

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**Loyalist College**  
(College)

and

**Ontario Public Service Employees Union**  
(Union)  
**(Academic /Grievor : Reilly)**  
**(OPSEU #: 98C014)**

**BEFORE:**

Helen Finley	Chair
Robert Gallivan	College Nominee
Derek Blackadder	Union Nominee

**APPEARANCES:**

<b>For the College:</b>	
Douglas Gray	Counsel
Dave Butler	Vice President Human Resources
Glennyce Sinclair	Dean Health and Community Studies

<b>For the Union:</b>	
Gavin Leeb	Grievance Officer
Cecelia Reilly	Grievor
Bernard Belanger	President Local 420
Gary Warren	Steward Local 420
Bill Campbell	Secretary Local 420- (Observer)

The hearing in this matter was held in Belleville, Ontario on June 10, 1998

## DECISION

Ms. Cecelia Reilly is a full-time professor in the School of Health & Community Services at Loyalist College in Belleville. She teaches in Year 1 and Year 2 of the Law and Security Program and is in her eighth year of teaching at the College. On November 10, 1997, she grieved as follows:

I grieve that the College's direction to me to be on vacation from December 8 to December 24, 1997 and April 27 to May 7, 1998 and August 3 to September 1, 1998 is a violation of Article 15.01A of the Academic Collective Agreement. I further grieve that scheduling my vacation coincident with the time period of the Academic Year is a violation of Article 11.01B1, and that precluding scheduling my vacation during that part of the year lies outside the Academic Year without my permission is a violation of Article 11.03.

She sought the following remedy:

The College will schedule my vacation as a single vacation of two months duration and falling entirely outside the Academic Year.

The relevant articles are

### Article 6

#### MANAGEMENT FUNCTIONS

- 6.01** It is the exclusive function of the Colleges to:
- (i) maintain order, discipline and efficiency
  - (ii) hire, discharge, transfer, classify, assign, appoint, promote, demote, lay off, recall and suspend or otherwise discipline employees subject to the right to lodge a grievance in the manner and to the extent provided in this Agreement;
  - (iii) manage the College and, without restricting the generality of the foregoing, the right to plan, direct and control operations, facilities, programs, courses, systems and procedures, direct its personnel, determine complement, organization, methods and the number, location and classification of personnel required from time to time, the number and location of campuses and facilities, services to be performed, the scheduling of assignments and work, the extension, limitation, curtailment or cessation of operations and all other rights and responsibilities not specifically modified elsewhere in this Agreement.
- 6.02** The Colleges agree that these functions will be exercised in a manner consistent

with the provisions of this Agreement.

**Article 11**  
**WORKLOAD**

**11.03** The academic year shall be ten months in duration and shall, to the extent it be feasible in the several 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.

**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.

**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 a vacation of one month, as scheduled by the College.

Such teacher shall also receive a bonus of ten percent of the employee's annual 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 shall be given consideration in resolving conflicting vacation requests.

**15.03** A portion of the hourly rate for partial-load teachers is in lieu of vacation pay.

**Article 22.01**  
**PARENTAL LEAVE**

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

The School of Health & Community Services offers programs in law and security administration, police foundation, recreation and leisure services, fitness and health promotion, and in nursing, practical nursing and personal support. Both the law and security and police foundation programs for the last three years have had a student intake in January and, therefore, their sequential semester runs into the summer, to the end of July. As a result, teaching is required in the summer.

Glenyce Sinclair is the Dean of the School of Health & Community Services and she testified that during the past three years the July portion of these programs has been taught by one full-time faculty member and a number of part-time faculty members. In the first of these years, following a meeting with members of faculty concerning the scheduling of the summer session in 1996, Terry Wood, a full-time faculty member, volunteered for the teaching assignment, and Larry Cook, another full-time faculty member, was assigned the full-time teaching assignment by rotation in 1997. The rotation is based on program needs, qualifications of faculty, and those who have previously taught in July. The full-time teaching assignment for the following year, 1998, was also assigned by rotation; this time, to Cecelia Reilly, the Grievor.

