

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CONFEDERATION COLLEGE

(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(THE UNION)

AND IN THE MATTER OF THE GRIEVANCES OF L. SARMIENTO AND
B. TRONIAK

ARBITRATOR: HOWARD D. BROWN

APPEARANCES FOR THE COLLEGE:

WALLACE KENNY, COUNSEL
CHRISTINE BATES

APPEARANCES FOR THE UNION:

MARY MACKINNON, COUNSEL
KAIA BEAUDRY, PRES. L. 731
R. SOMPMI, V.P.
L. SARMIETO, GRIEVOR
B. TRONIAK, GRIEVOR

FURTHER HEARINGS IN THESE MATTERS WERE HELD AT THUNDER BAY
ON OCTOBER 17 AND 18 AND AT TORONTO ON DECEMBER 18, 2006.

AWARD

By the award dated April 10, 2006, the Arbitrator took jurisdiction to deal with the merits of both grievances involved in this matter. At subsequent hearings, the evidence of the parties was completed at Thunder Bay and the submissions of Counsel were received at the hearing in Toronto all of which has been considered in the preparation of this award. The statement of facts agreed by the parties is set out in the prior award and need not here be reproduced. In addition, however, both parties presented oral evidence on the issues at the hearings in Thunder Bay. Both grievances allege an improper application by the College of the Early Retirement Incentive Policy (ERIP) and allege a violation by the College of Articles 28 and 6 of the collective agreement in that the College failed in its obligation with regard to the ERIP and had acted in bad faith. Both Grievors request payment of the maximum retirement incentive under this policy.

At page 12 of the prior award, I stated as follows:

“The development and application of the committee’s recommendation is within the control of Management of the College but because the parties have addressed the issue in the terms of Article 28, there is I find, a connection in the collective agreement between the requirements of Article 28 and the rights of Management in Article 6 which leads to the issue of the arbitrability of a claim that the College acted in bad faith in its administration of the ERIP as approved by the College Planning Committee.”

and at p. 13:

“ The ERIP while developed and applied by the College has its generation from the right of recommendations by the Employment Stability Committee which in my view is a sufficient nexus to allow the grievances as defined in Article 32.12C to proceed on a claim of bad faith in the application and administration of the ERIP by the College.”

Clearly, it is the claim of bad faith in the administration of the ERIP by the College which arises in both grievances, each of which must be determined on the basis of the alleged limited claim that the College had acted in bad faith. It does not extend therefore to a question of whether the College's decision to deny full compensation to the Grievor on their retirement pursuant to the terms of the ERIP was incorrect or not reasonable and thus a violation of the collective agreement. There is no contractual provision for early retirement in the collective agreement but rather that procedure arises through a College formulated policy for early retirement set out in the ERIP which by itself is not a term contained in the College agreement.

Christine Bates testified that the purpose of the ERIP was to provide savings to the College due to its fiscal issues through Professors who decided to take the offer of the College for early retirement. The consideration for payment was whether a Professor was replaced or that a complement and salary line was eliminated. In the latter event, the employee would be paid one-half of the savings by deletion of the salary line but if the

salary line was continued in the department then there would be an estimate of the difference of the salaries at Step 10 to compute the employment savings. She said that when there was more than one employee in the department who applied for the ERIP and only one of two positions would be filled, she would offer the higher incentive pay to the more senior employee. That policy was applied to Mr. Troniak when two of three positions were replaced but the third was not and as Mr. Briden had more seniority than the Grievor he was paid 50% of the salary savings in accordance with the policy and the Grievor was qualified for the lesser amount. She explained her rationale to the Grievor who was also provided an estimate of the money he would receive upon his retirement before he did retire. The Grievor could have remained at work but chose to take his early retirement as had Mr. Briden.

Mr. Sarmiento's position was replaced by a full-time employee Bill Gregorash, who had been a sessional employee but applied and was successful for a full-time posting which was a replacement in the full-time complement in the school of Hospitality and Culinary Management. The posting of that position resulted from the retirement of the Professor whose vacancy was filled and the three full-time salary lines remained in the full-time complement of that department. She maintained that a "position" is part of the complement of a department which in her application of the policy is a budget issue and not an assessment of the courses required in the work of a Professor. The College was looking for savings through the elimination of positions and in that regard, she does not consider the work required of the employee but only the complement to determine the savings on which the payment to the retiree is calculated. Ms. Bates set out this position

in a response to Mr. Somppi that where an employee is not replaced, the retiree receives half of the savings in the year of the position and where an employee is replaced, they received half the difference between their salary and Step 10 pro-rated and wrote:

“The definition of ‘not replaced’ has not been literal, but rather based on the net effect to complement the program.”

