

IN THE MATTER OF AN ARBITRATION

Between:

CANADIAN UNION OF PUBLIC EMPLOYEES, Local 5555

(the Union)

- and -

KAWARTHA PINE RIDGE DISTRICT SCHOOL BOARD

(the Board)

SOLE ARBITRATOR: M.G. Mitchnick

RE: Retirement Gratuity Grievances

APPEARANCES:

For the Union:

Stephen Horner, National Representative

Ron Maguire, President Local 5555

Al Mailey, Vice-President, Local 5555

Vern Andrus, Member, Local 5555

For the Board:

Amanda Lawrence-Patel, Counsel

Kees Kort, Counsel

Debbie Hill, Team Leader, Employee Labour Relations, Kawartha Pine Ridge DSB

Marga Dunn, Labour Relations Consultant, Kawartha Pine Ridge DSB

Hearing held in Peterborough, Ontario on November 9, 2016

AWARD

This matter concerns the entitlement of a number of the Board's employees to the Retirement Gratuity provided by Article 17 of the local collective agreement.

Article 17.04 provides in that regard:

17.04 At time of retirement, subject to the provision of Articles 17.07 a), b) and below, a retirement gratuity will be paid to the employee with ten (10) or more consecutive years of service with the Employer (including continuous service with Predecessor Boards) who has accumulated sick leave credit according to the following scale . . .

The elimination of the Retirement Gratuity at school boards was of course very much a part of the province-wide negotiations that resulted in Memoranda of Understanding in 2012 and 2013, as well as Ontario Regulation 1/13. The 2012 Memorandum negotiated with CUPE, for example, provides:

C. Retirement Gratuities (Where Applicable)

1. Effective August 31, 2012, employees currently eligible for a retirement gratuity shall have accumulated sick days vested, up to the maximum eligible under the retirement gratuity plan.
2. Upon retirement to pension, an employee eligible for a retirement gratuity shall receive a gratuity payout based on the employee's current accumulated vested sick days, in accordance with #1 above, and years of service and salary as of August 31, 2012.
3. Effective September 1, 2012, all accumulated non-vested sick days shall be eliminated.
4. Eligible employees shall be informed not later than May 31, 2013, indicating their future entitlement to a gratuity payment in accordance with numbers 1 to 3 above. Such statement shall also identify the number of vested sick days.

5. Such retirement gratuity shall be paid in accordance with the terms and conditions of the 2008-12 collective agreement.
6. For employees covered by a collective agreement that has a service requirement greater than 10 years, this requirement shall be reduced to ten years as at 31 August, 2012 and their days shall be vested.
7. Those employees not eligible for a retirement gratuity as of August 31, 2012 as a result of insufficient service credits shall be entitled to a Gratuity Wind-Up Payment based on their years of service, accumulated sick days and annual salary as of August 31, 2012, provided this is funded by the Provincial Government ...

The upshot of these provisions is that those who had qualified for the full Gratuity as of the specified date retain it, while those not so qualified would be entitled only to the Wind-Up Payment. And the parties agree that the terms of those province-wide dictates leave the matter here to be decided simply on the basis of the parties' own collective agreement.

As it happens, when the present School Board was formed through amalgamation in 1998, the parties negotiated their own "cut-off" of the Retirement Gratuity, stipulating in Article 17.07(a) that:

17.07 a) There will be no retirement gratuity available to new employees hired after 30 June 2002, including those new employees who may have been eligible for a retirement gratuity with another school board or other Employer.

All of the grievors were hired by the Board prior to June 30th, 2002, and their employment records continue to show that "original start date". However, all of them began their employment at that time as "Casuals", not becoming permanent employees

with the Board until a date subsequent to June 30th, 2002. Article 7.03 of the collective agreement stipulates:

7.03 Employee Definition

a) Permanent employees are those who have obtained a permanent position and who have completed their probation period as defined in Article 7.02 above.

b) Casual employees are defined as follows:

(i) employees hired for a specific term to cover the absence of a permanent employee up to and including ninety (90) working days; or

(ii) employees hired to provide temporary assistance above the normal complement or to work on special projects for periods not to exceed ninety (90) working days, unless otherwise agreed by the Union and the Employer.

(iii) notwithstanding (i) above, in the case of pregnancy/parental leave and extensions, casual employees may be employed for the duration of the leave.

c) Casual employees as described above will be subject to the terms and conditions of this agreement, with the exception of the following articles:

(i) Article 7 – Seniority

...

