

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SAULT COLLEGE OF APPLIED ARTS AND TECHNOLOGY

(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION AND ITS LOCAL 613

(THE UNION)

AND IN THE MATTER OF THE GRIEVANCES OF J. [REDACTED] V. [REDACTED]

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIR
MARTHA B. YOUNG, COLLEGE NOMINEE
EDWARD E. SEYMOUR, UNION NOMINEE

APPEARANCES FOR THE COLLEGE:

AMANDA J. HUNTER, COUNSEL, AND OTHERS

APPEARANCES FOR THE UNION:

CAROLINE V. (NINI) JONES, AND OTHERS

A HEARING IN THIS MATTER WAS HELD AT SAULT STE. MARIE ON
DECEMBER 16, 2003.

AWARD

The Grievor is a Professor in the Natural Resource Department teaching in the Outdoor Park and Recreation Program when he was in receipt of a notice of layoff dated April 10, 2003 which in part is:

“We regret that due to the financial position of the College, the position you occupy as a Professor in the Natural Resources Program is being eliminated from complement.

In accordance with Article 27.06(viii) of the collective agreement for Academic Employees, please consider this your notice of layoff. You are required to work until May 9, 2003. Your vacation is scheduled for Monday, May 12, 2003 to Friday, July 11, 2003 and, unless extended through your participation in retraining activities, your layoff will become effective at the close of business on Friday, July 11, 2003.

Article 27.06 (viii)(c) of the collective agreement carries a provision permitting retraining of laid off employees. Should you decide to engage in retraining activities, your layoff date will be extended to the close of business on Friday, October 10, 2003. You shall maintain your current salary and benefits for the duration of the notice, scheduled vacation, and retraining periods. In order to access the retraining provision, it is necessary to submit an application to the College Employment Stability Committee. Application forms are available in Human Resources Services. You will be paid for any carry-over of vacation and time off in lieu of overtime if any, which has accumulated as of your layoff date...”

The Board was advised that the layoff was caused by the declaration of the College of an Extraordinary Financial Exigency under Article 29 of the collective agreement and that the application of those procedures applicable in that provision is not

in dispute. The College decided as a result to suspend the Aboriginal Resource Technician Program and made other adjustments to reduce contact hours which left surplus staff including the Grievor.

A grievance dated April 30, 2003 was filed under the provisions of the collective agreement in which the Grievor claims wrongful dismissal, violation of Articles 6.01, 6.02 with a request for reinstatement. The response of the College at Step 1 of the grievance procedure is in part:

"I find that there are no grounds for your grievance because you have not been dismissed from Sault College. You have in fact been laid off in accordance with Articles 27.05 to 27.10 (inclusive) of the collective agreement and retain all of the rights of a laid off employee. Your grievance is therefore denied."

On October 8, 2003, a second grievance was filed in which the Grievor alleges a violation of Article 27 as to, contracting out, overtime and part-time, with a request for reinstatement. The response of the College on October 28th is in part:

"You have alleged that there has been a violation of Article 27 of the collective agreement for Academic Employees related to part-time teaching, contracting out and overtime.

Firstly, from time to time work becomes available on a part-time basis, i.e. six hours per week or less and in keeping with the terms of Article 1 of the collective agreement, it is not included in the Academic Bargaining Unit. In this particular case, the part-time employee hired was also a Support Staff employee. The employee was contracted

separately and this teaching was not carried out as a part of his duties as a Technologist.

Secondly, you have alleged contracting out of the work associated with Field Camp. The Academic instruction at field camp this fall was assigned to Professor Harvey Robins. Although the location was changed to Searchmont, the method of providing work in support of field camp was no different than in the past year except for location.

Although some of the professors in Natural Resources may have an overtime projection for this semester, it is with the provisions of the collective agreement.

Based on the above, there is not sufficient work available to recall you to a full-time position. I find no breach of the collective agreement for academic employees and your grievance is therefore denied."

