

IN THE MATTER OF AN ARBITRATION

97B697  
L. 417  
CAAT-A-

BETWEEN: ST. LAWRENCE COLLEGE

AND: ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

AND IN THE MATTER OF THE GRIEVANCE OF GRAHAM SHORTING. GRIEVANCE  
#97B697

O.B. SHIME, Q.C.	CHAIRPERSON
H. J. COOK	NOMINEE FOR THE COLLEGE
M. LYONS	NOMINEE FOR THE UNION

APPEARANCES

C.L. KAY-AGGIO	COUNSEL, and others for the College
G. LEEB	REPRESENTATIVE, and others for the Union.

Hearings were held in this matter at Kingston, Ontario on May 5 and 18, 1999

## AWARD

In this matter, the grievor claimed that the College has violated the Collective Agreement by not properly compensating him for the period September 1995 to August, 1996. During the course of the proceedings, the grievor adjusted his claim and asserted he had been ill and the College had not properly accommodated his disability; in addition, he claimed the College had used sick benefits to pay him, rather than holiday pay. The College denied that there had been any violation of the Collective Agreement.

The grievor had been a professor with the College for approximately 20 years and in 1995 he became ill with chronic fatigue syndrome. From September of 1995 he received short-term disability benefits either in whole or in part, depending on how much he worked. From January to May 1996, the grievor worked approximately 35% of the time and on May 7th that arrangement ended. However, the grievor worked part-time in a non-teaching capacity for the period May 7th to June 14th, 1996. On June 14th, 1996, the grievor stopped working and commenced his vacation period and then returned to teach in the Fall of 1996. The grievor maintained that the College did not accommodate him for the period May 7th, until June 14th, 1996, when he began his vacation.

The grievor testified that he had been a professor at the College for twenty years, in the Faculty of Applied Arts and had taught English, Media Studies and Film. In the Fall of 1995, his workload was reduced to accommodate his illness. In November of 1995, his illness was specifically diagnosed as chronic fatigue syndrome.

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It is clear that the grievor attempted to work notwithstanding his debilitating condition, and while it appears that he might have been totally disabled, there is no question that he is conscientious **and attempted** to work beyond his capacity. He worked from September 1995, until May 7, 1996, and when he did not work full-time his salary was topped off by utilizing sick credits. The grievor obtained work from the College from May 7th to June 14th in a non-teaching capacity, counselling applicants to the General Arts and Science Programs. The grievor stated that while he was not clear as to how he came to be employed as a counsellor, he recalls speaking to Sharon Godfrey, the departmental assistant, and requesting that she find him employment that was "not too demanding". When the counselling opportunity was offered, he took it.

The grievor maintained that he ceased working as a counsellor on June 14th, 1996, in order to take a vacation; he was exhausted and under extreme stress because he had been denied LTD benefits. The grievor had requested some work subsequent to May 7, 1996, to see how much work he could do because he was driven by a strong work ethic and it was important for him to work **and to find a reasonable level of work**. In May and June of 1996, he did counselling and some course development for the courses for which he was responsible. The grievor also maintains that in June of 1996, he took the first phase of a professional development course, but submitted the time as counselling activity after receiving advice from the director; he claimed only half of the time for June 13th and 14th.

When cross-examined, the grievor said that he saw his doctor on June 12th, 1996,

and his doctor suggested that he stop work for a seven week period and accordingly he took his vacation. The grievor admits that he may have told Sharon Godfrey that he was **too tired to continue and that he was going to take his vacation.**

In August of 1996, the grievor initiated discussions to return to work with Mr. Pat Finucan, the Director of the School of Applied Arts, and he returned to a 70% work level which he had requested. The grievor also admitted that there was nothing that Pat Finucan failed to do for him that he asked. The grievor does not blame anyone individually for the difficulties he encountered, but maintains that the system failed him. The grievor claims that his accommodation for disability should be retroactive, notwithstanding that he had made no request for further accommodation for the relevant period; he also testified he was unaware that he could make a request at that time.

We also note, that during that period, the grievor had a number of discussions with Myrna Garrison, the Director of Compensation and Benefits at the College, concerning his **long-term disability claim, and ultimately, that claim was denied by the insurance company.** The grievor appealed and the appeal was also denied.

