Headnote

Re OPSEU and George Brown College
Grievance of N Triger OPSEU file 96D994
Decision of K. Swan Oct 7, 1998-10-27

Key Words: Vacation, Notice of Layoff, Continuous Service

Issue; Whether entitled to continuous service credit for vacation following notice of layoff. Employer only required to issue vacation pay.

Facts: The grievor was hired in Sept, 1986 and worked full time until she was laid off on Aug 22, 1996. The grievor was paid 43 days pay for vacation for the year commencing Sept 96, but she did not receive a scheduled period of vacation time before her layoff took effect. As a result, the grievor was six days short of qualifying for the ten years of continuous service necessary to receive a payout of sick credits on termination. She grieved the denial of vacation.

Held: The right to vacation and the right to notice of layoff are independent. Continuous employment terminates at the end of the notice period, whenever that might arise, and any accrued vacation is to be paid out in full. While an employee may be required to take scheduled vacation during the notice period, there is nothing in the collective agreement to suggest that the notice period is to be extended by the length of any unused vacation. Grievance denied.

George Richards
October 27, 1998

96D994
Local 556
CAAT(A)

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

GEORGE BROWN COLLEGE

(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF N. TRIGER - #96D994

BOARD OF ARBITRATION:	Kenneth P. Swan, Chairman René St. Onge, College Nominee Mike Lyons, Union Nominee

APPEARANCES:

For the College:	J. Lynn Thomson, Counsel Sally Roy
For the Union:	George Richards, Senior Grievance Officer Tom Tomassi, Chief Steward, Local 556 N. Triger, Grievor

AWARD

A hearing in this matter was held on May 27 and July 17, 1997, at which time the parties were agreed that the board of arbitration had been properly appointed pursuant to the collective agreement, and that we had jurisdiction to hear and determine the matter at issue between the parties.

The grievance which initiated this arbitration was filed by Professor Nina Triger on September 12, 1996. The grievance alleges a violation of a letter of understanding dated June 3, 1992 relating to a continuation of the cumulative sick leave plans "as in operation on August 31, 1973". The letter of understanding also confirms the agreement of the parties that employees hired before April 1, 1991 have a right "to be paid a lump sum gratuity on retirement, termination of employment or lay-off".

Based on the submissions of counsel, it appears that the cumulative sick leave plan has evolved over the years, and may not exist as a single authoritative document. Both parties agree, however, that the test for entitlement to a pay-out of sick leave credits in the form of a lump sum gratuity on lay-off is dependent upon completion of "10 years continuous service".

The grievor was hired on September 1, 1986, and was indefinitely laid off on August 22, 1996. While she had taught for ten academic years, therefore, she was some six days short of ten calendar years of employment, and was thus denied any pay-out of her sick leave credits. She was then re-hired on a sessional appointment, which has the effect of continuing laid-off status from her regular employment.

At the outset of the hearing, the Union challenged the decision not to grant the grievor a lump sum payment on a number of alternative grounds. One of these was that the grievor should

have been continued in full-time regular employment and not rehired as a sessional lecturer for the 1996-97 academic year, contrary to what the Union claimed to be an established practice which would have the effect of estopping the college from proceeding in this way. We rejected this argument on the basis that a claim for continued full-time employment was logically incompatible with the current grievance, which is a claim for benefits which can only arise upon termination. All but one of the other arguments were abandoned by the Union when the hearing resumed on July 7, 1997. The only argument now before us, therefore, is to the effect that the grievor's length of service should be extended by the amount of vacation for which she was paid upon termination, but which she was not allowed to take as a continuing full-time employee.

The facts on which this matter is to be determined are not in dispute. The grievor's employment commenced on September 1, 1986, and she taught without interruption for the ensuing ten academic years. As at September 30, 1995, she had 139 days of accumulated sick leave credits. On February 27, 1996, the grievor received a formal notification of lay-off to be effective May 27, 1996.

Apparently, none of the re-deployment possibilities provided under clause 27.06 were available to the grievor until the provisions of subparagraph 27.06(viii)(c) were reached. That provision is as follows:

(viii) (c) Failing placement under 27.06 (viii) (a), such employee shall be laid off with written notice of not less than 90 calendar days. Such employee shall be granted release from all or part of the normallly assigned duties, for this period of notice, for the purpose of engaging in retraining activities, where such release is feasible given the normal operational requirements facing the College. Where such release is not possible, the notice period shall be extended by up to 90 days to permit retraining and the employee shall maintain current salary and

benefits for the duration of the notice period.

