

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

Union

- and -

GEORGE BROWN COLLEGE

Employer

RE: GRIEVANCE OF BRIAN RICHMOND #00D156

Before: M.G. Mitchnick - Chair  
Sherril Murray - Union Nominee  
Rene St. Onge - Employer Nominee

Appearances:

For the Union: Alick Ryder - Counsel  
Brian Richmond

For the Company: Michael Doi - Counsel  
David Ivany

Hearings in this matter held at Toronto on October 12, 2000, March 7, 2001 and January 23, 2002.

## AWARD

This is a grievance brought on behalf of Mr. Brian Richmond, claiming that the College has improperly declined to continue certain benefit contributions while Mr. Richmond was off work on Long-Term Disability. Mr. Richmond has suffered from what is characterized as a mental form of disability and was off work first on “short-term disability” from March 12<sup>th</sup> to November 30<sup>th</sup>, 1998, at full salary and benefits. He was then on “long-term disability” from December 1<sup>st</sup>, 1998 to April 22<sup>nd</sup>, 2000, during which period the College, in accordance with its practice, discontinued its contributions toward the cost of benefit insurance. Those contributions are otherwise set out in the collective agreement as follows:

### **Extended Health Plan**

**19.01** The College shall pay 100% of the billed premium of the Extended Health Plan for employees covered thereby and subject to the eligibility requirements of the Plan.

### **Dental Plan**

**19.03 A** The Colleges agree to pay 100% of the billed premiums of an insured dental plan (the Plan) based on the Ontario Dental Association (ODA) schedule for the immediately preceding year.

**19.03 B** Coverage shall apply, subject to the eligibility requirements and conditions of the Plan, to all eligible full-time employees on the active payroll and in the active employ of the College following the completion of six months continuous service during the probationary period . . .

The Dental Plan contributions, as can be seen, are explicitly stated to be only for

employees “on the active payroll and in the active employ of the College”. The Extended Health Plan, on the other hand, is limited to employees “covered thereby and subject to the eligibility requirements of the Plan”. The Plan itself states:

Termination of employment - occurs on the last day of the month in which a person

. . . .

(b) ceases to be actively at work on full time . . . except that the Policyholder, acting in such a manner as to preclude individual selection, may deem that employment continues

The College does take advantage of that latter discretion offered it, to allow individuals on LTD who wish to continue their coverage to do so by paying the cost of the applicable premiums on their own.

It is the Union’s first argument that Article 19.01, at least, is unqualified by any words like “active payroll” which appear in 19.03, and that it therefore applies *on its face* to all persons who continue to be employees of the College. However, this is a centrally-bargained collective agreement, and the practice (and provisions) at this College have been the same at every other College for more than twenty years. And the Union made exactly this same argument, unsuccessfully, at Loyalist College before arbitrator MacDowell in 1994. In his award dated February 17<sup>th</sup>, 1994, Mr. MacDowell noted, by way of further background:

Until 1981, the support staff collective agreement contained the same limiting language as the academic collective agreement. However, in the 1981 round of bargaining (for the 1981-82 agreement) the support staff bargaining team obtained an amendment to the long-term disability provision, to provide specifically for the payment of certain benefit premiums for long-term disability recipients. For support staff employees they have been paid ever since.

The details of the 1981 amendment need not be reproduced here. It suffices to say that the academic bargaining team did not press for a similar change to the language of its collective agreement. It is also interesting to note that, in the 1981 round of bargaining, the academic staff bargaining team and the support bargaining team had the same spokesperson.

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. . .

In summary, whether or not the collective agreement language is “ambiguous”, there is no doubt about the interpretation that the Colleges have adopted over the years, nor has there been anything surreptitious about this policy. The Colleges have followed the practice set out in the benefits administration manual, which is not only available to anyone who cares to look at it, but is also available to union and employer officials on the Joint Insurance Committee who have the responsibility to consider insurance questions.

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As far as the language of the collective agreement provision itself, Mr. MacDowell noted:

Article 22.02 does not create an open-ended obligation to pay premiums in all circumstances, or for all persons who might be considered “employees” under the terms of the collective agreement. The employer is only obliged to make premiums for “employees covered by [the Plan] and subject to the eligibility requirements of the Plan”. We do not think that we can ignore this limiting language, which takes one inevitably to the terms of the Plan.

Had the parties intended to make a particular benefit available to everyone, regardless of employment status, they could have used language like that found in the support staff agreement. Had the parties intended to make a benefit available to all “employees” in a general sense, they might easily have done so without any reference to the Plan, its coverage, or eligibility requirements. But they did not do that.