Sharon Godfrey, the secretary in the Department of the School of Applied Arts, who has been employed at the College for approximately 21 years, testified that she was the liaison between Pat Finucan, who was located at the Cornwall campus, and the Faculty at the Kingston campus. The Faculty came to Ms. Godfrey with matters such as time-tabling, workload, and contracts. Ms. Godfrey has known the grievor since 1981 and they have

a friendly relationship. In the Spring of 1996, the grievor asked for work and since there was a counselling position open, the grievor was able to take advantage of it. Counselling involved booking half-hour appointments for students to discuss their **courses for the Fall** of 1996. The counselling is done each year and is normally done by a full-time staff counsellor and a part-time faculty member. Ms. Godfrey testified she discussed the work with the grievor and particularly, what was involved, the hours that he wanted to work, and what was expected. The grievor told her that his short-term disability benefits were running out and he needed income.

Towards the end of the work period which ended on June 14th the grievor mentioned to Ms. Godfrey that he needed time off and was going to go to his cottage. She testified that the grievor seemed pleased with the efforts she had made on his behalf. If the grievor had asked for further work, there was work available. She also stated the grievor initiated his return to work in August of 1996.

When cross-examined, Ms. Godfrey testified that **Pat Finucan made the decision** about the work to be given to the grievor. Mr. Finucan had requested she find some work for the grievor since she was familiar with the workload available. When she spoke to the grievor about the counselling she based her assessment on her knowledge of the grievor's health. When the grievor approached her and told her that he needed work, she felt that the **easiest** workload was counselling because it was without pressure. She was aware of the courses in the school and their requirements and maintained she chose the counselling for the grievor's benefit, and he appeared to be very pleased with the work

assignment. If the grievor had asked for full-time teaching she would have suggested he teach biology. Ms. Godfrey maintained it was common knowledge that the grievor was quite ill. She testified that the grievor talked about his condition and was concerned about his health. He also advised her in June that he needed a break and was going to his cottage.

Ms. Godfrey felt that the grievor was not well at the time. He had just concluded teaching one course from January to April and had not been well enough to teach the full load. There were three sections to the course and he had taught one and his wife had taught the other two since the grievor was not capable of teaching all three. Ms. Godfrey stated that on June 13th and 14th, the grievor was doing counselling because the time sheets do not indicate that he was doing professional development work.

Patrick Finucan, who at the relevant time was Director of the School of Applied Arts, testified that Ms. Godfrey reported to him and was responsible for the administration and **secretarial duties at the Kingston campus. She worked under his direction, particularly** with respect to workload assignments for the faculty. He admitted to being more reliant on Ms Godfrey than he might have been if he had been continuously present at the Kingston campus.

In May of 1996, Mr. Finucan approved the arrangement with the grievor and did not assign him to a counselling position under the Collective Agreement. He was aware of the **grievor's illness and had had numerous conversations** with him about his progress, and

about arrangements for his workload in relation to his illness. Those discussions involved what work was available and what work the grievor was able to do at various points in time.

**Mr. Finucan approved the counselling in May of 1996, based on the grievor requesting work and Ms. Godfrey's suggestion as to the work to be done. The grievor did not ask for additional work.**

During the period when the grievor was doing the counselling, Mr. Finucan had a discussion with him as to how he was coping and discussed the state of his health. According to Professor Finucan, he was told that "it was a struggle", that the grievor was not well, and that he was making exceptional efforts with his students. The grievor did not say he was capable of taking on more work. Mr. Finucan also testified that course development work is normal activity in May and June and there is no additional **compensation for course development work.**

Mr. Finucan was aware that the grievor's LTD application was turned down in June, but testified that the grievor did not come to him for additional work that spring and the next request for work was made in August, which he approved.

During the relevant period, Mr. Finucan maintains that he and the grievor were quite friendly and had an amicable, close, and effective working relationship. Nothing that the grievor ever asked was refused. In addition, Mr. Finucan wrote a letter on the grievor's behalf to try and assist him with his LTD claim. There was never a suggestion from the **grievor that he was not** being accommodated and, in addition, Mr. Finucan had

conversations with the chief steward and nothing was said about additional work for the grievor.

When cross-examined, Mr. Finucan admitted that the College made no suggestions for alternate work and had simply responded to the grievor's request by providing him with a counselling assignment. Mr. Finucan asserted that the College did not make an independent proposal about other work because he understood that the grievor did not want the College to make such a proposal. His personal understanding was that the grievor was unwell and doing the best he could to do some work. Mr. Finucan maintained that he was operating on the basis that there was a limit on what the grievor was capable of doing and he had no understanding that the grievor wanted more than what was being provided to him at the time. If the grievor had wanted more work, Mr. Finucan was prepared to find work for him. He also understood that the grievor was being paid on an off loading basis or on the basis that the grievor was not doing teaching duties. Mr. Finucan does not recall conversations about professional development, but he has no reason to doubt that the grievor did the work.