Ms. Sinclair explained the process she institutes in order to arrive at the teaching assignments, once the requirements of the programs and the students have been determined. She testified that it is her practice to then send a memorandum annually to faculty members in which she identifies “the usual vacation period that normally runs between the end of June to the end of August”. The memorandum also indicates, she said, that if a faculty member wishes to have his or her vacation at times other than the July/August period, that a written request for approval of the specific time should be submitted. She testified that in the case of Terry Wood in 1996, time available was discussed and his vacation times were approved, and, in the case of Larry Cook, Ms. Sinclair

recounted that she identified 3 months on his Standard Workload Form and then asked him to identify his preferred dates. The result was that Mr. Cook, although he could have had a two-month-block vacation by taking his vacation during May and June, chose to have a split vacation.

Gary Warren who has taught at Loyalist College for 18 years, and who has been a union official during that time, is currently a Steward with Local 420. He testified with respect to his knowledge of other situations in which he believed the College assigned fragmented vacation periods and recalled 2 instances. He testified that faculty in the Adult Upgrading Department in 1992, who were and are for the most part non-post-secondary, were being assigned vacations in two month-long segments and some of those vacations ended in mid-month. A concern was expressed by faculty members, he related, that this practice was contrary to the Collective Agreement since they were of the opinion that the Collective Agreement required assignment of a two-month continuous vacation period. Mr. Warren testified that the faculty members involved also recognized the value to the College of having the option of a split vacation period and discussions resulted in a local agreement between Local 420 and Loyalist College respecting the vacation period for faculty in the Adult Upgrading Department.

Mr. Warren testified to the other situation of which he was aware, that of Ms. Pat Dockerell in the same division as Ms. Reilly, and he stated that he understood there was a request to proceed to arbitration on the matter. He confirmed that these were the only two situations respecting split vacations of which he was aware.

The Dean of Business and Computer Studies, Rodney Hudgin, testified that his department, which has a total of 21 full-time faculty members, has three programs in which teaching takes place during the summer months and which involve instruction by full-time faculty members. The number teaching between May 1st and September 30th ranged from 5 to 8 full-time faculty members and from 3 to 5 faculty members would normally teach in the July/August period. He testified that in one situation, following a review of the course offerings, the team recommends

who should undertake the teaching. In another situation, Mr. Hudgin determines the courses to be taught and considers the deployment of faculty in relation to the faculty teaching the first-year courses as he considers it important that there is some continuity of faculty for students during their program. It is his practice, he testified, to go through the full-time faculty list considering the skill set of individual faculty members and the special nature of the course. If the appropriate combination is not found within the full-time faculty list, he then seeks an appropriate person from the part-time faculty list. Having made the teaching assignments, he sends out a notice to all faculty members informing those who are not teaching in the summer, that the two-month summer block is their vacation period and inviting those who are teaching in the summer to submit their requests for specific vacation times. His rejection of their request would be based on the needs of the programs and/or the students, and they would be assigned a split vacation. If a faculty member teaching during the summer months asks for May/June vacation period, Mr. Hudgin testified that his response to that request would be based on what was taking place and that he would discuss it with the individual faculty member and provide an explanation of the problem. That, however, has not, to this point, he testified, been an issue as the scheduling of vacation has been arrived at by mutual agreement. For those individuals who are not teaching he invites them, should they wish, to propose dates different from those he has presented.

Ms. Sinclair testified to the particular situation of Ms. Reilly. According to her, Ms. Reilly commenced maternity/parental leave in January 1997 and returned on September 22, 1997 following this leave and her vacation. On May 13, 1997, during Ms. Reilly's leave period, Ms. Sinclair met with Ms. Reilly to discuss her upcoming workload. At that meeting a Standard Workload Form was prepared for the period September 22 to November 21, 1997. Ms. Sinclair testified that Ms. Reilly's assignment was to teach Year 2 courses and that she was not scheduled to teach from November 24 to December 19, 1997, as the students were participating in off-campus placements and Ms. Reilly was not scheduled to be involved in that aspect of the program. On May 20, 1997, Ms. Reilly signed this Standard Workload Form and indicated that it was a "Mutual Agreement of Assigned Workload" by placing a check mark in that box.

