

92F162

(AA-T(A))

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Loyalist College,

College,

- and -

Ontario Public Service Employees Union,

Union

BEFORE: Michael Bendel, Chair
Michael Lyons, Union Nominee
George H. Metclafe, College Nominee

APPEARANCES: For the Union:

Michael Gottheil, Counsel
Nick Nowitski, Grievor

For the College:

D. K. Gray, Counsel
David G. Butler, Director, Human Resources

Heard in Belleville, Ontario,
on January 7, June 8, June 9, June 21, 1993,
and January 31 and February 1, 1994.

ARBITRAL AWARD

I

The grievance of Mr. Nick Nowitski, a professor in the Architectural program of the School of Applied Science and Technology, challenges the College's decision to terminate his employment during his probationary period.

The grievor was employed at the College from August 1990 until June 26, 1992. The College's reasons for the termination were stated in a letter from Dean Andy van Andel to the grievor dated June 23, 1992, which reads, in part, as follows:

In response to your request and in accordance with Article 8.01 (d), following are some of the reasons for your release from employment.

- A. Failure to follow the Contract and Dean's instructions by:
- taking on a consulting activity outside the College without the prior written consent of the Dean,
 - failure to administer the "evaluation by students" to two courses in the Fall '91 semester, and
 - cancelling classes without permission.
- B. Failure to develop an atmosphere of respect and trust by:
- intimidating the students in one or more courses,
 - intimidating the Dean by attempting to record, without his permission, the proceedings of a meeting,

- not taking seriously the Engineering Drawing assignment,
- failing to work with the teacher of the other section of the Engineering Drawing course as a team, and
- asking irrelevant questions on an exam (names of reindeers for 8 marks!)

The grievance filed by the grievor was couched in the following terms:

STATEMENT OF GRIEVANCE
"Termination in Bad Faith"

I grieve that the College, in its conduct leading up to and causing the termination of my employment, has breached its obligation to act fairly, reasonably and in good faith.

SETTLEMENT REQUIRED

The College will retract the termination and reinstate me with full retroactive pay, benefits and seniority.

The board of arbitration heard extensive evidence concerning the grievor's employment with the College, on both his successes and failures there. In particular, it heard evidence relating to the specific reasons given by the Dean for the termination of his employment and to the performance evaluation process followed by the College in the grievor's case.

It is not necessary for us to recite in detail the evidence we received, given the rather narrow arguments presented

on behalf of the Union and the limited scope for our review of the College's decision to terminate the grievor's employment. The terms of the grievance, and the tenor of the evidence and submissions presented on behalf of the grievor were designed to persuade us that the College had not administered the grievor's probationary period in good faith and had not come to a good faith decision to terminate his employment. In these circumstances, it is pertinent to refer to the award in Re George Brown College and Ontario Public Service Employees Union (unreported award of arbitrator Mitchnick, dated September 24, 1991), where the issue of the scope of review under this agreement, and in particular the meaning of "bad faith" in this context, was canvassed. We respectfully endorse the following observations by that board, at pages 19 and 20, on the scope of review in such a case:

As noted, the law with respect to the scope of review of the discharge of "probationary" employees of the Colleges was reviewed in the Interim Decision of the board. Clearly the law can no longer simply be expressed as that set out in the Metropolitan Toronto case (decision of the Divisional Court dated July 3, 1981), which appeared on its face to limit the definition of "bad faith" as a decision that "was motivated by unlawful considerations or resulted from management actions which precluded the probationary employee from doing his best". In the subsequent St. Lawrence College case (1987), 32 L.A.C. (3d) 322 (Brent), the majority of the board of arbitration upheld the grievor's termination, although it had found in its award that "the grievor can be said to have been performing satisfactorily without any serious problems with his work", and the employer at the hearing called no evidence. The Divisional Court, in its decision dated February 17, 1989 (leave to appeal denied June 19, 1989) quashed the award of the majority in its apparent reliance on the restricted test set out in Metropolitan Toronto, and stated that the board, at least on the

