

93G277 RYCHLEWSKI VS HUMBER

IN THE MATTER OF the grievance of Gene Rychlewski

AND IN THE MATTER OF the arbitration of the grievance

BETWEEN:

Humber College of Applied Arts
and Technology

- and -

Ontario Public Service Employees Union
(for academic employees)

PLACE & DATES OF HEARING: Toronto, Ontario, September 28, 1994, January 6, 1995

BOARD OF ARBITRATION:

Hugh John Cook
Jon McManus
Stanley Schiff, chairman

APPEARANCES FOR THE COLLEGE:

Nancy Hood, director, human resources
Brenda Bowlby, counsel

APPEARANCES FOR THE UNION:

Robert Mills, chief steward, local 562
Gene Rychlewski, grievor Nick Luczay, counsel

AWARD & REASONS

The grievor is a professor at the College. He claims in his formal grievance that his salary should have gone up one step on the salary schedule on May 22nd, 1993. At the first day of hearing, the union sought to add a claim that, even if May 22nd is not the date for the increase, the grievor should have got it on September 1st notwithstanding the intervention of the Social Contract Act and the College's "fail-safe program" under it. The College rejects the claim in the formal grievance and objects to addition of the new claim at the arbitration hearing stage.

Faced with the objection, the board ruled that we would first entertain evidence and argument on the formal grievance and on the objection. If we allowed the grievance, that would end the matter. If we dismissed the grievance, we would then determine the objection. If we allowed the objection, again that would end the matter. If we dismissed the objection, we would reconvene a hearing to entertain evidence and argument on the new claim. At the second day of hearing, the College reinforced its objection with extra grounds, obliging the board to put off entertaining them until a future date. In the end, it was nonetheless agreed that we would proceed under our earlier ruling. Only if we dismissed both the grievance and the objection on the original ground would we entertain evidence and argument on the new claim and the extra grounds of objection at a reconvened hearing, and would determine them all, as necessary, in the award.

We turn to me formal grievance.

The grievor was hired into an academic unit position on September 2nd, 1980, and was then slotted into step 6 of the existing 16-step salary schedule the collective agreement contained. Because of his academic qualifications, the ceiling on his prospective highest salary was set by what is now section 14.03 A 1 (b) of the agreement at one step below the maximum, that is, at step 15. The relevant parts of section 14.03 A 1 (b) look this way:

14.03 A 1(b) The following table indicates both the maximum salary level attainable by an employee based on that employee's relevant formal education levels and equivalencies and the maximum starting step for that employee on the Salary Schedule.

Maximum Step Level Attainable	Required Qualifications
Maximum Step on the salary	4-year Canadian University Degree or more; C.G.A.; P.ENG.;C.A.;C.M.A.; (formerly R.I.A.)
One Step below Maximum	3-year CAAT Diploma or General Pass University Degree or Certified Journeyman holding equivalent qualifications

Two Steps below Maximum	2-year CAAT Diploma or Certified Journeyman
Three Steps below Maximum	1-year Post-Secondary certificate
Four Steps below Maximum	No formal post-secondary diploma, certificate or degree
Maximum Starting Salary	Four Steps below the maximum salary step attainable by that employee

On September 1st of each year up to and including 1989, the grievor's salary rose to a higher step under the provisions of section 14.03 A 2:

14.03 A 2 (a) Annual increments to the control point are based on experience, at the rate of one step for each completed year on-the-job experience. Above the control point, but not beyond the maximum, one step will be granted where performance in the past year was satisfactory. For the purposes of this paragraph the following shall be considered as on-the-job experience: leave for union activities, paid leave of absence, secondment.

14.03 A 2 (b) The following table indicates the control point relevant for an employee based on the maximum salary level that employee may attain in the salary schedule. The control point relevant to full-time instructors is contained within the wage schedule 14.03 A 2 (c).

