College Update

College Update: 2019 Year in Review

Date: January 29, 2020

2019 was a busy year in the College sector. We thought it would be useful to review some of the significant human resource issues from 2019 as these cases may impact your approaches in 2020. Curl up by the fire and have a read. Happy New Year!

In This Edition

Bill 148: What Happened?

Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*, came into force on January 1, 2018 and enacted numerous changes to the *Employment Standards Act, 2000* (ESA). For the first time, many provisions of the ESA became applicable to Colleges.

During the last round of academic negotiations, the parties agreed to meet to negotiate any consequential adjustments to the Collective Agreement once Bill 148 became law. If they couldn't agree on the changes, an arbitrator would determine what was required.

Equal Pay for Equal Work

The Union believed that the changes to the equal pay provisions enacted by Bill 148 would require the Colleges to increase the rates of pay of partial-load employees to ensure those rates were comparable to full-time faculty rates. The College Employer Council (CEC) disagreed, believing comparability already existed.

Effective January 2019, a new Ontario government repealed many of the Bill 148 changes (including the changes to the equal pay provisions) through Bill 47, the *Making Ontario Open for Business Act, 2018*. However, the Union asserted that the parties' agreement during the earlier negotiations still imposed an obligation to address the equal pay dispute. Accordingly, the parties sought clarification from an arbitrator.

In College Employer Council v OPSEU (CAAT-A Bargaining Unit), released in April 2019, Arbitrator Kaplan ruled that the repeal of the equal pay changes meant there was no further need to deal with the issue.

Vacation

As a result of Bill 148, the vacation provisions of the ESA became applicable to the Colleges for the first time. The Academic Collective Agreement makes no reference to vacation pay for regular full-time employees. Since the ESA requires an employer to specify the amount of money allocated to vacation pay, the CEC proposed that vacation pay language be added

to the Collective Agreement. Colleges have historically treated vacation pay as part of a full-time faculty member's salary. Two-twelfths of the annual salary is paid out over the two month summer vacation period. The CEC suggested that the practice be incorporated into the Collective Agreement.

The second vacation issue related to partial-load employees. The Union proposed that partial-load employees with less than five years' service be provided an additional four per cent of their gross hourly rate as vacation pay and employees with five or more years of service be provided an additional six per cent of their gross hourly rate.

In an award released in October 2019 (College Employer Council v OPSEU (CAAT-A Bargaining Unit), Arbitrator Kaplan dealt with both of these issues. He noted the Union's explicit acknowledgment at the hearing that the Colleges' practice of withholding two-twelfths of annual salary for vacation purposes exceeded the ESA minimum requirements. He concluded that this concession was sufficient to address the regular full-time vacation pay issue. It was therefore not necessary to incorporate new language into the Collective Agreement.

The Arbitrator also rejected the Union's demand to increase compensation to partial-load employees by providing new vacation pay entitlements. The CEC submitted that the parties' pay equity plan (Plan), negotiated in 1990, resolved the issue. Under the Plan, the parties had agreed that partial-load employees were to be treated as a female job class and regular full-time employees were to be treated as a male job class. As a result of that designation the *Pay Equity Act* required that the partial-load employees be paid at comparable rates to the full-time employees. Partial-load rates were increased. The Plan, when finalized, also specified that "*a portion of the partial-load employees hourly rate was in lieu of vacation pay."* This language was then incorporated into the Collective Agreement in Article 26.02(b).

The Arbitrator found that the evidence was "overwhelming" and "long standing" that partial-load rates were designed to reflect the full-time rates "including vacation pay at two-twelfths." As a result, the Arbitrator found that the introduction of the ESA minimum entitlements had no impact on the vacation entitlements of partial-load employees. He stated, "in the most simple terms, vacation pay for partial-load is based on vacation pay for full-time and that is two-twelfths."

This is an important decision in terms of ESA compliance. It would be prudent for Colleges to reflect the two-twelfths vacation pay for regular full-time employees and for partial-load employees in their record-keeping to ensure compliance with the ESA reporting requirements.

So what happened with Bill 148? At the end of all the discussions and the arbitration hearing, no changes were actually made to the Collective Agreement!

Status Matters: Classifying Part-Time, Partial-Load, and Sessional Employees

The Ontario Labour Relation Board rules

At the end of August 2019, the Ontario Labour Relations Board (OLRB) rendered Ontario Public Service Employees Union ("OPSEU") v College Employer Council, a significant decision that impacts the outstanding part-time academic certification application and the manner in which Colleges assign academic-related work.

