

A W A R D

The grievor, Lisa Piotrowski, was on professional development leave ("PDL") from May 10, 2004 to May 7, 2005, at 70% of her salary. Although she was given two months of vacation at 100% of her salary during the 2005 vacation period after she returned from her PDL, the Union contends that the Employer (also referred to in this award as the "College") violated the collective agreement by denying her an additional two months of vacation at 100% of her salary in respect of the year she spent on PDL, as it is the Union's position that she was not on vacation at any time during the PDL. It is the College's position that the 2004 academic vacation period from June 14, 2004 to August 13, 2004 was included in the grievor's PDL, and that she was properly paid at the 70% rate for that period. It is also the College's position that the grievance, which was filed on June 8, 2005, is untimely.

At the commencement of the hearing of this matter on June 28, 2006, it was agreed that this Board of Arbitration (the "Board") would hear evidence concerning timeliness together with evidence regarding the merits of the grievance, and that counsel would address both timeliness and the merits in final argument. Since they were unable to conclude their submissions at the hearing, counsel agreed to complete them through written submissions.

The grievor is a professor and co-ordinator who has been employed by the College for fifteen years. The purpose

of her PDL was to enable her to complete the final year of a Master of Social Work ("MSW") Program which, after discussing the matter with the College, she commenced in 2002 by taking courses on her own time, on the understanding that she would need a PDL to complete the final year of the program. It is common ground between the parties that the grievor was fully occupied during the period of the PDL with the duties and responsibilities involved in gaining the MSW, and that this left her with no time for an extended leisure break.

Prior to her retirement in 2005, Gloria Grummett had been the College's Manager of Employee Benefits and Records for approximately twenty of her thirty-two years of employment with the College. One of her duties and responsibilities was processing leaves, including PDL's of which she processed an average of about three per year. On January 6, 2004, the grievor met with Ms. Grummett to sign a Professional Development Leave Agreement (the "PDL Agreement"), which had already been signed by Executive Dean J. Maundrell, Vice-President Academic Z. Zabudsky, and President Timothy R. Meyer, on behalf of the College. The first paragraph of that two-page agreement describes the purpose of the leave as follows:

to complete final year of the Master of Social Work program, specific objectives are to complete practicum and course work in the final three semesters of MSW program. During this final year registered in placement practicum for 21 hours per week in addition to course work and at the completion of this period will have a Masters of Social Work graduate degree.

The second paragraph of the PDL Agreement provides:

In accordance with Article 20 of the Collective Agreement for Academic Employees, **Lisa Piotrowski** will be absent on an approved Professional Development Leave for the period from May 10, 2004 to May 7, 2005 at an earnings level of 70% of salary.

The PDL Agreement also contains provisions regarding insured benefits, CAAT pension, Canada Pension Plan, Employment Insurance, Workers' Compensation, Union dues, sick leave/STD, and seniority, as well as the following provision regarding vacation:

Vacation - shall accumulate at the rate of 100% of normal accrual per month for the duration of the leave.

Ms. Grummet, who was involved in preparing that PDL Agreement, testified that it was prepared from a standard PDL template which the College has used for a very long time. However, she also indicated that the timing of the grievor's PDL differed from most other such leaves, which traditionally commenced at the beginning of the academic year in mid August and finished at the end of the vacation period in mid August of the next calendar year, with the vacation period included in the PDL being paid at the PDL rate (which was generally 70% of salary). The only previous PDL which had a date structure similar to the grievor's was one taken from May of 2003 to May of 2004 by Laurie Barbeau, another member of the College's academic staff. Ms. Barbeau's vacation entitlement in respect of that leave was also the subject of a grievance. However, that grievance was settled on a without prejudice and without precedent basis, and consequently cannot have any bearing on the disposition of Ms. Piotrowski's grievance.

When Ms. Grummet met with the grievor on January 6,

2004, she went through each paragraph of the PDL agreement to provide Ms. Piotrowski with a brief explanation of their contents. When they came to the above-quoted vacation provision, Ms. Grummet referred to Ms. Barbeau's leave, which had a similar nontraditional date structure. She told the grievor that her PDL would include the June 14 to August 13, 2004 vacation period, which would be paid at the rate of 70% that she would be receiving during the period she was on leave. She also told the grievor that after she returned from leave in May of 2005, she would be paid at 100% of her salary for the 2005 vacation period. Ms. Grummet testified that she did not get the impression at that meeting that the grievor disagreed with how the College proposed to deal with her vacation entitlement.

It was the grievor's evidence (during examination in chief) that when she met with Ms. Grummet on January 6, 2004, Ms. Barbeau "was in the middle of a grievance about the vacation time". However, when it was suggested to her in cross-examination that Ms. Barbeau's grievance was not filed until May of 2004, she stated:

I don't know if it was the grievance or the disagreement. Barbeau had been having difficulty with that for some period of time. I don't know if it was a grievance or a difficulty. I'm sorry if I used the wrong word.

The grievor further testified that she and Ms. Grummet "discussed the fact that because that situation was still up in the air we really didn't know if it would affect my contract or not, and so I agreed with the contract as it

was worded and I asked Gloria Grummet to let me know what was happening with the other case and I signed off on that day."

