Ontario Public Service Employees Union v Algonquin College, 2015 CanLII 72753 (ON LA)

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IN THE MATTER OF AN ARBITRATION:

BETWEEN:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION (the Union)

AND

ALGONQUIN COLLEGE (the College)

RE: Grievance Numbers: 2010-0415-0136 and 2010-0415-0099 – Article 2 - CE Hours

Appearing for the Union: Wassim Garzouzi

Appearing for the Employer: Jock Climie

Sole Arbitrator: Norm Jesin

Hearings Held: October 6, 30, 2014, November 17, 2014,

June 10, 2015, August 24, 27, 2015

AWARD

In this case the Union alleges that the College has violated the collective agreement by failing to staff teaching positions for English courses in its School of Business in Continuing Education, with full time teachers rather part time ones. The Union alleges that this constitutes a violation of Article 2 of the collective agreement between the parties.

In Continuing Education, teaching positions are almost exclusively held by part-time appointees. Article 2 provides that in staffing teaching positions, the College must give preference to full time teachers over sessional appointees and what is referred to as partial-load teachers. Partial load teachers are defined in Article 26.01 B of the collective agreement as employees regularly teaching more than 6 and up to 12 hours per week. They are included in the bargaining unit. Sessional teachers are teachers who teach on a sessional basis. They are not included in the bargaining unit. Part time teachers teach no more than six hours per week and are not included in the bargaining unit. Article 2 does not refer to part-time employees and does not contain any express obligation to provide preference to full time employees over part time employees. It should be noted that although there is no

general obligation to prefer full time positions over part time ones, Article 27.05 does require that in cases of layoff, the College must give preference to the continuation of full time positions over partial load, sessional and part time appointments.

In an earlier decision in this matter I dismissed a preliminary motion brought by the College in which the College sought a ruling that Article 2 of the collective agreement had no application to its Continuing Education program (see *Algonquin College,* [2014] O.L.A.A. No. 107). At paragraph I made the following comment:

> … there is an ongoing discussions and evolution in the cases about the extent to which the collective agreement may be applied to compel the College to convert part-time positions to full time positions. It is not clear to me at this time what if any circumstances, might support such a result, particularly in CE, where there is an ongoing practice of utilizing part time staff to teach the available courses. I do not think it is appropriate to determine, on a preliminary basis, that such a claim cannot be pursued.

As a result, the Union continued to pursue its claim before me. This decision deals with a further preliminary motion brought by the College. In this motion, the College seeks to have the grievance dismissed on the basis that the Union is not entitled to rely on any assignments that the College has made to have Business English in continuing Education taught by part-time employees. It is the College's position that because there is no express obligation to provide preference to full time positions over part time ones, that a claim under Article 2 cannot succeed against assignments to part time personnel. Alternatively, the College asserts that even if somehow, the Union can challenge assignments of part time employees in continuing education, any preference given to full time employees in Article 2 is expressly subject to "operational requirements". The College asserts that the evidence has established that it has a long time practise of employing part-time employees to teach courses in continuing education and that it has establish the operational justification for doing so. In the face of that evidence the College asserts that it has established the operational requirement for its use of part-time employees in continuing education and that therefore the Union cannot succeed in its claim for preference for full time personnel.

The Union claim has its genesis in a series of cases in which arbitrators have suggested that Colleges under this collective agreement do not have an unlimited right to employ part-time teachers in preference to full-time teachers. For example, in *Algonquin College* (2003), 73 C.L.A.S. 194 (P. Knopf), arbitrator Knopf rejected an Article 2 claim in which the Union alleged that the College failed to give preference to full time employees over part time ones. Indeed, in paragraph 16 of the decision, after reviewing the requirement in Article 2 for the College to give preference to full time teachers over sessional and partial load appointments, but not part timers, she stated:

> … it can only be concluded that the collective agreement does not intend to restrict the use of part-timers as it does the use of sessionals and partial-load appointments.

However, at paragraph 42 of her decision arbitrator added the following end note:

> If there had been any evidence that the staffing patterns had been designed or intended to erode the

> bargaining unit or circumvent the collective agreement, this decision would have been very different.