language of the Colleges' collective agreement, should have gone on to consider whether the employer's overall handling of the matter indicated "the kind of bad faith found by the dissenting union nominee". That dissent of Mr. Cochrane, was a lengthy one, raising a number of grounds, and we take the Court's lack of any further elaboration upon the dissent to have been a deliberate attempt to move away from a "compartmentalized" approach to the question of what constitutes bad faith. Rather, while we reiterate that we see nothing in the jurisprudence that suggests that an employer's decision in not continuing the employment of a "probationary" employee is, under the guise of a "bad-faith" test, to be subjected to anything like the scope of review applicable where it is incumbent upon an employer to show "just cause", we take the Court in St. Lawrence simply to be saying that an employer's whole course of conduct towards an employee in administering its obligations, may be such as to be inconsistent with any other conclusion but that the employer was not really acting in good faith.

The onus on the Union in the present case is thus to satisfy us, upon a balance of probabilities, that there was an absence of good faith by the College in dealing with the grievor, particularly as regards its evaluations of his performance (concerning which it has some contractual obligations) and the decision not to retain his services after the end of the probationary period.

II

Before examining the evidence or submissions in the case, we wish to record a procedural matter that arose during the hearing. The grievor came to the hearing room with several files of documents and, in cross-examination, he stated that they

contained notes of meetings, diary entries, memoranda, etc. relating to his employment at the College. He testified that he was in the habit of retaining everything in one of his files. After several requests by Mr. Gray that the grievor locate particular documents in his files, Mr. Gottheil objected, on various grounds, including that Mr. Gray was engaged in a "fishing expedition" and that some of the documents might contain the grievor's hand-written notes, which might be irrelevant to the case or might be privileged. Counsel felt that this issue was a sufficiently important one that we should hear full submissions on the propriety of Mr. Gray's requests. In order to focus counsels' submissions, Mr. Gray caused a subpoena duces tecum to be issued and served on the grievor, which required him to bring to the hearing:

[T]he following documents in your possession pertaining to your employment with Loyalist College of Applied Arts and Technology during the academic years 1990-91 and 1991-92:

(a) memos and other correspondence between yourself and any member of management at Loyalist College pertaining to your employment, your teaching, your conduct as a teacher, your evaluation as a teacher, your relationship with students, and your relationship with staff;

(b) memos to file and other notations made by you pertaining to your employment, your teaching, your conduct as a teacher, your relationship with students and your relationship with staff;

(c) memos and other correspondence between yourself and students or staff at Loyalist College pertaining to your employment, your teaching, your conduct as a teacher, your evaluation as a teacher, your relationship with students, and your relationship with staff;

(d) copies of all final and draft evaluations and any covering memos or notes with respect thereto; and

(e) copies of all policies and procedures, and covering memos or notes, if any, relating to the evaluation of teachers at Loyalist College.

One of the major issues discussed by counsel in their submissions was whether Mr. Gottheil should be permitted to discuss the documents sought with the grievor since he was in the middle of his cross-examination. The other principal issue raised was whether Mr. Gray was engaged in a "fishing expedition" and was attempting to cast an overly broad net.

We do not intend to set out in detail the submissions we received or the reasons for which we arrived at our conclusion. We were, however, struck by the fact that, at the stage in the hearing at which the subpoena was sought, the issues in the case had not yet crystallized, and evidence was being presented on a whole range of matters having to do with the grievor's employment. We also felt that, if the Union were to receive informed instructions concerning the scope of the subpoena, they could only come from the grievor. The decision we issued, in a letter to counsel, was, in part, as follows:

a) We have decided that the scope of the subpoena duces tecum is not overly broad. In our view, this does not constitute a "fishing expedition". The documents described in the subpoena are "arguably relevant" to this case. We note Mr. Gray's undertaking to establish a

factual foundation for the admission of specific documents.

b) Even though the grievor is in the middle of being cross-examined, Mr. Gottheil shall be allowed to consult with him for the limited purpose of ascertaining whether the Union might have objections to the admissibility of any documents within the scope of the subpoena.

c) Mr. Gottheil shall not consult with the grievor, as permitted by paragraph b), until 21 days following the date of this letter. During that time, Mr. Gray may, if he so chooses, withdraw the subpoena by notice to Mr. Gottheil, in which case the consultation referred to in paragraph b) shall not be permitted.

