

DISSENT OF THE UNION NOMINEE, R.A. COCHRANE

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO COUNCIL OF REGENTS FOR THE COLLEGES OF APPLIED ARTS
AND TECHNOLOGY IN THE FORM OF LOYALIST COLLEGE
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(hereinafter called the "Union")

GRIEVANCE OF LISA WASILEWSKI
(hereinafter called the "Grievor")

BOARD OF ARBITRATION:

Richard H. McLaren
R.J. Gallivan, College Nominee
R.A. Cochrane, Union Nominee

COUNSEL FOR THE COLLEGE:

Douglas Gray

COUNSEL FOR THE UNION:

Ian Roland

THIRD PARTY INTERVENOR:

Randy Godfrey

DISSENT

The grievances involving Ms. Wasilewski that came before this Board could be viewed as pitting Union - Employer interests against the interests of an individual member of the bargaining unit. As the majority board concluded at Page 11 in its final supplementary award:

"...Ms. Wasilewski left Toronto to take up work in Belleville. She is a single parent. She is a competent and conscientious teacher....She was caught in the jaws of a vice."

The facts of this case as found by the Board's decisions are not in dispute. However, the findings that flow from these facts as they impact on the College suggest that the College never had any intention of hiring the grievor as a full-time employee at any time during her employment relationship. The employer's conduct suggests that indeed there was something "rotten in the State of Denmark". Did the employer's conduct prior to and following the filing of her grievance constitute bad faith in the termination of her employment? I would suggest that taken as a whole, the only reasonable conclusion is that it has acted in bad faith.

A review of the facts as found in the first decision of the Board reveals that, the employer was well aware that the continuation of Ms. Wasilewski's employment was approaching the threshold that could make her a full-time probationary employee. To prevent this from happening, Ms. Wasilewski was advised that while there was a continuing need for her services, she could no

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longer continue as a sessional employee. She was advised by the employer to set up her own company and the College would employ her company to teach at the college. The motive for this conduct could only be to prevent Ms. Wasilewski from becoming a full-time probationary employee. In fact, the College took the position before the Board that this time could not be counted towards the requirements specified in Appendix III, Article 1. The arbitration board correctly found that this was an artificial way of avoiding the commitment made by the employer to the Union as specified in Appendix III, Article 1. Clearly the conduct of the employer was directed at avoiding its contractual responsibility to the Union and by extension to the grievor.

The second incident which is telling on the employer's motive towards the grievor is the manner in which they respond to the grievor's request to be made a full-time probationary employee. The employer up to and including the arbitration hearings took the position that the grievor was not a full-time probationary employee. The timing of the events is crucial to determine whether or not the employer was acting in good faith in its dealings with Ms. Wasilewski. The union grievance dated October 29, 1990 asked the College to:

1. Comply with the provisions regarding posting.
2. Remit dues from July 1, 1990.
3. Declare Ms. Wasilewski a full-time probationary employee effective July 1, 1990.

Article 8.01(d) required the College to designate the

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position as a regular full-time bargaining unit position. Article 8.01(d) in requiring the College to recognize the position, requires it to:

"...fill the position with a member of the bargaining unit as soon as a person capable of performing the work is available for hiring on this basis. "

In the June, 1992 award the Board found at Page 9:

"That language (8.01(d)) does not directly say that there must be a job posting. It is stated in the fashion that it is because Article 8.01(d) refers to a position coming with the bargaining unit, whereas 8.01(c) refers to a person coming within the bargaining unit. These can be separate or simultaneous events. When it is simultaneous, as it was for Ms. Wasilewski, she could have been confirmed as filling the position."

In retrospect, this should have ended the matter. The collective agreement does not require that there must be a posting. There was a position that came within the bargaining unit and Ms. Wasilewski occupied that position as a member of the bargaining unit. It's not a choice of she could have been confirmed, she had a right to be confirmed.

In response to the union's grievance dated October 29, 1990, the employer read into the grievance what it wanted to. It agreed to post a position but it was not prepared to concede that the grievor was a full-time probationary employee, thus frustrating the simultaneous events spoken of in the Board's June, 1992 award. In fact, the position identified in the job posting and the position coming within the bargaining unit as contemplated by 8.01(d) bore no resemblance to one another. They were two

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completely different positions. Ms. Wasilewski did not compete as a member of the bargaining unit, she was treated as an outside candidate.

At Page 9 of the June, 1992 award the Board noted:

"The union could have sought a confirmation of her status under Article 8.01(d) and declaratory relief to that effect as a remedy for the individual grievance. They didn't seek that application of the quoted language of Article 8.01(d) but rather sought a job posting."

Earlier on Page 9, the Board found:

"The job posting was not a bad faith action by the College. The action itself was not required under the contract."