Ms. Grummet has a different recollection of their discussion of Ms. Barbeau's PDL. She testified that she referred to Ms. Barbeau's leave while discussing vacation entitlement with the grievor because Ms. Barbeau's PDL had the same nontraditional date structure as the grievor's. She has no recollection of the grievor asking to be kept abreast of what was happening in Ms. Barbeau's case. Indeed, she testified that she did not become aware that there was an issue regarding Ms. Barbeau's vacation entitlement until around the time she was doing vacation letters for the summer of 2004, which was after Ms. Barbeau returned from PDL in May of 2004.

Having regard to all of the evidence, we are satisfied that when she met with Ms. Grummet on January 6, 2004, although she did not know what stage the dispute had reached, the grievor was aware that there was a dispute between Ms. Barbeau and the College concerning Ms. Barbeau's PDL vacation entitlement, and she believed, not unreasonably, that the manner in which that dispute was resolved might have a bearing on her own PDL vacation entitlement. Although she probably did not articulate it as clearly or directly at that meeting as she did in her testimony, we are satisfied that she did advert to Ms. Barbeau's situation during the discussion of her vacation entitlement at that meeting. We are also satisfied that she came away from that meeting under the

assumption that although it was the College's position that her PDL would include the June 14 to August 13, 2004 vacation period and that this vacation period would be paid at the 70% PDL rate, that position could change depending on how Ms. Barbeau's vacation issue was resolved.

The grievor met with Ms. Grummet again near the end of April of 2004. During that meeting, Ms. Grummet reiterated that the grievor's PDL would include the 2004 vacation period which would be paid at 70% of her salary, and that she would be paid at 100% of her salary for the 2005 vacation period. Thus, Ms. Grummet again made it clear to the grievor that it was the College's position that she would be on PDL and on vacation simultaneously during the period from June 14, 2004 to August 13, 2004. However, although Ms. Grummet has no recollection of it, we accept the grievor's evidence that she disputed the validity of that position at that meeting by telling Ms. Grummet that she would not be on vacation during her PDL, as she would be busy pursuing her MSW. We are also satisfied that the grievor mentioned Ms. Barbeau's vacation entitlement dispute at that meeting, and expressed the view that the manner in which it was resolved might have some bearing on her own vacation entitlement.

The grievor was extremely busy during the months leading up to the commencement of her PDL. She worked on developing a new program which was to begin in the Fall of 2004. She was also on the hiring committee for a new Director of Native Education. Since there were "a lot of loose ends",

near the end of April or in early May she offered to come back to the College during her PDL to assist in their completion but was told by Fran Rose, who was her Dean at that time, that she was not to do any College business while she was on leave and that she was to focus on her studies. It was also the grievor's uncontradicted evidence that this advice was "jokingly affirmed by Judy Maundrell", the College's Academic Vice-President who was also a member of that hiring committee.

The following memo was mailed to the grievor's home after she commenced her PDL:

June 8, 2004

MEMORANDUM

TO: Lisa Piotrowski

RE: Vacation/Professional Development Leave

Hi Lisa: This is to confirm our conversation of January 6, 2004 and again in April 2004 with respect to vacation during your leave.

Your leave is for the period May 10, 2004 to May 7, 2005 at 70% of salary.

The 2004 vacation period is June 14, 2004 to August 13, 2004. This will be shown as vacation on your records, at 70% of salary. This uses the 43 day accrual for the period September 1, 2003 to August 31, 2004. The 10.5 days carryover remain.

You are accumulating vacation at the rate of 100% of normal accrual per month during your leave so for the period September 1, 2004 to August 31, 2005 you will accrue 43 days plus you have a carryover of 10.5 days for a total of 53.5 days.

The 2005 academic vacation period starts on June 13, 2005 and since you will be back at 100% pay effective May 9, 2005 vacation taken will be paid at 100% of salary.

Please call me if you have any questions.

Good luck on your Masters and have a great summer.

"Gloria"
Gloria Grummett
Manager Employee Benefits & Records

Before sending that memo to the grievor, Ms. Grummett checked its wording with Janice Beatty, the College's Vice-President of Human Resources.

It was Ms. Grummett's evidence that she sent out that memo after the grievor "popped into her office in June of 2004, asking what the normal period for vacation for faculty was". The grievor's testimony that she did not do so is supported by her datebook and by the very heavy demands which the MSW program was placing on her time. However, it is unnecessary to conclusively resolve that evidentiary conflict, as nothing turns on it in the circumstances of this case.

The grievor's explanation of why she did not file a grievance when she received that memorandum was:

First and foremost I took the [College's] word that I wasn't supposed to do any College business while I was on PDL. I took it that I wasn't supposed to do anything with the College while I was away. Because of my tendency to work more than I should, I was trying to set healthy boundaries. I believed what I was told, that I wasn't supposed to do anything with the College while I was on PDL. No matter what, I had to do what I was doing. I was right in the middle of an intensely busy summer, so I planned to address it when it was time for me to go back which is what I did. I brought it up immediately when I went back to work.

When she was asked (during cross-examination) why she did not approach the Union about the matter between January of 2004 and the time when she went on PDL in May of that year, she replied that she did not think it had evolved into an

issue. When asked (during re-examination) what she meant by that, she replied: "Nobody had denied me anything that I thought was there. Nothing had happened in my opinion up to that point."