Ms. Sinclair testified that at this meeting she asked Ms. Reilly to defer her vacation until November/December during the period when she would not have a teaching assignment and to return the first day of the semester which would have been September 3rd, rather than on September 22nd. According to Ms. Sinclair, Ms. Reilly preferred to have her vacation scheduled so that she could have quality time with her child and did not agree to Ms. Sinclair's request. Ms. Sinclair then informed Ms. Reilly that she would likely have vacation during the non-teaching time in November/December 1997, and would be teaching in the summer. Ms. Sinclair did not recall Ms. Reilly responding negatively to the November/December vacation but testified that Ms. Reilly indicated that she would grieve the July teaching.

Ms. Reilly returned to work on September 22, 1997, part way through Semester 1. On October 8, 1997, Ms. Sinclair sent the following memorandum to Ms Reilly:

[Emphasis added to highlight areas of change]

Your scheduled teaching this year as we discussed are [sic]:

September 22 to November 21, 1997	=	9 weeks
January 5, to April 17, 1998	=	14 weeks
May 11 to July <b>24</b> , 1998	=	<u><b>11</b> weeks</u>
Total	=	<b>34</b> weeks

Dates available for vacation are:

November 24 to December 24, 1997	=	20 days
April 20 to May 8, 1998	=	15 days
<b>July 27</b> to August 21, 1998	=	<u>20 days</u>
Total	=	<b>68</b> days

I have scheduled your vacation for:

November 27 to December 24, 1998 [sic]	=	20 days
May 5 to May 8, 1998	=	4 days
July 27 to August 20, 1998	=	<u>20 days</u>
Total	=	44 days

If you would prefer other dates as identified above as “available for vacation” please let’s discuss.

Ms. Sinclair and Ms. Reilly met following Ms. Reilly’s receipt of the October 8th memorandum and Ms. Sinclair issued the following memorandum on October 10th:

[Emphasis added to highlight areas of change]

The following, I trust, reflects our discussion of today regarding your scheduled vacation and dates available for such.

Scheduled teaching is/will be:

September 22 to November 21, 1997	=	9 weeks
January 5 to April 17, 1998	=	14 weeks
May 11 to July <b>31</b> , 1998	=	<u>12 weeks</u>
For a total of		<b>35 weeks</b>

SWF’s for the periods of January to April, 1998 and May to July 1998 will be confirmed within the contractual time lines.

Dates available for your vacation are:

<b>November 24</b> to December 24, 1997	=	<b>23 days</b>
April 20 to May 8, 1998	=	<b>15 days</b>
<b>August 3</b> to <b>August 28</b> , 1998	=	<u><b>20 days</b></u>
Total available days		<b>58 days</b>

To allow for semester end “wrap-up”, I have scheduled part of your vacation for **November 27** to December 24, 1997 (20 days).

The remaining vacation days I have scheduled as follows:

April 27 to May 7, 1998	(9 days)
August 3 to August 20, 1998	(15 days)

This brings your total scheduled vacation to 44 days. The dates for the April to May period and dates in August may be modified within the available dates identified above. If you wish to change these let’s discuss and finalize by March 6, 1998; otherwise I will assume they will be taken as identified.

Ms. Sinclair testified that Ms. Reilly did not express any disagreement during the meeting with the substance set out in the memorandum of October 10th. However, on October 20th, Ms. Reilly responded to the October 10th memorandum with the following E-mail:

I have given considerable thought and reflection to your proposal that I take holidays in Nov/Dec. 1997, along with the other dates outlined on your memo of October 10, 1997. I cannot consent to this. I am also withholding my consent to teach during the month of July, 1998. This entire proposal is, in my opinion, clearly a violation of the Collective Agreement, and as both a union steward and the

Local Secretary, I cannot in good conscience accede to this.  
Please contact me if you would like to discuss any other possibilities.

She testified that she did not contact Ms. Sinclair earlier, as she believed that Ms. Sinclair was on vacation the previous week.