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Thus Mr. MacDowell concluded:

In a grievance such as this, the onus is on the union to establish that the employer has contravened some article of the collective agreement. We are not persuaded that the union has met that onus in this case. On the basis of the evidence and argument put before us, we must conclude that the employer has complied with its obligations in Articles 22.02, 22.06, and 22.07, as defined and limited by the eligibility requirements in the plan.

Nothing new on this point has been put forward by way of argument or evidence in the present case, and the passage of time that has now elapsed since Mr. MacDowell expressly wrote about it provides further support for the position that the College has relied upon. If Mr. Richmond is to succeed here, therefore, it must be on some other ground.

And a new and further ground for upholding a claim for both Extended Health and Dental coverage is in fact put forward in this case. Mr. Richmond’s wife is a lawyer, and in perusing his wife’s O.R.’s, Mr. Richmond came across the case of *Orillia Soldiers’ Hospital v. Ontario Nurses’ Association* (1999), 42 O.R. (3d) 692. Mr. Richmond also had a copy of the College’s Policy with respect to the treatment of benefit coverage for persons on Workers’ Compensation, and comparing that with the treatment of employees

on LTD, felt that the College practice was discriminatory. That WCB Policy provides in its material part:

The College will maintain all benefits in place at the time of the accident for a period of one year. Benefit premiums will continue to be shared between the College and the employee on the same basis as regular employment.

It is common ground that this provision came into the College's Policy in 1991, as a requirement of the newly-passed amendments to the *Workers' Compensation Act*. Notwithstanding that statutory source, the Union puts forward the argument, initiated by Mr. Richmond, that to treat employees who are absent due to work-related causes differently from those absent due to non-work-related causes is "discriminatory", within the meaning of the *Ontario Human Rights Code*. Obviously the College has to comply with the dictates of the *Workers Compensation Act*, the Union acknowledges, but it submits that it is incumbent upon it to do so in a way that does not create discrimination. The obvious way to do that here, the Union submits, is to extend the premium coverage for both the Extended Health Plan and the Dental Plan for one year for all employees absent from the workplace due to a disability, so as to line up with the Policy of the College as it now pertains to Workers' Compensation cases.

With all the developments currently taking place in the Human Rights sphere, it is perhaps understandable that the grievor may have reacted in the way that he has to the difference between the College's "Workers' Compensation" Policy, and its longstanding

policy with respect to other forms of disability absence lying outside the scope of what is now the *Workplace Safety and Insurance Act*. His focus in doing so is a very narrow one, however, and the board is in agreement with the College that it is inappropriate to select one (indeed minor) element of what is a broad, comprehensive and indeed significantly-constraining legal scheme, and claim “discrimination” because that one element alone is not made available to individuals with disabilities generally.

It may be useful to begin by noting the legal issues that do *not* arise for the board in the present case. The “*Meiorin*” case, *British Columbia and Service Employees’ Union* (1999), 176 D.L.R. (4<sup>th</sup>) 1 (S.C.C.) is a strong statement about discrimination and the duty to accommodate, but must be recognized as dealing with the issue of “rules” or “standards” being imposed by employers as qualifications to occupy certain jobs. The case that deals expressly with issues of continued “compensation” for employees unable to present themselves at work is in fact that noted by Mr. Richmond, *Ontario Nurses’ Association and Orillia Soldiers’ Hospital* (1999), 42 O.R. (3d) 692; leave to appeal denied 169 D.L.R. (4<sup>th</sup>) vii, 252 N.R. 106n. There the Court of Appeal effectively endorsed the view that it was not “discriminatory” to tie compensation to the performance of work. That is not being challenged before us in the present case. The argument made to the employer in the present case is simply: “You do it for one group (employees absent on Workers’ Compensation); you have to do it for the other”. That is the sole issue that this board must now address.

The Court in *Orillia Soldiers* did, it should be noted, comment, at page 705:

On its face, discrimination would exist if the employer provided different levels of compensation for work because of handicap. Likewise, it would constitute discrimination if the employer provided different levels of compensation for not working because of handicap.

The Court was not in that passage, however, purporting to address the specific case of comparing “compensation” available to employees off on Workers’ Compensation with that available to employees off due to other disabilities; the Court earlier in its decision explicitly *refused* to consider that argument because it had not been made by ONA at the levels below. What the Court was referring to specifically, as the context indicates, were cases like *Gibbs v. Battlefords District Cooperative Ltd.*, [1996] 3 S.C.R. 566, 140 D.L.R. (4<sup>th</sup>), and *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4<sup>th</sup>) 321. In *Brooks* the Plan benefits available to employees absent due to other health-related causes were denied to employees on absences related to pregnancy. In *Gibbs*, a lesser level of benefits was provided for employees suffering from a “mental” handicap than those suffering from a “physical” one. Those conclusions were arrived at, as the Court in *Gibbs* put it, on the basis of the following analysis:

As set out in *Brooks*, in determining whether an insurance plan discriminates, it is first necessary to determine the true character or underlying rationale of the plan in the circumstances of the particular case. As noted above, discrimination should not be found on the basis of a comparison between the benefits given to employees pursuant to different insurance purposes.

