

IN THE MATTER OF AN ARBITRATION

BETWEEN: FANSHAWE COLLEGE

and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

The Employer

Caat A

90B375

The Union

Local 110

AND IN THE MATTER OF the grievance of Kathryn ~~Wigle~~ (OPSEU File No. 90B375) alleging incorrect calculation of seniority.

Board of Arbitration:

D.D. Carter, Chair  
W.A. Correll, Employee Nominee  
J. McManus, Union Nominee

Appearances for the Union:

M.A. Kuntz, Grievance Officer  
K. Wigle, Grievor  
T. Geldard, Local 110  
G. Fordyce, Local 110

Appearances for the Employer:

B. Brown, Counsel  
J. Mills, Fanshawe College

A hearing of this matter was held at London on September 7, 1990.

A W A R D

## AWARD

The grievor, Kathryn Wigle, commenced employment as a teacher in the Human Services Division of Fanshawe College on August 31, 1987. After the commencement of her employment and, while still a probationary employee, she applied for and was granted a leave of absence because of pregnancy. This leave covered the period March 3, 1989 to June 30, 1989 and, after the normal summer vacation period, she resumed her active teaching duties. In early January of 1990 she was advised that as of December 31, 1989, she would be classified as "regular", which meant that she had successfully completed her probationary period.

The difference underlying this grievance arises from the fact that the grievor was given no seniority credit for the period of her pregnancy leave. It is the union's position that in determining whether seniority accrues during pregnancy leave no distinction should be drawn between probationary employees and regular employees, as in each case seniority credit should be given for the period of pregnancy leave. The employer, on the other hand, takes the position that probationary employees are only credited with seniority equal to the two-year probationary period required by the collective agreement and, in the case of the grievor, this two-year period was not completed until December 31, 1989, because of its interruption by reason of her pregnancy leave.

The relevant provisions of the collective agreement are set out below. We realize that other provisions were referred to in argument but, in the interpretation of a collective agreement as detailed as this one, little weight can be placed on language used to deal with issues quite different from those presented by the grievance. In this case we are faced with the specific issue of whether probationary employees are entitled to seniority credit while on pregnancy leave and in resolving this issue it is necessary to focus upon those

provisions dealing with the seniority status of probationary employees and the accumulation of seniority while on leave of absence. These provisions are found in article 8 of the collective agreement.

Article 8 -- SENIORITY

8.01(a)(i) A full-time employee will be on probation until the completion of the probationary period. This shall be two (2) years' continuous employment except as described hereafter.

8.01(a)(ii) The probationary period for the following will be one (1) year's continuous employment:

- (a) a full-time employee who has completed a probationary period at the same or another Ontario College of Applied Arts and Technology, and is hired by the College in the same classification which the employee held during the previous probationary period.
- (b) a full-time teacher who holds one of the following professional qualifications and who has one year or more of full-time teaching experience in Ontario:
  - (i) a valid Ontario Teacher's Certificate;
  - (ii) Bachelor of Education Degree;
  - (iii) Master of Education Degree.
- (c) a full-time counsellor who holds one of the following professional qualifications and who has one year or more of full-time counselling experience in an educational institution in Ontario:
  - (i) a valid Ontario Guidance Specialist's Certificate;
  - (ii) Master's degree in Counselling or Guidance.
- (d) a full-time librarian who holds a Bachelor's Degree in Library Science or a Master's Degree in Library Science and who has one year or more of full-time experience as a professional librarian in Ontario.

8.01(b) The probationary period shall also consist of twenty-four (24) full months of non-continuous employment (in periods of at least one (1) full month each) in a forty-eight (48) calendar month period. For the purposes of this paragraph, a calendar month in which the employee completes fifteen (15) or more days worked shall be considered a "full month".

If an employee completes less than fifteen (15) days worked in each of the calendar months at the start and end of the employee's period and such days worked, when added together, exceed fifteen (15) days worked, an additional full month shall be considered to be completed.

8.01(c) On successful completion of the probationary period, a full-time employee shall then be appointed to regular status and be credited with seniority equal to the probationary period served.