While Ms. Sinclair was not surprised to receive this correspondence, she testified that she did not anticipate that she would receive a “statement stating that she [Ms. Reilly] was withholding her consent” to teach during the month of July (since she had indicated her objection to that when it was first presented to her).

Ms. Sinclair and Ms. Reilly met again on November 5th. According to Ms. Sinclair, Ms. Reilly informed her that she needed time to update her knowledge in relation to a course she would be teaching beginning in January and to finalize marks and wrap up outstanding issues from the fall semester. As a result of their discussion, Ms. Sinclair informed Ms. Reilly that the teaching period would remain as assigned and that she would adjust the November/December vacation period according to Ms. Reilly’s suggestion. She then adjusted the starting date of this vacation period from November 27th to December 8th. Ms. Sinclair testified that there was no further disagreement.

A memorandum dated November 5th was sent to Ms. Reilly by Ms. Sinclair respecting the “Revision to Vacation Schedule”:

The following is the vacation schedule that we confirmed during our meeting:

<b>December 8</b> to December 24, 1997	=	<b>13</b> days
April 27 to May 7[1]	=	9 days
August 3 to <b>September 1</b> , 1998	=	<u><b>22</b></u> days
Total		<b>44</b> days

This allows for non-teaching time on November 24 to December 5, 1997 and May 8, 1998 for a total of 10 days.

The assigned teaching time remains as identified in the memo of October 10, 1997

It was at this point, on November 10, 1997, that Ms. Reilly filed the grievance set out above.

Following a discussion, a final memorandum respecting vacation schedule was sent to Ms. Reilly by Ms. Sinclair on March 9, 1998:

Hopefully this will be the final edition of your 1997-1998 vacation schedule.  
To date you have taken the following days:

**December 8 to December 22 and December 24 = 12 days**

As a result of the summer semester beginning May 4, 1998 and your participation in the interviews the last week of April, the vacation scheduled for April 27 to May 4, 1998 (November 5, 1997 memo attached) is not possible.

As we agreed today, the dates for the remaining days will be:

**July 27, to September 1, 1998 = 27 days**

This combined with the dates from December provides a total of 39 days. The remaining 5 days will be scheduled during the next year on mutually agreed to dates.

Ms. Sinclair testified that the memorandum reflects the agreement which she and Ms. Reilly reached earlier on March 9th.

It was agreed that the discussions between Ms. Sinclair and Ms. Reilly were amicable and professional and that both referred to calendars during their discussions after which an understanding of when Ms. Reilly's vacation would take place, was arrived at. On March 27, 1998, Ms. Reilly requested that she take the 5 vacation days she was carrying, from April 27th to May 1st, and Ms. Sinclair approved her request. The 5 days' vacation, along with the vacation scheduled in August 1998, would complete the 44 days of vacation which would have been attributable to the 1997-1998 academic year. Ms. Reilly's vacation time occurred as written in December 1997, and in April/May 1998. She had returned to work on May 4th and at the time of the hearing in June, had not taught the July program nor had she taken the vacation scheduled from August 3rd to September 1st.

## **ARGUMENT**

### **The Union**

The Board was referred to the following cases by Gavin Leeb, representing the Union:

*Fanshawe College and The Ontario Public Service Employees Union (Union),*  
1978, Unreported, (Brandt),

*Loyalist College and The Ontario Public Service Employees Union (Plummer)*, 1995, Unreported, (M. Picher),

*Sir Sanford Fleming College and The Ontario Public Service Employees Union (Shosenberg)*, 1997, Unreported, (McLaren),

Mr. Leeb stated that the sole issue to be decided is the ability of the College to unilaterally fragment or split vacation. It is the Union's position that the College cannot do that. He conceded that it was probably acceptable for the College to schedule teaching during the summer months, given that a 10% bonus is set out in the Collective Agreement. This is not a situation where the College does not have a right to agree with an employee without going through the Union and it is acceptable for a college employee and his or her manager to agree that the employee's vacation is to be split. Should the Board find that Ms. Reilly did consent, then the case is over, although, Mr. Leeb submitted, he does not believe that the evidence supports such a conclusion.