She said that when a vacancy is posted, that position is part of the complement and whether it is called a position in the posting is not relevant to her application of the policy by replacing the full-time position, is a budget issue involving a savings through the elimination of a position which limits the complement.

Lorne Sarmiento retired from his position as a Professor-Coordinator in the Hotel Management Program on June 30, 2005 and said that he had taught all his courses in Hotel Management. Because of a low student enrollment, intake of 2004/05, there would be no second year students in his area which meant no work for him so that he decided to retire and took advantage of the Incentive Retirement Program, a copy of which he had received from Ms. Bates. It was his understanding based on that policy that he would be paid one-half year of his salary because he would not be replaced but later he learned that the College was hiring in the Culinary Program but in which he had not taught courses. There were two full-time Professors in Hotel Management, Ken Venerus and himself and two Professors in Culinary. He said that his position was not replaced because there was no work in the fall 2005 and there was no work in his area for Bill Gregorash who was

teaching in Culinary. He said he was told that he had been replaced and was only entitled to 50% of the savings but complained when he found out about the posting for the Culinary position.

A question arose as to the bumping process in the collective agreement to which Mr. Kenny objected on the basis of relevance in the application of the policy of the ERIP. Following submissions of Counsel, I found and ruled orally that the evidence sought to be introduced through this witness on the positions in the layoff - bumping procedure of the collective agreement is not relevant to the allegation of these grievances of bad faith in the administration of the ERIP. The bumping procedure on layoffs is an entirely different process under the collective agreement whereby qualifications to perform certain jobs may be at issue and requires an assessment of jobs. The ERIP is not part of the obligations and restrictions contained in the bumping and layoff provisions of the collective agreement therefore, that procedure under the collective agreement is not relevant to the claims of these Grievors relating to the bad faith in the administration of the ERIP. To extend the issue to the layoff and bumping procedure does not bear on the administration of this incentive plan and I so ruled in denying the admissibility of this form of evidence.

He said that in 2005, Bill Gregorash had completed his sessional contract and was employed with full-time benefits but with a one-year end rate and had no bumping rights nor accrued seniority. He said the College did not apply the ERIP in good faith as his position was not replaced and Mr. Gregorash had always taught in the Culinary Courses. He became full-time when he was successful for the posting as a regular full-time

employee in August 2005. He knew that the ERIP was designed to eliminate the higher salaried personnel and bring in younger persons as a cost saving through his membership on the CPC and agreed that the Union had not objected to the implementation of the ERIP. He was told however, that his position was being replaced and did not qualify for the full amount under the policy. He disagreed with the interpretation of the College of the replacement of his position in the Hotel Management Program which should not generally be found in the Hospitality Area.

Tim Mathews has been a full-time Professor for 20 years and Coordinator and Team Leader in the Culinary area. He was aware that Mr. Sarmiento was retiring and was hiring part-time instructors in the Culinary Program dealing with the work in the newly established Apprenticeship Program. He wanted Mr. Gregorash as a full-time Professor in the Program and arranged with the Union when his sessional contract expired, that he could be extended for two years as Staff with an end date. Subsequently, he was hired full-time in Culinary and had no expertise in Hotel Management but taught only in the Culinary program.

Ken Venerus is a full-time Professor and for the past four years, Coordinator of Hotel Management Program reporting to the Dean of the Business, Hospitality and Media Arts. In 2004, the first year intake in Hotel Management was stopped and the Program suspended but after the Grievor's retirement, there was no one to teach Hotel Management subjects and were looking for a new person to fill the position as there would be a first year intake in the fall of 2005. That situation required a Hotel Management

replacement for the Grievor who had only taught a specialty second year classes yet only part-time and Sessional advertisements were made for a Culinary position, subsequently held by Bill Gregorash on a full-time permanent position. He agreed that there are overlaps in the courses taken in the first year of the program with Primary Hotel Management and also Culinary students. Currently, there are three full-time professors in the Culinary Department.

Rick Potter, the Dean of the School of Aviation, said that both the Grievor and Charles Briden were in the aircraft maintenance program and decided to retire but only Briden had the E Licence with was required by the Department of Transport to teach his course in the 2nd year and had to be replaced. The Grievor did not have that licence. There were two positions posted but it was critical to have at least one who had the E licence qualification and did hire one in Maintenance and Advanced Electronic courses.

