

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ALGONQUIN COLLEGE OF APPLIED ARTS AND TECHNOLOGY
(Hereinafter referred to as the College)

AND

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

AND IN THE MATTER OF THE GRIEVANCES OF TAMARA RUDEKNO AND TED SCHNARE

BOARD OF ARBITRATION: Gail Brent
W. D. Shuttleworth, College Nominee
Ron Cochrane, Union Nominee

APPEARANCES:
FOR THE COLLEGE: Corinne F. Murray, Counsel
Gladys McRae, Personnel Assistant
John Hamilton, Dean

FOR THE UNION: Ian Roland, Counsel
F. Begin
G. Hancock
T. Rudenko
T. Schnare

Hearing held in Ottawa on March 29, 1982.

DECISION

The matter before this board arises out of the grievances of Tamara Rudenko and Ted Schnare (Ex. 3) filed on May 20, 1981. The grievance was filed as a group grievance, but it is clearly the grievances of two individuals who were affected by the same procedure and has been dealt with in that manner by the parties. The essence of the grievances concerns the manner in which the seniority of the two teaching masters was calculated.

The facts which were put before us are not the subject of any dispute. The issue with which the board must deal before the merits can be considered is whether it has jurisdiction to determine the merits,

given the time limits in the collective agreement.

Preliminary Objection Regarding Timeliness

Ms. Rudenko was first employed as a sessional teaching master on June 6, 1977. Mr. Schnare began as a sessional teaching master in February, 1979. Both of them were employed to teach in the Adult Basic Education Department. The Director of that department was, at all material times, Mr. Tom Evans. It is apparent from the evidence that both of the grievors were under the impression that as soon as they had accumulated twelve months of service the College would make some sort of decision about their continued employment.

In May, 1979 both of the grievors had a meeting with Mr. Evans to discuss the method of calculation of a month of work for the purposes of determining their service. At that time Mr. Evans made it known to them that there was some concern about reaching the plateau of twelve months because the College would then have to make a decision about whether to hire them or to terminate their employment. He told them that it was possible, given the method of calculation used by the College, to work over fourteen days in a calendar month without having that month count toward their service time. The method of calculation used by the College involved not counting split weeks (weeks which straddled the end and beginning of months) and not counting weeks in which there were fewer than thirteen hours worked. Both of the grievors accepted Mr. Evans statements as correct.

In September, 1979 both of the grievors met with Mr. Evans again, and the method of calculating service time was explored again. After that meeting Mr. Evans issued a memorandum (Ex. 24), dated October 9, 1979, which set out the method of calculation used to determine service

time. Both the grievors accepted this as an accurate statement of the correct method of calculation.

After that meeting both of the grievors checked their records from time to time in order to determine the number of months which were credited to them. They both saw that the months were being credited according to the method described by Mr. Evans, and they accepted that as accurate.

On November 11, 1980 Ms. Rudenko received a memorandum (Ex. 13) which read as follows:

Tamara Rudenko joined the establishment staff on September 26, 1980. However, because she was previously employed on a temporary basis, she is entitled to credit towards the two year probationary period, in accordance with the Memorandum of Understanding.

A payroll check indicates that Tamara Rudenko has earned 16 months credit. Therefore the date for regular status review will be May 26, 1981.

Ms. Rudenko said that she was surprised about the sixteen months credit; however, she was assured by the College that that was correct. She did not question the matter any further and did not contact the Union.

On November 11, 1980 Mr. Schnare received a memorandum (Ex. 19) identical in form to that received by Ms. Rudenko. That memorandum informed him that he had joined the establishment staff on September 26, 1980, that he had earned twelve months credit, and that his regular status review would be on September 26, 1981.

Mr. Schnare accepted this memorandum as correct and did not make any inquiries of the College or the Union concerning the calculation of his credits or the change in his status.

In May, 1981 both of the grievors were informed that they were being bumped. They both went to the Union to inquire about their rights

as probationary employees in a bumping situation. In the course of discussing the bumping situation with the Union, it became apparent to the Union and, for the first time, to the grievors that there had been an error in the calculation of their service. That resulted from the method of calculation employed by the College, which was realized, for the first time, to be based on a misapprehension concerning the days to be counted toward service time.

