

HEADNOTE

OPSEU	#91C592
LOCAL	#109

**OPSEU (Skinner, S.) and Fanshawe College
Award dated September 3, 1992 (MacDowell)**

PAID LEAVE - The grievor applied for leave with pay to permit him to remain at home to care for his spouse who suffered medical complications after the birth of their first child. The employer did not dispute the grievor's need to be at home but declined to grant leave with pay. The grievor was permitted to take time off using vacation credits. The employer's reason for refusing leave was that it had no policy to extend leave with pay in such circumstances and that other employees were only entitled to one or two days leave upon the birth of a child.

GRIEVANCE UPHELD - The employer has been found to have violated Article 12.2 which requires that leave with pay for extenuating personal circumstances not be unreasonably denied. In rigidly applying the policy of the College the employer has fettered its discretion and therefore unreasonably denied leave. The College is required to reinstate nine days credit to the grievor's vacation bank by way of remedy - the number of days for which the grievor requested leave of pay.

David Wright

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

- and -

FANSHAWE COLLEGE

Grievance of Sid Skinner - OPSEU No. 91C952

Before: R. O. MacDowell - Chairman
 Brian Switzman - Union Nominee
 Ron Hubert - Employer Nominee

Appearances:

For the Union: David Wright, Counsel
 Jean Crawford
 Sandra Kipper
 Sid Skinner

For the Employer: Susan J. McDermott, Counsel
 Debbie Laevens
 Doug Pinnell
 Ingrid Hobbs

Hearing held in London on March 24, 1992

A W A R D

I

This is the grievance of Sid Skinner ("the grievor") who claims that, in March 1991, the College unreasonably denied him the paid personal leave provided for in Article 12.2 of the collective agreement. Mr. Skinner submits that he should have been granted such leave to deal with his wife's unexpected medical complications following the birth of their first child.

The College concedes that the grievor was entitled to leave away from work to cope with these family obligations. The question is whether he was unreasonably denied leave with pay.

A hearing in this matter was held, in London, Ontario, on March 24th, 1992. The parties were agreed that the board is properly constituted, and has jurisdiction to hear and determine the matters in dispute between them. The parties were further agreed that if the board found a breach of the collective agreement, it could remain seized in the event there was any question about the amount of compensation to which the grievor was entitled.

The provisions of the collective agreement to which reference will be made are as follows:

12.1 Personal Leave Without Pay

Leave of absence without pay may be granted by the College for legitimate personal reasons.

12.2 Personal Leave with Pay

Recognizing the over-riding responsibility to the students, leave of absence will be scheduled where possible to ensure a minimum of disruption to the educational programs and services of the College. Reasonable notice shall be given to the Supervisor concerned.

Leave of absence for personal reasons, religious leave and special leave in extenuating personal circumstances may be granted at the discretion of the College without loss of pay and such requests shall not be unreasonably denied.

...

12.5 Parental Leave

In the case of childbirth or adoption, the parent who is not eligible for leave under the provisions of Article 12.3 or 12.4 and who has completed more than one (1) year of continuous service with the College, shall be granted, on request, a leave of absence without pay for a period of six (6) weeks or such other period as may be mutually agreed. Such request shall be made in writing with not less than two (2) weeks' notice, or as otherwise mutually agreed.

The grievance is based solely upon Article 12.2. No evidence or argument were addressed to Article 12.1, or the relationship between Article 12.1 and the other provisions in the agreement.

The facts are not substantially in dispute.

Credibility, as such, is not in issue. We might note, however, that we prefer the witness' oral evidence which was subjected to

the test of cross-examination, over some of the documentary material which was exchanged between the parties in the course of the grievance procedure. In any event, the problem in this case is not what happened, but rather how those events should be categorized and dealt with under the terms of the collective agreement.

II

The grievor is a caretaker who has been employed by the College since 1989. His immediate supervisor is Doug Pinnell. Mr. Pinnell reports to Debbie Laevens, the Assistant Manager of Caretaking.

In the week beginning Monday, March 10, 1991 and ending Friday, March 15, 1991, the grievor was away from work on sick leave. This absence was verified by a doctor's certificate (Exhibit 4) dated March 12, 1991, which stipulates a return-to-work date of Sunday, March 17, 1991. No one challenges the validity of that absence from work, or the sufficiency of the doctor's certificate.