While the singular action of posting a position may not be bad faith, the employer's treatment of the grievor prior to and subsequent to the posting, paints a different picture. The posting of a position and not the position as it existed when the Union filed its grievance, appears to be an expansion of the contracted obligations contemplated by Article 8.01(d) and 8.01(c). The Union by filing its grievance was attempting to force the employer to recognize that it had ventured into a situation whereby there was a position coming within the bargaining unit and at the same time it was asking that the grievor be declared a full-time probationary employee. Neither the College nor the Local Union had a right to alter Articles 8.01(c) or (d) as agreed upon by the parties to the Agreement, namely OPSEU and the Council of Regents. When the Board suggests:

"The Union could have sought a confirmation of her status under 8.01(d) and declaratory

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relief to that effect as a remedy for the individual grievance."

That was, actually, the only avenue open to the Union to meet its obligations to fairly represent the interests of its members in the bargaining unit. This is exactly what the Local Union was trying to accomplish when one reads the Union grievance and the relief sought, as a whole. In the award of December 1991, the Board suggested that the Union sought a job posting rather than the recourse noted above and went on to suggest the rationale for such a decision:

"This would typically happen when this Article is operating to increase the bargaining unit independent from the operation of Article 8.01(c). However, the remedy the Union sought was one which could be considered as arising within the language of Article 8.01(d). Therefore, the College's compliance with the Union's initial demand meant that when Ms. Wasilewski was not selected pursuant to the job posting procedure, she would have to be terminated unless the complement of employees was going to increase by two rather than merely one."

I do not agree with the Board's rationalization of the Union's conduct. First of all when the Union filed its grievance, the only position that came within the bargaining unit as contemplated by 8.01(d) was the teaching position occupied by the grievor. There is nothing in the evidence to suggest that the Union was aware that the employer would post a different position than the one occupied by the grievor. When one reads the grievance as a whole, the only reasonable conclusion to be drawn from the Union's actions was that it wanted the teaching position occupied by the grievor posted and the grievor declared a full-time

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probationary employee to fill that position. One must remember that it is the employer who has the power to increase the size of the bargaining unit and not the Union, except for the Article 8.01(d) provision. So when the Board suggests that the motive for seeking a job posting was to increase the bargaining unit independent from the operation of Article 8.01(c), it assumes that the Union felt it could force the employer to increase the size of the bargaining unit by creating a position by operation of 8.01(d) and a second position by declaring the grievor as a full-time probationary employee by operation of 8.01(c). This rationale is flawed in that the grievor as a full-time probationary employee must be assigned to a position. In the grievor's case, that position could only be the position that came within the bargaining unit by operation by 8.01(d).

On the one hand, the Board suggests that by asking for a job posting, the Union's local president as an experienced union official must have known what he was doing when he requested that the job be posted, if the employer failed to create the second position. If she was unsuccessful in competing for the position that had to be created by operation of 8.01(d), Ms. Wasilewski would be left without a position to try to complete her probationary period. This begs the question: Would a seasoned and experienced local officer, knowing the duty of fair representation and the economic climate at the College, place the future employment of Ms. Wasilewski in such jeopardy on the unlikely assumption that the College would create two positions. The only

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reasonable conclusion is that the local president would not expect the employer to create two positions. The purpose of the union grievance was to formalize the teaching position occupied by the grievor at the time the grievance was filed and to confirm her in it as a full-time probationary employee.

A careful reading of the Union grievance confirms that this is what the Union was asking for:

"The Union grieves under Articles 8.12(a); 12; Appendix III 1(c) and Appendix III 1(d) that the College has failed to post notice of a vacancy in administrative studies for September 1990 and has failed to collect dues from the person hired to fill the vacancy." (Lisa Wasilewski) Exhibit I, Tab 1.

The settlement which was requested:

"The College will comply with the provisions regarding postings and will remit dues from July 1, 1990 onward. Lisa Wasilewski will be declared a full-time probationary professor effective July 1, 1990." Exhibit I, Tab 1.

The Union clearly linked the posting of the position with a request that the grievor be declared a full-time probationary employee.

Instead the College created a new position, which had the effect of pre-empting any possibility of the grievor successfully completing her probationary period because her teaching position ceased to exist.

Appendix III 1(d) clearly did not contemplate or allow for the posting of an entirely different position:

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"(d) If the College continues a full-time position beyond one (1) full academic year of staffing the position with sessional appointments, the College shall designate the position as a regular full-time bargaining unit position and shall fill the position with a member of the bargaining unit as soon as a person capable of performing the work is available for hiring on this basis."

