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IN THE MATTER OF AN ARBITRATION

B E T W E E N:

ST. LAWRENCE COLLEGE

(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCES OF M. ROBITAILLE - #95E095/096

ARBITRATOR: Kenneth P. Swan

APPEARANCES:

For the College:
Ann Burke, Counsel
Anne Sliviaskas, Student at Law
Blayne Mackey, Vice-President, Human Resources
Cindy Bleakney, Human Resources Officer

For the Union:
David Jewitt, Counsel
Mary Ann White, Chief Steward
Bill Anderson, Vice-President, Local 417
M. Robitaille, Grievor

A W A R D

Hearings in this matter were held in Kingston, Ontario on December 15, 1995, March 29 and October 15, 1996. At the outset of the hearings, the parties were agreed that the board of arbitration had been properly appointed pursuant to the collective agreement, and that we had jurisdiction to hear and determine the matters at issue between them.

In the course of the hearing, because of the unavailability of a member of the board of arbitration, the parties agreed to confer all of the jurisdiction of the board of arbitration on the Chair, at least with respect to the preliminary issues which have occupied the hearings so far. This is therefore the award of the Chair alone, as sole arbitrator by agreement of the parties.

There are two grievances at issue, both filed on June 7, 1995. Both allege a violation of Article 27.09 B, one in relation to "the EFL position", and the other in relation to "two one-half load positions in the Centre for Quality Instruction". In each case the relief sought is recall into the position in question, and compensation accordingly.

In addition to clause 27.09 B, the Union also refers to clause 27.09 A. The right of the Union to rely on this second provision is an issue between the parties. For ease of reference, both are set out below:

> **Post Lay-Off Considerations**
>
> **27.09 A** To assist persons who are laid off, the College agrees to the following:

(i) Such a person may take, tuition free, one program or course offered by the college, for which the person meets the normal entrance and admission requirements. In addition, the College shall consider and implement such retraining opportunities as the College may consider feasible.

(ii) Before the College hires a sessional employee, a person who has been laid off under 27.06 within the last twenty-four months and has not elected severance under 27.10 A shall be offered the sessional appointment provided that the former employee has the competence, skill, and experience to fulfil the requirements of the sessional position concerned. The applicable salary for the duration of the sessional appointment shall be at the current salary rate, at the step level in effect at the time of lay-off.

For the purpose of Appendix VIII, the former employee will be deemed to be a new hire. This sessional employee will terminate employment at the end of the sessional appointment.

For the purpose of 27.03 E and 27.09 B the former employee will be deemed to be still on lay-off during the sessional appointment.

(iii) The College shall consider additional means of support such as career counselling and job search assistance where such activities are expected to assist the individual in making the transition to a new career outside the Bargaining Unit.

Recall

27.09 B Before hiring full-time employees, an individual who has been laid off under 27.06 will be recalled to that individual's former or another full-time position, provided that the individual has the competence, skill, and experience to fulfil the requirements of the position concerned. Such recall entitlement shall apply during the period of two years from the date of the lay-off.

The facts on which this matter is to be decided are not in much dispute, although there are contested interpretations

placed on those facts by the parties. The grievor was employed at all material times as a professor in the academic staff unit. In the spring of 1994, she was given a lay-off notice which became effective on October 2, 1994. Pursuant to Article 27, the grievor retained certain recall rights for a period of two years, until October 2, 1996.

On May 26, 1995, the College posted two half-time one-year term assignments, with the potential of renewal, in the Centre for Quality Instruction. The posting was stated to be restricted to full-time internal staff, and the intention appears to have been to appoint two serving professors to these positions on a half-time basis, while they continued to carry out teaching duties for the other half of their academic appointment. Grievance 95E095 complains that the grievor should have been "recalled into" these two half-load positions, presumably thus giving her full-time employment. The positions were assigned instead to two full-time professors who were not, at the time of the assignments, on lay-off. I shall refer to these positions, for ease of reference, as the CQI positions.