Myrna Garrison, who has been the Director of Compensation and Benefits since 1988, testified about her conversations and communications with the grievor concerning his claim for both short-term and long-term disability benefits. Ms. Garrison also testified as to the procedures followed and communications concerning the grievor's claim and appeal for the LTD claim. She stated that the grievor did not indicate he was looking for more work at any time. He did not request Ms. Garrison to look for modified work, and did

not indicate that he had asked anyone else for modified work. She stated that all the documentation indicated the grievor was unable to work. Ms. Garrison testified that her role with respect to accommodating disabled employees is to respond to requests, but maintained that the grievor's medical certificates indicated he was unable to work. Those physicians' statements were part of the grievor's LTD claim

Based on these facts the Union submits that there are two issues to be decided. The first issue concerns the failure of the College to accommodate the grievor for the period May 7th to June 14th. The second issue concerns 1995-96 when the grievor worked on a reduced basis. The Union claims that the grievor should receive holiday pay and instead the College deducted sick credits for those days. The Union maintains that the grievor should not have used up his sick credits for these statutory holidays and for the Christmas Holidays pursuant to Article 17.01 F4 of the Collective Agreement.

As to the first issue, the Union further maintains that the College did not attempt to find work for the grievor for the period May 8th to June 14th. The Union claims someone should have been specifically assigned to consider the situation with disabled employees. The Union argues that counselling work was bargaining unit work, and the grievor should be compensated on that basis. The Union does not claim that the College did not act in a bona fide way, but submits that the College had a further duty to provide him with additional work. The Union further maintains that on June 13th and June 14th, the grievor performed work as a professor and was not properly compensated for that work.

As to the second issue the Union relies on Article 17.01 F4 and maintains that the grievor should have received holiday pay and not lose sick pay since holiday pay is a benefit and part of the compensation package, and an employee should not be penalized and denied a holiday entitlement because the employee is ill.

The College submits that all the grievor's requests for work were answered and satisfied. He received reduced work when he requested it, he was given counselling work when he requested work, and when he requested that he return to work in August of 1996 **that request was also satisfied. At no point did the grievor seek anything more than the** work that he was given, and his actions make it clear that he was barely coping with the work that he was assigned. The College argues that the grievor never claimed that he **wanted additional work. The College further maintains that compensation was not an** issue in these proceedings and no mention was made as to the amount of compensation the grievor received while he did the counselling. The College argues that the grievor had recourse to his Union, and neither the grievor nor anyone **for the Union claimed that the** College was not doing enough for the grievor during the relevant period. The College asserts that the grievor had a duty to make his needs known and denies there has been a failure to accommodate.

As to the second issue, the College maintains that Article 17.00 is a comprehensive scheme for persons who are receiving sick benefits and the grievor fell squarely within the **meaning of Article 17.01** and was properly compensated. The College argues that Article

16.01 and 17.01 F1 are separate articles and the grievor, because he was on sick benefits, fell within the comprehensive provisions of Article 17 for those receiving sick benefits.

We now turn to the claim for increased accommodation by the College. On June 11<sup>th</sup>, 1996, toward the tail-end of the period for which the grievor claimed more work, he wrote a letter to Sun Life Assurance Company of Canada concerning the appeal of his disability claim. In that letter he dealt with his continuing illness at great length. He discussed his fatigue and stated, "I wake up in the morning feeling extremely tired", and "Sometimes the fatigue persists throughout the day, on other days it comes and goes in waves." He maintained "after working three or four days at the College doing academic counselling (Tuesday, Wednesday, Thursday) I must spend the next four days recuperating. I have reduced physical activity in my life considerably."

He indicated he was in great pain and stated "at times my back pain is so severe that I have extreme difficulty focussing and communicating effectively." The grievor was also seeing a chiropractor twice a week. He further asserted that he had headaches and facial numbness and that his symptoms were worse when he attended at St. Lawrence College. The grievor also stated that he had digestive disturbances, light-headedness, concentration problems, trouble absorbing information, remembering information, and recording data accurately. He maintained "this latter problem has become particularly pronounced when I give academic counselling to a few students in a row." He also claimed "when I look over my daily work, I detect a large number of letter and word omissions in my writing. During conversations with students, I still occasionally forget key names and

words, something I rarely did before I became ill.” The grievor asserted that he was emotionally and psychologically depleted. He stated that he had good days and bad days and that his condition was “maddeningly variable”.

The grievor then referred to the demands of teaching and added that “my greatest fear is that if I do too much I will fall into a complete state of exhaustion as I did in late September 1995 when Dr. Monahan recommended that I stop working completely.” He went on to state “I believe it is my professional duty to deliver to the best of my abilities, something I cannot do at this time, especially if the workload is too large.”

