

93C317 OPSEU VS LOYALIST

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

- and -

LOYALIST COLLEGE

Policy Grievance - OPSEU No. 93C317

BEFORE:	R. O. MacDowell	- Chairman
	Wayne Roberts	- Union Nominee
	Rene St. Onge	- Employer Nominee

APPEARANCES:

For the Union: Gavin Leeb, Grievance Officer
Harry Plummer

For the Employer: Ann E. Burke, Counsel
Harley Smith
Elizabeth McGregor
Stephen Lee Kam

Hearing held in Toronto on October 21, 1993.

A W A R D

I

This is a union grievance filed on June 18, 1992. The issue it raises can be simply stated: is the employer obliged to maintain certain benefits coverage (i.e, pay the premiums) for individuals away from work and receiving long-term disability payments. The benefits in question are the Extended Health Care Plan, the Vision Care Plan, and the Hearing Aid Plan. The relevant provisions of the collective agreement are as follows:

22.02 Extended Health Plan

The Colleges agree to pay one hundred per cent (100%) of the billed premium of the Extended Health Plan for employees covered thereby and subject to the eligibility requirements of the Plan.

* * *

22.06 Vision Care

The Colleges shall pay seventy-five percent (75%) of the premiums for a Vision Care Plan providing coverage to a maximum of \$200 each two (2) years, - per person 18 years of age and over, and \$200 each one (1) year per person under 18 years of age, for glasses, frames, and contact lenses, subject to eligibility requirements and enrolment requirements, and the balance of the premiums shall be paid by payroll deduction.

22.07 Hearing Aid Plan

The Colleges shall pay seventy-five percent (75%) of the premiums for a Hearing Aid Plan providing coverage to a maximum of \$300 each five (5) years, per person, subject to eligibility requirements and enrolment requirements, and the balance of the premiums shall be paid by payroll deduction.

(emphasis added)

These provisions were in effect at the time the grievance was filed and are continued in the 1991-1994 agreement, which was executed on November 9, 1992. The dispute focuses on the effect of the emphasized words in the three articles.

The union submits that as long as an individual is an "employee" within the meaning of the collective agreement, s/he is entitled to the subsidized benefits mentioned above. Benefit

entitlement is congruent with employment status. It is unnecessary to be an "employee" on the active payroll, or to be actively at work. Unlike Article 22.04 (the Dental Plan) the disputed clauses do not distinguish between employment and active employment. Accordingly, as long as someone remains an "employee" s/he is entitled to benefits under Articles 22.02, 22.06 and 22.07.

The employer concedes that, at least for some purposes, a person away from work on long-term disability continues to be an "employee" under the collective agreement. No one disputes, for example, that should such person recover s/he is entitled to return to work. But in the employer's submission, employment status, in itself, is beside the point: the issue is whether those "employees" are entitled to benefits under the relevant language of the agreement. The employer contends that LTD recipients are not so entitled, because they do not meet the eligibility requirements of the insurance plan, which are incorporated by reference into the terms of the collective agreement.

The employer asserts that the language of the agreement is "clear" and supports the interpretation that the employer urges upon us. However, the employer asserts, in the alternative, that if the language of the agreement discloses a "patent" or "latent" ambiguity, the past practice and negotiating history overwhelmingly supports its proposed interpretation.

In the further alternative, the employer contends that the same extrinsic evidence establishes an "estoppel", which precludes the union from pressing any claim inconsistent with the status quo - at least until the end of the current (1991-94) collective agreement. The employer points out that the provincial bargaining to settle the current agreement was concluded in June 1992, so there has been no opportunity to address the current issue at the bargaining table - and, in particular, no opportunity to clarify the contract language to make it conform to the way in which benefits had been administered for many years. In the employer's submission, this lost bargaining opportunity is sufficient "detrimental reliance" to ground an estoppel, and to preclude the union from advancing the interpretation now urged upon us. Having acceded to a particular interpretation, for years, the union cannot now claim that the agreement means something different.