Also in the spring of 1995, although the date does not emerge precisely from the evidence, the College posted what had previously been described as a "secondment position restricted to internal full-time staff" as a professor of English as a foreign language at Szechenyi Istvan College in Gyor, Hungary. This was one of a number of appointments made as part of a cooperative venture to create a legal assistant program at the college in

Hungary, and those positions were filled in a number of different ways, to be described below. The "EFL" position had previously been posted internally in March 1994, but there had been no internal applicants. Ms. Allison Motluck was appointed as an external hire. Although she had worked as a sessional at the College in 1991-92, she was at the time of her appointment not an employee of the College. Her appointment was from August 1, 1994 to December 30, 1994, and she was paid an hourly rate based on the rates paid to partial-load employees at the College, although she was working in Hungary on a full-time basis. Apart from the coincidence of the hourly rate, Ms. Motluck was not treated in any way as if she were covered by the collective agreement. I was informed that Ms. Motluck's appointment was the subject, among other things, of a grievance by the grievor against her lay-off, which is before another board of arbitration.

Because Ms. Motluck elected not to continue in the position after her first appointment, the new posting was entered into, and ultimately awarded to Ms. Anita Downey. The evidence indicates that Ms. Downey was not resident in Canada at the time of her appointment, that she performed no duties for the College in Ontario, and that she was not treated as a person covered by the collective agreement. Grievance 95E095 complains that the grievor was not recalled into the EFL position filled by Ms. Downey.

The College raises a general objection to the arbitrability of both grievances on the terms advanced by the Union, and similar but somewhat different objections to proceeding with either

of the two grievances on the merits based on understandings reached between the parties at the Union/College Committee, a body established by Article 7 and having authority to determine authoritatively the "local application of this Agreement or clarification of procedures or conditions causing misunderstanding or grievances". I shall deal with these objections in turn.

Each grievance begins in the same way, with an allegation "that the College is violating Article 27.09 B specifically but not exclusively in that I have not been recalled. . .". The only difference between the grievances is the specific position(s) identified, the CQI positions in one case and the EFL position in the other. For reasons which will become clear, the Union now wishes to argue that clause 27.09 A is also involved in the grievance, and that it can seek relief and remedies under that provision. The College objects that, given that the grievance procedure was waived in this case and there is nothing to show that the College has consented, either expressly or impliedly, to an amendment of the grievances, such an expansion of the grounds is contrary to Article 32 of the collective agreement. The material parts of that provision are as follows:

GRIEVANCE PROCEDURES

. . .

Grievances

32.03 Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under 32.12 C) in the following manner and sequence provided it is presented within seven days of the immediate supervisor's reply to the complaint. It is the

> intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College's written decisions at each step shall contain reasons supporting the decision.
>
> **Step One**
>
> An employee shall present a signed grievance in writing to the employee's immediate supervisor setting forth the nature of the grievance, the surrounding circumstances and the remedy sought. The immediate supervisor shall arrange a meeting within seven days of the receipt of the grievance at which the employee, a Union Steward designated by the Union Local, if the Union Local so requests, the Dean of the Division and the immediate supervisor shall attend and discuss the grievance. The immediate supervisor and Dean will give the grievor and the Union Steward their decision in writing within seven days following the meeting. If the grievor is not satisfied with the decision of the immediate supervisor and Dean, the grievor shall present the grievance in writing at Step Two within 15 days of the day the grievor received such decision.

Since it is well accepted that the time limits under this collective agreement are mandatory, and that the Colleges Collective Bargaining Act provides no jurisdiction for an arbitrator to waive or relieve against those time limits, the College argues that any attempt to amend the grievances at the outset of the arbitration hearing constitutes an attempt to circumvent those time limits, and ought not to be allowed.

A number of arbitration awards were referred to by the College in its argument on this point. I had occasion to review a number of these awards, and to discuss their proper application to this collective agreement, in Re George Brown College and Ontario Public Service Employees Union (Thomas Grievances 93A805/808), unreproted, July 19, 1994 (Swan). That award quotes extensively

from Re Electrohome Ltd. and International Brotherhood of Electrical Workers, Local 2345 (1984), 16 L.A.C. (3d) 78 (Rainer), at pp. 81-82, and from Re Algonquin College and Ontario Public Service Employees Union (Danielson), unreported, June 18, 1993 (Bendel).