During her PDL the grievor focused on her studies and had no involvement with anything happening at the College. She received no information about how Ms. Barbeau's grievance was resolved and, apart from a brief telephone conversation with Ms. Grummet about the orthodontic benefits available under the College's dental plan, the grievor had no further contact with any member of the College's management until April 18, 2005, when she telephoned Ms. Rose to discuss her reorientation into the College and to ask about how the vacation part of her PDL Agreement was going to be handled. Ms. Rose undertook to contact Human Resources to obtain that information prior to May 17, which was the day on which they agreed to meet following the grievor's return to the College. They went over a number of matters at that meeting but were unable to discuss the grievor's vacation time as Ms. Rose had not contacted Human Resources. When they met again three days later, Ms. Rose told her that Human Resources had indicated that she had already been on vacation while she was on her PDL. The grievor responded that she did not see how she could be on PDL and vacation at the same time, and that she certainly did not feel like she had a vacation, but that she wanted to think about what Ms. Rose had told her.

The grievor contacted Local Union President Jeff

Arbus on May 21, 2005 to discuss the situation and to obtain advice on what to do. When she subsequently asked Ms. Rose to provide the information obtained from Human Resources in written form, Ms. Rose sent her the following e-mail on June 7, 2005:

In response to your questions surrounding your vacation period for summer 2004 I refer you to the letter from Gloria Grummet dated June 8, 2004 (one year ago).

In that letter Gloria confirmed how your vacation would work. This was written confirmation of the discussions that had taken place of [sic] Jan 6 2004 and April 2004. I find paragraph three to be particularly clear.

Any concerns regarding this issue would have been addressed at that time.

After receiving that e-mail, Ms. Piotrowski filed her grievance on June 8, 2005. Although she was given two months of vacation at 100% of her salary during the 2005 vacation period, her request for an additional two months of vacation at 100% of her salary in respect of the year she spent on PDL was denied by the College.

Collective Agreement Provisions

PDL is the subject matter of Article 20 of the collective agreement which provides, in part, as follows:

PROFESSIONAL DEVELOPMENT LEAVE

20.01 The College recognizes that it is in the interests of employees, students and the College that employees are given the opportunity by the College to pursue College-approved professional development activities outside the College through further academic or technical studies or in industry where such activities enhance the ability of the employee upon return to the College to fulfill professional responsibilities.

20.02 To that end, each College will grant a minimum of two percent of full-time members of the academic

bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than six years, and an additional one percent of full-time members of the academic bargaining unit of the College concerned who have been members of the bargaining unit for a period of not less than 15 years, to be absent on professional development leave at any one time in accordance with the following conditions:

- (i) the purpose of the leave is for College-approved academic, technical, industrial or other pursuits where such activities will enhance the ability of the teacher, counsellor or librarian upon return to the College;
- (ii) a suitable substitute can be obtained;
- (iii) the leave will normally be for a period of from one to twelve months;
- (iv) the employee, upon termination of the professional development leave, will return to the College for a period of at least one year, failing which the employee shall repay the College all salaries and fringe benefits received by the employee while on professional development leave;
- (v) the salary paid to the employee will be based on the following scale: 55% of the employee's base salary increasing by five percent per year after six years of employment with the College concerned to a maximum of 70% of the employee's base salary after nine years. It is understood that the College's payment is subject to reduction if the aggregate of the College's payment and compensation or payments from other sources during the period exceeds the amount of the employee's base salary. The amount and conditions of payment will be pro-rated for shorter leaves;

....

- (xiii) For professional development leaves that are granted for a period of less than one year, the payment shall be pro-rated. The unused portion of the allowable earned leave shall be available to the teacher, counsellor or librarian subject to the application and approval processes of the College and those defined within this Article. Seniority for the purpose of granting the unused portion

shall include the seniority used in granting the first portion plus subsequent accrual. Payment for the unused portions of leave when taken shall be paid at the same proportion of salary as established in 20.02(v) when the first portion was taken;

....

The academic year is described as follows in Article 11.03:

The academic year shall be ten months in duration and shall, to the extent it be feasible for the Colleges to do so, be from September 1 to the following June 30. The academic year shall in any event permit year-round operation and where a College determines the needs of any program otherwise, then the scheduling of a teacher in one or both of the months of July and August shall be on a consent or rotational basis.

Vacation entitlement is dealt with in Article 15:

VACATIONS

15.01 A A full-time employee who has completed one full academic year's service with the College shall be entitled to a vacation of two months as scheduled by the College. A full-time employee who has completed less than one full academic year's service with the College shall be entitled to a two month vacation period and shall be paid the remainder of the employee's prorated annual salary.

15.01 B A teacher assigned to teach for an additional month (11th month) over the normal teaching schedule of the equivalent to ten months as part of a continuous 12 month program shall be entitled to receive a bonus of ten percent of the employee's annual regular salary for the additional eleventh month of teaching assignment to be paid on completion of such assignment. A teacher assigned to teach in the eleventh month for less than a full month will be entitled to a pro-rata amount of the ten percent bonus referred to above, to be paid on completion of such assignment.

A member of the teaching faculty teaching in a continuous program shall not be required to teach for more than 12 consecutive months without a scheduled vacation of at least one month.

15.01 C It is understood that the above provisions for vacations are not intended to prohibit Colleges

from scheduling non-teaching periods at Christmas and New Year's or at any other mid-term break.

15.02 In scheduling vacations, the College will take into consideration the maintenance of proper and efficient staffing of College programs and operations and the requests of employees. The College will notify employees of their vacation period at least four weeks prior to the commencement of the vacation period concerned. It is understood that following notification of vacation periods, vacation schedules may be changed in circumstances beyond the College's control or by mutual agreement. The College agrees that seniority will be given consideration in resolving conflicting vacation requests.