The parties are agreed that this board is properly constituted and has jurisdiction to hear and determine the matters in dispute between them. There are no objections to the arbitrability of this grievance and the case was argued on the basis of stipulated facts and uncontested witness statements which, it was said, were relevant to the issues and arguments put before us. It was agreed that we could receive this information, reserving as to the relevance or weight (if any) to be accorded to it.

This background is not really in dispute; but because we have not found it to be particularly helpful, we will deal with it only briefly. We will then turn to what we believe to be

the crux of the problem: the meaning to be accorded to the words "subject to the eligibility requirements ..." found in Articles 22.02, 22.06, and 22.07.

II

There has been collective bargaining between the current parties or their predecessors for many years. The union represents two distinct bargaining groups: academic staff and support staff. Each group is covered by a separate collective agreement. As might be expected, there is some symmetry between the language of the two collective agreements, and the collective-bargaining processes are interrelated. For example, for the period 1979-82 and 1987-94, the academic and support groups have had the same spokesman at the bargaining table; and the support group spokesman for 1983-87, became the academic group spokesman for the 1985-87 agreement. The two groups have broadly similar benefit packages, although, as will be seen, they can and do sometimes negotiate different benefit options.

The academic and support agreements are the product of provincial collective bargaining. Accordingly, the language here in issue applies to the academic employees of all Colleges across Ontario. At the present time, the academic agreement covers about 8600 employees, of whom about 176 are at Loyalist College.

With one exception, no College has ever paid the disputed benefit premiums for academic employees who are away from work receiving long-term disability payments. LTD recipients have always been responsible for their own benefits premiums. The exception is a single instance at Sheridan College, where premiums were paid, for a time, for one employee, then discontinued with the explanation that the payment had been made in error. That situation did not spark a grievance or any dispute between the union and employer about benefits entitlement.

The Extended Health Plan (Article 22.02 of the 1989-91 agreement) has been available to employees since at least 1972 and, it appears, actually pre-dates formal collective bargaining under the Colleges Collective Bargaining Act. The Plan was maintained outside the collective agreement for some years, and was not recognized in contract language until 1975-76. Both before and after its inclusion in the collective agreement, the benefit has been limited by the "subject to eligibility" language, which is the focus of the current grievance.

When Vision Care and the Hearing Aid Plan were added to the academic benefit package in the 1987-89 agreement, they too carried the limiting language referred to above - presumably because the new benefits were part of the same insurance package with the same carrier (Sun Life) and it was considered desirable to keep the eligibility requirements consistent. Over the years, these benefits have been enhanced or modified in various ways, but for the academic bargaining unit the eligibility restrictions have been preserved. Accordingly, the practice challenged by this grievance is not only generalized for all academic employees across the

College system, but has been in place, without controversy, for at least 20 years. Elizabeth McGregor is the Manager of Human Resources at Loyalist College, is responsible for benefits administration, and has been employed in this area since 1972. She confirms that the College has never paid these benefit payments for long-term disability recipients. Rather, it has always given such employees an option of discontinuing coverage or paying for it themselves.

No one has ever objected to that practice nor has there been any grievance in this regard.

Since 1979, 19 academic employees at Loyalist College have received long-term disability payments, and of these, 17 employees have elected to pay their own premiums. The other two employees were covered by their spouses' plan. Two of these 19 employees were union stewards at one time or another - although it appears that they did not hold that position at the time they went off work. We do not have evidence from other Colleges, or for the period before 1979, but it seems reasonable to infer that since 1972 quite a large number of employees might have been entitled to make a claim if the union's interpretation of the benefit package is correct. None has ever done so. Mr. Plummer is the president of the local union at Loyalist College and has been a representative on the negotiating team for academic employees for the 1985-86 and the 1987-89 collective agreements. He has been a union official for about 17 years. During that period no employee has ever complained about having to pay premiums when s/he was off work on long-term disability. Mr. Plummer filed a grievance in June 1992 immediately upon being informed of such employee complaint.

Although the disputed contract language has been in place for many years, and was carried into new clauses as new benefits were added, there is no evidence that it was ever the subject of specific scrutiny at the bargaining table. Until the present grievance no one really questioned what the benefit language meant, so it never was the subject of specific collective bargaining.