The error was first discovered on May 14, 1981 and on May 15, 1981 it was brought to the College's attention. On May 19, 1981 the grievors each received an identical memorandum from the College (Ex. 9) which indicated that the same method of calculation used for all sessional employees had been used to calculate the grievors' service and that no error had been made. On May 20, 1981 the grievance was filed.

The applicable portions of the collective agreement are set out below:

1.01 The Union is recognized as the exclusive collective bargaining agency for all academic employees of the Colleges engaged as teachers save and except teachers ... employed on a sessional basis.

9.02 Complaints

It is the mutual desire of the parties hereto that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, he shall discuss it with his immediate Supervisor within twenty (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 his immediate Supervisor an opportunity of adjusting his complaint. The discussion shall be between the employee and his immediate Supervisor unless mutually agreed to have other persons in attendance. The immediate Supervisor's response to the complaint shall be given within seven (7) days after the discussion with the employee.

9.05 General

(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;

Appendix III
SESSIONAL EMPLOYEES

1(a) A sessional employee is defined as a full-time employee appointed on a sessional basis for up to twelve (12) full months of continuous or non-continuous accumulated employment in a twenty-four (24) calendar month period.

(c) If a sessional employee is continued in employment for more than the period set out in paragraph (a) above, he shall be considered as having completed the first year of his two (2) year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be twelve (12) full months of continuous or non-continuous accumulated employment during the immediately following twenty-four (24) calendar month period.

There is no doubt that the grievors relied on the statements of someone in authority in the College in order to calculate their service credits, and there is no doubt that the reliance continued up to and including May 14, 1981 when they consulted the Union on an entirely different matter. There is also no doubt that the College official was, at all material times, honestly and faithfully relating the method of calculation used by the College. Finally, there is no question that the College was mistaken in its method of calculation and that it was an honest mistake based on a misinterpretation of the way in which days should be credited towards a month's service.

It was completely reasonable for the grievors to rely on Mr. Evans and to accept his statement concerning the method of calculation. Most employees in their position would probably have done just as they did.

Because of the wording of Article 9.05(a) of the agreement, it is

necessary for this board to determine when the twenty day period referred to in Article 9.02 began to run.

It is clear that, if the matter is viewed as non-continuing, the event complained of occurred more than twenty days before the grievance was filed. In this case the grievors were not actually aware of any breach of the collective agreement which affected them until May 14th, when they began to discuss their service with the Union. Although it was natural for the grievor's to depend on Mr. Evans to know how the College calculated their service (which he did), and on the College to apply the correct method of calculation to their service (which it did not), the College did nothing to prevent the grievors from discovering the mistake, and, in fact, did not realize that it was doing anything wrong until some time after May 15, 1981. Indeed, anyone with a collective agreement who put his or her mind to the question could have discovered that there was something wrong with the College's method of calculation or at least have questioned the College's method.

The first time that the grievor's could possibly have been in a position to question effectively the calculation and to have the situation rectified through the grievance procedure was November 11, 1980, when they were both informed for the first time that they had passed the first year of their probationary periods. It was at that time that they would be able to claim that the collective agreement applied to them pursuant to the provisions of Appendix III. Prior to that they would have been excluded from the bargaining unit and would not have been able to invoke the grievance procedure of Article 9. That was also the first time that they would have been able to seek the help and advice of the Union in pressing their claims. Despite the fact that

this was an innocent misunderstanding on the part of everyone concerned, it would be manifestly unfair to consider any time before the grievor's had access to the grievance procedure as running against them.

Despite the fact that the grievors relied on the representations of College officials that the service was being calculated according to the correct method, I am reluctant to hold the College to be an absolute guarantor of the accuracy of its opinion as to how the collective agreement should be interpreted, to the extent that time limits should not be applied in the normal fashion. Whenever any party puts forth its view of the meaning of a clause in a collective agreement, that party, and anyone relying on it, takes the risk that the interpretation may be wrong. It is the sort of normal risk which must be run every day in order to administer a collective agreement. If the interpretation is admitted or found to be wrong, then there will be a correction in the future, and there may also be some retrospective relief. The mere fact that an honest mistake in interpretation has been made by one of the parties does not, of itself, mean that the other provisions of the collective agreement, such as time limits, should not be applied.