On Wednesday, March 13, 1991, the grievor's wife had a child. The grievor's wife is a very small woman. She is only 4' 4" tall. The child was "normal", weighing 7 lbs. 9 ozs.

It was a difficult birth. The delivery was by Caesarean section. The surgery involved bruising, pain, and an incision which had to be regularly dressed and drained. It did not heal quickly.

In the aftermath of this abdominal surgery, Mrs. Skinner spent four days in hospital. When she returned home on Sunday March 17th, she was initially unable to look after either herself or her child. Nor were there any relatives able to lend a hand. Her husband was the only one available to provide the necessary care.

No one questions the grievor's need for time off. According to Ms. Laevens, there was only a brief discussion about that, and she was sympathetic to the grievor's predicament.

Ms. Laevens explained that she had had a Caesarean section herself. She had experienced the effects of abdominal surgery. She had been hospitalized for three weeks. Indeed, she was quite surprised that the grievor's wife had been released from hospital so soon. Ms. Laevens understood that the grievor's wife would not be able to be on her own in the days following her surgery and would need help at home.

Mr. Pinnell testified that he works the day shift, does not have continuing contact with the grievor, and had no

involvement in the grievor's request for paid personal leave in mid-March 1991. Mr. Pinnell testified that employees are ordinarily granted a day or two off, with pay, on the birth of a child, and he anticipated that this was the case for the grievor. He further recalled that some weeks earlier, the grievor had registered a request to take some vacation time around the date of his son's birth so Mr. Pinnell anticipated that he would be off work on that basis for the week of March 17-22. But there was no written request to this effect since the College no longer required such formalities. Mr. Pinnell recalls recording the grievor's request in his day book, but he did not have the day book with him and did not consult it prior to giving his evidence; however it came as no surprise that the grievor was off that week (and the next) or that it was considered vacation time. But this was a matter settled between the grievor and Ms. Laevens.

The grievor had a slightly different recollection. He agrees that he asked for time off around the time of his son's birth but he did not recall doing so well in advance and, at the time, did not recall describing the time off categorically as vacation time. However, as it turned out, the grievor did draw upon his vacation bank and took off a number of days which the College treated as "vacation". But the grievor maintains that he only opted to take "vacation" after his request under Article 12.2 was denied. Resorting to vacation time was the only way he

could continue to receive a paycheque while he was off work and the College's decision was being challenged.

Ms. Laevens confirms that the grievor was denied leave under Article 12.2, and was told that if he wanted time off, with pay, he should consider using his annual vacation. As far as Ms. Laevens was concerned, the grievor was not entitled to leave under Article 12.2, because the College had never paid leave in his circumstances before and no one had ever asked. The College policy was to grant a day or two off on the birth of a child. Ms. Laevens was unaware of any deviation from that practice.

Ms. Laevens conceded however that the practice developed in respect of "normal births" and that the grievor's situation was different and, for her, unprecedented. She acknowledged that the grievor's difficulties were special and pressing; however, in her opinion this did not warrant "special" paid leave under Article 12.2 because such leave had never been given before.

For Ms. Laevens, the question was not whether the grievor was entitled to time off but whether there was any other source of financial subsidy for the period of his absence since Ms. Laevens accepted its necessity and understood the financial hardship involved. Ms. Laevens considered several options: an

application under the Unemployment Insurance legislation; paternity leave under Article 12.5, or perhaps the Employment Standards Act; and an immediate draw-down of the grievor's vacation credits.

The grievor chose the vacation option because it was not at all clear to him that either of the others would give him any benefit at all. The week of March 17 and the week of March 24 were treated as "vacation time" with a corresponding reduction in the grievor's vacation bank. March 29th is Good Friday and was therefore a statutory holiday.

As late as the hearing, Ms. Laevens was unable to say how the Unemployment Insurance regulations might apply in the grievor's situation or whether there was any financial support available there or under the Employment Standards Act. Ms. Laevens testified that she thought there was a two-week waiting period and that U.I. benefits were only payable after the exhaustion of accumulated vacation credits. She was not sure. Similarly, she was not sure whether the grievor could derive any assistance from the "paternity leave" provisions of the Employment Standards Act. Accordingly, however attractive we might otherwise find the plea that the grievor should seek alternative sources of financial support before resorting to Article 12.2, the evidence does not establish that there were

any. The grievor opted to draw down his vacation bank because he had been denied leave under Article 12.2 and had no other practical alternative.