III

While the onus in this case is on the Union, it would be convenient to start our review of the evidence by examining the criticisms of the grievor's performance listed in the letter of June 23, 1992, and the role played by those criticisms in the College's decision to terminate his employment.

The College's position, as stated by Dean van Andel, was that, on the basis of the various failings in the grievor's performance or incidents noted in the letter of June 23, 1992, the Dean believed that there might be serious problems for the College if the grievor became a regular employee with seniority, even though much of the grievor's performance as a teacher was positive. According to Dean van Andel, there was no one incident that

supported that belief, but the cumulative effect of the failings noted in the letter led him to that conclusion.

The criticisms levelled at the grievor and the evidence relating to them are as follows:

Taking on a consulting activity outside the College without the prior written consent of the Dean

The grievor was invited to review a manuscript for a text-book which was designed for use in a course he was teaching. He accepted the invitation. He felt this was contributing to his course since there was no good text-book available. The Dean, on the other hand, felt that this was not an appropriate use of the grievor's time, which should have been more focused on his teaching. No consent was ever sought by the grievor. Upon learning of this activity, the Dean did not forbid further work on it by the grievor, but he did request him to delete it from his formal list of "objectives" for the year. Article 4.06 of the collective agreement prohibits any "employment, consulting or teaching activity outside the College except with the prior written consent of the supervisor".

Failure to administer the "evaluation by students" to two courses in the Fall '91 semester

Teachers are required to administer student evaluations of the courses they teach. The grievor failed to do so for two of his courses in the fall of 1991.

For one of the courses (Engineering Drawing), the grievor felt he was just "babysitting" the class for a part-time instructor. He was not "in control" of the class, he testified. He therefore decided not to administer the evaluations. For the other course (Computer Aided Design), the students refused to fill out the evaluations.

The Dean did not learn of the grievor's failure to administer the evaluations until the results of the student evaluations came back from the computer department (which analyzes the results). When he learned of it, he requested the grievor to rectify the omission by administering the evaluations, which the grievor did. However, according to Dean van Andel, he could not give much weight to the results of these particular evaluations in view of the circumstances in which they were conducted, namely that they were administered after the end of the course and after the grievor had had to provide an explanation to the students about his late request to them.

Cancelling classes without permission

The grievor cancelled one class since he had a dentist's appointment. He had not received prior approval to visit the dentist that day. This was contrary to the College's formal policy on the subject. The grievor testified that, before receiving the letter of June 23, 1992, he had not realized this had been a problem for the Dean (although the matter was addressed by him in a memorandum to the Dean dated February 25, 1992 (Exhibit 24)).

Intimidating the students in one or more courses

The Dean noticed that the grievor was receiving poor evaluations from the students on the factor of "developing an atmosphere of respect and trust in the classroom". He asked the grievor if he had any explanation. The grievor replied that, perhaps, the students felt somewhat intimidated by him in view of his large physique, loud voice and his tendency to walk around the classroom. The grievor's difficulties in developing an atmosphere of respect and trust in the classroom were noted in his performance evaluations. This was an ongoing problem with the grievor's performance in the Dean's view and a topic of ongoing discussion between them.

Early in June 1992, the Dean became aware of a further matter that, in his view, confirmed that the grievor intimidated his students. In December 1991, a student named Terry Coe had asked the grievor for an extension of time to complete an assignment, without which he would not receive credit for the course. The grievor, in discussing this request with Mr. Coe, told him the following: "I have your balls in my hand and I can let them go or squeeze them". This was an obvious reference by the grievor to the power he exercised over Mr. Coe's future in the program. The grievor did not grant Mr. Coe's request for an extension. Mr. Coe told the Dean, in a written statement in the summer of 1992, that he had felt intimidated by this exchange with the grievor. A few days after telling the Dean of this incident, Mr. Coe expressed some regret at having reported it, although he did not retract his statement or say that it had been untrue. In his testimony, Mr. Coe confirmed that he had felt intimidated by the exchange with the grievor.

