should receive credit for that month towards his probationary period. Mr. Nutley worked 64 teaching contract hours in February, 1993. Accordingly it is submitted that the month should be counted.

Finally, the comments of the Board in Safron v. Fanshawe (Royner) dated 21 January, 1981, (unreported) to which I referred at the hearing, are noteworthy:

Moreover, the Board is not convinced that an employee should move from one category to another on a weekly basis ... (at p. 14)

Rather, the month should be looked at as a whole in determining whether the grievor replaces a "full-time" employee. It is noted that the Employer did not argue on the basis of weekly differences at the hearing.

3. December, 1991: It is submitted that this was a short month - only 3 weeks worked - due to the Christmas holidays. Accordingly, the period of time over which Mr. Nutley's teaching contract hours are to be considered is 3 weeks. As the spread of hours averages 13,3 (40 . 3) over the 3 weeks the month therefore qualifies as full-time and should be counted.

I trust the foregoing is of assistance. If further information is required, please contact me.

A further hearing was then convened on the matter, in order to fully consider the post-award issues raised by the employer.

Unfortunately, the original thoughts of the majority must now be expressed by the chair as sole arbitrator, owing to the sad loss of board-member Kearney. And the board in its initial deliberations did, on the basis of the original case, make a finding, as the Union emphasizes, that the grievor had completed the critical 12 months in 24 as a "full-time" employee. And again, for the reasons set out earlier, only six of the months on Schedule II were the subject of any argument before the board. Applying the Union's test to the hours in the months before us, the board was of the view that probably all six of the months in dispute, and certainly at least four of them, should be viewed as "full-time" employment for these purposes as well. The Union might well be right in saying that that now ends the matter. However, it is apparent that the College(s) is/are in need of greater clarification,

and to the extent one can do that on a given set of facts, I recognize that that would be useful.

The question arising out of the initial award is whether the usage of the "sessional" or contract employee over the month - or more importantly, over a series of months, is such as to roughly approximate the load of a regular full-time employee, both in total hours used in each month, and in terms of the general way those hours are spread throughout the month. The Union acknowledges that where the College's requirements are for a high total of monthly hours but falling in a narrow span - for example, in a single week - one can see the need for a "contract" rather than a "regular" employee. Beyond that, it would seem to me reasonable to look for no less than an even split in the four full weeks of the month as between "full-time" hours (13 and up) and less than "full-time" hours, with, again, even the weeks that fall below the 13-hour level demonstrating something close to that, so that the month represents some kind of continuum "approximating" that of a regular employee.

On all of that one can see the College's concern now at having conceded, on the basis of a test that it thought had been established in the 1982 Arsenault case, that April of 1992 was one that "counted". On the present test, it probably should not, since as was confirmed at the second hearing, it in fact was made up entirely of weeks having less than 13 hours of teaching. On the other hand, March 1992 turns out to have been made up of weekly hours as follows:

10
10
20
20

for 60 hours in total. As noted, that would still seem to meet the test adopted, as does February 1993, at

12
12
20
20

As well

May '92
April '93
May '93
and June '93

are not on that test disputed by the employer.

More problematic, as it turns out, is the previously-agreed month of November '91, whose hours are now noted as:

13
13
10

Where months fall on the edge like that, it arguably would not be unreasonable to look at the context in which they occur - that is, whether as part of a "run" of generally "full-time" months in deciding which way they might shade. But on reflection, perhaps a clearer line for the system to consider would be the application of an "average-hours-of-teaching-per-week" test; that is, looking to see whether the total of the teaching hours in the 4 full weeks of the month at least equal what the minimum total would be for a regular full-time employee: 13 hours a week, or 52 hours in total - once again looking to see that those hours are spread over some sort of reasonably substantial continuum across the month. On that basis, November '91 would not qualify. On the other hand, December '91 was a three-week month for everyone, and the grievor was assigned to teach:

20

10

10

hours a week, being in excess of the 13-hours-a-week "average" for a three-week month. December '91, therefore, is perhaps a clearer month to count, and I think the parties' long-term interests will be better served if this award were to find that the month of December '91 does count, while November 1991 does not. Those seven, then, plus the previously agreed and still agreed months of:

September '91

October '91

January '92

February '92

and March '93

thus make up the necessary 12 months over the spectrum.

Accordingly, the grievor must be said to have completed 12 full months of "full-time" employment in 24 by the end of June of 1993, and his continuation in employment into the month of July would bring him within the provisions of paragraph 3 of Appendix VIII of the parties' collective agreement - as originally found.

I will continue to remain seized of this matter in the way the original board, as requested, had done, in the event there still arise differences between the parties as to the implementation, or ultimate impact on Mr. Nutley, of this award.

Dated at Toronto, this 26th day of August, 1994

M. G. Mitchnick

See attached schedule.