Following arbitrator Knopf's end note, in a number of subsequent decisions, arbitrators refused to rule that they did not have jurisdiction to consider a challenge to the assignment of part time employees rather than full time ones. Two of those decisions are *St. Lawrence College* (2005), 81 C.L.A.S 176 (O. Shime, O'connor and Kelly), and *Fanshawe College,* [2005] CarswellOnt 10980 (P. Picher, S. Murray and R. Hubert. In *Fanshawe,* at paragraph 47, a majority of the Board concluded that:

> … part-time hours are available for consideration by the Union and a board of arbitration in an article 2 grievance in circumstances where it can be demonstrated that the staffing scheme agreed to by the parties, as reflected in article 2, as situated in the collective agreement as a whole, is being undermined by the manner in which part-time hours are assigned. … if hours are being assigned to part-time positions in a manner that is thwarting the staffing scheme agreed to by the parties in article 2, the assignment of such part-time hours risks opening the door to an erosion of the bargaining unit and/or the circumvention of the collective agreement.

The Union asserts that subsequent cases have fallowed these comments in Fanshawe and have stated that part time hours may be considered in a claim for additional full time appointments, if it is determined that the use of part time teachers undermines the staffing scheme agreed to in the collective agreement or otherwise leads to an erosion or circumvention of the collective agreement. According to the Union, these cases support the notion that there is room for the Union to challenge the assignment of part time personnel in preference to full time personnel under the collective agreement. The Union asserts that it is premature to dismiss a claim such as the one in this case on a preliminary basis. Rather, the Union must be allowed an opportunity to establish that the assignment of part time personnel undermines the integrity of the bargaining unit and/or, that is in the words of the Picher panel in *Fanshawe,* contrary to the staffing scheme agreed to by the parties.

Although the motion being considered is a preliminary one, the parties did present substantial evidence in support of their positions. The evidence pertained to the extent of the practice of utilizing part time teachers in continuing education, as well as the reasons for such practice. In addition there was evidence pertaining to the similarities and difference between courses taught during the day and those taught in continuing education. The Union evidence consisted of the uncontested statement of Elizabeth Skittmore and the evidence of J. P. LaMarche. The Employer evidence consisted of the evidence of Linda Rees. In addition the parties agreed that I could consider any evidence already presented in the prior preliminary motion referred to above.

Ms. Skittmore is a full time English Professor at the College with over 20 years' experience at the College. She has also been coordinator of English in the School of Business for five years until in or about 2014. According to Ms. Skittmore at the time of her statement there were seven English courses being taught during the day in the School of Business and seven taught during the evening in the Continuing Education program – also on the School of Business. During the day the courses were taught either by full time teachers or partial load and/or sessional teachers. During the evening they were taught by part-time teachers. Ms. Skittmore stated that there was no distinction in the curriculum between those courses taught in the evening and those taught during the day. She also stated that day and evening courses shared the same outline and description. They were evaluated using the same

assignments and tests, although there were final exams in the evening courses but not in the day courses. She also stated that students were entitled to take both day and evening courses to obtain the necessary credits for their program. She noted that one teacher had taught English in both the day and the evening program. Essentially, she stated that the only distinction between the day and evening courses is that the day courses are taught by bargaining unit personnel and the evening courses are not.

Mr. LaMarche is also a teacher in the School of Business. He started as a sessional in or about 2002 and later became part time and then full time by 2005. He was elected chief steward in or about 2006 and has been chief steward since then. He succeeded Ms. Skittmore as English Coordinator.

According to Mr. LaMarche he was not aware that there were no full time personnel teaching in continuing education until he was made aware of that fact in 2011 in a conversation with Ms. Skittmore. It was that conversation that ultimately led to the grievance at issue in this case.

Linda Rees testified for the College. She has been employed in the Management Centre under the umbrella of continuing education since 1986. She has been the head of the Continuing Education Committee for the last ten years. She testified that the administration of continuing education was markedly different than day time programming. She testified that for day courses, students apply for a program in the fall and acceptances are confirmed starting in February. Most courses are picked by May and teachers are able to receive their SWF assignments in May in accordance with the collective agreement. Most day time students are aged 17 – 24.

