

IN THE MATTER OF AN ARBITRATION

97D443  
L655  
CAAT (A)

BETWEEN: ONTARIO COUNCIL OF REGENTS FOR THE  
COLLEGES OF APPLIED ARTS AND  
TECHNOLOGY (CAMBRIAN COLLEGE)

AND ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND IN THE MATTER OF THE GRIEVANCE OF G. SMITS

BOARD OF ARBITRATION: MAUREEN K. SALTMAN, CHAIR  
DAVID J. CAMELETTI, COLLEGE NOMINEE  
SHERRIL MURRAY, UNION NOMINEE

APPEARANCES:

FOR THE COLLEGE: STEPHEN J. SHAMIE

FOR THE UNION: TIM BANASIK

HEARING DATE: May 15, 1998

OPSEU FILE NO.: 97D443 (ACADEMIC)

## AWARD

The grievance in this case, which is dated November 24, 1996, involves a claim for sick leave credits on behalf of the Grievor, Gerard Smits. The claim arises under Article 17 of the collective agreement, the relevant portions of which are to the following effect:

### **Article 17 SHORT-TERM DISABILITY PLAN (STD)**

#### **Participation**

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

...

#### **Benefit Year**

**17.01 D** The benefit year shall be September 1 to August 31. For the balance of the benefit year expiring August 31, 1991, an employee will be credited with the unused credits, if any, standing in the name of the employee on April 1, 1991, under the terms of a previous Cumulative Sick Leave (CSL) Plan, where applicable. Employees hired between April 1, 1991, and August 31, 1991, shall be credited with a pro-rated number of annual credits, depending on date of hire.

...

#### **Benefits**

**17.01 F 1** 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.

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### **Expiry of Credits**

**17.01 G** Subject to 17.01 H, upon retirement, layoff or termination of employment, any credits standing in the name of the employee shall be cancelled and shall be of no effect.

### **Protection of Existing Rights**

**17.01 H** Notwithstanding 17.01 G, employees hired before April 1, 1991, shall be entitled to utilize available credits (or portions thereof) at the time of retirement, termination of employment or layoff as a lump-sum gratuity calculated in accordance with the terms of the pre-existing Cumulative Sick Leave Plans, where applicable and where the employee is eligible and shall not exceed the amount of one-half the employee's annual salary as of the date of separation.

The material facts are as follows: The Grievor, whose seniority dates from October 28, 1991, was initially hired by the College as a partial-load employee from December 17, 1990 to May 30, 1991. As such, he was entitled to 20 hours' sick leave under the previous Cumulative Sick Leave Plan.

Subsequently, the Grievor was employed as a sessional instructor from June 17, 1991 to August 31, 1992. It was agreed that there was no

entitlement to sick leave in respect of this period. Immediately thereafter, from August 31, 1992 to July 2, 1993, the Grievor held a term appointment as a full-time Professor. By agreement of the parties, for the duration of this appointment, the Grievor had the status of a full-time employee and was, therefore, entitled to 20 sick days under Article 17 of the collective agreement. In April, 1993, the Grievor was provided with a memorandum indicating his accumulated sick credits as of March 31, 1993 as 19 days (this being 20 days less one sick day he used during the period of his appointment). On July 14, 1993, following the end of his term appointment, the Grievor received the following memorandum:

**Collège CAMBRIAN College**

**HUMAN RESOURCES DEPARTMENT**

**MEMORANDUM**

**TO: GERRY SMITS**  
**FROM: A. Makynen**  
**DATE: July 14, 1993**  
**SUBJECT: TERMINATION OF EMPLOYMENT**

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On July 29, 1993 your pay for the period to and including July 2, 1993 and vacation pay for 42 days will be deposited to your bank account.

Attached are the following documents:

- 1) Notice of Conversion Privilege on Group Life Benefit you have 30 days from termination date to convert your group insurance coverage of \$25,000 to a personal plan without taking a medical.

Your CAAT Pension Plan Termination Election form outlining the options available will be forwarded to you August 1993.

Please submit claim forms for any extended health or dental expenses as all benefits will cease July 31, 1993.

If I can be of any service, please feel free to contact me.

'D. Rancourt'

A. Makynen (Mrs.)  
Personnel Officer

/ll

Enclosure

From September, 1993 to May 20, 1994, the Grievor was again employed as a sessional instructor. Thereafter, on May 23, 1994, the Grievor was appointed as a Professor in the Trades Training Department and, as such, was covered by the collective agreement. Subsequently, the Grievor signed up for a number of benefit plans provided under the agreement as a "new employee" rather than as a "rehire - previously insured".