The parties agree that the board should deal with both grievances together as the issues are interrelated. At the hearing, the Board was advised of the College's preliminary objection as to the arbitrability of these grievances which on agreement, was the issue dealt with at the hearing. The Board received the submissions of Counsel on this matter and reserved its decision without consideration of the merits of the grievances.

The submission for the College is that the Grievor's employment was not terminated by the College but rather he was laid off with retention of recall rights. The Grievor failed to identify any full-time positions that he could displace and therefore did not properly comply with the mandatory process in layoffs of employees in the collective agreement and did not set out a prima facie case for the remedy he has requested as he did not demonstrate he was dismissed from employment. The collective agreement allows the

College to layoff employees and provides the mechanism in the process under Article 29 by which Academic Programs were curtailed pursuant to Article 29.03(v)(b). When that process is completed, the terms of Article 27.06(a) apply. There is no entitlement for an employee to put together full-time assignments from work assigned to other faculty members in order to establish that there was full-time work available. There are mandatory time limits to assert a placement in the process under Article 27 with which the Grievor did not comply nor follow the requirements of Article 27(viii)(d). The grievance is not arbitrable regardless of when the issue was raised. There was no waiver by the College of these terms of the collective agreement.

The second grievance is beyond the time limit to identify a position that the Grievor sought to displace for which he had 20 days after receipt of the notice of layoff in April. As a laid off employee, he had placement options under Article 27 which existed at the time of receipt of his notice of layoff and his failure to comply with those terms blocked his challenge to his layoff. In the fall term, students in this course go on field trips which the Professor attends to conduct a program for a week. The Grievor claims this work still exists as does his teaching at the College which has been improperly given to part-time employees and persons in the Support Staff Bargaining Unit as well as to a Faculty member working overtime on his assignments. As well, part of the field trip was contracted out. The Grievor did not object to the SWIF's of other faculty members. The Grievor was entitled to and did obtain the 90-day training period after his layoff.

Reference in its submission was made to the following awards: Re Fanshawe College and O.P.S.E.U. (Simmonds, August 12, 1997); Re Seneca College and O.P.S.E.U.

(H.D. Brown, February 6, 1998); Re Canador College and O.P.S.E.U. (McDowell, December 12, 1996); Re Fanshawe College and O.P.S.E.U.(Kaplan, December 13, 1999); Re Fanshawe College and O.P.S.E.U. (Burkett, June 25, 1998); Re Cambrian College and O.P.S.E.U. (H.D. Brown, September 11, 2002); Re Mohawk College and O.P.S.E.U. (Thorne, March 4, 2003).

It is the submission of the Union that whether the Board has the power to consider the grievance is argument following the presentation of facts which are in dispute between the parties. Therefore, the Board should hear all of the evidence in the whole case. The Union alleges that the College violated obligations under the collective agreement with its interpretation of those terms for the performance of certain activities such as cobbling a full-time job together which the Grievor could perform requires significant evidence. The Grievor alleges that because the layoff was improper, it was a wrongful severance of his employment. The Union did not accept that there was not work available in April. The issue is the improper exercise of the power to layoff by the College contrary to the rights of management in violation of the collective agreement. The grievance is not directed to the application of Article 27.08 but to the Grievor's termination and the parties knew when these grievances were filed what the real issue was and should be dealt with as a wrongful termination issue as alleged by the Grievor.

As to the second grievance, the facts crystallized after the Grievor's initial layoff because the Grievor's job in its submission, continued to exist and the Union would provide evidence on which that submission is based. That evidence would include the

courses which had been taught by the Grievor and that they were continued to be taught in the Fall by part-time employees. As well, the Technician Program had not been cancelled but continued and the Camp Program in which the Grievor had been involved had been contracted out. It is submitted that to layoff the Grievor on April 10th, the College acted unreasonably and in violation of Article 6 because there was a workload for the Grievor's position, which continued to exist.