Other collective agreement provisions referred to during the course of these proceedings include:

Article 21

LEAVES OF ABSENCE

....

21.02 Leave of absence for personal reasons and special leave in extenuating personal circumstances may be granted at the discretion of the College without loss of regular salary. Where leave for personal reasons is denied, reasons shall be given in writing to the applicant where requested.

....

Article 22

PREGNANCY AND PARENTAL LEAVE

....

22.01 E The College will not require an employee to take vacation entitlement concurrently with leave under this Article.

....

Article 23

PREPAID LEAVE PLAN

....

23.05 B Sick leave credits will not accumulate during

the period spent on leave nor will sick leave be available during such period.

....

Article 32

GRIEVANCE PROCEDURES

....

Complaints

32.02 It is the mutual desire of the parties that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint....

Grievances

32.03 Failing settlement of a complaint, it shall be taken up as a grievance ... in the following manner and sequence provided it is presented within seven days of the immediate supervisor's reply

....

General

32.05 A If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

....

Summary of College Counsel's Submissions in Chief on Timeliness

The grievance procedure must be set in motion within twenty days after the circumstances have occurred, or have come or ought reasonably to have come to the attention of the employee. Time limits under the collective agreement are mandatory, and the *Colleges Collective Bargaining Act* gives the Board no power to relieve against their effect.

The grievor became aware on January 6, 2004, that it was the College's position that her PDL would include vacation and that she would be paid at the rate of 70% of salary for that vacation. This position was reiterated to the grievor in April and June of that year. However, she did not file a grievance until June of the following year. If the grievor had filed her grievance prior to the commencement of her leave, the College might have been in a position to do something about it. By waiting until after she returned from PDL to file the grievance, the grievor denied the College that opportunity.

The cases relied upon by the College in support of its timeliness submissions are *Fanshawe College and Ontario Public Employees Union (E. Ledwell - #91C399)*, unreported award dated March 10, 1993 (Swan); *Niagara College and OPSEU (L. Clark - #95A109)*, unreported award dated November 6, 1995 (Brent); and *St. Lawrence College and OPSEU (Beach, Robertson and Wilson - #'s 97B693, 97B694 and 97B695)*, unreported award dated March 30, 1998 (Keller).

Summary of Union Counsel's Response on Timeliness

For the purpose of these submissions, it is conceded that the time-limits are mandatory. The real question is when the "circumstances" of the "complaint" crystallized so as to commence the timelines. The grievor was not fully apprised of the Employer's interpretation relating to vacation in the January and April meetings with Ms. Grummet. The June 8, 2004 memo is the first definitive statement of the Employer's

position respecting vacation during PDL. However, that memo is simply the Employer's interpretation of what it can do vis-a-vis vacation while an employee is on PDL. There is a vast distinction between a statement of the Employer's position and the ability to actually carry out that stated intention. The College could only breach the collective agreement after the grievor returned from PDL, when it could actually refuse to give an already accrued vacation. The only time it would have been possible, in reality versus in a positional imagination, to deprive the grievor of the right to take an accrued vacation was when she was in a real position to take the vacation. This real possibility only came into actuality upon her return to work after her PDL. When the grievor came back to work she raised the issue and received the June 7, 2005 e-mail from Ms. Rose. This is when the grievor was actually refused her accrued vacation by the College, thus creating the circumstances of a breach. It was at this point that a real "crystallized" complaint could occur. The grievance was filed shortly after that actual refusal occurred, and is therefore timely.

The situation here is similar to that found in *Re Sunar Division of Hauserman Ltd. and United Steelworkers, Local 3292* (1979), 23 L.A.C. (2d) 1 (O'Shea). That case stands for the proposition that an employer cannot "start the clock" by simply announcing its intention to do something or stating its position about an issue. The grievance does not arise until the employer actually acts upon that intention.

The Union also relies upon similar findings in *Re Canadian Broadcasting Corporation and Canadian Union of Public Employees* (1985), 21 L.A.C. (3d) 389 (M.G. Picher); and *Re Milk and Bread Drivers, Local 647, and Standard Bread Co. Ltd.* (1963), 13 L.A.C. 327 (Thomas).

The cases relied upon by the College are all distinguishable from the present case. They establish that once the event in question actually happens, the crystallized "circumstances" occur that start the clock ticking. The twenty day period under Article 32.02 does not start until "circumstances" exist. Intentions are not "circumstances". It takes actions to create existing circumstances. The College is arguing that the grievor should have grieved in anticipation of breach. This analytical error arises from a confusion between the stating of an intention to do something (based upon an interpretation) and the action done to carry out that intention in conformance with the interpretation. A "circumstance" is created, for the first time, only when that action actually occurs.

Alternatively, the College is estopped from claiming time limits. In the further alternative, the Colleges actions constituted waiver. It told the grievor not to do College work while on PDL and the grievor obeyed. It gave her its "position" in writing well after she commenced her PDL. While she was still on leave it purported to "deem" her to be on vacation. Only when she returned from PDL would it be equitable to allow the Employer to rely on time limits

starting. The Union relies on paragraph 2:3130 of *Brown and Beatty, Canadian Labour Arbitration*; and *George Brown College and OPSEU (Giovanni De Simone) - #94A770/94A767*, unreported award dated December 29, 1995 (Burkett).