All of the jurisprudence under this collective agreement, including Re George Brown College, supra, includes some reference to Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486 (1975), 57 D.L.R. (3d) 199, 8 O.R. (2d) 103 [leave to appeal to S.C.C. refused November 17, 1975]. The following often-stated observations of Brooke, J.A. appear in Re Electrohome Ltd., supra, and are quoted again in Re George Brown College, supra:

> No doubt it is the practice that grievances be submitted in writing and that the dispute be clearly stated, but these cases should not be won or lost on the technicality of form, rather on the merits and as provided in the contract and so the dispute may be finally and fairly resolved with simplicity and dispatch. . .
>
> Certainly, the board is bound by the grievance before it but the grievance should be liberally construed so that the real complaint is dealt with and the appropriate remedy provided to give effect to the agreement provisions. . .

As I read the cases, no arbitrator under this collective agreement has asserted that only those provisions of the collective agreement expressly set out in the grievance may be referred to in argument. Virtually all the cases where arbitrators have refused to consider what they find to be an amendment to the grievance deal with circumstances where a completely different ground is raised for the first time at arbitration, rather than merely a different

collective agreement support for the same ground. The collective agreement provides only that the grievance must set forth "the nature of the grievance, the surrounding circumstances and the remedy sought". A comparison of clause 27.09 B, which is referred to in the grievance, and 27.09 A(ii), which is not, will indicate that both of them deal with the rights of an employee on lay-off to be considered for available work before a new hire is made. Clause 27.09 B deals with situations where the College is about to hire a full-time employee. Paragraph 27.09 A(ii) deals with a situation where the College is about to hire a sessional employee. Under clause 27.09 B, the laid off employee is "recalled", in the sense that the employee returns to active employment, while under paragraph 27.09 A(ii) the employee is deemed to continue on lay-off during a sessional appointment, which is for a limited term and is treated as completely separate from the ordinary employment relationship. The College's argument that, by specifying the concept of recall in the grievance, the Union is completely barred from making any alternative claim to a sessional appointment seems to put a remarkable premium on the technical use of the word "recall". So restricted a construction would certainly not be within the spirit of the quotation set out above from Re Blouin Drywall Contractors Ltd..

As will appear, it is only in relation to the EFL position in Hungary that the Union's desire to argue for an appointment to a sessional position becomes necessary, and the actual characterization of that position as sessional is in itself

fraught with difficulties. In my view, it would hold the grievor and her Union steward to far too high a standard of legal drafting to foreclose the Union from making an argument in the particular circumstances of that grievance, based on clause 27.09 A as well as clause 27.09 B.

I turn next to the arguments in relation to the deliberations of the Union College Committee. As will appear, both the CQI positions and the Hungary positions were under discussion at the UCC, and the deliberations of that body are therefore central to the College's objections to the arbitrability of these grievances.

The history of the CQI positions begins with the execution of Local Agreement #06 between the parties on March 21, 1994. This agreement concerns professional development opportunities, and the substance of it is as follows:

> For internal activities considered to be professional development opportunities and positions which have been mutually agreed to at the Union College Committee, Local 417 and the College agree to:
>
> a) posting of the position;
>
> b) terms not to exceed two years and limited to two consecutive terms;
>
> c) no issuance of a SWF;
>
> d) a record of teaching activities will be maintained including non-traditional delivery and will be available to the Local upon request;
>
> e) conditions of workload will be consistent with those outlined in the Collective Agreement for Counsellors and Librarians;
>
> f) changes as to the nature of the professional devel-

opment activities for a particular position will be discussed at the Union College Committee;

g) procedures concerning renewal will be reviewed and agreed to at UCC within one year.