There is no evidence before the board of any other situations in which the College has granted or denied paid leave under Article 12.2. There is, therefore, no background with which the grievor's situation can be compared, or which would help us to assess whether circumstances like his were usual or unusual, frequent or infrequent. As far as Ms. Laevens was concerned, the grievor's dilemma was unprecedented; but that is the only evidence we have. Similarly, there is no evidence of any situations in which leave has been granted or denied under Article 12.1, the companion leave provision.

This is not to say that the employer's practice in other situations would necessarily govern the result in this one; but to the extent that the "reasonableness" of its decision is under review, that term might take its colour from a broader context of leave requests. Words like "special" or "extenuating" suggest something out of the ordinary, and the degree to which the grievor's situation is, indeed, extraordinary might assist us in measuring the "reasonableness" of the employer's response. Looking after a sick spouse/child would not seem on the surface to be so unusual, but in the absence of any evidence of context,

we are left to weigh the grievor's situation in isolation and glean such enlightenment as we can from the language of the agreement itself.

What can be said is that there is no evidence whatsoever of any disruption or inconvenience to the College resulting from the grievor's absence from work, and no assertion that there was any. We repeat: there was no question of the grievor's need for time off, or the College's ability to accommodate it. The sole issue was whether the grievor's request could, and should, have been granted under Article 12.2 - that is, whether his situation amounted to an "extenuating personal circumstance" that warranted a "special leave" with pay of about two weeks duration. The employer did not quarrel with the two-week period or argue that the grievor should have been able to make alternative home-care arrangements in some shorter time (for example by retaining a visiting nurse).

The issue, then, is whether Ms. Laevens was entitled to deny special leave in the grievor's case, precisely because his situation was unusual or unprecedented and there was no College policy precisely on point, or because the College only "allows" a day or two off on the birth of a child. In our view, the answer is no.

III

We may begin by observing that we are not here dealing with the kind of implied duty of "fairness" or "reasonableness" which troubled the Court of Appeal in Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association et al (1981), 33 O.R. (2d) 476. The discretionary language in the agreement before us is specifically qualified by the phrase "such requests shall not be unreasonably denied". It is unnecessary to "imply" anything. The College's decision must meet an objective test of reasonableness, and is subject to arbitral review on that basis.

There is not much doubt that on the evidence before us, the grievor had "personal reasons" for being absent, or that he found himself in "extenuating personal circumstances". The situation was unforeseen, beyond his control, and demanded that he be away from work to attend to family obligations. The College did not really quarrel with that. The grievor meets that part of Article 12.2. The problem is how the College is to apply the broad discretion which arbitrator Gail Brent has described this way:

As is obvious when one examines the language in Article 12.1 of the collective agreement, the parties have given virtually no guidance for distinguishing between leaves without pay for "legitimate personal reasons" in Article 12.1, and leave of absence with pay for "personal reasons, religious leave and special leave in extenuating personal circumstances" in Article 12.1.2.

Because the granting of both Article 12.1 and Article 12.1.2 leaves is at the discretion of the College, it is only reasonable to expect the College to be concerned that those who grant leaves have some guidance about how to apply those two provisions of the collective agreement ... When the language of Article 12.1.2 is examined, it is clear that it would be a formidable, if not impossible task to try to catalogue all of the circumstances which could possibly qualify as being either "personal reasons" or "extenuating personal circumstances". The parties no doubt used those broad general phrases to reflect the reality that there are as many "personal reasons" and "extenuating personal circumstances" as there are grains of sand on the beach. The intent of the provision must surely be to give the employee the right to have his/her situation examined fully before determination is made whether or not to grant a request for leave with pay.

We adopt those observations. The clause is broadly drafted, and there is a legitimate concern for consistent application, but an individual is nevertheless entitled to a fair examination of the request unfettered by unreasonable prejudgement.

Is there some guidance in the language of Article 12.2 as to how the College must exercise its discretion? Only partially. The opening lines of the clause focus on disruption of the educational program and the requirement for reasonable notice. No other criteria are identified, and, of course, there is no evidence of disruption here, and no objection taken to the amount of notice given to the supervisors concerned. To the extent that the agreement identifies specific reasons for denying "special leave" - insufficient notice, disruption to the employer's operation - they are not factors present in the grievor's case.

