

95C871 LOYALIST VS OPSEU

IN THE MATTER OF the grievance of Terry Wood

AND IN THE MATTER OF the arbitration of the grievance

BETWEEN:

Loyalist College of Applied Arts and Technology

- and -

Ontario Public Service Employees' Union

PLACE & DATE OF HEARING: Belleville, Ontario, February 7, 1996

BOARD OF ARBITRATION:

George Metcalfe  
Edward Seymour  
Stanley Schiff, chairman

APPEARANCES FOR THE EMPLOYER:

David Butler, vice-president human resources  
Glennyce Sinclair, dean health sciences  
Patricia Murray, counsel

APPEARANCES FOR THE UNION:

Harry Plumber, local union president  
Terry Wood  
Rebecca Murdock, counsel

**AWARD AND REASONS  
ON PRELIMINARY OBJECTION**

The grievor is a professor in the School of Health and Community Services. On April 6th, 1995 he put in a formal grievance alleging, essentially, misconduct by Glenyce Sinclair, the dean. The Statement of Grievance reads:

I grieve that the College has breached its duty to act fairly, reasonably and in good faith toward me. This breach comprises:

- deviating from College policy on student complaints;
- deviating from College policy on faculty evaluation;
- using the Student Questionnaire, which has never been negotiated with the Union, for purposes for which it was never intended and for which it is patently inadequate; and
- engaging in an unwarranted course of conduct (soliciting complaints from my classes) thereby undermining my professional credibility and causing me unnecessary embarrassment.

The grievor asks for various remedies, including a declaration that the dean's conduct seriously departs from College policy, an order that she not use the questionnaire for an improper purpose and her apology for embarrassment caused to him.

By agreement the parties argued the arbitrability of the grievance at the opening of the hearing.

It is the College's position that whatever Mrs. Sinclair did was done under the authority of s. 6.01 (iii) of the Management's Functions article and is immune from arbitrators' review. Since there is no allegation on the face of the grievance form that the dean has violated any provision of the agreement, it does not set out a "grievance" for the purpose of s. 32.12 C. Section 32.04 D then prohibits us from dealing with it.

The union hardly responds to the College's argument. Instead the union says that the formal grievance and the allegations outlined to us in argument support a case that the College breached a duty to act toward the grievor in a fair, reasonable and good faith manner. The union argues that, according to recent case law, every collective agreement contains an implied obligation upon the employer to exercise management's rights in good faith and without discrimination or arbitrariness. So, says the union, the absence of an

allegation that a specific provision of the agreement has been violated does not matter: the allegations that the implied obligation has been violated are enough.

During the union's recital of allegations we heard of a series of events beginning in October 1994 and coming up to early April 1995. Here, in synopsis, is what the union alleges happened: The dean sent the grievor a memorandum expressing concerns about students' complaints that he had missed classes and about the structure of his courses. She allegedly told students that complaints had been lodged against him. She interviewed students about his conduct, soliciting their unfavourable remarks. She attended classes of other instructors to solicit complaints about him. She was not interested in hearing positive or neutral comments about him, and publicly berated a student who so spoke. She ignored his request to give him details of the complaints. She sent him a memorandum warning him of discipline if he violated academic policy in the future. And, despite his objection, she administered a questionnaire to students in his classes about his performance. **The College says** that, indeed, the dean received complaints from students that the grievor was missing scheduled classes, that she met with students to discuss the complaints, then met with the grievor, and finally administered the questionnaire in the same form as that usually administered each year in every class.

Absent the allegation in the grievance form that the dean's conduct constituted a breach of a "duty to act fairly, reasonably and in good faith", the grievance could not be arbitrable. The conduct would fall squarely within the College's authority under s. 6.01 (iii) and could not support a complaint constituting a grievance under s. 32.12 C. For the agreement of other arbitrators, see Re Seneca College and OPSEU (1978), 17 L.A.C. (2d) 113 (Brown, chairman), and Re Mohawk College and OPSEU (Young grievance) (1984), unreported (Kruger, chairman).

But the grievor makes the extra allegations and the union supports them by the recital of alleged events we have set out. The union argues that, if proved, these allegations of fact show the dean's course of conduct constituting bad faith, discrimination or arbitrariness. Since such conduct, the union says, is barred by a prohibition implied in every collective agreement, we have jurisdiction to determine the grievance as the grievor and union have shaped it.