The grievor acknowledged that he was impaired, forgets information and materials, says confusing things, and sometimes did not react quickly enough during class discussion and question period. He also indicated that reading, marking and class preparations can be increasingly taxing. The grievor concluded that he believed “*that at the present I am unable to do the entire job I was hired to do.*” (emphasis added). The grievor was also unable to put a numerical figure on the degree of severity of his disability at that time, but did indicate he had “limited energy.”

Also, on June 19th, 1996, Dr. Monahan, the grievor’s doctor, wrote to Sun Life Assurance Company and stated that the grievor’s condition would be considered moderately severe and places restrictions primarily on the duration of his activities rather than the activities per se. He also stated that, “*The current level of activity (i.e. 1/3 time employment) appears to be nearly the full extent of Mr. Shorting’s mental and physical*

*stamina. This is of course primarily a symptomatic illness and there is no objective measure for this.*" (emphasis added).

Based on the grievor's evidence, his letter and Dr. Monahan's letter, we are unable to conclude that even if the grievor had been offered further work that he would have been able to do it. There is no doubt that the grievor wanted to work and was very diligent in attempting to obtain work, but we are not satisfied that the grievor was capable of performing more work if it had been assigned to him. It is reasonable to infer from all the evidence that the counselling work was the full extent of the grievor's capacity and that he was unable to do more work.

Alternatively, after duly considering the evidence of the grievor, Mr. Finucan and Ms. Godfrey, we are satisfied that, in the circumstances, the College took reasonable measures and acted in a bona fide manner in finding work for the grievor. This was not a hostile situation. The grievor was friendly with both Ms. Godfrey and Mr. Finucan and had a number of conversations with them concerning his illness and his capacity for work. It was against this background, that Ms. Godfrey under the direction of Mr. Finucan, assessed the grievor's needs and provided him with counselling work. Counsel for the College is quite correct in saying all of grievor's requests for work were honoured by the College. Both the grievor's evidence and the evidence of Dr. Monahan suggest that the grievor had a limited capacity for work. How the full extent of the grievor's capabilities could have been more objectively assessed by the College is not clear. The College made an assessment based on the information that was communicated to it, and based on the

information it had, and in the absence of any further requests by the grievor, I am satisfied that the College did all that it was required to do. Dr. Monahan conceded that the grievor was working to capacity and that there was no objective measure for his illness. If Dr. Monahan could not measure it objectively, how could the College be expected to measure his illness so as to conclude he could do more work. Moreover, there was a duty on the grievor and the Union to assist in reaching an appropriate accommodation. That duty at the very least demands that the Union and/or the employee inform the employer that he or she is capable of performing more work. In the absence of such information the College cannot be faulted. Its duty was not one of perfection, but rather to take reasonable measures to accommodate the grievor, which it did. Central Okanagan School District No. 23 v Renaud (1992) 95 D.L.R. (4th) S.C.C. Accordingly the grievor's claim for additional compensation arising from a failure to accommodate is dismissed.

As to the amount of compensation during that period, it appears that there was some special arrangement between the College and the Union with respect to this part-time counselling work which was not to be considered as counselling within the meaning of the Collective Agreement. However, that was a matter that was not fully explored at the hearing and we are not satisfied on the balance of probabilities that the grievor's claim for additional compensation for counselling within the meaning of the Collective Agreement should be allowed. Accordingly, the grievor's claim for additional compensation in that regard is dismissed.

However, the grievor testified that he attended on two days for professional

development activity and Mr. Finucan testified that if the grievor did so claim, he had no reason to doubt him. Moreover, Mr. Finucan suggested that the grievor should be believed. The grievor stated he was told to claim the amount of time as counselling and no doubt that explains the time sheets and Ms. Godfrey's view of the situation. However, based on all the evidence we accept the grievor's testimony that he did attend for professional counselling on June 13th and 14th and we determine that the grievor should be compensated at the appropriate rate of pay in an amount to be determined by the parties. Failing agreement we will remain seized of that issue.

We now turn to the relationship between statutory holidays and short-term disability plan. The relevant provisions of the Collective Agreement are as follows:

Article 16  
HOLIDAYS

16.01A An employee will be granted the following holidays on the day on which the holiday occurs or is celebrated by the College without reduction of salary:

Good Friday	Civic Holiday
Victoria Day	Labour Day
Canada Day	Thanksgiving Day

16.01B An employee will be granted the holiday period of December 25th to January 1st inclusive without reduction of salary.