The grievor applied for retraining pursuant to that provision, and by letter of May 16, 1996, was informed that her effective lay-off date would be extended to August 22, 1996 in order to accommodate the 90 day retraining period after the end of her academic duties in relation to the academic year then just ending.

In the ordinary course, an academic staff member teaching in the normal academic year from September to May would apply to have vacation scheduled during the months of June, July and August. Paragraph 15.01 A entitled the grievor to two months' vacation, which would normally translate into 42 or 43 working days. When the grievor was assigned to retraining until August 22, 1996, she continued to receive her pay at the regular rate and on the regular schedule. Upon her lay-off, she was paid for an additional 43 days vacation.

The Union's argument is that she should have also had this vacation scheduled over the 43 working days following August 22, 1996, thus extending her continuous service past the ten year mark and entitling her to sick leave pay-out. The issue between the parties is therefore whether the grievor is entitled to continue in employment until the end of the vacation to which she is undoubtedly entitled, or whether she is only entitled to the vacation pay already received.

While there are many cases on the entitlement to vacation under successive collective agreements in the College system, the parties were unable to point us to any case which was directly on point. In *Re St. Clair College of Applied Arts and Technology and Ontario Public Service Employees' Union (Union grievance, 88C899)*, unreported, June 14, 1989 (Brown), a majority of a board of arbitration found that the 90 day notice of lay-off required by the collective agreement

could run concurrently with vacation. In *Re Sir Sanford Fleming College and Ontario Public Service Employees' Union (Shosenberg, OPSEU File #96C166/167)*, unreported, May 14, 1997 (MacLaren), the majority of the board of arbitration found that an employee granted a twelve month professional development leave without any specific reference to taking vacation during that leave was entitled to carry over the vacation entitlement. In *Re Humber College and Ontario Public Service Employees' Union (Michaud)*, unreported, July 2, 1992 (Devlin), the majority of a board of arbitration found that engaging in retraining is not consistent with being on vacation, and therefore retraining and vacation cannot occur simultaneously.

This last case is certainly the closest to the fact situation before us. It was determined during the lifetime of the first collective agreement to provide for a retraining period, and therefore had to deal with the previous jurisprudence in light of an amendment to the collective agreement. It notes that, prior to the amendment, the notice period simply involved the passage of time, and whether the employee was engaged in assigned duties or on vacation really had no impact on whether the obligation to give notice of lay-off had been met.

In the view of the majority, however, the change in the collective agreement had an impact on the earlier jurisprudence (at pp. 14-15):

> In contrast, the current Agreement specifically contemplates the employee engaging in retraining activities during the initial or extended notice period. In our view, engaging in retraining is not consistent with being on vacation and, accordingly, retraining and vacation cannot occur simultaneously.
>
> Moreover, if the College's interpretation were correct there would be no incentive to release an employee from his assigned duties during the initial notice period as, by deferring the release, an employee could be required to retrain during the scheduled vacation period. In our view, such an interpretation would deprive the employee of the vacation entitlement set out in the Collective Agreement, or alternatively would

> force the employee to forego some portion of the period provided for retraining under Article 8.05(h)(iii) of the Collective Agreement.
>
> This is not to say, however, that from a scheduling point of view, there is to be a hiatus in the notice period in the event that the notice period overlaps the scheduled vacation period. Clearly, the parties have provided for an "extension" of the notice period where an employee cannot be released for retraining during the initial 90 day period. In other words, the notice period continues to run to its conclusion with the result that an employee such as the Grievor can be required to retrain during the summer months when other employees are scheduled on vacation. In this event, however, the Grievor cannot be deprived of the vacation to which he is entitled under Article 5.01 of the Collective Agreement.

It will be observed, of course, that the *Humber College* award does not deal with the extension of employment issue raised before us, and the College has conceded in the present case that the grievor cannot be deprived of her vacation, in the sense that she is entitled to be paid for it. The College denies, of course, that this entitles the grievor to any continuation of her service.