Summary of College Counsel's Reply Submissions on Timeliness

The grievor returned from PDL on May 16, 2005 and was on vacation, at 100% of pay starting on June 13, 2005. Any inquiry regarding vacation made upon her return to work from PDL would have been with respect to a future entitlement beyond the summer of 2005. Ms. Rose's response regarding the grievor's entitlement did not differ from the College's previously stated intentions. If the grievance does not crystallize until the benefit is actually denied, it would not crystallize until the grievor requested the accrued vacation for a particular time and was refused. In fact, following the same logic to its extreme would lead to the absurd conclusion that the grievance does not crystallize until the first day of the requested vacation, when the employee is at work instead of being on vacation.

The grievance crystallized on January 6, 2004 when the College, through Ms. Grummet, communicated to the grievor its position, with which she disagreed, that she would be on vacation and PDL at the same time. Although the Agreement is silent on when vacation will be taken, it is clear that the College approved the PDL on the basis that there would not be additional vacation after the leave. By choosing not to press the issue before she started her leave, the grievor waived any

right to raise the issue upon her return.

When taken in context, the statement which the grievor attributes to Ms. Rose about not doing any College business while on PDL cannot reasonably amount to the College having waived its rights to rely on time lines under the collective agreement for any issue that arose before or during the grievor's leave. There was nothing preventing the grievor from pursuing the issue of her vacation entitlement before or during the time she was on leave. It was a conscious decision on her part not to do anything about it. If it was a live issue at the time her leave began, she could and should have advised the College that she intended to pursue the issue at a later date. If equity is to be considered in determining the outcome of the time limits issue, it should be considered in the College's favour. On several occasions the College advised the grievor of the basis on which her leave was approved. By failing to bring a timely grievance, she denied the College any opportunity to reconsider its approval of the leave or take any steps to resolve the disagreement.

The estoppel argument cannot succeed because the College did not make any representation that it would not rely on the time limits under the collective agreement.

Decision on Timeliness

In the majority award in *Fanshawe College and Ontario Public Employees Union (Grievance of E. Ledwell - #91C399)*, *supra*, Arbitrator Swan wrote, in part, as follows (at pages 8 and 9) regarding the diligence required of grievors in the

College system:

... Under the collective agreement which is before us, the limitation on our remedial authority comes squarely from the grievance procedure established in Article 11 [now Article 32]. That grievance procedure provides that an employee must set in motion the grievance procedure, pursuant to the complaint provision in clause 11.02 [now 32.02], "within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee"....

The collective agreement requires of the parties and the employees covered by it a certain degree of diligence in enforcing their rights. The enforcement mechanism for that diligence is the grievance procedure, which considers any potential grievance in relation to a breach of the collective agreement to have been abandoned after twenty days after knowledge of the breach either came to the employee's attention, or ought reasonably to have done so....

The unanimous award in *St. Lawrence College and OPSEU (Beach, Robertson and Wilson - #'s 97B693, 97B694 and 97B695)*, *supra*, notes (at page 4) that it is "trite law that under the collective agreement the 20 day time limit is a mandatory one" and that the "Board has no authority to amend or alter or vary it". In that case the Board found that the twenty day period commenced in May of 1996 when the grievors, who were terminated in April of that year, made inquiries about entitlement to severance and were told by the College that they had no entitlement. In rejecting the Union's contention that the time limit was not triggered until April of 1997, when the grievors came upon information that led them to appreciate that a breach may have taken place, the Board relied upon the following passage from Arbitrator Brunner's unreported award dated October 4, 1983 in *Re Algonquin College*

and O.P.S.E.U.:

... it is not when an employee first appreciates or ought reasonably to have appreciated that a breach of a Collective Agreement has or may have taken place that triggers the commencement of a limitation period, but rather when the circumstances or the facts which give rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee.

However, as indicated in *Re Milk and Bread Drivers, Local 647, and Standard Bread Co. Ltd., supra*, a grievor is entitled to await the crystallization of an issue before filing a grievance, and is not required to anticipate a breach of the collective agreement. That case involved a grievor who had left the employ of the company and was protesting a certain deduction which had been made from his final pay cheque. Although the grievor had been orally advised that this deduction would be made, he did not file a grievance until after receiving the final pay cheque from which that deduction had in fact been made. The company raised a timeliness objection to the arbitrability of the grievance on the grounds that the grievor had failed to comply with the collective agreement requirement that the grievance be launched no more than five days after the event giving rise to the grievance. In rejecting the company's contention that the event giving rise to the grievance was the grievor's being told that the deduction would be made, the majority of the arbitration board chaired by District Court Judge Thomas held that the grievor was entitled to file his grievance at any time within five days after the date on which he received the final pay cheque because "an employee is not bound to

anticipate a breach of the agreement and in the instant case the complaint did not crystallize until the final pay cheque was received by the grievor".

Arbitrator O'Shea adopted a similar approach in *Re Sunar Division of Hauserman Ltd. and United Steelworkers, Local 3292, supra*. In that case the grievor, who was absent because of illness on one of the qualifying days for a holiday, was told by his supervisor on February 20, 1979 that he would not be paid holiday pay for that holiday unless he produced a doctor's certificate or some other medical proof of his illness on the qualifying day. After the grievor failed to receive the holiday pay on March 1, 1979, which was the payday on which payment for that holiday was to be made, he filed a grievance on March 7, 1979, claiming that the company had violated the collective agreement by not paying him for the holiday in question. The collective agreement required a grievance to be filed "within seven (7) days of the occurrence which gave rise to the complaint" (or within seven days of the date the employee or union should reasonably have become aware of that occurrence). The company raised a preliminary objection that the grievance was untimely because it had not been filed within seven days of the date on which the supervisor put the grievor on notice that he would not be paid holiday pay unless he produced proof that he was sick on the qualifying day. However, Arbitrator O'Shea found that the seven-day time limit did not begin to run until March 1, 1979, as the incident which gave rise to the grievance was not the

February 20, 1979 notification of what the company intended to do, but rather the company's actual failure to pay the holiday pay in question.