Maximum Step Attainable	Control Point 1991 -92	Control Point 1992-93	Control Point 1993-94
Step 12 \\\\\\\\\\\\\\\\\\\\	Step 6 \\\\\\\\\\\\\\\\\\\\	\\\\\\\\\\\\\\\\\\\\	\\\\\\\\\\\\\\\\\\\\
Step 13	Step 7	Step 7	\\\\\\\\\\\\\\\\\\\\
Step 14	Step 7	Step 7	Step 8
Step 15	Step 8	Step 8	Step 9
Step 16	Step 8	Step 8	Step 9
Step 17	\\\\\\\\\\\\\\\\\\\\ \\\\\\\\\\\\\\\\\\\\	Step 9	Step 10
Step 18	\\\\\\\\\\\\\\\\\\\\	\\\\\\\\\\\\\\\\\\\\	Step 10

salary position on the salary schedule has long been above the "control point" set out in section 14.03 A 2 (b), there is no need for the "completed year on-the-job experience" required for the progression under the first sentence of section 14.03 A 2 (a); his salary may advance to the next step based on his "satisfactory...performance in the past year" as provided in the second sentence. In any event, says the union, the progression provided in section 14.03 A 4 is independent of the salary steps section 14.03 A 2 governs. Instead, section 14.03 A 4 gives him "an allowance", as indicated by the title preceding sections 14.03 A 3 through 14.03 A 5, which is independent of anniversary dates of hire and periods of service.

We say at once, as the parties appear to agree, that the letter of understanding has no direct bearing on this grievance: the grievor does not have fifteen years of service. The letter indeed contains a policy statement respecting "the parties[']... on-going commitment to the quality of teaching in me CAAT system." It goes on to announce that the policy is implemented by the establishment of the In-Service Teacher Training Program. Fifteen-year service employees get a one step advance in salary when they enrol. Everyone who successfully completes the program has a previous salary ceiling below the maximum removed. That serves only to direct the grievor and those in the like situation back to section 14.03 A 4, which begins with virtually identical language.

We disagree with how the union reads sections 14.03 A 4 and 14.03 A 2 (a).

Section 14.03 A 4 does not, as the union would have it, direct immediate progression to the maximum step upon an employee's attaining one or other of the qualifications listed. It says that the employee "shall be entitled to progress to the maximum step..." [emphasis added], not that the salary moves right away. If the union were right, an employee whose salary was at, say, step 10 on the date of attaining the qualification would immediately get the salary at step 17. That cannot be so. The words we quote direct that the salary of the employee who has just attained one or other of the qualifications may now "progress to the maximum step on the salary schedule": what the words do is remove the ceiling section 14.03 A 1 (b) had imposed on that employee's salary. When the progression occurs is not mentioned. That depends on the mechanism for annual increments section 14.03 A 2 (a) contains.

Unlike how the union reads the second sentence of section 14.03 A 2 (a), we do not see that the reference to "the past year" can be interpreted as anything different than "completed year" in the first sentence. The two sentences are part of the one mechanism governing Annual increments". They are designed to distinguish between automatic increases below the control point and merit increases above. They are not designed to distinguish between different time periods, the completion of each of which is a condition for a salary increase.

To help show that step progressions are not inevitably tied to completed years of service, the union referred to the Step Value description for the factor of "Further Formal Education" in the table of "Progression Factors": "1 step for each completed year at the post-secondary level...". We do not read those words as providing for the progression whenever the employee has completed a year at the post-secondary level. As we see it, here too the progression must await the end of another year of service at the College under section 14.03 A 2 (a). In any event, the union did not claim that the grievor's situation fitted within this particular progression factor.

We also do not think that the positioning of section 14.03 A 4 between two other provisions governing allowances and underneath the "Allowances" title renders it immune to the mechanism of section 14.03 A 2 (a). Sections 14.03 A 3 and 14.03 A 5 apparently are so immune. But, despite the positioning and the title section, 14.03 A 4 is not an allowance provision. In function, it amends section 14.03 A 1 (b) and should probably be positioned immediately after it in the printed agreement. Section 14.03 A 2 (a) governs the timing of the step movements for all employees relying on section 14.03 A 4.

The College's practice has been to make the step increases on September 1st, January 1st or May 1st. We need not determine whether doing that as a practice conforms generally with the collective agreement. We need only look to the facts involving the grievor. We know that he was hired on September 2nd, 1980 and that the College has always treated September 1st as the anniversary date of his hiring and the date for implementing his step progression. That has given him the increases one day earlier than the strict yearly measurement from hire date warrants, and he never objected to either the September 1st date or the slight advancement from date of hire. September 1st, 1980 is therefore the beginning date for the purpose of determining for him "each completed year" and "the past year" under section 14.03 A 2 (a). And, as we have said, section 14.03 A 2 (a) is the mechanism for implementing salary increases and pinpointing their timing.