The union relies heavily on the decision of the Ontario Divisional Court in Re Brampton Hydro Electric Comm'n (1993), 108 D.L.R. (4th) 168, 177. The court there certainly comes close to saying--if it does not say explicitly--what the union argues for. But if that indeed is the judges' opinion, we have trouble reconciling it with the reasons of the Court of Appeal in Re Metro Toronto Police Comm'rs (1981), 124 D.L.R. (3d) 684, as interpreted by the Court of Appeal in Re Council of Printing Industries (1983), 149 D.L.R. (3d) 53, and in Metro Toronto v. C.U.P.E. (1990), 69 D.L.R. (4th) 268. Indeed, the judges of the Divisional Court in a later decision, Stelco Inc. v. Steelworkers (1994), 111 D.L.R. (4th) 662, 663, 675, 676, cleave strongly to the reading of the Police Comm'rs case in Metro Toronto v. C.U.P.E.

We do not have to take Brampton Hydro as far as the union wants: what the Court of Appeal said in Metro Toronto v. C.U.P.E. is enough support. The court there

confirmed that an arbitrator may properly find the employer's duty to exercise authority under management's rights provisions fairly, without discrimination and in good faith if what the employer is doing would

otherwise undermine, negate or unduly limit the scope of other provisions. 69 D.L.R. (4th) at 285, 286. The board in Metro Toronto had concluded that the employer's exercise of management's rights impinged on employees' rights under the agreement to be disciplined only for just cause. The arbitrators there, the court said, did not read the collective agreement unreasonably by finding the employer's duty not to exercise management authority arbitrarily. The court found support for its conclusion in the concluding clause of the management's rights provision that forbade exercise of the discretion in a manner "inconsistent with the provisions of this agreement." Id. at 285.

Section 6.02 of the collective agreement before us also requires exercise of management "functions...in a manner consistent with the provisions of this agreement." And we have heard a list of allegations including the dean's warning of discipline should the grievor continue violating College policy. Beyond that specific allegation, we can easily see that the end of the dean's alleged inquiry might well be some manner of discipline, possibly discharge. When we read s. 6.01 together with provisions in Article 32 governing discipline and discharge grievances, we cannot think that the parties intended that the College might conduct an inquiry potentially leading to discharge or discipline short of discharge unfairly, in bad faith, discriminatorily or arbitrarily. To the contrary, according to Metro Toronto v. C.U.P.E., we can justly say that the College is bound to proceed fairly and in good faith and without discrimination or arbitrariness. Nothing less, under the terms of this agreement, will do.

Awards the College relies on are not inconsistent with our conclusion. Re Niagara College and OPSEU (Mills grievance) (1991), unreported (Swan, chairman),

involved a grievance against the college's performance evaluation of the grievor. Unlike what we have before us, nothing in the formal grievance nor in the record alleged the college's bad faith or improper motivation. Moreover, especially in the presence of a provision (virtually identical to s. 31.01 in the current agreement) governing the significance of performance appraisals and employees' rights when appraisals are put in the employment record, the board found nothing in the agreement permitting an inference of the parties' intention to limit the college's exercise of management's rights. In Re Markham Hydro Electric Comm'n and Electrical Workers (1992), 24 L.A.C. (4th) 412 (Knopf, arbitrator), the grievor had been discharged during the probationary period. Unlike the agreement before us, the agreement denied just cause protection against discharge in the circumstances. With Re Council of Printing Industries and Metro Toronto and C.U.P.E. in mind, the arbitrator searched for some provision in the agreement supporting a duty of good faith and reasonableness. She found none.

In the end, it may not matter to the result whether we see the rule of the employer's duty as a product of contract interpretation (as the arbitrators in Niagara College and Markham Hydro said they did) or of the arbitrator's educated sense of how the parties ought to administer their agreement day to day in a real-life collective bargaining relationship. For the purpose of this grievance, the key to the way the College must exercise management's rights is the potential impact on employees' rights to protection against discipline without just cause.

As yet we have heard no evidence. It may be that, after the evidence and counsel's argument are done, we will not be persuaded that the union's allegations are true or the characterizations justified. But the union is entitled to try.

We declare that we have jurisdiction to hear the grievance as set out in the grievance form and detailed in the union's statement of allegations. The objection to jurisdiction is dismissed.

DATED at Toronto this 15th day of March, 1996.

Edward Seymour

Stanley Schiff, chairman