Continuing Education courses are historically taken by older students on an individual course basis rather than a program basis. Most students are over the age of 25. They take courses to enhance their skills or to facilitate a career change. Marketing for fall courses does not begin until the June-July period – well after the SWF assignments are made. The number of students in any given continuing education course averages around 12 whereas there are generally 35 students in a daytime course. Ms. Rees also noted that the source of funding for continuing education is different from that of day programs as courses are funded from enrollment. If full time teachers were utilized courses would require 35 students per course in order to break even.

For these reasons, the College has hired part time teachers to teach continuing education courses for as long Ms. Rees has been employed at the College. Ms. Rees noted that the part time teachers are generally working professionals who teach to supplement their income. They are paid less than bargaining unit teachers. It is only through the use of part time teachers that many continuing education courses can be maintained. Ms. Rees noted that there has been a 35% reduction in the number of continuing education courses on a provincial basis over the last 7-8 years.

In cross-examination of Ms. Rees the Union sought to challenge many of her assertions as outlined above. For example, Ms. Rees conceded that daytime programming and continuing education received funding from the provincial government. She also conceded that students in daytime programming could make last minute changes to their course schedule adding or dropping courses just prior to the commencement of the course, as students might do in continuing education. Ms. Rees also conceded that it might be possible for the college to revise SWF assignments after they are first issued in May to accommodate changes necessitated by course additions or cancellations, either in daytime programs or in continuing education. The Union also noted that the reduction in the number of continuing education courses could not be used as a reason to employ part time teachers because the College employed part time teachers even at a time when enrollment was high. Finally, Ms. Rees conceded although the College hired part time teachers to teach in continuing education, there were occasions where courses in continuing education were taught by partial load employees employed in the bargaining unit. This would

have occurred where a teacher was assigned a course as a part time teacher, but later picked up additional hours so that under the terms of the collective agreement, they would be converted to a partial load designation. However, Ms. Rees asserted that this scenario was becoming less frequent as the College became more adept in administering its assignments to ensure that part time employees remained part time employees. Finally, Ms. Rees conceded that many of the courses taught in continuing education, including English courses have substantially the same curriculum as those courses taught during the day.

In its submissions, the Union has asserted that the preliminary motion raises the following three issues:

a. Is there a distinction between CE and daytime delivered programs, for the purposes of article 2?

b. Has the College established that article 2 does not apply to part-time hours?

c. Has the College established that it has operational requirements justifying the dismissal of the grievance on a preliminary basis?

I do not agree that the questions as framed by the Union are of assistance in dealing with this motion. I would note that there is no express clause in the collective agreement (other than Article 27.5 which applies in cases of layoff only) which protects the work of the bargaining unit from being performed by part time personnel. So the real question is to what extent is the College restricted from assigning bargaining unit work to part time personnel.

I begin with the obvious and accepted point that whereas the language of Article 2 of the collective agreement clearly places a restriction on the use of partial load and sessional teachers, no express restriction is placed on the use of part time teachers. It is trite law that a restriction in the use of non-bargaining unit personnel may be implied from the language of the collective agreement such that excluded personnel may not be used to an extent that would allow an Employer, motivated by bad faith, to intentionally erode the bargaining unit or otherwise circumvent the collective agreement. (See for example, *Algonquin College,* at paragraph 19, in which arbitrator Knopf cited *North West Co.,* 57 L.A.C. (4th) 158 (Freedman) and *Irwin Toy,* 6 L.A.C. (3d) 328 (Burkett)). To that extent, there is nothing remarkable in the End Note inserted by arbitrator Knopf in her decision in *Algonquin College.* That restriction, which is acknowledged and conceded by the Employer, is found not in Article 2, but in the collective agreement as a whole.

In *Algonquin College,* arbitrator Knopf observes that the fact that the collective agreement does expressly restrict the use of partial loaders and sessionals, but not part timers, makes it even more clear that an arbitrator has no express jurisdiction to restrict the use of part timers under the collective agreement. Arbitrator Knopf illustrates the point with the following comments in paragraphs 16-18 of her decision.