Article 17  
SHORT-TERM DISABILITY PLAN (STD)

Participation

17.01A Effective April 1, 1991, all full-time employees shall be covered by this plan.

**Benefits**

17.01 F1 During absences due to illness or injury, participating employees who would otherwise be scheduled to work shall receive 100% of regular pay for up to and including 20 working days in any one benefit year, plus any unused credits carried forward from previous years. Days not utilized in any year shall be considered to be credits (on the basis that one credit represents 100% of regular pay for one working day) and shall be carried forward to the next benefit year. Debits shall be made from the total assigned benefit on a day-for-day basis.

17.01F2 During absences due to illness or injury in excess of the accumulated days referred to in 17.01 F 1, participating employees shall be paid 75% of regular pay for up to the difference between the number of accumulated days referred to in 17.01 F1 and the date the employee would normally qualify for LTD.

17.01F3 Where the qualifying period for LTD has expired, and the employee qualifies for LTD, and the employee still has credits standing in his or her name under this plan, such credits may, at the election of the employee, be utilized by the employee instead of LTD benefits, until the employee elects to take LTD benefits, if qualified.

17.01F4 During the period defined in 17.01 F1, a participating employee who is absent due to injury or illness on the day before or after a holiday as defined in 16.01 shall receive pay for the holiday at the rate defined in 17.01F1.

17.01F5 During the period defined in 17.01 F2, a participating employee who is absent due to injury or illness on the day before or after a holiday as defined in 16.01 shall receive pay for the holiday at the rate defined in 17.01 F2.

17.01 F6 Application for benefits under the plan shall be made at such time and in such manner as the College shall determine and shall be supported by such medical evidence, if any, as the College may require.

It is apparent, that under Article 16.01A and B, employees are to receive the appropriate statutory holidays along with the December 25th to January 1st holiday period which would include Christmas Day, Boxing Day and New Years Day without a reduction of salary. In effect, employees are to be paid for those holidays.

However, Article 17 of the Collective Agreement, in our view, is a comprehensive plan to deal with employees who are receiving short-term disability benefits. Where employees are absent due to illness or injury they are entitled to receive either 100% of their regular pay under Article 17.01 F1 or 75% of their regular pay under Article 17.01 F2. Article 17.01 F4, guarantees that employees who are injured or ill shall receive pay for the holiday in the same manner as employees who are not ill. The Article ensures that employees receiving short-term disability benefits shall not be penalized when holidays arise during the period that they are injured or ill; the holidays are to be considered as days for which the employee is entitled to receive "pay for the holiday". Article 17.01 F5 is to the same effect, but for employees who are only receiving 75% of their regular pay.

Since holiday pay is an earned benefit, Article 17.01F4 and 1701 F5 ensure that participating employees, that is employees who participate in the STD plan, are guaranteed and not deprived of their holiday pay. Thus, for example, Article 17.01 F4 ensures that a participating employee not be deprived of his/her holiday pay merely because that employee is absent on the day before or day after a holiday as defined in Article 16.01. The reference in Article 17.01F4 to Article 17.01F1 is to establish the "rate" to be paid participating employees and similarly, the reference in Article 17.01 F5 to Article 17.01 F2 is to establish the "rate" to be paid. Since employees who participate in the STD plan are paid at different rates - either 100% of regular pay under Article 17.01 F1 or 75% of regular pay under Article 17.01 F2, the references to the "rate" in Articles 17.01 F1 and 17.01 F2 are merely to ensure that payment for holiday pay is consistent with the rate of pay that the

employee is receiving under the STD plan. The references in both Articles are not to deprive an employee of holiday pay but merely to ensure that the rate for the holiday pay, is consistent with the payment that the participating employee is receiving under the STD plan. If it had been intended that employees not receive holiday pay and only be entitled to their sick benefits, Articles 17.01 F4 and 17.01 F5 would have provided that employees shall be paid in accordance with Article 17.01 F1 and 17.01 F2 and not simply at the "rate".

In the result, we determine that the grievor is entitled to be paid his holiday pay while he was a participating employee in the STD plan under Article 17. We will remain seized of that issue should the parties be unable to agree on the amount.

For the reasons given, the grievance is denied in part and allowed in part.

DATED AT TORONTO THIS 1st DAY OF NOVEMBER, 1999



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**O.B. SHIME, Q.C.**  
**CHAIRPERSON**

"I Concur"

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**H.J. COOK**  
**NOMINEE FOR THE COLLEGE**

"I Concur"

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**M. LYONS**  
**NOMINEE FOR THE UNION**