The minutes of the UCC for May 17, 1995 indicate that there were discussions about positions at the Centre for Quality Instruction. The complete minute reads:

> Committee reviewed and revised postings/position descriptions/ search criteria for CSAC, Instructional Development and Education Technologies professional development opportunities.
>
> ACTION: 1/2 time workload issue to be referred to WMG for decision.
>
> Blayne Mackey to send revised search criteria and postings to committee members for review prior to posting.

At the Committee's next meeting, on June 14, 1995, the minutes of the May 17 meeting were approved as amended, but there is no indication of any amendments on this particular topic. Meanwhile, the two positions in question in the CQI had been posted. There were apparently some issues still alive between the parties as to the filling of these positions, including the length of time for which the postings were to be displayed, and the minutes of the meeting of June 14 indicate the following resolution to those issues:

> 20. Union Grievance
>
> Mary Ann White indicated that the Union Grievance will be withdrawn.
>
> The College agreed that the vacancies created by the

> filling of the professional development opportunity postings (CQI) will be filled by Bargaining Union employees if possible. The College agreed to give preference to filling at least one of the vacancies with a full-time Bargaining Unit employee.
>
> Local 417 approved the professional development vacancies.
>
> ACTION: Bring forward process for renewal of professional development positions to September meeting.

The two persons identified in these minutes testified at the hearing. Blayne Mackey is Vice-President of Administration and Human Resources at the College, a member of the UCC, and in attendance on the relevant occasions. Mary Ann White is the Chief Steward for Local 417, also a member of the UCC who was present on these occasions.

It is clear that these two individuals viewed what occurred at the May and June meetings of the UCC somewhat differently, but on the face of the minutes it is obvious that the UCC considered the terms of the documentation relating to the postings, and approved the postings in the form in which they finally appeared, whether that approval was given prospectively on May 17 or retrospectively on June 14. The UCC approved the positions as half-time professional development positions, to be given to full-time professors who would continue to carry a half-time teaching load, and the details of exactly how workload was to be measured were referred to the Workload Measurement Committee (WMG) for resolution. There is also no doubt that these positions were intended to be posted pursuant to Local Agreement #06, and that

these meetings constituted the occasion on which the parties "mutually agreed to" these positions.

In my view, based on the totality of the evidence and the wording of clauses 27.09 A and 27.09 B, the grievances do not identify a breach of the collective agreement in relation to the two CQI half-time jobs. What occurred here is that two positions were created, and then filled by regular full-time academic staff members. They were filled on a half-time basis, as approved by both the UCC and the WMG. Neither position involved the hiring of a full-time employee, nor the hiring of a sessional employee. Even if such a hiring eventually took place to fill the teaching duties vacated by the two successful applicants, it would be that hiring which would trigger any rights which the grievor might have under clause 27.09 A or 27.09 B.

The posting of the half-time positions in the CQI did not trigger any such rights, and therefore did not give the grievor either the right to be recalled under clause 27.09 B or the right to be hired on a sessional appointment under clause 27.09 A. In the result, Grievance 95E096 is not arbitrable because it does not disclose any breach of the collective agreement. While the College's preliminary objection was expressed in somewhat different terms, relating to a form of estoppel against the Union, I think that the simple answer is that, because of the way in which the parties agreed to structure these positions and the postings for them, the condition precedent to any rights for someone in the grievor's position under Article 27 was never met.

As to the positions in Hungary, the evidence indicates that there had been discussions between the parties for a considerable period of time about the status of persons appointed to those positions. At one point, the Union was concerned that those positions constituted a place where the College could "hide" employees during downsizing, since they could continue to accrue seniority while in a location where they would be effectively insulated from displacement by a more senior employee. At some other point, the College appears to have taken the position that these were bargaining unit positions to which it could assign laid off employees by offering them recall, the refusal of which would constitute a resignation by the employee. Both parties appear to have requested legal opinions at one time or another, and their respective positions seem to have flowed back and forth over a period of time.