The issue on the merits is whether the Grievor is entitled to carry over 20 hours of sick leave under the previous Cumulative Sick Leave Plan attributable to his partial-load employment from December 17, 1990 to May 30, 1991, as well as 19 sick days attributable to his term appointment from August 31, 1992 to July 2, 1993, to his present employment as a Professor commencing May 23, 1994. There was also an issue as to arbitrability based on the allegation that the grievance was filed outside the time limits under the collective agreement.

Apart from Article 17, the following provisions of the collective agreement are relevant to a determination of these issues:

**ARTICLE 32  
GRIEVANCE PROCEDURES**

...

**Complaints**

**32.02** It is the mutual desire of the parties that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the employee and the immediate supervisor unless mutually agreed to have other persons in attendance. The

immediate supervisor's response to the complaint shall be given within seven days after discussion with the employee.

...

**General**

**32.05 A** If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

...

**32.05 C** At any Complaint or Grievance Step of the grievance procedure, the time limits imposed upon either party may be extended by mutual agreement.

...

**APPENDIX V  
PARTIAL-LOAD BENEFITS**

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**B. Time-off Benefits**

...

**(c) Sick Leave**

- Participation - All partial-load employees under contract
- Eligibility - All partial-load employees under contract
- Waiting Period - nil
- Benefit Level - same as full-time employees except that annual entitlement is prorated based on length of contract and number of Teach-

ing Contact Hours in accordance with Appendix VI.

...

**NOTES**

...

**3. Bridging Benefit re: Sick Leave Plan**

The sick leave plan is based on the cumulative sick leave plan which is in place for the full-time academic employees hired up to and including March 31, 1991. There will be bridging of this benefit allowed if the partial-load employee is re-hired within 6 months of the end of any contract or if upon termination of a contract there is a written contract for future employment as a partial-load employee. In the event that a partial-load employee is on an approved leave of absence the 6 month period will not commence until the end of the leave.

Effective April 1, 1991, all partial-load employees not hired before April 1, 1991, shall be covered by the short term disability plan as set out in Article 21 of the 1989-91 Academic Collective Agreement with the bridging provisions as set out above.

...

**LETTERS OF UNDERSTANDING**

**The following Letters of Understanding, negotiated by the parties and renewed during the most recent round of bargaining, are reproduced for information purposes.**

...

Council of Regents  
for Colleges of  
Applied Arts and  
Technology

11th Floor  
790 Bay Street  
Toronto, Ontario  
M5G 1N8

June 3, 1992

Re: Cumulative Sick Leave Plans

This will serve to confirm the advice given in negotiations by the Colleges' Negotiating Committee that the Colleges will continue the Sick Leave Plans as in operation on August 31, 1973, until March 31, 1991.

This will also confirm the agreement of the parties that the right of employees hired before April 1, 1991, to be paid a lump sum gratuity on retirement, termination of employment or layoff will be protected and will be maintained in perpetuity, and any amendment to the right of such employees to the gratuity shall be subject to ratification by majority vote of such employees.

F. Upshaw  
President  
Ontario Public Service  
Employees Union

R. Johnston  
Chair  
Ontario Council  
of Regents

With respect to the period from December 17, 1990 to May 30, 1991, the College submitted that although the Grievor was entitled to 20 hours' sick leave, the bridging provisions of Appendix V do not apply to maintain these credits as the Grievor was not rehired as a partial-load employee within six months of the end of his contract and as there was no written contract for future employment as a partial-load employee. Moreover, although the Grievor was entitled to 19 sick days (being comprised of 20 days less one day he utilized) for the period of his term appointment from August 31, 1992 to July 2, 1993, the College submitted that, in accordance with the provisions of Article 17.01 G, upon termination of his full-time appointment effective July 2, 1993, these 19

days were cancelled. Apart from the merits, the College submitted that the grievance is inarbitrable as it was filed outside the mandatory time limits set out in the collective agreement and as there is no jurisdiction to relieve against time limits under the Colleges Collective Bargaining Act.