As you are aware, there are three types of contract teachers in the College system: part-time, partial-load and sessional teachers. Each are hired under contract for a specific term. The number of hours they "teach" distinguishes between the three categories. Part-time teachers are defined under the *Colleges Collective Bargaining Act, 2008* (CCBA) as teachers who "teach" up to six hours per week. While there is no hourly definition for sessional employees, the parties have generally treated sessional employees as those who are contracted to "teach" more than 12 hours per week. Both part-time and sessional teachers are included in the *part-time* academic bargaining unit that is currently the subject of the certification application.

Sandwiched between these two groups of employees are the partial-load teachers. Partial-load teachers are in the *full-time*

bargaining unit. By definition, they “teach six (6) up to and including 12 hours per week.”

The Union filed the certification application on June 23, 2017. Determining whether an employee was a part-time or sessional teacher on that date is critical to determining the outcome of the application. The Union had to demonstrate that it had membership evidence for at least 35 per cent of the employees employed in the bargaining unit on that date. If the Union did not meet that threshold, then the OLRB would dismiss the application. The Colleges submitted names for significantly more employees than the Union estimated were in the bargaining unit when the application was filed. The Union challenged the status of over 3000 employees, claiming they should either be excluded from the list or names of others should be added.

The issue became complicated because many Colleges regularly enter into additional contracts with part-time, partial-load or sessional teachers to perform other functions other than classroom teaching such as curriculum development, academic coordination, technical classroom support, or administrative activities. The Union asserted that hours worked performing these additional academic-related activities should be included when determining the number of hours that a contract teacher works. For example, a part-time teacher teaching six hours with additional coordinating functions or curriculum development work would move from part-time to partial-load status and be excluded from the bargaining unit, or a partial-load teacher teaching 12 hours with additional coordinating functions or curriculum development work would move to sessional status and be added to the bargaining unit.

The Union relied heavily on a 2018 arbitration award (St. Lawrence College) to support its argument that these ancillary hours should be considered in deciding who was in or out of the bargaining unit for the certification application. In that award, the Arbitrator concluded that a partial-load employee could rely on her additional coordinating hours to claim she was “teaching” in excess of 12 hours per week. This resulted in the teacher rolling over into regular full-time teaching status. (Note that following the release of that award, Colleges were cautioned about adding curriculum development or coordinating contracts to part-time or partial-load employees because of the risk that those hours might change the employee’s status (see College Update dated April 23, 2018).)

In its decision, the OLRB reviewed extensive case law that has addressed when persons should be treated as teachers and what types of activities should be considered teaching functions. The OLRB recognized that a person may be hired only to work in a lab, or to perform coordinating functions, or to perform curriculum review without any teaching associated activity. It concluded that none of those duties, viewed independently, would allow the OLRB to treat the individual as a “teacher” and include them in the part-time academic bargaining unit. It was therefore difficult to find hours performing these functions should be treated a “teaching hours.”

The OLRB ultimately determined only *teaching contact hours* should be used in determining an employee’s bargaining unit status. Hours associated with other ancillary functions should not be counted.

The OLRB decision is considered at arbitration

The OLRB decision was considered and applied in Seneca College v Ontario Public Service Employees Union, Local 560. Similar to the 2018 *St. Lawrence College* case, the grievor claimed that her coordinating hours should be added to her 12 hours of teaching to convert them from partial-load to sessional status and allow them to roll over to a regular full-time position. The Arbitrator found that the OLRB decision had clearly defined employees in the part-time bargaining unit on the basis of teaching contact hours. She therefore declined to follow the *St. Lawrence College* award and concluded that the employee status should be determined exclusively by looking at the number of teaching contact hours that the grievor had taught. The grievance was therefore dismissed.

What does it mean for future assignments and employee status?

While each set of facts may affect the outcome of future cases, these decisions should provide a level of confidence that assigning additional work such as curriculum development or coordinating functions under separate contract is unlikely to affect the employee’s bargaining unit status. This should benefit part-time or partial-load employees who may be assigned

additional responsibilities and be provided more hours of work. The OLRB decision may also have a significant impact on the part-time academic certification application. The parties are continuing their detailed review of the employment information with the OLRB's assistance to determine if the Union has met the 35 per cent threshold which would permit the ballot boxes to be opened.