Moreover, it is clear that persons appointed to positions in Hungary were treated in different ways. For example, a regular full-time academic employee, Ms. Kathy Lawton, had applied for a curriculum development position which also included a certain amount of EFL teaching, which was posted at the same time as the EFL position which eventually became the subject of Grievance 95E095. Ms. Lawton was successful, and was "seconded" to the position. She was apparently treated as a full-time faculty member on an approved leave, one of the terms of which was that she was entitled to retain her College salary and benefits, and to continue to accrue seniority while she was overseas. Ms. Motruck and Ms.

Downey, who filled the EFL position, were not full-time employees of the College when they were engaged, were hired on an hourly wage basis, received no College benefits, and certainly did not accrue any seniority.

The discussion between the parties also reached a certain level of resolution at the UCC meeting on May 17, 1995. The minutes include the following reference:

> 6. Postings for Professors in Hungary
>
> The College agrees that where a temporary vacancy occurs in an academic position physically located outside of Canada, that the College will consider the position as a sessional assignment under Article 27.09 A. If the College decides that an employee who is on layoff with recall rights has the competency, skill and experience to fulfil the requirements of the position, then that employee will be offered the assignment. The College agrees that where an employee offered such an assignment declines the offer, that the employee will not lose recall rights.

The only reference to this agreement between the parties in the minutes for June 14, 1995 was an action notice that Mr. Mackey would have this agreement published in College News. As a result, therefore, the only conclusion is that, as of May 17, 1995, the parties had agreed that someone in the grievor's position would be considered under Article 27.09 A for appointment to a position such as the EFL position based on her competency, skill and experience to fulfil the requirements of the position. It may be that the expression "if the College decides that" confers more discretion on the College than the language of clause 27.09 A, but that is surely a matter for argument based on the circumstances of

each individual case. The simple fact is, however, that at about the same time as the EFL position was being filled for the second time, the question of whether such positions should be treated as wholly foreign to the collective agreement, or as sessional positions invoking clause 27.09 A, was under active discussion between the parties, and was still apparently not finally resolved, as the evidence suggests that there were further discussions thereafter.

In my view, in these circumstances the College's attempt to restrict the grievor from the modest expansion of her grievance to include reference to clause 27.09 A as well as 27.09 B relies on a mere technicality that ought not to stand in the way of a determination of what is actually at issue between the parties, and a resolution thereof.

In addition, however, the College advances an argument based on the Colleges Collective Bargaining Act, R.S.O. 1990, c. c-15, Schedule 1. Paragraph (x) of that Schedule excludes from the academic staff bargaining unit "a person engaged and employed outside Ontario". The College advances a sophisticated constitutional law argument to the effect that, because Ms. Downey was certainly employed outside Ontario, and was also engaged outside Ontario, the grievor has no rights in relation to her position.

While the College's argument is interesting, it is in my view completely misplaced. The only effect of paragraph (x) of Schedule 1 to the Act, is to exclude from the academic bargaining unit a person in Ms. Downey's position; that provision says nothing

whatsoever about rights the grievor may have, in Ontario, to be considered for vacancies which the College intends to fill. It may be that if the grievor was appointed to fill a vacancy outside Canada, there might be some question as to whether she was covered by the collective agreement or not, but that is a very different question from what rights she had, entirely within the boundaries of the province of Ontario, under the collective agreement which clearly applied to her lay-off status.

Perhaps surprisingly, the evidence which I have before me does not indicate the precise time at which Ms. Downey was "engaged". I also do not know when the grievor became aware of this engagement. Obviously, a number of issues may arise from the timing, respectively, of the posting of the Hungary position, the appointment of Ms. Downey, the agreement concluded on May 17, 1995 in respect of such appointments, and the filing of the grievance. Without further knowledge of those issues, not to mention evidence about the grievor's qualifications and experience, it is impossible for me to go any farther with this matter at the present time. For the moment, all I can do is to make certain declarations in relation to the preliminary issues put before me, and to remit the matter to the parties for further discussion and, if required, further hearings on the matters outstanding.

In the result, therefore, I declare that:

1. Grievance 95E096 is not arbitrable, on the grounds that the filling of the two CQI half-time positions took place in accordance with an agreement between the parties in such a way as