> 16. In contrast, the Colleges' collective agreement does have specific language relating to staffing of teaching appointments. By creating specific restrictions and yet omitting reference to part-timers, it can only be concluded that the collective agreement does not intend to restrict the use of part-timers as it does the use of sessionals and partial-load appointments. … because the parties have failed to include part-time appointments within the restrictions in Article 2, this leads to the

conclusion that Article 2 does not operate to restrict the use of part-time appointments.

17. This conclusion may appear to be counter intuitive at first. Why would the parties not be deemed to restrict part-time assignments when the obvious purpose of Article 2 is to give preference to full time positions and protect the integrity of the bargaining unit as long as operational requirements can be met? Without any contractual restrictions on the use of part-timers, a college might be tempted to staff in a way that could erode the bargaining unit by making multiple part-time assignments. However, an arbitrator cannot make decisions based on intuitive responses or impose his/her own preferred collective bargaining or pedagogical models. An arbitrator's role is to discern, interpret and apply the intention of the parties on the basis of the language they have adopted in the collective agreement.

18. It is presumed that the parties adopted the language of Article 2 for rational reasons. They have retained this language for many years through several rounds of collective bargaining. The parties consciously chose to give preference to full-time positions of partial-load and sessional appointments. They did not restrict the use of part-timers who are discreetly defined as a status quite different than partial-load or sessionals. Therefore it cannot be implied or concluded that part-time appointments would encompass sessional or partial-load appointments as one group. Instead, part-timers must be viewed as a separate entity that is recognized in various parts of the collective agreement, but not factored into staffing protections provided in Article 2.02 and 2.03A. This leads to the inevitable conclusion that an arbitrator has no jurisdiction to interfere with staffing decisions with respect to the assignment of part-time positions over full-time positions.

The statement in paragraph 18 that "*an arbitrator has no jurisdiction to interfere with staffing decisions with respect to assignment of part-time positions over full-time positions"* would at first instance seem to provide a clear answer to the grievance in this case. However Ms. Knopf's End Note from *Algonquin* clearly raises some doubt on the matter. In order to consider how the End Note should be interpreted in light of the previous comments, it is necessary to review the End Note in its entirety. It is expressed at paragraph 42 of the decision as follows:

42. This award appears to be the first in the sector dealing with the substantive question of whether Article 2 imposes restrictions on the use of part-time teachers. I have concluded that the wording of Article 2 and the collective agreement as a whole do not restrict the use of part-time appointments in the same way that it does for partial-load and sessionals. I have reached this conclusion based on the strict wording of the collective agreement. However, it must be noted that this decision was reached in the context of evidence where there is absolutely no suggestion of any intent to erode or weaken the bargaining unit. The Union may well have had concerns about the effect of Dean's Barkers' staffing model, but there were no suggestions of bad faith or anti-union animus. Further, while Dean Barker may have failed to take the collective agreement into consideration when he made his staffing decisions, it is also clear that he had no intent to undermine the Union, circumvent or diminish the integrity of the bargaining unit. Dean Barker's objectives were purely pedagogical. He was also adamant that he intended to retain the use of full-time faculty. This Award should not be viewed as an endorsement or criticism of such a staffing program. Absent the jurisdiction to deal with the part-time staff, I have no authority to pronounce whether this model

> complies with the spirit of Article 2 or not. But it is important to recognize that the Award is being made in the factual context of a College and a Dean recognizing the importance of full-time bargaining unit positions to the stability and successes of a program. If there had been evidence that the staffing patterns had been designed or intended to erode the bargaining unit and or the collective agreement, this decision would have been different.

It seems clear, when considering the entirety of Ms. Knopf's comments that any restriction against the use of part-timers flows not from Article 2, but rather is to be implied from the entirety of the collective agreement. Further the restriction to be implied is designed to ensure that the College cannot use part-timers in a manner intended or designed to erode the bargaining unit or otherwise circumvent the collective agreement. To put it another way, part-timers may not be assigned in a manner that amounts to bad faith or anti-union animus. Again, to that extent there is nothing remarkable or controversial in the End Note expressed by arbitrator Knopf.