The result is that, while the grievor's maximum attainable salary advanced to step 17 on May 22nd, 1993, he was not entitled to begin receiving the step 17 salary on that date. The grievance is therefore dismissed.

We turn to the College's objection to the proposed new claim based on the original ground of objection. We conclude that the objection should be allowed.

This is not an instance of a union merely fleshing out what is inherent in the general language of the formal grievance as filed. If that were so, we could proceed to resolve the full scope of the grievance. As an example, see Re Liquid Carbonic Inc. and Steelworkers (1992), 25 L.A.C. (4th) 144 (Stanley, arbitrator). But, what the union puts here is an independent and alternative claim necessary for determination only if the specific claim in the formal grievance fails. An example close to this is Re Electrohome Ltd. and I.B.E.W. (1984), 16 L.A.C. (3d) 78 (Rayner, chairman). Section 32.03 of the agreement directs that at Step One the "employee shall present a signed grievance in writing...setting forth the nature of the grievance, the surrounding circumstances and the remedy sought." This the grievor before us did. It may be that the quoted words render the content of the writing the necessary framework of the parties' dispute presented for our determination. Seen in that light, the specific claim set out in the document is all we have authority to determine. That is how the board treated the matter in Re Int'l Chemical Workers and Brockville Chemical Industries Limited (1972), 24 L.A.C. 423 (Reville, chairman). Our authority could be expanded by the parties' explicit agreement or, at least, by the College's acquiescence after the union early communicated the new ground of complaint. If neither were shown, we would need the College's representation that the new claim might be brought and the union's detrimental reliance on the representation.

Here, there is no agreement to the expansion. And there is no evidence that the union mentioned the new claim before the first day of hearing, let alone evidence of the College's

acquiescence or representation. We see that the College's director of human resources mentioned the impact of the Social Contract Act in what serves as the Step Two written decision. But there is nothing to show that the union ever indicated before the hearing that it rejected the College's position on that or wanted to expand the grievance to claim the step 17 salary increase on September 1st despite the Social Contract Act. The evidence is uncontradicted that, as far as the College was concerned, up to the hearing the union continued to restrict the claim to that set out in the document the grievor put in on August 30th.

But, even if the formal grievance document does not impose a jurisdictional limit, the evidence shows that it was the sole basis on which the parties discussed the merits of the grievor's complaint through the grievance procedure. To allow expansion to an unrelated claim would deny the grievance procedure the full play it should have as a vehicle for parties' ventilating of opposing viewpoints leading to possible agreed settlement. As an example of other arbitrators' concern about this, see Electrohome Ltd. at 83. Solving that problem would require our ordering the parties back to Step One to process the new claim from there, if need be, up to the arbitration stage. Quite apart from the possible bar of the time limits, the union's counsel has said that he rejects that remedy as the price of proceeding.

To allow expansion of the unrelated claim would also inevitably threaten prejudice to the College whose preparation for the hearing focused solely on the grievance document as filed. Responding to such prejudice, of course, is easy: we might simply grant an adjournment to allow counsel to prepare to meet the new claim. But that would mean extra expense for the College to cover the extra hearing day, since we have no authority to award compensating costs. As events have unfolded, the hearing ran into an extra day anyway to allow evidence and argument on the questions of the College's knowledge of the new claim and of its acquiescence or representation. The College has therefore had plenty of time to prepare for the new claim. But we have found that, over the days of hearing we have had, there was no evidence of knowledge, acquiescence or representation. And, under our agreed plan, counsel and the board contemplate another day to entertain more evidence and argument on the two extra grounds for the objection. The problem of prejudice remains.

In all, as we have said, we allow the College's objection: the union may not add the new claim. Since we have already dismissed the August 30th grievance, there are no other issues before us.

DATED at Toronto this 31st day of January, 1995.

Hugh John Cook

Stanley Schiff, Chairman

I dissent.

Jon McManus