(viii) Article 17 – Retirement Gratuity

The Board does not that argue that the lattermost language precluded a Casual employee from ultimately qualifying for the Retirement Gratuity once they had become permanent. Rather, the position of the Board is that the grievors do not qualify for the Retirement Gratuity provided by Article 17.04 because they were specifically excluded at the time the “grand-parenting” of this Benefit was negotiated, by virtue of being “new employees hired after June 30th, 2002”. That Article, it is to be noted, does not

say “hired as *permanent* employees after June 30th, 2002”, and instinctively one might incline to the view that these were not “new employees” being hired by the Board for the first time after June 30th, 2002. The Board wrote to affected employees, however, in the following sample terms:

As you are aware, on September 11, 2012, Bill 115 received Royal Assent. This Bill expressly supersedes the provisions of current collective agreements and Terms and Conditions of Employment in a number of areas, specifically the payment of retirement gratuities. As a result, all accumulated sick leave in your bank as of August 31, 2012, will be frozen and no longer available for your use when you are ill.

You were hired with the Kawartha Pine Ridge DSB after June 30, 2002 and therefore do not qualify for a retirement gratuity based on Article 17.07 (a) of the CUPE collective agreement which states:

“There will be no retirement gratuity available to new employees hired after 30 June 2002, including those new employees who may have been eligible for a retirement gratuity with another school board or other Employer.”

However, for your information only, as of August 31, 2012 your accumulated sick leave was: 111 days.

To understand the Board’s view of the matter, regard must be had to Article 7.01(a) of the collective agreement, which as a general matter provides:

ARTICLE 7 – SENIORITY

7.01 a) Seniority will accrue from the date on which an employee was last hired to a period of continuous **permanent** employment with the Employer and/or its Predecessor Boards, if the employee is in a permanent position within the bargaining unit. . . .

(emphasis added)

And consistent with that, Article 7.02 establishes a “probation period” as follows:

7.02 Probation Period

New employees will serve a probationary period of sixty (60) days worked before acquiring seniority rights, which will then date back to their last date of hire. During the probationary period, the employee will enjoy all the rights and privileges under this Collective Agreement with the exception of the just cause provisions.

What complicates the matter here is that the Union has accepted the difference in commitment by a Board between hiring an individual on a "Casual" basis, versus a decision to hire the individual on a "permanent" basis, with the "just cause" requirements for termination that that entails. Reflecting that, the practice at this Board is to treat the movement of an employee from Casual to permanent as equivalent to a "new hire" for the purposes of the Probationary clause. The Board thus writes to employees making the change in status in the following terms:

This will confirm our offer of employment with the Kawartha Pine Ridge District School Board in the position of Education Assistant at South Monaghan PS for 30 hours/wk, effective September 2, 2003.

Please read the attached information carefully and refer any questions you might have to the Human Resources Department and/or your supervisor.

The Ontario Municipal Employees Retirement system (OMERS) Pension Plan is compulsory for all non-teaching employees effective on the start date of your appointment to a regular position. You will be required to complete the "OMERS" Employees Enrolment Card- Form 102" (attached). Please complete and return to the Payroll Department as soon as possible.

All new employees are subject to a probationary period of 60 days worked, during which time assessments are made to determine the suitability of the new incumbent to the position assigned. The supervisor of the new employee is requested to submit an assessment before completion of the 60 working day probationary period. If the probationary review is favourable, and if both the new employee and the supervisor are satisfied with the appointment, the employee is placed on the continuing staff of the Kawartha Pine Ridge District

School Board. From then on performance reviews are made on a regular basis.

Once you have successfully completed your probationary period, you will be entitled to enrol in the Board's Benefit Plan. If you are interested in enrolling in the benefit plan you are asked to contact Penny Barrett, Human Resources Specialist – Benefits on or after 25 November 2003.

May I take this opportunity to welcome you to employment with the Kawartha Pine Ridge District School Board and provide my good wishes for a pleasant and mutually rewarding work experience with us.

That is what the Board relies on in the present matter – not unreasonably, in light of the congruency in language between Article 17.07, and Article 7.02 and the letter of appointment. There are, however, further considerations here which once again lend support to the position of the Union.

To begin with, it is to be noted that Article 7.02 itself, establishing the probation period, provides that once an employee has completed the probation period, his or her seniority "will then date back to their last date of hire". More to the point, this retrospective recognition of an employee's full service with the Board is specifically made to apply to those who begin with the Board as "Casuals", in the ensuing subsection to 7.01 (a), 7.01(b):

b) Casual employees as defined in Article 7.03 (b) will be credited with all seniority earned during continuous employment with the Employer upon completion of the probation period after having successfully posted into a permanent position.

Note: Continuous employment shall be defined as one (1) shift per calendar month.