To this point, we have limited our observations to the academic bargaining unit. The situation for the support staff is a little different.

Until 1981, the support staff collective agreement contained the same limiting language as the academic collective agreement. However in the 1981 round of bargaining (for the 1981-82 agreement) the support staff bargaining team obtained an amendment to the long-term disability provision, to provide specifically for the payment of certain benefit premiums for long-term disability recipients. For support staff employees they have been paid ever since.

The details of the 1981 amendment need not be reproduced here. It suffices to say that the academic bargaining team did not press for a similar change to the language of its collective

agreement. It is also interesting to note that, in the 1981 round of bargaining, the academic staff bargaining team and the support bargaining team had the same spokesperson.

The academic collective agreement establishes a Joint Insurance Committee composed of representatives of the union and the various Colleges. The purpose of the Committee is described this way:

"The purpose of this Committee is to facilitate communication between the Council of Regents and OPSEU on the subject of group insurance applicable to the Academic Staff Bargaining Unit, including Basic Life, Supplementary Life Insurance, Extended Health Insurance, Long Term Disability Insurance, the Dental Plan and such other negotiated benefits that may, from time to time, be included in the group insurance plan."

Mr. Plummer has been on the Joint Insurance Committee for 12 years. As far as he is aware, no one has ever raised the issue addressed by this grievance. This is confirmed by Harley Smith, who has been involved with benefit issues on behalf of the employers from 1972 to his retirement in 1992. As far as we can ascertain from the evidence before us, the question raised in this grievance has never surfaced, and consequently has never been addressed by the Joint Insurance Committee.

Since at least 1980 the College has produced a benefits administration manual. That manual has been updated periodically, and has been provided to the union through Shirley McVitie, who is the trade union resource person for both the academic and support staff joint insurance committees. The underlying insurance plan language has also been provided to the union, over the years, through Ms. McVitie and her predecessors.

Exhibit 4 is an excerpt from the benefits administration manual in effect in January 1989 - that is, at the time the 1989-91 collective agreement was concluded. Exhibit 4 makes it clear that a faculty member on long-term disability may continue various benefits, including extended health - but only if s/he submits the full premium to the College. In other words the manual reflects the Colleges' practice from 1972 to date. No one has ever questioned or challenged the manual.

In summary, whether or not the collective agreement language is "ambiguous", there is no doubt about the interpretation that the Colleges have adopted over the years, nor has there been anything surreptitious about this policy. The Colleges have followed the practice set out in the benefits administration manual, which is not only available to anyone who cares to look at it, but is also available to union and employer officials on the Joint Insurance Committee who have the responsibility to consider insurance questions.

Against that background, it is difficult to accept the union's submission that, for 20 years, it was totally ignorant of the employer's position - although it may have only recently considered whether it amounts to a breach of the collective agreement. The precise issue before us was addressed for the support staff unit in the 1981 round of bargaining, and with the same spokesman for both units, it seems unlikely that the academic negotiating team was totally unaware of what the sister unit was doing. But whatever was raised or resolved in 1981, there is no reason for any academic employee to believe that these benefits would be maintained during long-term disability, and, until the present grievance, there was nothing to alert the employer to the possibility that its long-standing practice would be challenged.

If the board were to determine the employer's obligations by the way in which the parties had ordered their relationship and conducted themselves over the last 20 years, there would be no support for the union's position. However, can such support be found in the language of the collective agreement? That depends upon how one interprets Article 22.02, upon which Articles 22.06 and 22.07 have been modelled.

III

Article 22.02 does not create an open-ended obligation to pay premiums in all circumstances, or for all persons who might be considered "employees" under the terms of the collective agreement. The employer is only obliged to make premiums for "employees covered by [the Plan] and subject to the eligibility requirements of the Plan". We do not think that we can ignore this limiting language, which takes one inevitably to the terms of the Plan.