The Union submitted that Article 17.01 H maintains the entitlement of employees hired before April 1, 1991 to a lump sum gratuity on retirement, termination of employment or layoff based on sick leave credits accumulated under the previous Cumulative Sick Leave Plan. The Union further submitted that the entitlement under this Article is not restricted to employees hired on a full-time basis and that, having been hired as a partial-load employee before April 1, 1991, the Grievor was entitled to the benefit of this provision. Moreover, as the Grievor was rehired within six months of the end of each of his contracts, the bridging provisions of Appendix V have the effect of maintaining his entitlement to sick leave under the previous Cumulative Sick Leave Plan. In the result, the Grievor was entitled to the restoration of 20 hours of sick leave attributable to his partial-load employment for his current use or to be taken as a lump sum gratuity upon retirement, termination or layoff, and to the restoration of 19 sick days attributable to the period of his full-time term appointment for his current use. As to the issue of arbitrability, although there was no dispute that the time

limits are mandatory or that there is no jurisdiction to relieve against time limits, the Union maintained that the grievance was filed in timely fashion.

### **DECISION**

Article 17 of the collective agreement sets out the Short-Term Disability Plan applicable to full-time employees (Art. 17.01 A). Under this plan, employees are entitled to 100 percent of regular pay for up to and including 20 working days in respect of each benefit year (the benefit year being from September 1 to August 31 (Art. 17.01 D)), as well as unused credits carried forward from previous years. Credits not utilized in any benefit year are to be carried forward to the next year (Art. 17.01 F 1). Upon retirement, termination or layoff, however, these credits are cancelled (Art. 17.01 G) except that employees hired before April 1, 1991 shall be entitled, upon retirement, termination or layoff, to a lump sum gratuity based on eligibility for credits accumulated under the previous Cumulative Sick Leave Plan not to exceed one-half the amount of the employee's annual salary as of the date of separation (Art. 17.01 H; Letter of Understanding Re: Cumulative Sick Leave Plans).

In this case, there was no dispute that, having been appointed to a full-time position effective May 23, 1994, the Grievor is covered under the Short-

Term Disability Plan and is, therefore, entitled to up to 20 working days of sick leave credit in each benefit year. The issue is whether he is also entitled to carry over 20 hours of sick leave credits in respect of a period of partial-load employment from December 17, 1990 to May 30, 1991, as well as 19 days of sick leave credits attributable to a full-time term appointment from August 31, 1992 to July 2, 1993.

As to the claim for 20 hours of sick leave attributable to the period of partial-load employment, assuming, without deciding, that the Grievor was hired before April 1, 1991, he would be entitled to a lump sum payment in respect of these hours upon retirement, termination or layoff (Art. 17.01 H). Nevertheless, the College submitted that the Grievor ought to have known well before November 24, 1996, when the grievance was filed, that he had not been credited with the 20 hours in question and, therefore, filed a grievance. Article 32.02 of the collective agreement requires that an employee commence the grievance procedure by initiating a complaint "within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee". These events, it should be noted, are mutually exclusive. In other words, a complaint is untimely which is initiated more than 20 days after the circumstances giving rise to the complaint have occurred or have come to the employee's attention or ought

reasonably to have come to the employee's attention. As the time limits under the collective agreement are mandatory, and as the Board has no jurisdiction to relieve against these time limits, a grievance which is initiated outside the time limits is inarbitrable: see Re Cambrian College and Ontario Public Service Employees Union; Grievance of Bailey - #92D627, October 18, 1994 (Swan (unreported)).

Different considerations, however, apply to a continuing grievance or, in other words, a grievance which relates to continuing, or repetitive, breaches of the collective agreement. In the case of a continuing grievance, failure to file the grievance (or complaint, as the case may be) within the stipulated time limits from the initial breach will not render the grievance inarbitrable, although it may limit the relief which may be awarded.

In this case, the Union claimed that, as there is a continuous bank of sick leave credits, failure to recognize the Grievor's sick leave credits attributable to his partial-load employment involves an ongoing breach of the collective agreement, which may be the subject of a continuing grievance. There would appear to be two aspects to the Union's claim, one relating to the utilization of these sick leave credits as a lump sum gratuity on retirement, termination or layoff, and the other, to the restoration of these credits for the Grievor's current

use. Although it is at least arguable that a claim for the restoration of credits for the Grievor's ongoing use would fall under the rubric of a continuing grievance, it seems clear that a claim for a gratuity, which arises upon the occurrence of a discrete event, namely, retirement, termination or layoff, would not.

