

Local 240

CAAT(A)

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

- and -

MOHAWK COLLEGE

Grievances of D. Sobczak - OPSEU File Nos. 90E127 and 90E129

Before:	M. G. Mitchnick	-	Chairman
	Larry Robbins	-	Union Nominee
	William Wright	-	Employer Nominee

Appearances:

For the Union:	Pamela A. Chapman, Counsel
	Ray Czajkowski
	Daniel Sobczak

For the Employer:	Susan McDermott, Counsel
	Steve Bantoft
	Zaki Ullah

Hearings held in Hamilton on June 12 and November 6, 1991.

A W A R D

This grievance, filed by Mr. Daniel Sobczak, raises a number of issues, only one of which it is agreed will be determined by the board at the present time. There is no dispute that the grievor was hired commencing December 19th, 1988, as a full-time sessional employee pursuant to Appendix III of the collective agreement. Section 1(a) of Appendix III in that regard provides:

APPENDIX III SESSIONAL EMPLOYEES

1(a) A sessional employee is defined as a full-time employee appointed on a sessional basis for up to twelve (12) full months of continuous or non-continuous accumulated employment in a twenty-four (24) calendar month period. Such sessional employee may be released upon two (2) weeks' written notice and shall resign by giving two (2) weeks' written notice.

The dispute is whether, having regard to the actual period of his employment, and section 1(c) of Appendix III, the grievor continued to have the status simply of a "sessional" by the time his employment with the College was ended on May 18, 1990.

Section 1(c) provides:

(c) If a sessional employee is continued in employment for more than the period set out in paragraph (a) above, such an employee shall be considered as having completed the first year of the two (2) year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be twelve (12) full months of continuous or non-continuous accumulated employment during the immediately following twenty-four (24) calendar month period.

The grievor was hired in 1988 to teach electrical courses in the College's Apprenticeship Department at its Wentworth campus. The first of a series of similar letters documenting his appointment as a sessional instructor was dated January 18, 1989 and read:

Mr. Daniel M. Sobczak
38 Hollywood Street North
Hamilton, Ontario
L8S 3K6

Dear Mr. Sobczak:

I am pleased to confirm that approval has been granted for your sessional appointment in the Apprenticeship Department, commencing December 19, 1988 and terminating March 31, 1989.

You will be paid at the daily rate of \$156.00, which includes four percent in lieu of vacation pay. The terms of employment and safety information are also attached. Please note that the continuation of your sessional appointment is subject to any exigencies beyond our control although we sincerely hope that no such situation will arise.

As confirmation of your acceptance of the above terms, please sign the enclosed copy of this letter and forward it to the Human Resources Division as soon as possible in order for payment to be processed.

I trust that you will find this satisfactory. Thank you very much for your contributions to Mohawk College.

Sincerely yours,

"K.J.Nixon"

Keith J. Nixon, Dean
Faculty of Skills Development

Enclosures
cc: E. Strauch
Human Resources

The evidence is that, with the boom going on in construction at that time, the College had difficulty hiring qualified instructors, and all sessional instructors in the program were paid the daily rate for 5 days a week, irrespective of the number of actual teaching hours assigned. That pay rate, the College notes in its evidence, was intended to cover both the teaching time contracted for as well as preparation time and all other associated functions. The grievor himself was initially assigned some 22 hours of teaching on his weekly schedule. However, we accept the evidence and recollections of the College's witnesses that the College had received complaints about the grievor by the end of the first week of the program, and that the grievor's schedule was reduced to ten hours in the second week of the program to allow more time for preparation. Specifically, Clyde Meldrum, the Senior Co-Ordinator in Apprenticeship and a member of the bargaining unit, testified in that regard that he had met with his Manager, Peter Dawn, on the Friday of the first week of January in order to discuss the problems that had been reported with respect to the grievor. Mr. Meldrum testified that it was agreed that he would speak to the grievor on Monday or Tuesday of the following week so that the grievor could be taken out of class on Wednesday for the balance of the week and the following week in order to have the grievor work on his program. Mr. Meldrum recalled clearly that he had changed the grievor's timetable in the second week of the program which commenced

January 9, 1989, that the grievor had been given nine days off teaching from January 11 to 20, 1989, in order to better prepare and that he himself had picked up the extra teaching hours taken away from the grievor as of the second week of the program. The grievor made no objection to this change, and remained on the revised schedule until the end of the session, which was February 24, 1989. Mr. Meldrum did not advise payroll of the change in the grievor's assigned teaching hours (again, the practice at the time was to pay all the instructors at the rate of 5 days a week regardless), and there was no suggestion to the grievor (or anyone else) that the change in teaching assignments would at the same time be regarded as a change in his status.