In *Re Canadian Broadcasting Corporation and Canadian Union of Public Employees, supra*, Arbitrator M.G. Picher found that having not grieved a letter from the employer purporting to extend an employee's probationary period did not preclude that employee from later grieving what the employer characterized as a probationary discharge. In reaching that conclusion, the arbitrator expressed the view (at page 393) that "the mere communication of an opinion of an officer of the corporation that an employee continues to be probationary" did not constitute an "incident" within the meaning of the applicable collective agreement provision requiring a grievance to be filed "within thirty (30) days of the employee becoming aware of the incident". He also found that the "incident which put the grievor's employment status into question in a meaningful way did not occur until her termination".

Applying those principles to the facts of the instant case has led us to conclude that the College's timeliness objection cannot succeed. Although the PDL Agreement which the grievor signed on January 6, 2004 stipulates that vacation shall accumulate at the rate of 100% of normal accrual per month for the duration of the leave, it says nothing about when that vacation or any previously accrued vacation is to be taken. Ms. Grummet's advising the grievor in January and

April of 2004 of the approach which the College intended to adopt with respect to vacation entitlement is akin to the oral indication which the departing employee received in the *Standard Bread* case that the company intended to make a particular deduction from his final pay cheque. Her memorandum of June 8, 2004 parallels the letter in the *Canadian Broadcasting Corporation* case by which the employer purported to extend the employee's probationary period. Although those communications put the grievor on notice of what the College intended to do, that stated intention was not actually acted upon by the College until after the grievor's return from PDL when the College denied her request for an additional two months of vacation in respect of the year she had been away on that leave. That denial was the circumstance which gave rise to the grievor's complaint and which forms the subject matter of the grievance she filed on June 8, 2005, which was within twenty days of that denial.

If the parties had wished to obtain an advance ruling on what the grievor's vacation entitlement would be upon her return from PDL, it might have been open to them to agree to have that issue predetermined by expedited arbitration. However, in the circumstances of the instant case, it was not unreasonable for the grievor to believe that the manner in which Ms. Barbeau's vacation entitlement dispute might ultimately be resolved could have a bearing on her situation and change the College's intention regarding her own vacation entitlement. Thus, it would have been open to question

whether proceeding with a grievance in such circumstances would have served any useful purpose, as the College's stated intention might well have changed and never been acted upon. Moreover, even if Ms. Grummet's memorandum of June 8, 2004 could be found to have crystallized the issue of the grievor's vacation entitlement by purporting to supplement or revise the PDL Agreement which she had signed, it would be inequitable to permit the College to successfully advance a timeliness objection on the basis that the grievor was required to return to the College to consult with the Union and to devote the time and energy generally involved in determining whether or not to file a grievance on an issue of this complexity, at a time when she was very busily engaged in pursuing the purpose of her PDL and duly following the instruction given to her by her Dean that she was to focus on her studies and not do any College business during her PDL.

For the foregoing reasons, we have concluded that the College's objection to the timeliness grievance cannot succeed.

Summary of Union Counsel's Submissions in Chief on the Merits

The College violated section Article 15 of the collective agreement by deeming the grievor to be on vacation from June 14, 2004 to August 13, 2004 during her PDL, and by denying her an additional two months of vacation at 100% of her salary in respect of the year she spent on PDL. An employee cannot be on PDL and on vacation at the same time as those are mutually incompatible statuses. Once a full-time

employee has completed one full academic year's service, which is ten months of service, the employee is entitled to a vacation of two months under Article 15.01 A. The Article 15.01 B requirement that a teacher assigned to teach for an additional month over the normal teaching schedule of ten months be paid a ten percent bonus reflects the fact that the employee would otherwise be on vacation and free to do whatever he or she pleased, during a period of time in which the College would not have any legitimate expectation that the employee would be doing anything for the College's benefit. The PDL is a separate and distinct right under the collective agreement. As indicated by Article 20.02(i), an employee on PDL is away from the College engaging in a College-approved pursuit which will enhance the employee's ability upon the employee's return to the College.

The PDL Agreement stipulates that sick leave may not be used during the period of the leave. That right to be paid while away from work is not available because an employee cannot be absent from work due to illness during a period that the employee is not at work in any event. The same is true of vacation. An employee cannot logically take a vacation from work during a period that the employee is not at work but rather is away from work on PDL. The PDL agreement indicates that vacation shall accumulate at the rate of 100% of the normal accrual per month for the duration of the leave, but it does not say that vacation will be deemed to be taken during the PDL.

The purpose of the grievor's PDL was to complete the final year of her Master of Social Work program. She was vigorously engaged in that pursuit on a full-time basis from May of 2004 to May of 2005. She could not and did not "kick back" and have a vacation from June 14, 2004 to August 13, 2004. The expectation that she would be developing professionally by pursuing a master's degree endured throughout that period, and she clearly did not have a vacation during that period nor during any other two-month period while she was on PDL.