The Grievor had been in the position of a Professor in the Aircraft Maintenance Program since 1997 and in the interim 04/05, he decided to retire, checked the ERIP and said that he was initially told by Mr. Potter that he had not intended to replace him but would pick up existing courses with others. Mr. Briden however, would have to be replaced because of the licence requirement. He said that he had no background in Avionics but the posting for two positions in the school of Aviation in April 2005 was much more complex than his position which was not then replaced. It was his position that he was treated differently than Mr. Briden as he was told they would not be filling his position but the position of Briden was replaced and therefore he claims the full

compensation under the ERIP. He was told that Mr. Briden received the higher amount because he had more seniority and was retiring but had he not done so, the Grievor would be entitled to that higher amount. He admitted that he knew in February 2005 what amount he would receive when he retired in June under the plan. As it was Mr. Potter's intention not to replace his job that of Briden who had the E licence, the policy was improperly when the full benefit was paid to Briden and not to the Grievor.

Rod Somppi questioned Ms. Bates by letter dated June 3, 2005 as to the administration of the ERIP after the Grievors had raised their concerns with the Union prior to which it did not know how the College was interpreting and applying that plan. He said of the positions which were given priority, 10 of 12 were replaced from the priority list for the 2005/06 years and said that the College had always dealt with positions and not complement. The vacancy priority list which was received by the Union in September 2005 indicates those who were hired with two replaced in Culinary including Bill Gregorash who was shown in a full-time position with an end date. He said the Union has never raised a grievance concerning complement but only as to the positions under the collective agreement.

The submission for the Union is that there was an improper administration of the ERIP and the College failed to apply the policy in good faith. Further, the College engaged in a discriminatory practice in its application of the ERIP to Bryan Troniak and an arbitrary application by the College of the ERIP to Lorne Sarmiento and engaged in a bad faith creation and application of the ERIP in failing to follow Article 28 of the

collective agreement and the application of the policy to the Grievors. It was submitted that under the provisions of Article 28, the College has an obligation to bring new initiatives for ERIP as well as any changes or issues to the CESC for mutual review of both parties. The ERIP was not in this case brought to the CESC but taken to the CPC, a management committee with no bargaining unit participation. The second version of the ERIP which set out a new example of payment arrangements for employees who were retiring but not replaced, was approved by the management team without discussion or input by the Union Representatives. By this, there was a failure by the College to appropriately design, interpret and apply the ERIP while it has an obligation under this Article to deal with the ERIP in the CESC Forum. Further, the College has an obligation to create, interpret and apply rules regarding the ERIP in good faith, in a reasonable manner consistent with its obligations under the collective agreement.

The College did not assert that the early retirement incentives were not affordable but said that because the Grievors had been replaced, they were not eligible for the higher incentive which policy had not been previously communicated to the Union. The case law relied on by the Union supports the proposition that the College may not arbitrarily create, apply or interpret these policies even absent specific language in the collective agreement, in a way that treats similarly situated employees in a different manner. The College interpretation of the policy that payment of maximum compensation is entitled only when there is reduction in complement is not consistent with the terms of the collective agreement. In layoff, classification, job posting, or staffing level situations, the bundle of duties is considered and the instructional assignment triggers the position.

The College created a policy which was subject to arbitrary and discriminatory application in that it failed to consistently apply its policy or had applied different rules to employees in the same situation. Ms. Bates was told that Mr. Troniak would not be replaced in that Mr. Potter required an employee with the E Aviation Maintenance Licence to satisfy Transport Canada's requirement for Instructors where Mr. Troniak did not have that background yet. Mr. Briden was paid the full ERIP benefit although Troniak's position was not replaced but Briden's was replaced which is clearly discriminatory. Had Lorne Sarmiento not retired, and as his program had eliminated one year's intake of students that would have resulted in layoff of junior employees in the Hotel Management program. Bill Gregorash was a full-time employee in the Culinary Management Program with a full-time workload on a full-time contract with an end date. That was planned before the Grievor gave notice of his intent to retire. That position was for Culinary Management in courses that the Grievor had no experience with as his field was Hotel Management which position was not intended to be replaced nor had it been by the summer 2006. Therefore, in its submission, he had fulfilled the requirement that his position was not replaced which assisted the College in avoiding the layoff of a junior employee. Therefore he should have been paid the full ERIP benefit. It is submitted that the grievances should be upheld and the College directed to provide the difference to the Grievor's between the partial ERIP payment and the full payment to which they are entitled under the ERIP.