The grievor's first sessional contract had an expiry date of March 31st, 1989, and he was then issued a further sessional contract running April 1st to May 26, 1989. There was then a break in the grievor's service, before he was employed on a further sessional contract commencing July 24, 1989, and with no end-date specified. It might be noted that there was, in the fall session of that year, a strike of the academic bargaining unit which, according to the evidence we have, lasted from October 16th to November 14th. The grievor, as a "sessional", was not part of the bargaining unit that was on strike, and continued to be paid and perform work at the College, although his only teaching, with classes cancelled, was limited to Continuing Education courses. The evidence at the same time indicates that the College's concerns about the grievor

continued, and that the College would have preferred not to continue the grievor beyond the end of December. Mr. Meldrum testified that he advised the grievor of that in December, but that with construction still booming, no suitable replacement could be found. The grievor accordingly continued to teach into the new session commencing January of 1990.

There is, as noted, a restriction under the collective agreement as to how long "sessional" instructors can continue to be employed (while remaining outside the bargaining unit), and once again we accept the evidence of the College as to the discussions that took place around that issue here.

Both the witnesses from management and the Union steward at the Wentworth Campus, Bob Nelson, testified that a practice had existed since at least 1978 which required that all full-time positions be posted at the College in accordance with the collective agreement, and that interviews be conducted to determine the best candidate. The practice required the College not to continue any sessionals in employment for more than 12 in 24 months; accordingly, all sessionals were advised at the time of their first appointment that there would be no automatic "rollovers" and that there was no guarantee that a person in a sessional position would fill the full-time position after it was posted.

Mr. Nelson, the steward, was called by the College as a witness, and testified that according to the College's practice,

there is a definite time limit for sessional appointments: 12 in 24 months ("12 in 24"). This practice has existed at the College for as long as he has been there, which is 1979. Mr. Nelson testified that he keeps track of the sessional appointments and, since he has been there, no one has been rolled over and the College has always posted the full-time positions as required under the collective agreement. Mr. Nelson stated that the Union supports this practice as it avoids nepotism or favouritism and shows that the College has fully canvassed for candidates and ensured that the best possible person is hired. Mr. Nelson further testified that it is his function as the Union steward to monitor the sessional appointments in order to ensure that there is no abuse of the appointments, and that a report on the sessional appointments is sent by him to the Union Executive. Mr. Nelson testified that he fulfils this function of monitoring sessional appointments by discussing the appointments with the Manager and the Co-ordinator, by keeping notes when people are hired, and generally by keeping track of the appointments. Mr. Nelson then meets with Management once or twice a year to discuss the appointments and to make sure that his facts agree with Management's, especially if they are getting close to a "12 in 24" situation. Mr. Nelson testified in particular that he had kept track of the grievor's sessional appointments, and had discussed them with Clyde Meldrum and Peter Dawn. Mr. Nelson stated that the grievor was approaching the "12 in 24" and he

wanted to ensure that a posting went up if the College had to continue the sessional appointment past "12 in 24" months. The evidence further indicates that Sam Mega, another instructor in the Department, had moved to Fennel Campus and an opening had been created as a result. Mr. Nelson stated that he met with Peter Dawn on January 6, 1990 to discuss the need to post if Sam Mega were not coming back. He testified that Peter Dawn assured him that a posting would go up, but Mr. Nelson said that he was still going to monitor the situation. It was also Mr. Nelson's evidence, however, that in the January meeting he did not discuss any employee other than Sam Mega, as no other sessional employee would complete more than "12 in 24" before they broke for the summer.