Intimidating the Dean by attempting to record, without his permission, the proceedings of a meeting

In February 1992, the Dean wanted to meet the grievor to discuss his performance evaluation, a draft of which was provided to the grievor in advance. The draft contained several negative comments on the grievor's performance. The grievor asked the Dean,

in writing, for permission to have a union steward present at their meeting, which the Dean refused. The grievor brought a tape-recorder to the meeting on February 18, 1992. It is common ground that the tape-recorder was in his brief-case, which was open and lying on a chair, although there is a dispute between the Dean and the grievor as to whether it was visible to the Dean. At some point in the meeting, the Dean ordered the grievor to stop the taping and to hand over the tape, which the grievor did. The grievor testified that he did not actually tape any part of the meeting. The Dean doubted this, but he was never able to establish how much, if any, of their conversation was captured on the tape, since it was accidentally destroyed before he had an opportunity to listen to it. The Dean was very upset by this incident, although the meeting did continue as planned. In his testimony, the Dean stated that the incident led him to wonder how the grievor treated his students if he treated his dean with such lack of respect.

Not taking seriously the Engineering Drawing assignment and

Failing to work with the teacher of the other section of the Engineering Drawing course as a team

The grievor was assigned to teach a course in Engineering Drawing. This was one of the courses in which the grievor failed to administer the student evaluations. When the Dean discussed this

failure with the grievor, the grievor made certain comments about the course which disturbed the Dean.

The grievor was sharing the course with a part-time instructor, who, according to the grievor, had described the course as a "Mickey Mouse" course, a description the grievor adopted in his discussions with the Dean. The grievor also stated, to the Dean and in his testimony, that he felt he was just "babysitting" the class and was not "in control". It was a beginners' drawing course intended for surveying students. The grievor stated that he had difficulties in co-ordinating the class with the part-time instructor, who was rarely available for discussion.

The grievor's comments about the course led the Dean to believe that not much took place in the course and that what did take place was of dubious quality. In particular, the grievor's comments led the Dean to believe that the grievor had deliberately failed to administer the student evaluations since he realized he had given a poor course. The Dean testified that if there were problems with the course, the grievor should have brought them to his attention in a timely fashion, which he failed to do.

Asking irrelevant questions on an exam (names of reindeers for 8 marks!)

In the fall of 1990, his first semester as a teacher, the grievor set an examination in mid-December in his course on Building Materials, which contained some contentious questions. The students were asked what were the names of Santa Claus's reindeers, how many days were left until Christmas, and what would be their response if the grievor wished them "Merry Christmas". Credit was assigned for these questions. The reindeer question was worth eight marks, the other two questions two marks each. Thus the three questions were worth 12 marks out of a total of 150 (or 8% of the total score). The grievor testified that he viewed these questions as a "tension-breaker", and that some students told him afterwards that they also regarded these questions in that way. However, at least one student, who, it appears, was intent on making the Dean's list, complained to the Dean. When the matter was brought to the grievor's attention, he offered to recalculate the grades in the course so as to exclude these questions from the reckoning.

The grievor was cross-examined extensively on these irrelevant examination questions. At first, he refused to accept that it was irresponsible for him to have asked these questions for credit, but later in his cross-examination he conceded that he now realized that it was an irresponsible thing to do. At the end of his cross-examination on this matter, however, he stated that if

he were dean, he would not take the view that questions like this were irresponsible.