Mr. Leeb argued that the fact the College saw fit to enter into an agreement to allow split vacations with faculty in one section of the College was indicative of the College's recognition it could not split vacations, and such an inference can be drawn from its participation in that agreement. It is significant, he submitted, that the agreement is not noted as being "without prejudice", nor does it state that the agreement is not to be used in any other proceeding.

Mr. Leeb then considered the language of the Collective Agreement noting that Article 15.01 (*supra*) refers to "a vacation of two months", not 'vacation entitlement of two months' or 'two months to be scheduled by the College'. This interpretation is supported by the reference in Article 15.02 (*supra*) to "vacation period", not 'periods'. All phrases, he submitted, are singular. Article 22.01 E (*supra*) cannot force an employee to take "vacation entitlement" concurrently with leave, and Article 11.03 (*supra*) defines the normal vacation period in an implicit way:

The academic year shall be ten months in duration and shall, to the extent it be feasible in the several colleges to do so, be from September 1 to the following June 30.

A reading of all the articles together, Mr. Leeb submitted, says that an employee can, through rotation or consent, be required to work in July or August and that management has the right to schedule the vacation. What the College cannot do is unilaterally break up that vacation period. If the College needed the Grievor to teach in July, then she should have been given the two-month vacation period at another time, unless she consented to break it up. The College can determine when the two-month vacation period is to be taken, however, management cannot break that two-month period up if an employee insists or does not agree since the parties have agreed that it should be “two months solid”.

Mr. Leeb cited the *Fanshawe College* case (*supra*) in which the Board determined that the month referred to in conjunction with vacation was “a calendar month” and that the two-month vacation period “is entitled to be enjoyed uninterruptedly”. It was Mr. Leeb’s view that the contractual interpretation issue had been fully and correctly resolved by the decision in the *Fanshawe College* case and that, were it not for the Supreme Court of Canada decision in *Isabelle v. Ontario Public Service Employees Union* (1981), 122 D.L.R. (3d) 385 (S.C.C.), in which the Court concluded that

the statute and the agreement itself recognize, by their terms, that differences will arise which do not necessarily involve all colleges and all their employees, and they have left grievances to be addressed to individual colleges... ,

he would be in a position to bring a preliminary motion of *res judicata*. In a practical sense, he argued, all of the principles underlying the notion of *res judicata* - the need for stability, consistency and predictability, and the basis on which collective agreements are negotiated in future still pertain. Mr. Leeb submitted that even though the employer is not the same, the Collective Agreement is, and it does not make sense that at Fanshawe College, full-time faculty would be entitled to an uninterrupted two months while at Loyalist College, they would not.

Mr. Leeb suggested by way of remedy that the only way to make Ms. Reilly whole would have been to order that she be on vacation during July, the month she had been scheduled to teach. The periods during which Ms. Reilly was off in December, April and May, were not vacation periods, and while the College may say that she is getting paid twice, the Grievor should not be

out, due to the actions of the College. The entitlement is much greater when one has it in a single, uninterrupted period, rather than in “bits and pieces”, he submitted. If this is not possible, and Mr. Leeb recognized that it may not be, he put forward that an appropriate remedy would be the 10% bonus as the only proper vacation for Ms. Reilly was in August. A further alternative would be to remit the matter to the parties to resolve and remain seized.

## **The Employer**

Douglas Gray, Counsel for the College, referred the Board to the following cases excerpts and cases:

Brown and Beatty, *Canadian Labour Arbitration, Third Edition*, Canada Law Book Inc., Aurora, Ontario; Section 8:3240- Scheduling vacations - at page 8-61.

*Ontario Public Service Employees Union ( Membury) and The Ontario Council of Regents for Colleges of Applied Arts and Technology (Conestoga College)*, (1976), Unreported, (O’Shea),

*Seneca College and The Ontario Public Service Employees’ Union*, 1977, Unreported, (H.D. Brown).

Mr. Gray submitted that on the merits, the College had the right under this Collective Agreement to schedule the vacation in the way it did, and in the alternative, the College scheduled the vacation with the consent of the employee and Ms. Reilly, has no cause to complain.