At the beginning of March the situation changed, in that it was announced that there would be a hiring freeze, and thus any postings were going to be delayed. Mr. Nelson testified that he accordingly had further discussions with Mr. Meldrum and Peter Dawn about this, and the question of the grievor arose in these discussions as well. While certain instructors, for whatever reason, continued beyond May 18, 1990 that year, May 18th was nonetheless the scheduled end of the term, and both Mr. Nelson and the College officials agreed that that would be a convenient date for bringing an end to the grievor's teaching contract, without allowing him to slide past the "12-in-24" restriction. Mr. Nelson's own calculations, he testified in that regard, were broken down as follows:

"January to May 1989: that was 5 months

3 months in the fall, being August, September and December (there having been a strike in there)

4 months in 1990 from January to April"

Mr. Nelson added that "May wouldn't count because the grievor would have only 14 teaching days in the month". Both Mr. Meldrum and Mr. Dawn testified that they concurred with Mr. Nelson's calculation. The date upon which this specific discussion of the grievor's accumulated time is not, however, clearly established, beyond the fact that it occurred in "March". The letter to the grievor once again extending his appointment to May 18th is dated March 26, 1990, and all that Mr. Dawn could say is that the discussion of the grievor's dates would have been within a few days of that.

The attached calendar shows in the shaded portions the periods during which the grievor was actually employed by the College in his capacity of a sessional instructor. On their face those periods cumulatively appear to be well in excess of the 12-month limitation provided for by Appendix III of the collective agreement. The College in its submissions, however, discounts that employment time in a number of ways. Firstly, it notes that December 1988 was only a partial month, and as well that the grievor did not actually start teaching until January. Then, it notes, the grievor's case load dropped from mid-January

until the end of February to 10 hours a week, which is below the "full-time" limit of 12 hours per week. Thirdly, it notes that the grievor did not teach regular courses at all for periods in October and November 1989, as a result of the academic unit's strike.

Dealing with that lattermost point first, we note that the grievor himself was not on strike during that period, being a sessional, and not part of the bargaining unit. Notwithstanding that, however, we do note that the "Return to Work Protocol" which was issued by Mr. Teplitsky on November 28, 1989, and which is binding on the parties, provided at paragraph 10:

"10. For the purposes of Article 8 and Appendix III, Article 10 and Article 11, the work stoppage period will not be considered in determining the time requirements."

Were it necessary to make a decision, we might have difficulty going behind that "Return to Work Protocol". Leaving the "strike" issue aside, however, we have other difficulties with the manner in which the College submits the grievor's time ought to be counted or characterized. Dealing with the question of the grievor's "status" in the reduced teaching weeks of January and February 1989, we note that in the St. Lawrence College case, an unreported decision of Ms. Brent dated November 16, 1982 and relied upon by the College, there was no contract before the board from which the College's relationship with the grievor could be divined for the period in question, and the board had to

attempt to reconstruct that relationship as best it could from the worksheets that it had before it. That is not the case here. The grievor clearly was hired as a "sessional", at full week's pay, from the beginning, and there was no indication to either Payroll, or perhaps more importantly, to the grievor, that any of the temporary adjustments the College in its judgment was making between teaching and preparation time would in any way affect the grievor's status. Appendix III of the collective agreement in fact defines a sessional employee as "... a full-time employee appointed on a sessional basis", and we do not find the College to have taken any steps here to alter that continuing relationship. In a similar (though admittedly more narrow) vein, see as well the comment of the board of arbitration in Fanshawe College, Re Safran, an unreported decision of W. B. Rayner dated January 21, 1981, at page 14, that "the Board is not convinced that an employee should move from one category to another on a weekly basis".

On the question of "part" months, the College notes in particular that the computation in section 1(a) is defined in terms of "full" months of employment, be it on a continuous or non-continuous basis. Considering the meaning of that definition first on a "continuous" basis, however, we would have great difficulty absent anything else expressly stipulated in the collective agreement, in finding that an individual hired and working, for example, from December 19, 1988, to January 18, 1989, had not at that point completed "one full month ... of

employment". (Nor do we think, once again, that anything turns on what the individual was actually assigned to do during that period, as between teaching, preparation, or the other related responsibilities that the College in its own evidence noted this sessional rate is paid for). It seems to us that when one speaks of "non-continuous accumulated" employment, the inference is even stronger that "part" months are not simply to be ignored, but may be "accumulated". Again, if one looks at the dates worked solely on a month-to-month basis, a "full month" of employment would, as indicated, have been completed by the grievor as of January 18th, 1989. Similarly, a second full month by February 18th, and so on, with 5 full months in by May 18th. Even ignoring the remaining days in May and resuming from July 24th, 1989, the grievor would complete 2 more full months as of September 23rd. In the normal course he would complete a further month as of October 23rd. However, if one discounts the 4-week strike period, that "full-month" completion date moves back to November 20th. That adjusted date at that point would then cumulatively give the grievor 8 full months of employment. December 20th, 1989 would mark 9 months, January 20, 1990 10 months, February 20th 11 months, and March 20th 12 months - all of which would take the grievor to the limit.