The collective agreement does not, in specific terms, deal with the present issue. Clause 27.13 provides that an employee must give at least 90 calendar days written notice of resignation, failing which there will be a reduction in the employee's vacation entitlement. It does not suggest that an employee must take all of his or her accrued vacation during that 90 day notice period, nor that the employee must defer a resignation until all vacation has been taken. It merely provides a penalty for resignation with insufficient notice. Paragraph 27.14, which deals with discharge and the requirement for 90 days' written notice where immediate discharge is not warranted, provides that "any vacation entitlement of an employee shall be paid in addition to the 90 days' notice period or to any payment in lieu thereof." One result of this is that vacation and notice of discharge are mutually exclusive; the other result is that vacation may be paid rather than scheduled in circumstances of a discharge.

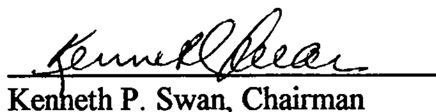
Neither of these provisions is of direct assistance in the case of an employee laid off pursuant to clause 27.06. That clause, however, read as a whole, does offer some hint as to the intention of the parties.

The clause provides a number of successive alternative mechanisms for placement of an employee under notice of lay-off. Only in subparagraph 27.06(viii)(c), after all of these alternatives are exhausted, does the right to retraining arise. Under subparagraph (viii)(d), it is clear that the purpose of this retraining is to allow the employee to gain the competence, skill and experience to perform the requirements of a vacant full-time position. Subparagraph (viii)(e) provides that if such placement is impossible, the employee "shall be laid off without further notice". That formula also appears in a number of other provisions, such as subparagraph 27.06(v)(e), (vi)(d) and (vii)(d). The intention clearly is that the notice period will be given once, and that even where the employee's employment is extended by certain kinds of placement to replace partial-load, part-time or sessional employees, there is no entitlement to any further notice period. Obviously, any such employment is likely to create additional vacation entitlement, but clause 27.06 does not specify the delay of the implementation of any subsequent lay-off pending the completion of any accrued vacation.

In our view, the parties appear to have intended the right to vacation and the right to notice of lay-off to be independent. Continuous employment terminates at the end of the notice period, whenever that might arise, and any accrued vacation is to be paid out in full. While an employee may required to take scheduled vacation during the notice period, there is simply nothing to suggest that the notice period is to be extended by the length of any unused vacation. It is thus entirely consistent with the collective agreement for the College to insist that a lay-off commence at

the end of the notice period, whether extended or not for retraining, and that any unused vacation entitlement be paid out. This result means that the grievor is still some six days short of any entitlement to a lump sum payment of her sick leave credits. That is no doubt a harsh result, but to alter it would require an interpretation of the collective agreement which we do not think would be justified.

DATED AT TORONTO this 7th day of October, 1998.



Kenneth P. Swan, Chairman

I concur — "Rene St. Onge"
Rene St. Onge, College Nominee

I dissent; see attached — "Mike Lyons"
Mike Lyons, Union Nominee

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GEORGE BROWN COLLEGE

-and-

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION
(NINA TRIGER - 96D994)

DISSENT OF MICHAEL LYONS - UNION NOMINEE

I have read the majority award in regard to this matter and, with regret, I must dissent.

Article 15.01 A of the Collective Agreement requires the College to schedule a two month vacation for full time employees when they complete a full year's academic service. The Grievor completed a full year of academic service in May 1996; however, rather than schedule her vacation, the College immediately scheduled the Grievor to commence her 90 day retraining period in accordance with article 27.06(viii)(c).

At the conclusion of the 1996 academic year, the Grievor was still a full time employee covered by the Collective Agreement; therefore, she was entitled to all the benefits of that agreement, including the right to have the College schedule a two month vacation for her.

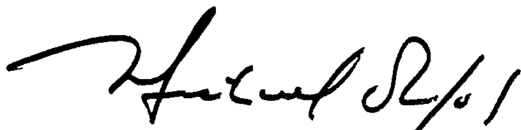
The majority of the Board has found that the College's obligation to provide the vacation benefits of article 15.01 A can be met simply through the payment of vacation pay. I disagree. This benefit clearly consists of time as well as money. There is nothing in the Collective Agreement that allows the College to deny a full time employee earned vacation time. To do so would be a violation of Article 15.01 A.

Since it is clear that the Grievor's vacation could not be scheduled at the same time as her 90 day retraining period, the College ought to have scheduled the Grievor's two month vacation either immediately prior to, or immediately following, the retraining period.

Had the College done what they were required to do by the Collective Agreement, the Grievor would have had more than 10 years continuous service with the College, thereby entitling her to sick leave pay-out.

Accordingly, I would have upheld the grievance.

Dated at Toronto this 30th day of September 1998.



Michael Lyons, Union Nominee