The Board should require the College to give the grievor two months of vacation in addition to her regular vacation entitlement, without any diminution in her yearly pay, in order to compensate the grievor for the breach of the collective agreement by which the College effectively denied accrued vacation to the grievor by purporting to deem her to have taken it during the PDL.

Summary of College Counsel's Response on the Merits

In normal circumstances there is an academic year which is ten months long as set out in Article 11.03, during which time there is a teaching period and a non-teaching period. Upon completion of an academic year, a full-time employee is entitled under Article 15.01 A to take a two-month vacation, as scheduled by the College. The employee's annual salary is paid for those ten months of work, and the two months of vacation is considered to be an unpaid period, although most of the Colleges spread out the payment of that

salary so that employees do not go without pay during the summer. PDL is completely different from those normal circumstances. It is not a leave which the College forces the employee to take, and it does not involve work that the College demands the employee to perform. It is a leave obtained at the option of the employee, with the approval of the College, to obtain additional training which will benefit the College and the employee. While on PDL, an employee is not providing service to the College.

If the parties had intended to preclude employees from being on vacation and PDL concurrently, they would have included language like Article 22.01 E, which prevents the College from requiring an employee to take vacation entitlement concurrently with pregnancy leave or parental leave. Another example of such language is Article 23.05 B, which provides that sick leave will not be available during the period spent on leave. Where the parties have wished to exclude such a possibility, they have expressly said so in the collective agreement. However, there is no equivalent provision which precludes an employee from being on vacation for a portion of a PDL. Moreover, considering an employee to be on vacation during the course of a PDL is consistent with the College's practice. Year-long PDL's traditionally commence in mid August and end in the middle of the following August. Employees on those PDL's are deemed to be on vacation for the last two months of their PDL. Here there is really no difference except that because the grievor started her PDL in

May, she was considered to be on vacation for a two-month period near the beginning of the leave rather than at the end of the leave. She was paid at the 70% rate for that two-month period. The rate at which she was paid for that period could have been calculated on the basis of her earning 70% for the latter part of the ten-month period that she worked to earn that vacation and 100% for the earlier part of that ten-month period. However, the grievor did not suffer any loss as a result of being paid at the 70% rate for the 2004 summer vacation period, as she was paid at the 100% rate for the 2005 summer vacation period, even though she was earning only 70% during most of the period in which her entitlement to that vacation accrued.

The basis upon which the College agreed to grant the leave was that it would include two months of vacation time. It was explained to the grievor at the time she signed the PDL Agreement that she would be considered to be on vacation for that portion of her leave. Although the grievor may not have agreed with this, she clearly understood it. While she may not have had leisure time during the PDL, there is no guarantee in the collective agreement of leisure time. It is really no different from the preceding two years during which the grievor chose to use her own time to begin pursuing her MSW. During the PDL there was a similar kind of compromise. She was relieved of her obligation to teach so that she could pursue her goal of obtaining an MSW, which was also good for the College. It just happens that it took up the full twelve

month period. The grievor may have lost out on some leisure time as a result of this pursuit, but that does not change the fact that the College had the right to include vacation in the PDL. The situation would be different if the College had told the grievor that she must get an MSW and that she could not take any vacation.

Summary of Union Counsel's Reply Submissions on the Merits

Paying the grievor at the rate of only 70% during her deemed summer vacation from June 14, 2004 to August 13, 2004 is another aspect of the College's arbitrariness. If the College was going to be consistent, she should have been paid at the rate of 100% for the vacation entitlement which accrued in the period prior to her PDL.

As a separate document entered into by the grievor and the College, the PDL Agreement can confirm and add to her rights under the collective agreement, but it cannot derogate from them. Moreover, that Agreement does not include the language contained in Ms. Grummett's memorandum of June 8, 2004 regarding vacation entitlement.

The fact that the College cannot force anyone to go on PDL is irrelevant. Once the grievor's PDL had been mutually agreed to, the College could not turn around and take away the vacation entitlement which the grievor had accrued. While on PDL, the grievor was not providing her usual services to the College but was providing the services contemplated by Article 20. The *quid pro quo* for having the benefit of a PDL is giving up 30% of one's salary to go down to 70%, not going

down to 70% and also giving up two months of vacation. If the parties had intended PDL to have that effect, they would have expressly written it into the collective agreement.

Article 22.01 E does not determine the issue in this case in which there is nothing written in the collective agreement about an employee being concurrently on vacation and PDL. Concluding that an employee who is on PDL can also simultaneously be on vacation results in an absurdity. Moreover there is a distinction between vacation and pregnancy leave. An employee accrues vacation entitlement by working ten months. Vacation entitlement is like money in the bank. Pregnancy leave is not. What the College is attempting to do is to deprive the grievor of accrued vacation entitlement. Collective agreement language is not required, as there is no need to have a clause which says that the Employer cannot deem something that is contradictory.

The grievor is not seeking a guarantee of leisure time. What is being sought is a vacation at a time that makes sense, namely, after she returned from PDL.

Article 23.05 B applies to employees on prepaid leave under the Prepaid Leave Plan. It is different from leave of absence under Article 21.02, and PDL under Article 20.

Decision on the Merits

Neither counsel referred the Board to any previous award dealing with the issue of whether an employee can be on vacation and PDL simultaneously. Thus, this appears to be a case of first instance, which must be decided by determining

the intention of the negotiating parties from the language which they chose to include in the collective agreement.