If the agreement has no negotiated criteria for the exercise of discretion and the ultimate decision must nevertheless be "reasonable", could the College policy be the controlling factor which Ms. Laevens made it? In our view it could not. Without necessarily importing administrative law concepts into the interpretation of the collective agreement, we think that the obligation to be reasonable encompasses a duty to fairly consider each claim on its particular merits, without regard to some rigid or pre-established policy. In Re Meadow Park Nursing Home and SEIU (1983), 9 L.A.C. (3d) 137, arbitrator Swan described the employer's duty in these terms:

In particular, we think that the exercise of the employer's discretion must be in good faith, must be a genuine exercise of discretion and not merely the application of a rigid policy, and must include a consideration of the merits of each individual case. All relevant factors must be considered, but no extraneous or irrelevant considerations may be taken into account.

The employer cannot adhere to a policy which unreasonably fetters its discretion under Article 12.2 or superimposes a limitation that the parties have not negotiated; for to do that would be tantamount to unilaterally amending the agreement. Any purported policy must leave room for an honest assessment of each case, and must itself effect a reasonable disposition of the class of cases for which it was devised. A policy which reflects the

accumulated experience of reasonably exercised discretion may be perfectly proper but it cannot preclude consideration of different or special cases, and must be reasonably related to the circumstances under review - if only by analogy.

But here, Ms. Laevens' decision was controlled entirely by her understanding of the College "policy" and that "policy" had no application to the grievor's circumstances at all. The reflexive reference to "established practice" precluded any genuine consideration of the grievor's situation and led to the erroneous conclusion either: that the grievor's circumstances while pressing, serious, unprecedented and beyond his control were not "extenuating"; or that precisely because they were pressing, but unprecedented, they did not fit within established "policy" so as to justify "special" leave. Neither conclusion is reasonable or warranted. We find that the grievor's request was not properly considered and was therefore unreasonably denied.

We do not think that it was open to the College in the circumstances in this case to demand that an employee use up his vacation credits prior to the exercise of any discretion under 12.2. In the first place, on the evidence before us, that was not the option put to the grievor who, for the reasons outlined above, had already been denied special leave before the alternatives were explored. More fundamentally, though, to

permit the College to make the availability of one negotiated benefit conditional upon the exhaustion of another would amount to an unwarranted re-writing of Article 12.2. The parties could have negotiated that qualification, but they did not; and it is not open to the College to create such limitation through the purported exercise of its discretion.

Vacation is not the same as special leave. One has not been made contingent on the other and the detailed negotiated scheme of payment, pro-rating, scheduling and carry-over of vacations is quite inconsistent with the suggestion that those rights are linked to or qualify the right to special leave provided by Article 12.2. It is also interesting to note that the vacation Article 11.5 actually does contemplate some situations where an employee's personal circumstances preclude enjoyment of vacation which can therefore be justifiably extended, which suggests that, in a limited way, the parties have accepted that vacation time is for vacation. This too is inconsistent with the assertion that vacation time must be used in extenuating personal circumstances before special leave may be granted under Article 12.2.

Likewise we do not think that Article 12.5 "Parental Leave" provides any assistance to the College. There is no reason to hold that the presence of a parental leave clause which

provides up to six weeks leave for that particular purpose precludes special leave under Article 12.2 if the terms of Article 12.2 are otherwise met. The clauses have different purposes and can sit comfortably together without any conflict or preclusive effect. Again, if the parties had intended to make leave under Article 12.3 conditional upon exhausting leave under Article 12.5 (or Article 12.1 for that matter), they could easily have said so. They did not; moreover, Article 12.5 Parental Leave is triggered by an employee request on not less than two weeks' notice - a formula which does not apply in the present circumstances where there was no such request and the requested Article 12.2 leave does not extend beyond two weeks.

For the foregoing reasons, we have no difficulty concluding that the leave under Article 12.2 was unreasonably denied or that the grievor's case was not properly considered. We have not doubt, therefore, that there has been a breach of the collective agreement. We are more troubled by the appropriate remedy.

IV

Because the College did not fairly consider the grievor's claim, and denied it for reasons which are extraneous and inappropriate, it is difficult to predict just how it would have exercised its discretion if only the proper criteria had

been considered. We are asked therefore to remit this matter back to the College for reconsideration in somewhat the same manner as a Court might do if the decision of an administrative tribunal were quashed. It is said that to do otherwise would be an unwarranted usurpation of "management rights", and that reconsideration is the appropriate response where the grievor has lost the "opportunity" of a fair consideration of his request. If the employer has unreasonably denied leave, the remedy is to direct it to consider the request again - this time reasonably.