The End Note was considered by the Shime panel in the *St. Lawrence College* case. That case dealt with an allegation that the Employer had violated Article 2 by filling full-time vacancies with a combination of partial load, sessional and part time appointments. The Employer sought a preliminary ruling precluding the consideration of any part time appointments. In paragraph 15 of that case the majority stated:

> What was patently obvious to the learned arbitrator in Algonquin College, and which had not been really addressed in previous cases, is that no mention is made of part-time positions in Article 2. Accordingly, absent bad faith or anti-union animus the utilization of part-time positions does not constitute a breach of Article 2, since there is no specific requirement, as there is in the case of partial load and sessional positions, that preference be given to full time positions over part-time positions.

At paragraph 17, however, the majority made the following noteworthy comment:

> 17. While we acknowledge the use of part-time employees does not constitute a violation of Article 2, it may very well be in the course of considering operational requirements that there be some incidental evidence to be considered dealing with part-time employees and we do not, at this stage of the proceedings, in the absence of a specific factual context, exclude the possibility of such evidence. The introduction of such evidence must be decided on a case by case basis.

It seems that the panel appears to agree that an arbitrator, absent bad faith or anti-union animus, has no jurisdiction to consider whether the college gives preference to full time positions over part time appointments. However, the panel did not preclude the consideration of evidence of use of part timers in tandem with partial loaders and sessionals. One presumes that it was open to consider whether the use of part time positions together with partial load and sessional positions in that case, could support a conclusion that the college improperly preferred partial load and sessional positions to full time ones.

In addition, the majority went on to determine that the Union could continue to assert that the assignments to part-timers eroded the bargaining unit. At paragraph 18, the majority stated that such an inquiry would "require

a board of arbitration to assess the full-time position and to consider the part-time assignments in the context of reviewing the overall workload in the bargaining unit and the operational requirements that caused the College to assign the work as it did." However, the majority went on to state at paragraph 20 that in making such a case the burden of proof lies with the Union. "To merely state that the College has [assigned part-timers] is merely to affirm its right. The Union must go further and establish how the College has violated the collective agreement."

In *Fanshawe College,* the union alleged that the college had breached Article 2 by failing to give preference to full time positions in Art and Design division. According to the union in that case more than half the hours were taught by a combination of partial load, sessional and part-time appointments. The college sought a preliminary ruling preventing consideration of any hours assigned to part-time personnel. The Board refused to grant that ruling. Instead, as set out earlier in this decision, the Board stated that part time hours are available for consideration where they demonstrate that the staffing scheme agreed to by the parties has been undermined by the use of part time positions. The panel made the following further comments at paragraphs 58 and onwards:

> 58. Part-time teachers fit within the staffing scheme set out in article 2 although they are not regulated by it. They do not stand in complete isolation, they do not stand behind an impenetrable wall where, without recourse by the Union, they can be utilized in a manner that erodes the bargaining unit or thwarts the parties staffing scheme as incorporated in article 2, (with its stipulated preference for regular full-time positions over partial-load and sessional positions) and as understood in the context of the collective agreement as a whole.
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> 59. While article 2 does not expressly regulate part-time positions, the collective agreement as a whole clarifies their hours. In article 27.12, the College is required to notify the Union periodically of all part-time personnel hired or terminated. In article 7.02 (vi) the College is required, when asked by the Union in a UCC meeting, to explain its rationale respecting its use of part-time teachers and to consider the Union's submissions regarding the feasibility of assigning work on a full-time basis rather than on a part-time basis. …
>
> 60. Moreover, in article 27.05, when the College plans to lay-off or reduce the number of full time employees, the College is under an obligation, subject to operational requirements, to give preference to full-time positions over partial-load or sessional positions …
>
> 61. The provisions of the agreement, when read as a whole, reveal the intention of the parties that the part-time employees who are outside the bargaining unit, are at the low end of the hierarchy. While the part-time teachers are not in the bargaining unit, the parties both have recognized the importance of their use in the staffing scheme established in the agreement and have ensured that their use will be in co-ordination with full-time, partial load and sessional teachers, and not in isolation from, or in conflict with, them.