As can be seen, the only stipulation for this recognition is that such earlier period of service be "continuous", as again specifically defined. In summary, then, although employees who come onto permanent staff from the Casual pool are required to pass through a further period of employment on "probation", once that additional evaluation

period is successfully completed, they are given full credit for their service from their original date of hire – again, to the extent that that pre-“permanent” period of employment has been “continuous”.

This same perspective of the parties shows itself in another of the Benefit categories, Vacation. There the Vacation Article sets out in 15.01(a) the Vacation entitlements as follows:

Less than one (1) year of service as of July 1	Four percent (4%) of wages
After one (1) year of service as of July 1	Two (2) weeks
After three (3) years of service as of July 1	Three (3) weeks
After nine (9) years of service as of July 1	Four (4) weeks
After sixteen (16) years of service as of July 1	Five (5) weeks

It is agreed that the practice at this Board is to use the employee’s seniority date, which, as shown, includes Casual time spent in “continuous service”, to calculate what an employee’s “service” date is for the purposes of this benefit entitlement (again, by virtue of Article 7.01(b), the employees’ seniority date will equal their original service date as long as there has not been a break in “continuous service”).

So that, then, is the difficulty with the present case: for some purposes employees moving from Casual to permanent service with the Board are treated like a “new employee”. For other purposes, they are not; rather, once they do in fact pass the additional test of a probation period, they are, provided they meet the “continuous service” requirement, treated as having begun their employment with the Board as of their “original date of hire”, notwithstanding the fact that the hiring began as a “Casual”. Significantly, the latter treatment is that adopted by the parties to this

collective agreement with respect to both seniority and benefits, and appears to be a much closer fit with the further benefit entitlement at issue here.

On balance, therefore, notwithstanding the practice and language of the parties surrounding the distinct issue of a “probation” period, it is my conclusion that, for Benefit purposes, once a Casual employee has successfully completed the probation period in a “permanent posted position”, such employee is considered as having been hired as of their most recent “continuous service” date, including their service as a Casual employee. It is, further, not without significance that the parties to this collective agreement have been very clear in distinguishing “permanent” from Casual employment in Article 7 where they considered it appropriate to do so; whereas no such distinction is made by the parties in the language of Article 17.07(a), in addressing which existing members of the bargaining unit were to be henceforth excluded from this Benefit, when speaking of “new employees hired after 30 June 2002”.

It is useful in that regard to contrast the collective-agreement language in the present case with that before Arbitrator Hayes in *Trillium Lakelands District School Board and OSSTF*, 2016 CarswellOnt 16099. There the Retirement Gratuity was stated to be payable to “any member who has a minimum of ten years of continuous service”, and the grievance before Arbitrator Hayes was filed on behalf of members claiming credit for their service as *Short-term Occasionals (STO’s)*. On the crucial Seniority/Service question, the agreement provided:

18.02 Teachers Employed as Bargaining Unit Members After April 16, 1998

18.03.01 For teachers hired on or after April 16, 1998, Seniority shall be the length of continuous service with Trillium Lakelands District School Board and the predecessor School Board from the first day worked as a Bargaining Unit member after being hired, including continuous service in Long-Term Occasional teacher positions which immediately preceded a regular teaching job with no break in service . . .

Thus the School Board was able to make the argument that:

26. . . . The only exception permitted by Article 18.03.01 is that granted to LTOs if three prerequisites for service outside of a regular teaching position are demonstrated. The Board submits, by necessary inference, that this exception, that permits the counting of certain limited LTO service for purposes of regular teacher seniority, settles the STO question.

And therefore:

27. . . . In the instant case, the Board's collective agreement does not permit attribution of time spent as an STO.

Arbitrator Hayes, not surprisingly, agreed with that argument. Here, by contrast, the period of employment in question is expressly recognized by the parties in dealing with time spent as a "Casual", relating it, *once the probation period has been completed*, to their original date of hire, where there has been no break in service.

It is accordingly my finding that, for purposes of the benefit entitlement provided by Article 17.07(a), as is the case with the parties' application of the Vacation Article under this collective agreement, "new employees hired after 30 June 2002" does not exclude those employees whose seniority date, by virtue of their "continuous service" with the Board, predates 30 June 2002. Or, as the Union otherwise put it: for the purposes of the Retirement Gratuity, an employee's length of service with the Board includes that period of employment as a Casual that pre-dates the employee's move to "permanent" status, to the extent that the employee meets the collective agreement's definition of "continuous service". I so declare.

I will remain seized as requested in the event the parties are unable to resolve the application of this finding to the individual grievors in question.

Dated at Toronto this 22nd day of December, 2016


Morton Mitchnick - Arbitrator