As indicated above, Union counsel submitted that an employee cannot be on PDL and on vacation at the same time as those are mutually incompatible statuses. In replying to Employer counsel's argument that if the parties had intended to preclude employees from being on vacation and PDL concurrently they would have included language like Article 22.01 E (which prevents the College from requiring an employee to take vacation entitlement concurrently with pregnancy leave or parental leave), Union counsel suggested that there is a distinction between vacation and pregnancy leave. However, he did not suggest and we do not see any material distinction between PDL and pregnancy leave (or adoption leave) in relation to what he contended to be the incompatibility between being on such leave and on vacation at the same time.

If the collective agreement did not contain Article 22.01 E, Union counsel's contention that an employee cannot be on PDL and on vacation at the same time might be tenable. However, the logic which might lead to the conclusion that an employee on PDL cannot simultaneously be on vacation would also lead to a similar conclusion regarding an employee on pregnancy or parental leave. Thus, if Union counsel were correct in his contention that, since the Employer cannot deem something that is contradictory, there is no need to have a collective agreement clause expressly precluding the College from requiring an employee to take vacation concurrently with

a PDL, it would be equally true that there would be no need to have such a clause for pregnancy or parental leave. However, as noted above, Article 22, which provides for pregnancy and parental leave, contains Article 22.01 E, which provides:

The College will not require an employee to take vacation entitlement concurrently with leave under this Article.

As noted in paragraph 16.6.2 of Mitchnick and Etherington, *Labour Arbitration in Canada* (2006, Lancaster House), at page 296:

... it is a normal rule of construction that, if possible, all words in the agreement are to be given meaning; arbitrators are loath to adopt an interpretation that renders a word or clause redundant.

If Union counsel's submission regarding the inherent incompatibility of vacation and leave were correct, there would be no need for Article 22.01 E and its inclusion in the collective agreement would be essentially meaningless and redundant. The inference which we draw from the inclusion of that prohibition is that if it were not in the collective agreement, the College would be in a position to require an employee to take vacation entitlement concurrently with pregnancy or parental leave under Article 22. The absence of a similar provision in Article 20 leads us to conclude that it was not the intention of the negotiating parties that the College would be precluded from including the normal two-month academic vacation period in a year-long PDL which encompasses that two-month period.

Applying that approach to the grievor's PDL was

consistent with the College's longstanding practice of considering an employee to be on vacation for the normal academic vacation period during the course of a year-long PDL. It is clear from Ms. Grummet's uncontradicted evidence that this approach has been applied by the College for many years in granting PDL's to members of the academic bargaining unit. As indicated above, year-long PDL's traditionally commence in mid August and end in the middle of the following August, with employees being considered to be on vacation for the last two months of their PDL's. The only difference in the grievor's case was that because she commenced her PDL in May, she was considered to be on vacation for a two-month period near the beginning of the leave rather than at the end of the leave. Although it is arguable that she should have been paid at a higher rate than 70% during the 2004 academic vacation period because most of her entitlement to it accrued during a period in which she was receiving full salary, the grievor did not suffer any significant loss as a result of being paid at the 70% rate for that vacation period as she was paid at the 100% rate for the 2005 summer vacation period, even though she was receiving the PDL rate of 70% for most of the period during which her entitlement to that vacation accrued. Thus, any underpayment which may have occurred in respect of the 2004 academic vacation period would have been offset by an overpayment of similar magnitude in respect of the 2005 academic vacation period.

It is understandable why the grievor wanted an

additional two months of vacation to make up for her lack of leisure time during the 2004 academic vacation period, which fell during a time when she was busily engaged in performing some of the tasks involved in completing the final year of her MSW Program. However, as submitted by College counsel, the compromise involved in that vacation period being devoted to that worthwhile endeavour is not significantly different from the situation which existed in the preceding two years during which the grievor began to pursue her MSW by using a substantial amount of what might otherwise have been leisure time. Moreover, the basis upon which the College agreed to grant the PDL was that it would include two months of vacation time, during which the grievor would be paid at the 70% rate. This was explained to the grievor at the time she signed the PDL Agreement. Although she undoubtedly hoped that the resolution of Ms. Barbeau's vacation dispute would lead to a revision of the College's position, she entered into the PDL Agreement with a clear understanding that the College intended to include the 2004 academic vacation period in her PDL. For the reasons set forth above, we have concluded that the College did not violate the collective agreement when it subsequently acted upon that stated intention by denying her request for an additional two months of vacation.

For the foregoing reasons, the grievance is hereby dismissed.

DATED at Burlington, Ontario, this 2nd day of October,
2006.



Robert D. Howe
Chair

I dissent in part, for
the attached reasons.

"Sherril Murray"
Union Nominee

I concur.

"John Podmore"
College Nominee

Dissent, in part.

With regards to the merits of this case, this member respectfully dissents. While the majority presents a thoughtful and reasoned approach to the language of this collective agreement, there exists one major flaw: if the parties had intended a vacation form part of the professional development leave, then it stands to reason a 10 month leave would have been the maximum allowable under the provisions of Article 20. In effect, this decision alters the plain wording of the collective agreement.

The parties recognize the mutual benefits attained by the pursuit of higher learning. However it remains a contraction to grant a 12month educational leave and “deem” two of those months as a “vacation”. It is common ground between the grievor and the employer that she had no time to “vacation” in the true sense of the word.

This practice makes a mockery of the language of article 20. It is this member’s belief, that the grievor should have been permitted to take her two months vacation at the conclusion of her 12 month leave (May /June) and required to return to the college at the commencement of the September term.

All of which is respectfully submitted, Sherril Murray.