In regard to the claim for a gratuity, Article 17.01 H maintains the entitlement of employees hired before April 1, 1991 to a lump sum gratuity based on eligibility for sick leave credits accumulated under the previous Cumulative Sick Leave Plan on retirement, termination or layoff. Assuming that the entitlement under this Article is not restricted to employees hired on a full-time basis, there are at least two junctures at which the Grievor's employment would appear to have come to an end, these being at the end of his partial-load employment in May, 1991 and at the end of his full-time term appointment in July, 1993. With respect to the term appointment, in particular, the appointment document contains within it a notice of termination. Moreover, following both of these periods of employment, there was a hiatus of between three weeks (in the case of the partial-load employment) and two months (in the case of the term appointment). Although the Union suggested that, having been employed initially as a partial-load employee, the Grievor was entitled to the benefit of the bridging provisions in Appendix V following the end of all of his contracts, including his term appointment in July, 1993, the Board cannot agree. Even if

the Grievor were entitled to the benefit of the bridging provisions following the end of his partial-load contract on May 30, 1991 (which the College maintained he was not, as he was neither rehired, nor was there a written commitment to rehire him, on a partial-load contract), the Appendix has application only to partial-load employees and there was nothing to suggest that the bridging provisions apply following the termination of any other type of contract.

In the absence of a bridging mechanism, the Board finds that the Grievor's employment was terminated, if not before, at the end of his term appointment on July 2, 1993. It was at that point, if any, that the right to a gratuity in respect of the 20 hours of sick leave credit arose under Article 17.01 H. However, as no grievance was filed at that time and as the grievance at hand is significantly out of time with respect to that claim, the claim for a gratuity under Article 17.01 H cannot be sustained. Accordingly, pursuant to the provisions of Article 17.01 G, as of July 2, 1993, these credits were cancelled and are, therefore, unavailable for the Grievor's ongoing use.

There was also an issue as to timeliness with respect to the claim for 19 days of sick leave attributable to the period of the Grievor's full-time term appointment from August 31, 1992 to July 2, 1993. Although the College maintained that, having been advised by memorandum at the end of his term

appointment in July, 1993 that "all benefits will cease July 31, 1993", the Grievor should have recognized that his sick leave credits had been cancelled, the memorandum makes no reference to such credits. Instead, the memorandum deals with vacation leave, health and welfare benefits and the Grievor's pension plan entitlement. More importantly, the reference to the cessation of benefits is in relation to extended health and dental expenses ("Please submit claim forms for any extended health or dental expenses as all benefits will cease July 31, 1993.") Accordingly, in this context, the Board is not satisfied that the Grievor ought reasonably to have known that his sick leave credits were also cancelled.

In any event, the College claimed that the Grievor should have recognized, upon acceptance of full-time employment in May, 1994, that he was considered to be a new employee for the purposes of sick leave entitlement (having signed up for benefits as a new employee) and filed a grievance at that juncture. In our view, however, although the Grievor applied for benefits as a new employee (which seems anomalous in view of the fact that he had previously enjoyed benefit coverage), there was no reference in the application to sick leave or sick leave credits. Accordingly, it has not been demonstrated that the Grievor was aware or ought reasonably to have been aware of the status of the sick leave credits attributable to his term appointment prior to November, 1996 when the grievance was filed. The Board, therefore, finds the

grievance respecting the claim for accumulated sick leave credits attributable to the period of the Grievor's full-time term appointment to be arbitrable.

As to the merits, however, Article 17.01 G provides that, upon retirement, termination or layoff, accumulated sick leave credits are cancelled. In this case, as has been stated, the Board finds that the Grievor's term appointment commencing August 31, 1992 was terminated effective July 2, 1993. Accordingly, his accumulated sick leave credits were cancelled effective as of that date.

In the result, the Grievor's claim respecting his entitlement to 20 hours of sick leave credits attributable to the period of his partial-load employment from December 17, 1990 to May 30, 1991 and to 19 sick days

attributable to his term appointment from August 31, 1992 to July 2, 1993 must be dismissed.

DATED AT TORONTO, this <sup>3<sup>RD</sup></sup> day of ~~July~~<sup>SEPTEMBER</sup>, 1998.

A handwritten signature in cursive script, appearing to read "Maureen Lee", written over a horizontal line.

Chair

"I concur - David J. Cameletti"  
College Nominee

"I dissent - Sherril Murray"  
Union Nominee