It was also submitted that Article 27.08 was waived by the College in any event that Article has no application to the grievances because on April 30th the Union alleged that the layoff was improper and did not refer to the Grievor's right to bump some other employee because it was not the Union's position that he could do so as his job remained and that he was dismissed and should not have been laid off. It is not whether the provisions under Article 27.06(a) apply to allow the Grievor to displace persons in certain positions which is not the claim of the Grievor. The second grievance was not untimely because the facts crystallized on that grievance in September when the lists were provided by the College giving the information which underlies the grievance. Reference was made to: Re Fanshawe College and O.P.S.E.U. (Mitchnick, September 19, 1997); Re George Brown College and O.P.S.E.U. (I.G. Thorne, November 5, 1999); Re St. Clair College and O.P.S.E.U. 65 L.A.C.(4th)219 (McLaren).

The agreed facts are clear that the College declared an Extraordinary Financial Exigency (EFE) pursuant to the recognition of its right to do so in Article 29 of the

collective agreement. In those circumstances, the parties have agreed that certain procedures would thereafter follow insofar as to the plan of the College to:

“Reduce the number of full-time regular employees who have completed the probationary period by lay off...”

Those procedures outlined in that Article were completed and no objection was raised to any aspect of the application of the terms of that Article which we note includes in Article 29.03(v) whether reductions could be accommodated by:

“curtailing certain academic programs”

or

“adjusting Faculty instructional assignments”

The second part of this section has relevance to the Grievor’s claim in his second grievance.

However that may be, what occurred under the application of Article 29 remained in effect without change to the decision of the College to layoff employees. It is that consequence which follows the declaration of an EFE, i.e. full-time employees are laid off and the Union is advised of “the courses, programs and services to be reduced or eliminated”.

It does not follow from these terms that the affected employees through the exercise of an EFE have had their employment terminated or that they have been discharged pursuant to the right of the College in Article 6.01(ii). There is in this case no suggestion of disciplinary action leading to the Grievor's dismissal without just cause. If that was the real cause of the Grievor's complaint, then he had 20 days of the date of "receipt of the written notification of the dismissal" to present a grievance pursuant to Article 32.07. The Grievor was not subject to or in receipt of a notification of dismissal but rather notice of his layoff under Article 27.06(viii) "due to the financial position of the College" which is based on the EFE declaration pursuant to Article 29.

The scheme of the collective agreement provides for a complaint procedure where an employee has been given a notice of layoff under Article 27.06(viii) in the terms of Article 27.08(a) which have been consistently held by Arbitrators to be both written in substantive and mandatory language and therefore requires strict observance by the affected employee. The Union submits that the Grievor is not claiming an improper layoff but that his termination of employment was wrongful in that he alleged his position remained and the courses which he taught had been improperly parcelled out to others in the Fall term. Whatever factually occurred to the Grievor's teaching position, the Board must infer from the terms of Article 29 which are not in dispute was included within the examination of the College Employment Stability Committee pursuant to Article 29. Under the terms of that Article which allows the College to layoff employees as a result of an EFE declaration, the affected employee cannot be found when in receipt of a notice of

layoff under Article 27.06 (vii) to have any claim as a wrongly dismissed employee. That form of relief is in these circumstances clearly not available to the Grievor. Once the declaration of EFE has been made, layoffs follow with notices under Article 27.06(vii). As a result, the relief which must be claimed if at all is that which arises under Article 27.08 (a) of an improper layoff. In so doing, the affected employee must state the Employees and Positions that he claims entitlement to displace.

We find it is not open to the Union under the specific and clear detailed terms of the collective agreement applicable to an EFE to disregard this contractual procedure in order to have the case heard as to the facts on which it would base the allegation in the grievance of wrongful dismissal. Even should the Board allow the reception of such evidence, its conclusion would be bound by the strict terms of the collective agreement which we have noted above and therefore the proposed evidence would have no relevance and would not lead to any other conclusion than the Board is constrained to find in the application of the above-referenced provisions of the collective agreement which cannot be bypassed through the Grievor's claim in his first grievance.