Mr. Gray submitted that the Union’s case relies entirely on the award of Arbitrator Brandt in the *Fanshawe College* case (*supra*) when, if effect, there is more jurisprudence on this matter prior to the *Fanshawe College* award which may not have been drawn to the attention of the Board in that case. The Supreme Court of Canada in the *Isabelle* decision (*supra*) referred to the earlier cases with approval, he noted and the Board should consider the persuasive value of these cases, along with the award of Arbitrator Brandt. The persuasive value of the former cases should outweigh, Mr. Gray submitted, that of the latter. Mr. Gray stated that there are two conflicting lines of authority and the Board, in the case before it, is entitled to select the more persuasive in terms of the Collective Agreement as a whole.

Mr. Gray then considered the language of the Collective Agreement. He noted that Articles 11:03 and 15.00 (*supra*) are usually interpreted together. Article 11.03 which refers to the contractual academic year as opposed to the practical student academic year, says that year-round operation is permitted and while noting that the teaching year is generally from September 1st to June 30th the Collective Agreement contemplates that this is not always the case, and allows for teaching during the months of July and August. Further, it is obvious that the scheduling of a faculty member's vacation is dependent on his or her teaching assignment; that is, if the work must be allocated at different times during the year, the vacation has to be slotted around work requirements.

Mr. Gray argued that Article 15.00 (*supra*) can admit of more than one interpretation. "A vacation of two months as scheduled by the College" could mean a single block of time, or, without doing great violence to the language, it could mean that the vacation must come to a total of two months. Faculty teaching in the twelve-month programs can, although not in the situation at hand, end up with a vacation period of 1 month with a 10% bonus, and the final paragraph in Article 15.01 B which sets a maximum continuous teaching period of 12 months, contemplates that a member of faculty could be required to teach 12 continuous months. In other words, the parties have contemplated that the scheduling could result in a faculty member getting a vacation which is not a two-month block. In Article 15.02, Mr. Gray submits, there is a mixture of plural and singular and one finds therein, "vacations" used in the plural

**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. - [Emphasis added]

The College cannot assign "bits of vacation throughout the year", since the Collective Agreement states that the College is to "notify employees of their vacation period" (singular) whereas the plural was used previously in Article 15.02. The language of Article 15.00, Mr. Gray argued, contemplates a broader interpretation than a single block of two months for vacation, and since vacation schedules might be changed, it would seem odd that the parties would only have

contemplated a single block of two months if the Article permitted changes to the vacation schedule to meet a schedule requirement that was beyond the control of the College. The language contemplates an entitlement of two months after the specific factors - requests and seniority - set out in Article 15.02 are taken into account.

Mr. Gray submitted that generally, it is the right of management to schedule the vacation of employees subject to the overriding requirement that the scheduling be done in good faith to manage the enterprise. If management has a right to schedule vacations it then also has the right to divide up the vacation and schedule the vacation at a time which is convenient to it. The Collective Agreement does not mandate a two-month block subject to the employee's veto.

Mr. Gray referred the Board to the *Conestoga College* case (*supra*) in which the Board chaired by Arbitrator O'Shea, found that under Article 5.01 (15.00) (as in *Fanshawe College*)

the College was entitled to schedule the grievor's vacation at any time during the calendar year pursuant to the provisions of Article 5.01 of the Collective Agreement.

He then directed the Board to the *Seneca College* decision in which Arbitrator Brown found that

There is, in Article 5.01 [15.00] no restriction on the Employer to schedule vacations, and specifically the words used by the parties are "as scheduled by the College" with regard to the vacation entitlement. This article sets out the entitlement of the teaching faculty to vacation, but does not restrict the scheduling of that vacation as suggested by the Union, to any period, and while the College must recognize and confer upon the teaching faculty who have completed one full academic year of service the two month vacation, the scheduling is left to the College both under Article 7 [6.00] and Article 5 [15.00].

...

We are satisfied under the terms of Article 5.01 [15.00] that the College's right to schedule vacation during the academic year is not limited to periods following the completion of that year but may do so at any time a faculty member has entitlement to vacation. ... As has been found, the College has the right to schedule vacations at any time during the calendar year.