Counsel for the College submitted that the notion of placing part-time positions on a hierarchy of an agreed to staffing scheme constitutes an erroneous expansion of the conclusion reached in *Algonquin* and *St. Lawrence,* that absent bad faith or anti-union animus, an arbitrator has no jurisdiction to consider whether full time positions are being preferred to part-time ones. Union counsel on the other hand, seeks to preserve the Union's ability to demonstrate that the use of part time positions in continuing education is inconsistent with the "staffing scheme agreed to by the parties" and therefore, is inconsistent with article 2 and/or the collective agreement as a whole.

To consider these submissions, the *Fanshawe* case need to be examined more carefully. First, at paragraph 44, the majority clearly indicates that is in agreement with "much of the decision" in arbitrator Knopf's award in *Algonquin.* Further, at paragraph 50 she summarizes five important conclusions drawn from the decision in *St. Lawrence.* They are as follows:

1. That absent bad faith or anti-union animus the utilization of part-time positions does not constitute a breach or Article 2.
2. Than "it may very well be that in the course of considering operational requirements [under article 2] there may be some incidental evidence to be considered in dealing with part-time employees".
3. That "if a vacancy had been created in a full-time position, the Union would be entitled to grieve either on the basis that there had been a violation of Article 2, in that preference was not given to full time positions over sessional or partial load persons, or alternatively, in a general way, by maintaining the College had eroded the bargaining unit by assigning the work to part-time employees."
4. That "[t]hat would require a board of arbitration to assess the full-time position and to consider the part-time assignment in the context of the overall workload in the bargaining unit and the operational requirements that caused the College to assign the work as it did" and
5. That the College, thereby, "is not allowed a free hand in eroding the bargaining unit".

When *Algonquin, St. Lawrence and Fanshawe,* are all read together, it appears that the Picher panel has arguably accepted the proposition that the assignment of part-timers must be found to have been designed or intended to erode the bargaining unit or circumvent the collective agreement before it will be found to have been in violation of the collective agreement. This might occur if the college converts existing full time vacancies into part time position in order to circumvent its obligations under the collective agreement. In addition if the Union could establish that existing full time vacancies in day programs are moved into continuing education in as a means of avoiding the College's obligations to fill full time vacancies or to avoid its obligation under Article 2 to prefer full time positions over part time or sessional appointments, again, that may give rise to an argument that part timers are being assigned improperly to circumvent the collective agreement.

Furthermore, like Shime before her, arbitrator Picher also accepts that evidence of the use of part-timers may be relevant to establish a violation of article 2, even where there is no conversion of full time vacancies to part time appointments. For example, where part-timers are used intentionally to avoid the use of partial loaders (who are included in the bargaining unit), that may give rise to an argument that the use of part-timers is designed to avoid the College's obligation under article 2 to prefer full time positions over partial load positions. One can contemplate a situation in which a series of partial load vacancies are converted to part-time appointments for the sole purpose of avoiding the College's obligation to prefer full time position over part-time ones. That may be one example in which the Union may argue that the appointment of part time teachers was designed to avoid the College's obligation under Article 2 and might therefore be in violation of the collective agreement.

The mere existence of the appointment of part time positions, no matter how numerous, cannot however be in violation of the collective agreement where it cannot be shown that the appointments were designed or intended to avoid the College's obligations under Article 2 or the collective agreement generally.

Looking back at the first question posed by the Union, in my view, the question is not whether there is a

distinction between day-time delivered programs and continuing education delivered programs. Rather, the issue to be determined when considering part time hours, is whether the use of part time teachers was intended or designed to avoid the College's obligations under Article 2 or under the collective agreement as a whole. This approach is confirmed in a series of decisions by arbitrator K. G. O'Neil involving these same parties. In *Algonquin College,* [2007] CarswellOnt 10683, (*Algonquin 2*), the Union claimed that the College was in violation of Article 2 by failing to give preference to full time positions in the School of Media and Design. The Union relied on part time hours in support of its claim and the College raised a preliminary objection to the Union's ability to rely on such part time hours. In that case the arbitrator dismissed the College's motion as the evidence established a systemic practice of avoiding assigning work in a manner that would create partial load or sessional positions. As a result, the arbitrator concluded at paragraph 49 that the "evidence was consistent with, although not conclusive of, circumvention of the bargaining unit and the negotiated classification scheme of the collective agreement".