The position contemplated by this clause could only be, in this case, the position occupied by Ms. Wasilewski because it was the only position that had existed for the past 12 months. She was the only sessional employee that taught for that period. Appendix III 1(d) was clearly intended to regularize a situation that currently exists and had existed for at least 12 months previously. It would, in my view, be patently unreasonable to conclude that this provision triggered a right of the employer to create a different position that had not previously existed and that was not previously staffed with sessional appointments, so as to avoid the affect of Appendix III 1(d).

The third incident which tells against the employer and its willingness to give the employee a fair chance to complete her probationary period occurs well after the events that gave rise to the original grievances. The successful candidate for the position posted by the College, in response to what the College took in its own interest to be the Union request, resigned while this grievance was being arbitrated. The College was then in the position to recreate the position contemplated by Appendix III 1(d) that the

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grievor occupied when the October 1990 grievance was filed and to give her a fair opportunity to complete her probationary period.

The employer has chosen not to take this course of action. It continues to take the position that it cannot be faulted for doing what it was asked to do by the Union. However, for the reasons stated earlier, the College did not respond to the Union's request. It did not post the bargaining unit position that existed when the union grievance was filed. Instead, it took the opportunity to create and post what it characterized as an entirely different position. It did not declare the grievor a full-time probationary employee entitled to fill the position she was actually filling. In fact, it disputed before the Board that the grievor was a full-time probationary employee. It did not collect union dues until the Board declared that the grievor was a full-time probationary employee.

In consequence, the grievor was never given a fair opportunity to complete her probationary period. With the resignation of the successful applicant, the circle was complete. The employer never intended to make the grievor a full-time probationary employee and it acted in a manner consistent with this approach. Given that there is no dispute that the grievor was a competent and conscientious teacher and the roadblocks created by the employer as witnessed by the totality of its actions, it cannot be said that the College acted in good faith in releasing Ms. Wasilewski as a probationary employee. She was never given a chance, let alone a fair one, to complete her probationary period.

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It truly is a travesty of justice to allow this to happen. How could one reasonably conclude that an employer who has acted so strenuously to avoid recognizing the grievor as a full-time probationary employee be said to have acted in good faith in releasing her while on probation.

In the OPSEU vs. St. Lawrence College, the Court noted:

"It is clear from Council of Printing Industries (1983) 42 OR (2d) 404 that different language in a different agreement read as a whole might properly be interpreted as giving a Board jurisdiction to consider good faith, in a sense broader than that used in Metropolitan Toronto, as the subject of a grievance. Having regard to the language of this agreement, we think this is such a case."

The Agreement spoken of in the Court's decision is the same collective agreement before this Board.

In its subsequent decision, in OPSEU vs. St. Lawrence College, the Board of Arbitration reviewed the employer's conduct in light of the Court's decision. At page 3 of that Award, the Board noted:

"We therefore consider that the Divisional Court has directed us to consider whether or not in exercising its positive obligations under 8.01(c), the College exercised its power under this article on a reasonable basis and without bad faith, discrimination or arbitrariness.

We believe that test is what the Court was referring to when it directed us "to consider good faith, in a sense broader

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than that used in Metropolitan Toronto", which looked only at illegality or obstruction in connection with a management's rights clause."

In the instant case, Ms. Wasilewski was never given the opportunity to be assessed against the code of conduct and positive obligations set out in Article 8.01(c) because the employer did everything it could to prevent her from becoming a full-time probationary employee. As evidenced by Exhibit I, Tab 5, the College took the position that she ceased to be an employee at the end of the sessional appointment. If the Union was correct in its assertion that she was a full-time probationary employee, then the letter was to be read as an official notice of termination during her probationary period.

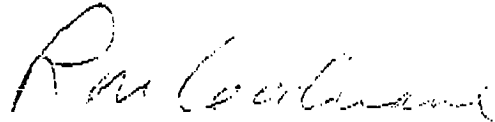
I would note that there are no reasons given for the termination of her probationary status. No evidence that her work was unsatisfactory and there was no evidence of periodic evaluations. There was evidence that the grievor was a competent and conscientious teacher.

Ms. Wasilewski was declared a full-time probationary employee by the Board after the fact.

In my view, in considering the question of whether or not the termination of the grievor was made in bad faith, one must address the question of whether the probationary period was administered in good faith. How could this possibly be, when the employer fought the legitimacy of her status all the way to this Board and setting up roadblocks to prevent her from gaining this

Clearly the employer is entitled to create as many positions as it feels necessary, but it cannot use its authority in this regard to avoid creating positions required by the collective agreement e.g. Appendix III 1(d) and avoid its responsibility to administer the probationary period in good faith.

For these reasons I would have allowed the grievance and ordered her reinstatement with full compensation and retain jurisdiction on the amounts owing.



R.A. Cochrane.