III

The main thrust of the Union's case is that while there may indeed have been difficulties or problems between the grievor and the Dean on the items listed in the Dean's letter, the grievor never committed any of these failings again after they were brought to his attention. The grievor addressed the Dean's concerns. The purpose of a probation period and of the periodic performance evaluations during that period, according to the Union, is to give the probationary employee an opportunity to improve his performance if it is found to be lacking in some way. Since there was no repetition by the grievor of any of these alleged deficiencies in his performance, the termination of his employment was not rational or in good faith. The Union also takes issue with the Dean's reliance on the student evaluations of the grievor's performance as a teacher, since, according to the Union, these evaluations constituted a rather crude tool for appraising a teacher's effectiveness.

As regards the student evaluations of the grievor's performance as a teacher, testimony was given by Mr. Gary Warren, another professor at the College, whose academic interests include

the area of "program evaluation" and who has been intimately involved in the development and monitoring of the student evaluation system at the College. His evidence was mainly opinion evidence. Although Mr. Gray, on behalf of the College, questioned his status as an expert in the field, the Board allowed Mr. Warren to give opinion evidence. His evidence, in summary, was that the student evaluation system at the College was "unreliable", in that consistent results would not be achieved through this evaluation, and "invalid", in that it did not measure the factors it was supposed to measure.

It is not necessary for us to express any opinions on Mr. Warren's testimony, given the use made of the student evaluations by the Dean. Although his evaluations of the grievor's performance make several references to the student evaluations, we are not persuaded that they played a significant role in the decision to terminate the grievor's employment, except as regards the question on "respect and trust". And, as regards that issue, the Dean used the results of the student evaluations in a way that appears to us to be unimpeachable, namely as a means of identifying a possible problem which needed further investigation. The Dean's conclusion that the grievor had failed to develop an atmosphere of respect and trust in the classroom was not based solely on the student evaluations. Rather, the evaluations were used as a starting point for discussing a possible problem with the grievor.

IV

We have already set out our view on the extent to which we can inquire into the Dean's decision to terminate the grievor's employment. What is alleged is, essentially, bad faith, and this has to be understood in the manner described in Re George Brown College, supra.

It is thus not pertinent for us to say whether we agree with the Dean's conclusion that the grievor's employment should be terminated. The question we have to ask is whether there was an absence of good faith by the College in its decision not to retain the grievor's services after the end of the probationary period.

The main attack on the College's decision was that the grievor had learned from the Dean's criticisms of his performance. An important element in the purpose of a probationary period was to give the employee an opportunity to improve his performance if it is found to be lacking in some way. According to the Union, the decision to terminate his employment was not a good faith decision since he did not commit any of the failings a second time after the Dean had brought them to his attention.

In our view, this argument is without merit. There is a thread running through most of the Dean's criticisms of the

grievor's performance. While the Dean did not articulate his decision in quite this way, it seems obvious to us that, in his view, there was an underlying deficiency in the grievor's performance, which would likely create problems if the grievor became a regular employee. That deficiency lay in the area of the grievor's judgment. The grievor, in the Dean's view, simply did not have the good judgment required of a professor, as demonstrated by the various incidents about which evidence was presented. So, although there was no carbon-copy repetition by the grievor of any of the occurrences for which he was criticized, their cumulative effect persuaded the Dean that he would be asking for trouble by confirming the grievor as a regular member of the faculty.

Far from being a bad faith decision by the Dean, this case reveals, in our view, a proper use of a probationary period, namely to see whether an employee can function effectively in a particular environment, something that can rarely be assessed strictly on the basis of formal qualifications or a pre-hiring interview.

It is not necessary for us to say whether we agree with the Dean's conclusion. It is for the College, not for this board, to determine whether an employee will likely be able to make the grade to the College's satisfaction. We simply state that, in light of the evidence presented, the College's decision appears to us to

have been entirely rational, easily understandable and made in good faith.

For all these reasons, the grievance is hereby dismissed.

DATED at Thornhill, Ontario, this 23^d day of February 1994.



Michael Bendel,
Chair

I concur/~~I dissent~~

"M. LYONS" per A.B.
Michael Lyons,
Union Nominee

I concur/~~I dissent~~

"G. METCALFE" per A.B.
George H. Metcalfe,
College Nominee