8.11 A full-time employee shall continue to accumulate seniority for the purpose of this Article while:

- (a) in the College's active employ;
- (b) absent through verified illness or injury and/or leave of absence for up to twenty-four (24) months;
- (c) on a College-approved leave of absence on an exchange program;
- (d) on a College-approved professional development leave of absence;
- (e) on a College-approved secondment for up to twenty-four (24) months.

Our starting point is article 8.11 of the collective agreement. That provision clearly provides that a full-time employee continues to accumulate seniority while on a leave of absence for up to twenty-four months. Pregnancy leave is provided by article 17.02 of the agreement so it would appear at first glance that the grievor, as a full-time employee, should be given seniority credit for the period of her pregnancy leave.

Counsel for the employer, however, took the position that article 8.11 did not apply to probationary employees. He argued that, since probationary employees had no seniority, it was not possible for them "to continue to accumulate seniority" as contemplated by article 8.11. According to this argument, a probationary employee was instead only entitled to be credited with seniority equal to the probationary period served once the probationary period has been successfully completed by virtue of article 8.01(c).

The distinction that counsel attempted to draw appears to be one without a difference. The fact that probationary employees receive no credit for seniority until the successful completion of the probationary period, in our view, does not necessarily mean that they cannot continue to accumulate seniority as

probationary employees. It is clear that the parties contemplated that probationary employees would be given seniority credit for their service during the probationary period and this seniority credit continues to grow, or accumulate, during the probationary period. This accumulated seniority is then credited to the employee upon successful completion of the probationary period. Article 8.11 standing alone, therefore, appears to include both probationary and regular full-time employees within its embrace.

Counsel for the employer, however, argued that article 8.11 must be read in conjunction with articles 8.01(a) and 8.01(c). The former article stipulates a probationary period of two years "continuous" employment, while the latter provides that a full-time employee appointed to regular status is only to be credited with seniority equal to the probationary period served. Counsel argued that this requirement of two years continuous employment meant two years of active service so that the grievor could only be given seniority credit for active service during her probationary period.

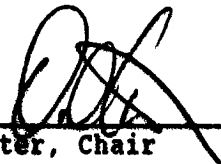
The difficulty with this argument is that, as counsel conceded, there was no break in the grievor's employment with the College during her pregnancy leave. At all relevant times the grievor continued to be an employee of the College even though she did not perform her normal duties during the period of pregnancy leave. Based on the plain meaning of article 8.01(a) we can only conclude that the pregnancy leave did not interrupt the grievor's probationary period so that this period expired on August 31, 1989. At that point she should have been given credit for the two years of seniority that had accumulated during her probationary period and, from that point onward, she should have been treated as a regular employee for the purpose of the calculation of seniority.

In reaching this conclusion we understand the employer's concern that, because of the grievor's pregnancy leave, there was less opportunity for an assessment of the grievor's performance as a probationary employee. If there is any doubt about a probationary employee's work performance, however, there is nothing to prevent the employer from reaching agreement with the union for an extension of the probationary period. We should point out, though, that if the probationary period were to be extended in this manner, the probationary employee would still be entitled to seniority equal to the actual probationary period served.

At the core of this grievance is the question of whether probationary employees are to be treated differently than regular employees in respect of the accumulation of seniority during pregnancy leave. The employer was quite candid in conceding that regular employees continue to accumulate seniority while on pregnancy leave. In the absence of clear language to the contrary we see no justification for treating differently those probationary employees who successfully complete the probationary period. This collective agreement contains no such clear language and, accordingly, this grievance is allowed and the employer directed to credit the grievor with seniority for the period while she was on pregnancy leave.

We remained seized of this matter to deal with any difficulties arising from the implementation of this award.

Dated at Kingston this 9th day of October, 1990.



D.D. Carter, Chair

I concur/~~dissent~~

"W. A. Correll"

W.A. Correll, Employer Nominee

I concur/~~dissent~~

"J. McManus"

J. McManus, Union Nominee