The situation would be quite different if there were some act on the part of the College which prevented the grievors from discovering the facts and assessing the propriety of the College's action. While it might be reasonable for the grievors to accept the statements made to them, it does not follow that they were thereby prevented from ascertaining whether the College was correct or from testing the correctness of the College's method.

It is agreed that this collective agreement contains mandatory time limits and that the Colleges Collective Bargaining Act does not contain any provision which gives the board the discretion to vary time limits.

Given the facts in this case, it is concluded that the earliest time when the circumstances ought reasonably have come to the grievor's attention was on November 11, 1980 when they were informed of their changed status and the provisions of the collective agreement were made applicable to them.

That does not end the matter of jurisdiction, though. Matters of this sort have been traditionally viewed as continuing grievances by arbitrators and boards of arbitration. At page 79 in Canadian Labour Arbitration (Brown and Beatty) the authors state:

Where the violation of the agreement is of a continuing nature, compliance with the time limits for initiating a grievance is not as significant unless the collective agreement specifically provides that the grievance must be launched within a fixed period of time. Continuing violations are ones which involve repetitive breaches of the collective agreement rather than simply a single or isolated breach. Where it is established that the breach is a continuing one, it has held that the failure to initiate it within the stipulated time from the date of its first occurrence will not render it inarbitrable. However, the relief or damages awarded in such circumstances may be limited by the time limit. Thus, where a grievance claimed improper payment and the grievance was allowed, the award limited the damages recovered to five full working days prior to the filing of the grievance which was the applicable time limit for initiating the grievance.

This is the sort of violation of the collective agreement which involves "repetitive breaches" and unless remedied will affect the grievors throughout their employment with the College. Accordingly, the grievance is arbitrable as a continuing breach of the collective agreement, and the grievors are entitled to have their seniority dates corrected and the proper amount of service credited to them. / Any financial relief is limited by the provisions of Article 9 of the collective agreement to that which can be claimed within twenty days of

the time when the grievors discussed their complaint with their Supervisor on May 15, 1982.

Decision on the Merits

Since there is no disagreement on the facts, and since the College has admitted that an error was made and that the collective agreement was misinterpreted, the decision on the merits has become almost a formality. The board accepts the interpretation that, pursuant to Article 8.01 (b), any month in which the grievors completed fifteen or more days should have been credited as a full month for the purposes of calculating seniority. This should have been the case regardless of the number of hours worked in the week or the fact that a week straddled two months.

The board was provided with the employment records which related to Ms. Rudenko's employment (Ex. 15). Based on those records and the provisions of Article 8 and Appendix III of the collective agreement, Ms. Rudenko would have completed the first twelve months in a twenty-four month period on July 25, 1979 and she should have had the collective agreement apply to her from that date on. From the records provided, it would appear that she completed the next twelve months of continuous or non-continuous service on or about September 19, 1980, and her probationary period would have been completed then and not on May 26, 1981 as stated by the College (Ex. 14). On September 19, 1980 Ms. Rudenko should have been credited with two years seniority, pursuant to Article 8.01 (d) of the collective agreement.

The board was not given all of Mr. Schnare's records; however, from the records submitted (Ex. 20) it is clear that Mr. Schnare completed the first twelve months of his probationary period on March 25, 1980 and

not on September 26, 1980 as stated by the College (Ex. 19). The earliest that he could have completed his probationary period would have been March 25, 1981. Now that the parties have agreed upon the correct method of calculating service under the collective agreement, there should be no problem in determining when the probationary period was completed, and of crediting him with the two years service pursuant to Article 8.01 (d).

The board will remain seized should there be any problems in implementing the award or of calculating any monetary claims which the grievors may have.

DATED AT LONDON, ONTARIO THIS ^{1st} DAY OF *June*, 1982

Gail Brent

Gail Brent

"W D Shuttleworth" JB

W. D. Shuttleworth, College Nominee

"Ron Cochrane" JB

Ron Cochrane, Union Nominee