Had the parties intended to make a particular benefit available to everyone, regardless of employment status, they could have used language like that found in the support staff agreement. Had the parties intended to make a benefit available to all "employees" in a general sense, they might easily have done so without any reference to the Plan, its coverage, or eligibility requirements. But they did not do that.

This is not a case in which the employer has sought to diminish its obligations under a collective agreement, or has entered into a collateral contract inconsistent with those obligations. It is clear that it could not do so. The employer is required to provide the benefits specified in the collective agreement; but in this case, those obligations can only be defined and understood with reference to the insurance documents that establish "the Plan".

Excerpts from the insurance contract were filed with the board as Exhibit 3. In the employer's submission the critical plan eligibility requirement reads as follows:

Employee - A person who is a non-teaching member of the Academic bargaining unit employed by the employer on a full-time basis, or who is a member of the Academic bargaining unit employed by the employer on a full-time basis and whose terms of employment require him to work and/or teach at least 30 hours a week and a person who is a teaching member of the faculty employed by the employer on a full-time basis and whose terms of employment require him to teach more than 12 hours a week.

Employment - employment as an employee.

Termination of employment - occurs on the last day of the month in which a person

(a) ceases to qualify under the definition of employee, or

(b) ceases to be actively at work on full time, whichever is the earlier, except that the Policyholder, acting in such a manner as to preclude individual selection, may deem that employment continues

1. during any period he is absent from work due to illness, or
2. for the employee's scheduled paid vacation period, or
3. during any period in which the employee is temporarily laid-off, or
4. during any period in which the employee is granted sabbatical leave or leave of absence with pay for any reason other than illness or vacation, or
5. for a period of not more than 15 months following the date the employee is granted leave of absence without pay for any reason other than illness or vacation, or
6. during any period in which the employee is on an early retirement program approved by the College Board of Governors, or
7. during any period in which an employee who retired later than May 1, 1988 (i) is in receipt of a Pension from the Policyholder or the Teachers Superannuation Fund, and (ii) maintains coverage under O.H.I.P.

Actively at work on full time - an employee is actively at work on full time on any day when he actually works at any one of the colleges listed above or at some other location where the employer's business requires him to be. An employee is deemed to have worked on a scheduled non-working day if he worked until the end of the immediately preceding scheduled working day.

As will be seen, that the insurance contract defines the group of "employees" covered by this benefit plan, and deals expressly with persons who "cease to be actively at work on full time". Such persons - which would include individuals on long term disability - are considered to have terminated their employment. But that, in itself, does not preclude their continued coverage and participation in the benefit program. The employer is given a discretion to deem that employment continues provided that it exercises such discretion "in such a manner as to preclude individual selection".

The union does not challenge the applicability of this definition or point to any other portion of the plan which qualifies its effect. Nor, with respect, was the union able to

point to any contractual basis for its submission that the "discretion" contained in the plan could only be exercised jointly by the employer and the union through some collective bargaining process. That is not what the plan contemplates. The clause in question gives the employer a discretion. It does not, on its face, invite a process of collective bargaining, nor was our attention drawn to any other clause in the collective agreement or the plan which would have that effect. The union did not argue that this discretion under the insurance contract could be reviewed by an arbitrator and we do not see any basis for arbitral intervention.

In a grievance such as this, the onus is on the union to establish that the employer has contravened some article of the collective agreement. We are not persuaded that the union has met that onus in this case. On the basis of the evidence and argument put before us, we must conclude that the employer has complied with its obligations in Articles 22.02, 22.06, and 22.07, as defined and limited by the eligibility requirements in the plan.

In view of our interpretation of the contract provisions offered to above, it is unnecessary to reach any final conclusion about whether the clauses in dispute are "patently" or "latently" ambiguous, so as to justify reference to extrinsic evidence. Nor is it necessary to consider the employer's estoppel argument.

For the foregoing reasons, this grievance is dismissed.

Dated at Toronto this 17th day of February, 1994.

CHAIRMAN

"Wayne Roberts"
I DISSENT:
UNION NOMINEE

"Rene St. Onge"
I CONCUR:
EMPLOYER NOMINEE