Mr. Gray submitted that according to the Brown decision (*Seneca College*), the College has the unilateral right to schedule vacation time for its faculty and according to the Brandt decision (*Fanshawe College*) it must schedule a two-month block of vacation time and the employee has a veto. He noted that the Supreme Court in *Isabelle* referred to the Brown but not the Brandt decision. It was Mr. Gray's opinion that the

Brown decision is much more in line with the ordinary meaning of words and the overriding language of scheduling, the needs of the program, the requests of the employee and the management rights clause.

Respecting consent, Mr. Gray submitted that the Grievor's wishes were taken into account several times during the vacation scheduling process. Ms. Reilly did consent to the scheduling of her vacation, her objection centred around the issue of teaching in July. He stated that the whole course of Ms. Reilly's conduct, with the exception of Ms. Reilly's E-mail of October 20th directed to Ms. Sinclair, signified that the vacation scheduling was acceptable.

As to the issue of remedy, Mr. Gray reminded the Board that any remedy must be designed to make the Grievor whole not to compensate her doubly and that by the end of August, Ms. Reilly will have had her total vacation entitlement for 1997/1998. The most she could get would be a declaration as to scheduling.

### **Union Reply**

Mr. Leeb stated that the Union was not saying that the College was unreasonable in what it did, but, in this case, the issue is not one of reasonableness but rather, whether or not the Collective Agreement provides for a two-month uninterrupted vacation. He views the differences in the cases, not as conflicting lines of authority on the same questions, but rather, a matters which are distinct, one from the other. Finally, Mr. Leeb was emphatic in stating that there was no evidence whatsoever of the Grievor's having consented. She was, rather, making the best of a bad situation, and further, she informed the Employer of errors in the schedule. He submitted that the Grievor had put the Employer on notice from the outset that she was intending to grieve the July assignment, and later sent an E-mail stating that she was not consenting.

### **DECISION**

The evidence presented testifies to the consensual approach that the parties have taken at Loyalist College to the scheduling of vacation. Management and faculty members have a history of successfully negotiating a variety of vacation schedules which have achieved a mutually acceptable balancing of the needs and interests of the students, the programs, the College and the

individual faculty members.

At the time of the filing of Ms. Reilly's grievance, in November 1997, there were three issues for her:

- whether or not the Employer had the right to schedule her to teach in July without her consent;
- whether or not the Employer had the right to schedule her vacation during the academic year; and
- whether or not she was entitled to an uninterrupted two-month vacation period.

If the College were required to grant her a two-month vacation period, outside the academic year, that is, during July and August, the College would then, as she saw it, not be able to assign her to teach in July as this would interfere with her vacation entitlement.

At the hearing the parties agreed that

- the Employer has the right, under Article 11.03, to assign Ms. Reilly to teach during the months of July and August as well as throughout the normal academic year; and,
- the Employer has the right under Article 15.01A to schedule Ms. Reilly's vacation, outside the months of July and August, that is, at any time during the academic year as well as during the months of July and August.

The Board notes that under Article 6 the College has the right to "direct its personnel" , and "determine complement... the scheduling of assignments and work ... and all other rights and responsibilities not specifically modified elsewhere in this Agreement". The Board confirms the

parties' interpretation respecting the assignment of teaching during the months of July and August and the scheduling of the vacation. It notes that if a July/August teaching assignment is not scheduled with the consent of the employee, then it must be scheduled on a rotational basis.

Having established that Ms. Reilly could properly be scheduled to teach during the month of July, and that the Employer could schedule her vacation time outside the months of July and August, the question remaining is whether or not Ms. Reilly is entitled to have that two-month period uninterrupted, or from the Employer's perspective, whether or not the College is entitled to fragment her two-month's of vacation time, without her consent.

The Board accepts that a decision rendered in the case of another College does not bind the other Colleges in the system, and that this has been confirmed by the Supreme Court of Canada in its decision in *Isabelle*, (*supra*). However, the Board notes that in the case of interpretation of the central Collective Agreement, there is a certain value in a consistency of interpretation of the language of that Collective Agreement.