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Applying that test, the Ontario Court of Appeal in *War Amputations of Canada* (1997), 26 O.R. (3d) 709, decided that it was not “discrimination” for the *Pension Act* to provide less favourable pension treatment to surviving “spouses” on the death of their veteran husband, than it does to surviving veterans on the death of their spouse. The full context of the differing benefits, and their history, was a factor that could not be ignored.

The fundamental differences between the two classes of “disabled” employees clearly go much further here. As Mr. Doi has amply articulated, the Workers’ Compensation system has been in place in this province for almost 100 years, providing a comprehensive and mandatory legal regime for dealing with, in the main, the issue of compensation for employees temporarily or permanently disabled as a result of causes attributable to the workplace. As the current “Guide” to the Workplace Safety and Insurance Board puts it:

Fundamental to the system was (and still is) an historic compromise in which workers give up the right to sue for their work-related injuries, irrespective of fault, in return for guaranteed compensation for accepted claims.

In the late 70's Paul Weiler was commissioned by the government to study the existing system and recommend any needed improvements due. One of the changes Mr. Weiler identified in his 1980 Report was the need for some enhanced benefit coverage under the scheme while the injured worker was drawing the *Act*'s fixed level of income replacement, and that recommendation culminated in section 5a of Bill 162, the 1989

amendments to the *Workers' Compensation Act* [now re-drafted as section 25 of the *Workplace Safety & Insurance Act, 1997*]. The 1989 provision (upon which the Ontario Community Colleges, *inter alia*, were required to act) stipulated:

**5a.** - (1) An employer, throughout the first year after an injury to a worker, shall make contributions for employment benefits in respect of the worker when the worker is absent from work because of the injury.

(2) For the purpose of determining a workers' entitlement to benefits under a benefit plan, fund or arrangement, a worker shall be deemed, for one year after the date the injury occurred, to continue to be employed by the worker's employer on the date of the injury.

(3) If the Board finds that an employer has not complied with its obligations under subsection (1), the Board may levy a penalty on the employer to a maximum of the amount of one year's contributions for employment benefits in respect of the worker.

(4) The employer is liable to a worker for any loss the worker suffers as a result of the employer's failure to make the contributions required by subsection (1).

(5) Contributions under subsection (1) are required only if,

- (a) the employer was making contributions for employment benefits in respect of the worker when the injury occurred, and
- (b) the worker continues to pay his or her contributions, if any, for the employment benefits while absent from work . . . .

That is the specific provision that the grievor seeks to emulate here. Not surprisingly, the notion of his employer being required to extend his benefit coverage for a year is attractive to him. But, as discussed, it is only one small part of a comprehensive,

integrated statutory scheme, with both upsides and *downsides* to the employees who fall under it. It seems clear to the board that that one single element (and there may be other elements of the statutory scheme that, on an isolated basis, would be attractive) cannot be extracted out of the whole package of rights and obligations on the basis of “equal” treatment. As articulated in *War Amps* and the cases it refers to, the whole context of the two existing legal schemes would have to be compared and considered. And the real issue would be whether the government can create two distinct legal regimes, one setting a wide array of rules for dealing with disabilities arising from the workplace, and the other, by default, for all other forms of disability. In the present case the grievor’s disability may be such that he would have no one to potentially sue in any event. But there would in that “other” category be cases of accident where that would *not* be the case. If it were found that one had to expand the scope of the existing “Workers’ Compensation” scheme to other individuals or employees, what would its new parameters be?

The board does not hazard a guess in that regard. If the Union, or any other affected body were to formulate a decision that the whole “Workers’ Compensation” scheme creates an unlawful duality between classes of disabled employees in this province, it is free to mount that challenge in some case in the future, upon due notice to the government so that it may come forward and defend its legislation. As for the present narrowly-focused case, however, we do not find that the College’s forced adherence to section 25 of the *Workplace Safety & Insurance Act*, supplementing the Act’s income-

protection levels with the continuation of employer benefit-contributions for a year, establishes “discrimination” with non-*WSIA* employees, and the grievance must be dismissed.

Dated at Toronto this 8th day of May, 2002.

“M. G. Mitchnick”

Chairman

I Dissent

“Sherril Murray”

Union Nominee

I Concur

“Rene St. Onge”

Employer Nominee