That is one way of calculating the "part" months. However, there is another even more plausible way of dealing with the question. Article 8.01(b) of the main body of the agreement,

as the parties have noted, specifically addresses this type of issue for probationers in the bargaining unit, and provides:

8.01 (b) The probationary period shall also consist of twenty-four (24) full months of non-continuous employment (in periods of at least one (1) full month each) in a forty-eight (48) calendar month period. For the purposes of this paragraph, a calendar month in which the employee completes fifteen (15) or more days worked shall be considered a "full month".

If an employee completes less than fifteen (15) days worked in each of the calendar months at the start and end of the employee's period of employment and such days worked, when added together, exceed fifteen (15) days worked, an additional full month shall be considered to be completed.

We are mindful of the College's argument that Article 8.01(b) does not strictly apply to sessionals, who, so long as they remain so, are not covered by the main body of the collective agreement. However, if one were to ask what "rule of thumb" the parties in dealing with this issue of part-month counting under Appendix III would most likely contemplate as a reasonable method of doing so, it is hard to ignore as a guide what is set out in Article 8.01 of this very collective agreement. Using the 8.01(b) method, the only months that "count" are those with at least 15 days of employment (which we take to be the meaning of days "completed" or "worked", as the logical compromise method of "rounding" up or down on a typical calendar month of 30 days, bearing in mind also that what is being talked about are points part way in a month where an employment period either commenced or ceased). But at the same time, part months not otherwise

counted at the beginning and end of each period of employment are added together to see if combined they equate to the mid- or cut-off point of 15 days that would be the equivalent of at least one month.

Applying that full method here, the grievor's initial period of employment from December 1988 to May 1990 would still, once again, produce 5 months in total. July 24th to the strike date of October 16 would be 3 more months (counting the 16 days in October alone, and thus not even taking into account the 7 days in July), November 15th to the end of the month, being another 16 days, would count as another month, and December, January and February 1990 would bring the total to 12. By this method, continued employment of the grievor at all into March, 1990 would have taken him beyond the 12-month limit. We would note also that in the case of Fanshawe College, Re Oglesby, an unreported 1982 decision of Mr. Kruger relied upon by the College, it was really the "15 days in a month" referred to in Article 8.01(b) that the board was looking at when it commented that the word "month" ought to be given its natural meaning as a "calendar month", and in that context the conclusion of the board would appear to be a rather obvious one. We would also note as an aside that in that case there was "no dispute" that the 15-or-more-days-equals-a-month formula was the one to apply in computing service for sessionals.

Thus, either way one computes it, we find that the sole basis upon which the College could succeed in denying the attainment by Mr. Sobczak of 12 full months of employment in 24 is the estoppel argument put forward with respect to the consultations that took place with the Union's steward, Mr. Nelson. On the basis of Mr. Nelson's own evidence of the role he customarily played in that capacity, particularly with respect to monitoring with the College the "proper" application of the "12 in 24" rule, we have little doubt that the representations of Mr. Nelson could have bound the Union with respect to an individual case. But to succeed on the basis solely of estoppel, the College must establish detrimental reliance - i.e., that its conduct in fact was affected, to its prejudice, by those representations. Here it is clear that the steward did agree with the end-of-term date of May 18, 1990 as a "safe" date for Mr. Sobczak's termination. What is not established, however, is that Mr. Nelson's "representation" in that regard was made prior to the time that the grievor's 12-month limit had already been passed. The best Mr. Dawn could say was that the detailed discussion which took place with Mr. Nelson in this regard was within a few days of the March 26th letter. Since on either count we have found the grievor having reached his limit at least by March the 20th, that is simply not sufficient evidence to establish the basis for an estoppel here.

Accordingly, it is the conclusion of the board (once again, without having to decide the "strike" issue) that at the

latest Mr. Sobczak would by March 20, 1992, have accumulated 12 full months of employment in 24, within the meaning of section 1(a) (and thus (c)) of Appendix III of the collective agreement, and the board so declares.

As agreed, the board will not deal at this time with the consequences which flow from that in this case, but rather will remain seized in the event the parties are unable to come to an agreement in that regard.

Dated at Toronto this 30th day of April, 1993.



CHAIRMAN

I CONCUR:

"Larry Robbins"

UNION NOMINEE

I DISSENT:
(to follow)

"William Wright"

EMPLOYER NOMINEE