In three follow up decisions, however, after hearing full evidence including evidence regarding the use of part time hours, the Union's claims for full time positions based on those hours were dismissed. In an unreported decision dated September 14, 2007 (*Algonquin 3*), the arbitrator considered the Union's claim for full time positions in the Print Media program. At p. 8 of that decision the arbitrator noted that "There was no suggestion that the assignment of part-time teachers in the Print Media program is done intentionally to undermine the staffing scheme, erode or avoid the bargaining unit." At p. 9, the arbitrator further noted "there is no evidence that partial load positions have been reduced and replaced by part-time positions and thus no case of erosion of the bargaining unit by failure to replace partial-load bargaining positions". Those conclusion did not fully answer the Union's claim however as the arbitrator left open a consideration of whether there was a misuse of part time hours from which an avoidance of the collective agreement could be inferred. On that point the arbitrator made the following comments at p. 10-11:

> [The] level of use of part-time hours in itself, or as compared to the total other hours, is not, in my view, sufficient to warrant an inference of misuse on the evidence before me. And, as noted above, other aspects of the issue, such as erosion or intentional avoidance of the bargaining unit, are not supported by the evidence. As the evidence stands, to accept that the union has made out a prima facie case of erosion of the bargaining unit or misuse of part-time hours in the circumstances of this portion of the grievance, it would be necessary to infer from the fact that the College *could* have created one full-time workload out of the non-full-time hours, including part-time hours in the limiting semester, that is misusing part-time hours, unless it can justify their use on the basis of operational requirements. The problem with that is that there is no discernable difference between that concept and a requirement for a preference of full-time over part-time positions at all times, not just on layoff-off and reduction of the full time complement. The current wording of the collective agreement, as interpreted in the evolving jurisprudence, does not support such a requirement.

In a further unreported decision dated September 17, 2007, (*Algonquin 4*) arbitrator O'Neil dismissed a claim for full time positions in the Theatre Arts program for similar reasons. Arbitrator O'Neil's last decision in this saga was dated May 20, 2008 and concerned a claim for full time positions in the school of Media and Design. In that

case the arbitrator found at p. 16 that over 10 years, "the Advertising program had been run on the basis that partial load positions were to be avoided wherever possible". As a result she determined that a prima facie case of avoidance of the collective agreement had been established. However, she then went on to consider whether the use of part time personnel could be justified on the basis of operational requirements. She considered the College's evidence that the use of part-time personnel in the programs at issue were designed to enhance the students' experience by adding faculty members currently working in the industry. At p. 20 of her decision she concluded that management decision to use part time personnel based on operational requirements must be given "some deference, unless the employer's assessment of the situation is shown to be improper in some sense such as being unreasonable or in bad faith." As a result, the Union's grievance was dismissed.

Regarding this last comment, I would note that the obligation in Article 2 to provide prefer full time positions over partial load and sessional appointments is subject to operational requirements. As there is no obligation to prefer full time positions to part time ones, there is no requirement to justify part time appointments based on operational requirements. However, in considering whether the assignment of part time personnel was improperly designed or intended to circumvent the collective agreement, a consideration of operational requirements would be relevant in determining the intention and/or bona fides of the College. In that regard, I would register my agreement with the notion that some deference should be given to management decisions to justify the use of part-time personnel based on operational requirements. I would observe that the degree of deference might be less where there is an actual erosion of bargaining unit positions as opposed to circumstances in which the Union seeks additional full time positions which had not previously existed. I would also note in general, the degree of deference to be given to the College's reasons for using part timers should be higher than the deference given to the reasons for relying on operational reasons in a standard Article 2 claim. That is because as the Union has correctly pointed out, in a standard Article 2 claim, where the evidence shows that partial loaders or sessionals are being preferred over full time positions, the onus is on the College to establish its operational justification. Regarding the use of part timers, the onus is on the Union to show that the assignments were intended or designed to erode the bargaining unit or circumvent the collective agreement. The operational justification put forward may assist in determining whether the assignments of part time teachers were so intended. As a result, when considering the College's operational justification for the use of part time personnel, I would agree with arbitrator O'Neill's comment that deference should be given to the employer's assessment unless it is shown that operational requirements are relied on are "unreasonable or in bad faith".