We further find that the second grievance alleging a violation of Article 27 is clearly beyond the time limits for the presentation of his complaint pursuant to Article 27.08(a) and 32.02. Whatever has been stated in arbitration decisions prior to the Zurowski grievance determined by the Simmons Board, that decision has been upheld by a judicial review and in our view is determinative on the basis of the findings in that award that failing to name vacant positions is a fatal flaw to the grievance. Furthermore, that

Board found that the time limit referred to in Article 32.02 applies from the date of the notice of layoff received by the employee from which date the Grievor had 20 days to lodge a complaint of an improper layoff. The Simmon's Board's award deals with the same collective agreement between the same parties and there is no reasonable basis to consider that it was wrongly decided so as to not follow that result by this Board.

We also note that while obiter, the Board stated its opinion as to the combination of lesser than full-time assignments to a regular full-time position or as set out in the Lambton College award (Swan) referred to at p. 19 of the Simmon's award:

“In this instance, the intention of the grievance is that the Grievor would take certain teaching assignments away from each of the three employees who teach less than full-time, in the process putting together a full-time job made up of pieces of teaching previously done by others...”

The Board found that while the situation fell under Article 27.08 and in (b), the Grievor is able only to arbitrate on a specific provisions of Article 27.06(a) and not under Article 27.06(iv) but under 27.06(1) does not allow, the Grievor to search and cobble a number of partial or part-time positions to make a full-time position. In the Kaplan award (supra), that issue is revisited and is found clearly that:

“It now seems well established that the vacant position must be identified when the grievance is referred to arbitration and that the later attempted cobbling of courses from other employees to make a full-time complement for one employee is inconsistent with the scheme set out in the

collective agreement. Put another way, there is nothing in the collective agreement that requires the Employer to take away courses belonging to other employees, partial load, part-time and particularly full-time or senior employees and then give them to the Grievor in order to provide the Grievor with full-time employment. To be sure, there may be, as argued by the Union, a preference in the collective agreement for full-time employment. But there is also a detailed scheme for asserting claims to vacant positions whether full-time or otherwise and a position means an existing job, whether full-time or otherwise not a collection of courses that could when combined create full-time employment...”

In that case, there was also a declaration of en EFE and it was there found that the procedures in that regard were followed and that no grievance was filed by the Union and at p. 8, the Board stated:

“Again, even accepting the Union’s submission that there is a preference in the collective agreement for full-time jobs, the collective agreement also evidences the shared recognition that financial exigencies can occur and that job losses may result. A highly detailed processes provided to ameliorate as much as possible the impact of layoffs by providing employees with a succession of opportunities on displacement...”


In the Seneca College award (supra), it was found that the terms of Article 27.08 are substantial and mandatory:

“and the failure to meet those terms as a matter of substance is fatal to the grievance. That is the position which this Board follows and adopts. Therefore, the doctrine of waiver as described and applied in the George Brown award does not apply to waive substantial and mandatory requirements of the collective agreement”.

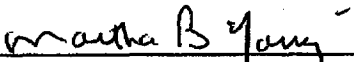
We find the same result must apply in the circumstances of these grievances and therefore, it cannot be found that the College did not intend to exercise its legal rights under the collective agreement in responding to these grievances. This is not a matter of allowing the Grievor to proceed on the alleged real issue of his grievance regardless of the wording as the only issue which could arise following the receipt of the notice of layoff under Article 27.06(vii) is as stated above and cannot be converted or considered by the Board under the terms of this collective agreement in any other manner.

Having regard to the submissions of Counsel and for all of the foregoing reasons, the Board finds that the preliminary objection of the College to both grievances is allowed and therefore that both the grievance dated April 30, 2003 and the grievance dated October 8, 2003 are not arbitrable. It is therefore this Board's award that these proceedings are terminated.


DATED AT OAKVILLE THIS 30TH DAY OF MARCH, 2004.



HOWARD D. BROWN, CHAIR



MARTHA B. YOUNG, COLLEGE NOMINEE



EDWARD E. SEYMOUR, UNION NOMINEE