The cases referred to in the Union's submission are Re Toronto Transit Union and ATU 132 L.A.C.(4th)225 (Shime); Re Cape Breton and Nova Scotia Teachers Union 127 L.A.C.(4th)110 (Kydd); Re Natrel Inc. and Teamsters, Local 647 129 L.A.C.(4th)419 (Herman); Re Pacific Newspaper Group and CEP, Local 2000 123 L.A.C.(4th)209 (Germaine); Re University of British Columbia and Association of University and College Employees, Local 1 14 L.A.C.(3d)255 (Black); Re OPSEU v. St. Lawrence College (1989) O.J. 2955 (Ont. Div. Ct.); Re Rolland Inc. and CPU, Local 310 27 L.A.C.(3d)176 (M. Picher); Re Metropolitan Toronto v. CUPE, 74 OR (2d) 239; Re Quintette Coal and U.S.W.A., L. 9113 (1998) B.C.A.A.A. No. 89 (Lanyon).

It is the submission for the College that the only standard of review is bad faith in the application of the ERIP; with reference to Article 28. It is not a question of unfairness, arbitrary or unreasonable application of the plan which is not included in Article 28 which provides a recommending procedure where there is no obligation for the parties to utilize the committee only for early retirement. The College could implement its policy regardless of whether the CESC had discussed it. It was noted however, that the Planning Committee had approved the early retirement plan and Mr. Sarmiento was a member of that committee as Union President at the time so that the Union had full knowledge of the policy and could have discussed it at the CESC which it did not do and did not result in a violation of the agreement. The extent of the enquiry is whether management acted in good faith. Re Complex Services Inc. and OPSEU, L. 278 (February 21, 2005, Gray).

The evidence is that Ms. Bates applied the ERIP since 2002 in a particular manner and there is no evidence that she did something inappropriate with regard to the Grievors' applications for retirement. She considered whether there was budget savings in the full-time complement in the department whereby the decision to award a retirement gratuity comes before the filling of specific jobs. Ms. Bates applied the policy with regard to budget savings and her practice was to provide the most senior of the applicants in the complement of a department with the full payment. The ERIP was applied by Ms. Bates in good faith with consistency in her application of the policy. Both Grievors chose retirement when they knew exactly what payment they would receive. Ms. Bates considered the elimination of the full-time job of Mr. Sarmiento where there was a posting for a full-time vacancy obtained by Mr. Gregorash which meant there was no change to the complement in the department and the Aeronautics Division there were three retirees and two of the complement were replaced but although Brighton's position was replaced, he had more seniority than the Grievor and was paid the whole benefit which was consistent with how Ms. Bates had applied the policy in the past. While the policy could have been administered by the College differently, it has been applied consistently since its start in order to obtain savings for the College.

The scope of my consideration of both grievances requires the consideration of whether the College "acted in bad faith in its administration of the ERIP as approved by the College Planning Committee" more particularly set out in the prior award at p. 12 which is the applicable finding in the assessment of the relevant evidence in both

grievances. While I found the reference in Article 28 to the principle of early retirement in providing a nexus for the arbitrability of the grievances, that does not broaden the basis of consideration but rather underlines the limitation of the scope to an examination of the allegation of bad faith in that administration of the ERIP as it was applied to each of the Grievors.

In this context, it is instructive to consider the meaning of bad faith in collective agreement administration and refer to an award of Arbitrator MacDowell in the OPAC award referred to in the Complex Services award at p. 15, 16 where it is set out in part: -

“Thus, in Canadian Labour Law 2nd edition, George Adams approves the following definition:

... bad faith refers to a subjective state of mind, that is, conduct which has been motivated by ‘ill will’ hostility, dishonesty, malice, personal animosity, or even ‘sinister purposes’. Conversely good faith has been described as ‘honesty of purpose’.

Black’s Law Dictionary defines the term ‘bad faith’, (in part) this way:

the term bad faith is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity, it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or will.

...However, in our view, the words 'bad faith' also have an independent content, and carry a connotation of wrong doing, ill will, or improper motive - which is to say, a meaning that goes beyond merely being 'unreasonable' in some sense or 'unfair' ... Bad faith is a matter of motive, it involves something improper in the mind of the decision maker.

To put the matter another way: a decision can be quite wrong, or unreasonable, unfair, or even arbitrary, without necessarily having been made in bad faith."