We agree that in some circumstances an unreasonable denial of benefits under Article 12.2 might be remedied by a direction to reconsider. However before adopting that remedy we think it appropriate to recognize the realities of the situation. It is, to say the least, a trifle artificial to order the party that has breached the collective agreement and has wrongly denied a benefit to reconsider to see whether the benefit could have been properly denied "for the right reasons". That is especially so in a case like the present one where the circumstances are unusual. There is no policy applicable, and the parties are being asked to reconstruct the situation, considerations and options they faced well over a year ago. This is not like a judicial review where the Court is remitting the matter back to a tribunal required to act judicially within defined legal parameters. Without in any way questioning Ms. Laevens' good

faith, there would be a natural inclination to reach the same result - thereby precipitating another round of litigation which has already cost far more than the amount of the claim. We repeat: it seems odd that a party that has abused its discretion should be entitled to a further unfettered exercise of the same discretion, with the only check a further resort to grievance arbitration.

It appears to us that if the College is to be given a second opportunity to assess a claim after an initial wrongful denial, it must at the very least be able to outline the reasonable criteria which if properly considered would point to a different result. It must be able to establish some reasonable basis for the probability that the "lost opportunity" was in fact of no economic value because leave would have been denied in any event. If it were otherwise, there could be repetitive litigation as the employer devised new reasons which would then once more have to be subjected to the test of reasonableness.

On the evidence before us, we find that the grievor was improperly denied special leave. We further find that he should not have been required to exhaust his vacation credits before being entitled to special leave. In addition, on the evidence before us we find that, on the balance of probabilities, a reasonable consideration of the situation would have led to the

granting of special leave for the 9 working days from March 18th to 28th. That is the appropriate evaluation of his "lost opportunity" in the absence of any evidence that the employer would have reached a different conclusion if properly instructed.

We decline to speculate upon the factors which might properly be considered in the myriad situations which could arise under Article 12.2. We need only find that, on the facts of this case as outlined by Ms. Laevens, the grievor was entitled to and should have been granted leave under Article 12.2. The employer advanced no reason for a contrary conclusion.

We direct therefore that the grievor's vacation bank be rectified to the extent of 9 days with pay. This remedy excludes March 29th which is a statutory holiday and likewise excludes March 13-15 when the grievor was already away from work on sick leave. In our opinion no "pyramiding" or "double benefit" problem arises in respect of March 13-15, because on no construction of the facts would the grievor have been reasonably entitled to or granted "special leave" for this period. The evidence is that his wife returned from the hospital on Sunday, March 17th. No leave would have been warranted for any period before that, so there is no basis for an ex post facto change to the characterization of these "sick days".

In accordance with the agreement of the parties the board will remain seized in the event that there is any difficulty implementing this award.

Dated at Toronto this 3rd day of September, 1992.



CHAIRMAN

I CONCUR:
(Addendum attached)

"Brian Switzman"

UNION NOMINEE

I CONCUR:

"R. A. Hubert"

EMPLOYER NOMINEE

IN THE MATTER OF AN ARBITRATION

BETWEEN: FANSHAWE COLLEGE

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND IN THE MATTER OF THE GRIEVANCE OF S. SKINNER - OPSEU #91C952

A D D E N D U M

I have joined with the Chair in his award. I am in full agreement with the conclusion and results found therein.

However, in one respect I have a different view than the chair as found in his comments on page 16 of the award. I do not agree that a breach of Article 12.2 can be remedied by a direction to reconsider. The clause requires the employer to grant paid special leave in certain circumstances and the request "...shall

not be unreasonably denied." If the employer unreasonably denies the leave then, as in this case, it must pay the appropriate leave. What constitutes the appropriate amount of paid leave, will in all cases be decided by the Board of Arbitration that hears the matter. As in the improper denial of any other paid leave -- maternity, bereavement, union leave, etc. a finding of a breach of the agreement can only be remedied by a direction to pay what has been denied the grievor.

Dated at Toronto, Ontario this 25th day of August, 1992.

Respectfully submitted by,

"Brian Switzman"
Brian Switzman
UNION NOMINEE