

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

HUMBER COLLEGE  
(The Employer)

- and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
(The Union)

AND IN THE MATTER OF GRIEVANCE #93G241

BOARD OF ARBITRATION:	Kenneth P. Swan, Chairman H.J. Cook, Employer Nominee Sherril Murray, Union Nominee
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APPEARANCES:

For the Employer:	Carolyn Kay-Aggio, Counsel
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For the Union:	Bebe Ahad, Grievance Officer
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## A W A R D

A hearing in this matter was held in Toronto on May 2, 1994, at which time the parties were agreed that the Board of Arbitration was properly constituted, and that we had jurisdiction to hear and determine the matter at issue between the parties. On the part of the College, however, that concession to our jurisdiction was subject to its position that the grievance itself was not arbitrable.

The grievance, #93G241, was filed on January 12, 1993, and is in the following terms:

### Statement of Grievance

I grieve that I am being treated inequitably by the College. My colleagues and office mates, who teach the same courses to students in the same program, are being paid \$1975. more than I am being paid for work done in the winter 1990 semester.

### Settlement Desired

To be paid the \$1975. overtime compensation awarded to my colleagues.

The facts from which the grievance arises are not in dispute. During the 1989-90 academic year, there was a strike of professors in the Colleges of Applied Arts and Technology represented by the present Union. When that strike was over, completion of the academic year required a restructuring of the teaching schedule. From that restructuring, a number of claims for overtime compensation were generated, and ultimately referred to arbitration. There were, we understand, hundreds of such grievances across the system, including 206 at Humber College; one such grievance was filed by the present grievor. All of the grievances were apparently referred to the same Board of Arbitration, comprised of Mr. Martin Teplitsky, Chair, Mr. Warren K. Winkler, College nominee, and Mr. James K. A. Hayes, Union nominee. That Board issued its award in December 1992, allowing compensation to a large number of grievors in varying amounts, including, as the grievor sets out in the present grievance, to most of the members of his department in the amount of \$1975.00. The grievor's own grievance was not one of those allowed, and the award concludes with a blanket dismissal of all of the other grievances.

On this basis, the College argues that the present grievance is inarbitrable because it is out of time, having been filed in January, 1993 in relation to the events of the winter term of 1990. Most important, however, the College argues that the matter has been finally resolved before another Board of Arbitration, and is thus res judicata, since there is a final and binding determination of precisely the same grievance between the Union and the College in relation to precisely the same grievor.

On its face, the College's argument would appear to be conclusive, and the Union very properly conceded that, if the present grievance is merely a repetition of the grievance which was before the Board of Arbitration chaired by Arbitrator Teplitsky it was indeed foreclosed from any further adjudication, and was thus res judicata before us. The grievor wished, however, to put to us different characterization of the grievance, which he asserted would demonstrate that the grievance was in fact completely different, that it only arose upon the issuance of the Teplitsky award in December, 1992 and that it was therefore in time when filed in January, 1993. Over the objections of counsel for the College, and with some reservations of our own, we heard the grievor's submissions in this regard. The grievor argues that the real issue here is the unfair treatment meted out to him by the College when it chose to rely upon Arbitrator Teplitsky's dismissal of his original grievance to deny him overtime compensation for precisely the same kind of contribution to the College's program in the winter semester of 1990 as made by all those members of his department who received the overtime compensation pursuant to the Teplitsky award. ~e asserts, and we have no reason to disbelieve it, that there was no difference in what he did during that period and what was done by other members of his department who were successful in the Teplitsky arbitration. Therefore, he asserts that the College has treated him unfairly, and that we should order the College to redress that unfairness by paying him overtime compensation in the same amount.

With respect, this purported re-characterization is entirely without merit. The College and the Union have entered into a legally binding collective agreement which specifies terms and conditions of employment for professors at this College, and provides for arbitration for the resolution of any disputes in relation to the interpretation, application or administration of that collective agreement in any particular case. The award of an arbitrator issued pursuant to the collective agreement is binding upon the College, the Union and upon all individual employees affected. Nothing in that collective agreement sets out a general obligation on the College to avoid "unfair treatment", although there may very well be certain aspects of arbitrable doctrine which could subject certain actions by the College to a test of fairness. But no such test requires the College to pay sums claimed under grievances which have been dismissed, merely because of an assertion that it would constitute unfair treatment to rely on the final and binding determination of a Board of Arbitration.

In any event, it is perfectly obvious that the only way the grievor could establish that he has been treated unfairly by the College is to demonstrate that the Teplitsky award is incorrect insofar as it dismisses his grievance, that the incorrectness is obvious to the College, and that the College deliberately ignored the known incorrectness. Without even suggesting that such an allegation is arbitrable, it is clear that permitting anyone to pursue such a notion in a subsequent arbitration would render the concept of the final and binding nature of arbitration awards, specifically provided in clause 32.04 C of the collective agreement, a sham. No degree of convoluted re-characterization can avoid the simple conclusion that the grievor has had his "day in court", has lost, and is now attempting to reopen precisely the same issue before another board of arbitration. There could not be.

a more compelling case of res judicata, and the grievance is therefore obviously not arbitrable. The College asked, at the close of the hearing, for its costs of the arbitration. An award of costs would appear to be prohibited by clause 32.04 E, which requires each party to bear one-half of the fees and expenses of the chair, and the entire cost of its own nominee to the board of arbitration. We thus reject the motion for costs, while acknowledging that the prospect is tempting in this case.

This matter should never have come to arbitration. In insisting on pursuing this matter, the grievor has cost the Union and the College large sums of money, and wasted a day of arbitration hearing which could have been put to good use in the cause of one of his fellow employees with a legitimate grievance to be dealt with. We are not inclined to attempt a generous characterization of the grievor's insistence on proceeding. It was an enormous waste of other people's time and other people's money, and an abuse of the arbitration process.

DATED AT TORONTO this 24th day of May, 1994.

Kenneth P. Swan, Chairman

I concur; see addendum

"H.J. Cook"  
H.J. Cook, College Nominee

I concur

"Sherril Murray"  
Sherril Murray, Union Nominee

I concur in the decision of the chairman that the grievance is not arbitrable, and particularly his statement that it was an enormous waste of other people's time and other people's money, and an abuse of the arbitration process. My concurrence should not be taken as agreement with his view with respect to clause 32.04 E.

"H.J. Cook"

H.J. Cook, College Nominee