In applying all of these cases to the one before us I would note the following:

First, in this case there is no evidence that the use of part-time personnel has resulted in an erosion of the bargaining unit, intended or otherwise. There is no suggestion that full time vacancies or partial load vacancies have been converted to part time assignments. Nor does the evidence disclose that day courses taught by full time teachers or partial load teachers are being shifted to continuing education in order to convert those positions into part time ones. Instead, the evidence discloses the College has utilized part time teachers routinely in continuing education since at least 1986. Furthermore, rather than disclose that the number of courses in continuing education is growing at the expense of day time programming the evidence discloses that there has in recent years been a 35% reduction in enrolment in continuing education. It is true, as the Union asserts that this reduction does not take into account growth in on-line courses. But still, the evidence does not disclose any growth in continuing education or in the use of part time personnel and instead suggests the contrary. Nor does the evidence disclose that larger classes, normally taught during the day are being shifted into continuing education. In the face of this evidence, not only must I find that the use of part time personnel has not eroded the bargaining unit, but acceptance of the Union position could result in a significant accretion to the bargaining unit by compelling the

College to assign full time positions in continuing education where it had not done so in the past.

Still there is some suggestion in the evidence that the manner of utilizing part time personnel may have been administered to avoid the collective agreement. Ms. Rees candidly acknowledged that there have been rare instances in which teachers originally hired as part time had been converted to partial load when they have added extra courses to their assignment. Ms. Rees candidly acknowledged that this is a result which the College sought to avoid and that over time the College had become more adept at ensuring that partial load teachers would not be given teaching assignments in continuing education. Like the decision in *Algonquin 4,* such an approach by the College might be interpreted as a prima facie intent to avoid the collective agreement such that the part time hours may be considered.

However, again, like the situation in *Algonquin 4,* I have determined that the College has put forward a reasonable and bone fide operational justification for its use of part time teachers in continuing education. First, the classes in continuing education are significantly smaller. This alone creates a bona fide justification for the use of part time personnel as the College has established that average class sizes in continuing education would have to be higher in order to economically support the use of full time personnel. In addition, I accept that the numbers enrolled per class are more fluid until the last minute making the certainty that the class will be taught and not cancelled less certain. Also unlike regular daytime students, most students in continuing education do not take their courses as part of a full program, but rather they take the courses on a course by course basis to enhance particular skills or educational requirements. For these reasons the College has determined that it is preferable to hire industry professionals on a part time basis (rather than full time academic teachers) to teach courses in continuing education. That has been the College's approach since at least 1986, as long as Ms. Rees has been employed by the College.

Although the Union has put forward some reason to challenge some, though not all, of the justification for the use of part time personnel put forward by the College, I find the operational justification for the use of part time personnel as described in the evidence to have been honestly and reasonably held by the College. The evidence does not support a conclusion therefore that part time personnel has been used to improperly avoid the obligations of the College to apply the Collective agreement to continuing education.

I would add that my decision does not mean that continuing education is excluded from the collective agreement in perpetuity. Clearly it is not. For example if it becomes apparent that daytime courses are being shifted to continuing education in order to avoid the collective agreement the decision might be otherwise. In addition, if circumstances change so that the operational justification can no longer be borne out, but the use of part time personnel is maintained in order to avoid the collective agreement, the decision might again be otherwise.

Nor am I suggesting that the College does or does not have a free hand to assign part time personnel to teach newly established programs. However, in a case such as this where there has been a long established history of utilizing part time personnel for operational reasons which I have found to be honestly and reasonable held, I cannot find that the use of part timers in continuing education in this case was designed or intended to erode the bargaining unit or otherwise circumvent the collective agreement.

For all of these reasons the College's motion for dismissal is upheld and the grievance is dismissed.

Dated at Toronto, this 12th day of November, 2015

Norm Jesin