The allegation of the Grievors is that they were dealt with by the College in bad faith, is the test of the merits of their complaints. It is not then on the meaning to be given to that issue set out above, whether it might be found that Ms. Bates interpretation and application of the ERIP was unreasonable or wrong or in violation of any term of the collective agreement. What is at issue is whether she, as the Administrator of the ERIP, deprived both Grievors of the higher compensatory claims under the plan because of an improper in the sense of a dishonest administration of the ERIP. Her evidence which I accept, is that she had since 2002 when the plan was fostered, and early retirement for full-time employees was considered by the CPC which is the Committee which subsequently approved the plan, related the plan solely to the numbers of employees who constituted a complement of a department in order to achieve budgetary savings. There has been no deviation in her administration of the plan on that basis since its inception and that consistency of administration was shown to both Grievors prior to their actual retirement dates when they knew the actual amount they would receive under that policy.

I find that there was no attempt or intent to deprive the Grievors of money which the College would otherwise have paid but for some sort of misrepresentation of the administration of the plan to their detriment. The evidence of the administration by Ms. Bates is completely contrary to such result and while it might be argued that the policy could have been applied in the sense of replacing positions as opposed to numbers of employees, it is I find, consistent with the purpose of the ERIP as set out by the Committee and as administered by the College, to determine the replacements by the remaining numbers of employees and not whether such that conclusion is based on actual course contents. The issue is not whether the administration of the plan could have been carried out differently than devised by Ms. Bates who was fixed with the responsibility for its administration or that it was a reasonable result. I find that its application was not arbitrary but even that consideration does not mean that there was an exercise of bad faith of the College. The result for the Grievors comes from Mr. Bates' understanding of the purpose and goal of the ERIP to reduce costs for the College through a reduction of the numbers of employees.

There is nothing binding in the ERIP on the College to maintain course contents or equivalent instructor ability to those Professors who have indicated retirement. The ERIP is a Management policy which falls outside of the scope of bargaining between the parties as is indicated in the prior award, and while the Union does have through the CESC a method means to speak to the issues, its administration rests solely with the College. Having regard to the issue as set out above, the Union must establish that in the

administration of the ERIP which arose through the methods set out in Article 28 intentionally deprived both Grievors of compensation to which they would be entitled other than for its dishonest administration which would mean that Ms. Bates would have authorized the payment to the Grievors knowing that a higher compensatory amount was appropriate under the plan but was refused to them. I find the evidence does not in any way justify such a conclusion in the situation of the Grievor and Mr. Briden which payment she administered in accord with her past applications of the policy by which she applied the seniority principle which while arguable in the result certainly does not indicate any male fides on her part.

The Union representatives on the committee established under Article 28 had access to the policy and an opportunity to consult as to its application. There is no basis in these circumstances to find any dishonest treatment of the Grievors by the College and therefore, the allegation of bad faith in the administration of the policy in their circumstances is not established by the Union.

As stated in the MacDowell award -

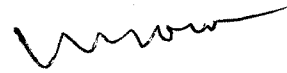
“a decision can be unfair or unreasonable or arbitrary (or discriminatory in results so long as it is not also discriminatory in intent) without its also being in bad faith. Those feelings may spring from negligence or stupidity, rather than malice or ill will. The test to which the parties have agreed focuses on malice or ill will. In effect, it affords the employer the ‘right to be wrong’ -- that is, freedom from review for correctness on the basis of its decision - when it decides to discharge a probationary employee, as long as the decision is based on a good faith, work-related assessment...”.

That statement applies in the circumstances of these grievances as to the effect of a bad faith allegation and what must be established to support that base of claim under the collective agreement. The evidence is not that Ms. Bates deliberately applied the ERIP inappropriately to the Grievors but rather she had explained her rationale for the administration of the policy of the basis of complement of the departments and while it was argued that this was not consistent with other parts of the collective agreement where the contents of positions become significant, the ERIP is not policy is not part of the collective agreement but is administered solely by the College. Those other terms of the collective agreement referred to in the submissions as I indicated in my ruling at the hearing, are not relevant in the decision the issue raised as to the administration of the ERIP. Management has that right constrained only by bad faith in its application of its own policy as it applied to its employees.

As the evidence I accept in this matter does not support such intent or impropriety in the administration of the ERIP by the College. There is no basis on which to allow the claims of the Grievors for the higher compensation payment under the ERIP.

Having regard to the evidence and the submissions of the parties, and for the foregoing reasons, it is my award that each of the grievances is dismissed.

DATED AT OAKVILLE THIS 29TH DAY OF JANUARY, 2007



Howard D. Brown, Arbitrator