The Board has considered the language of the articles of the Collective Agreement which address vacation, and has determined, independent of the *Fanshawe College* decision (*supra*), that the uses of the term "vacation" result in the conclusion that the two-month vacation period of the individual is to be uninterrupted, unless otherwise specified. In arriving at this conclusion, the Board has reasoned that its conclusion must be based on the norm rather than the exceptions. Article 11.03 states that the normal "academic year shall be ten months in duration" and shall, to the extent feasible, be from September 1, to June 30th. Article 15.01 A states that a full-time employee who has completed one full academic year's service", that is, ten months, is to receive "a vacation of two months", and the ten months plus the two months constitutes a full year.

Article 15.01A refers to "a vacation of two months"[singular]; Article 15.01 B refers to "a vacation of one month" [singular], and, "without a vacation of at least one month" [singular].

Article 15.02 refers to “..scheduling vacations” [plural], in conjunction with the “requests of employees” [plural], which the Board interprets as referring to the numerous individual vacations of the group of employees, rather than segments of the vacation of individual employees. The plural is also used in the same article - “notification of vacation periods [plural], vacation schedules” [plural] but, once again, the plain meaning of the language, leads to the interpretation that the plural is used to refer to the individual vacations of all the employees, rather than the segmented vacation periods of individual employees; The reference to “The College will notify employees [plural] of their vacation **period** [singular]”, is interpreted by the Board to mean that each individual has a single vacation period. The only wording which might lead the Board to conclude that an individual might have more than a single vacation period is found in Article 15.02 “the commencement of the vacation period concerned”. This could be interpreted as referring to an individual employee having several vacation periods, or to a vacation period of one month or two months. It would also include whatever vacation periods the parties have negotiated and the individual employees have consented to. The point here is the notice time, and the notice would be the same whether the individual employee is scheduled for a two-month vacation, or whether the College and the individual employee have agreed to a fragmented vacation which would result in an employee having a number of vacation periods throughout a year. It does not, however, on balance, alter the Board’s conclusion that, unless there is agreement that a vacation will be fragmented, the full-time faculty member not covered by Article 15.01 B, is entitled to a two-month uninterrupted vacation period.

Faculty who teach full-time during the normal academic year from September to June will, where feasible, have their vacation during the July/August period. However, under Article 15.01B, providing “the teacher” is teaching in a “continuous 12 month program” he or she is not entitled to the two-month vacation period. Instead, he or she is “entitled to a vacation of one month, as scheduled by the College” plus “a bonus of ten percent of [his or her] annual salary for the additional eleventh month of teaching assignment” or “a pro-rata amount of the ten percent bonus” when “assigned to teach in the eleventh month for less than a full month”.

If Ms. Reilly's assignment to teach in the eleventh month were part of "a continuous 12 month program" she would then be covered by Article 15.01 B and would be entitled to a vacation of one month plus a bonus. However, it is the Board's understanding, that her assignment to teach in July 1998 was not part of "a continuous 12 month program", and therefore, she was entitled to an uninterrupted vacation of two-months at a time scheduled by the College.

The Board recognizes that the uninterrupted two-month vacation period limits the flexibility of the College to schedule assignments and vacations but the situation will arise only in cases in which an individual employees fails to request a fragmented vacation or to consent to a vacation schedule proposal. For many employees, it is advantageous to have the possibility of a fragmented two-month vacation, and that must be one of the reasons that the parties have had such a successful history of negotiations around this issue.

The grievance succeeds in part. The Board has concluded that it should limit its remedy to a declaration and declines to award further vacation time or monetary compensation. This is based on the Board's understanding that the Employer was acting in good faith and that Ms. Sinclair was following a practice which was well established, and, on the assumption that Ms. Reilly will have had the total requisite vacation time by the time this decision is issued.

Dated at \_\_\_\_\_

this \_\_\_ day of \_\_\_\_\_

---

Helen .S. Finley, Chair

---

Derek Blackadder, Union Nominee

Dissents (“Decision” attached)  
Robert J. Gallivan, College Nominee

---

---

loyalist.awl