Colleges should also recognize that persons who only have a curriculum development contract or a contract to perform coordinating functions are properly considered in the *support staff* part-time bargaining unit as they are not teaching. Only persons with teaching contact hours and counsellors are included the full-time or part-time *academic* bargaining units.

A Question of Time: Arbitrator Limits Scope of Harassment Grievance Due to Delay

Grievors alleging harassment can often state a case that dates back many years, which can result in raising long-forgotten facts and extensive litigation due to evidence being presented on context and history.

Arbitrator Davie recently issued *Sault College v Ontario Public Service Employees Union*, a helpful award in which she limited the scope of arbitral allegations and admissible evidence. This was due to the fact that about two and a half years before the grievor filed her grievance, the College investigated various allegations of harassment, met with the grievor and her Union and clearly stated the allegations were unfounded. The Arbitrator held that the College "could reasonably conclude that matters had been brought to a close" given the Union did not immediately file a grievance.

Arbitrator Davie's finding differs from at least one College arbitrator who held that an arbitrator has no jurisdiction at all to limit the temporal scope of evidence in a harassment grievance. In contrast, she said:

…an arbitrator should also keep in mind the time honored principle of labour relations that grievances about alleged violations of the collective agreement should be brought within a reasonable time after the matter in issue arose. I accept Union counsel's submissions that the issue of delay in filing a grievance can be addressed through fashioning appropriate remedial relief, and that admission of evidence of incidents that date back many years for contextual purposes does not mean that remedial relief will be granted for such incidents. However, it is my view that a delay in filing harassment grievances results not only in prejudice in conducting a fair hearing (which is what most of the cited awards seem to focus on). Delay also impacts the ability of the parties to properly address, in a timely fashion, issues and concerns as they arise. That circumstance affects ongoing relations between and amongst the Employer, the grievor and the Union. As Professor Laskin put it so eloquently *in General Electric* supra, the proper administration of a collective agreement requires "…mutual recognition by the parties of a principle of repose as to all claims under the Agreement not asserted within a reasonable time." There is real danger to present relations by permitting a grievance to drag up ghosts from the past when the Employer is either unaware of the matters of concern at the time they arise (and therefore unable to address them) or where the Employer believes the concerns have been addressed and the matter concluded.

Practically, Arbitrator Davie's award illustrates the benefits of encouraging employees who feel aggrieved to bring forward their concerns so they can be addressed in a timely fashion. When workplace problems are raised, investigated and dealt with appropriately, an arbitrator will be inclined to treat those problems as resolved, inarbitrable and inadmissible regardless of what other workplace problems may later arise.

What's the Priority? Clarification of Hiring Priority Practices for Partial-Load Teachers

In the last round of academic bargaining, Article 26.10 was modified to give partial-load employees greater rights to be hired for future partial-load assignments. Where a College decides to create a partial-load assignment, it becomes necessary to:

1. consider which current and previously employed partial-load employees have registered their interest in working on partial-load assignments in that calendar year

2. determine whether the registered partial-load employees have taught any of the courses included in the assignment previously and if they had sufficient seniority
3. determine if their current partial-load employment or their prior service as a partial-load employee gives them a priority hiring right to that new partial-load assignment.

A number of arbitration cases decided in 2019 have begun to clarify disputes over the way the new language in Article 26.10 should be applied.

Multi-College grievance decision concerning the "registry"

The CEC and the Union decided to consolidate a number of grievances that the Union had filed across a variety of Colleges and have them heard together for reasons of efficiency. The two issues to be addressed at the arbitration were:

1. Do potential priority hiring rights apply to all courses an employee has taught, whether taught as a partial-load, part-time or sessional employee or is that potential priority only limited to courses previously taught as a partial-load employee?
2. Does a College need to create a record of all courses ever taught by all partial-load employees and provide that record to the Union?

In July 2019, Arbitrator Knopf issued *College Employer Council For The Colleges of Applied Arts and Technology v Ontario Public Service Employees' Union (For Academic Employees)* dealing with these two issues and made a number of key determinations:

1. Service under Article 26.10(c) is based on hours teaching *as a partial-load employee.* Hours teaching as a part-time or sessional teacher do not impact on service under 26.10(c). The amount of service accumulated under 26.10(c) impacts on whether an employee can claim hiring priority for a new partial-load assignment.
2. Courses taught as a part-time, partial-load or sessional employee are all relevant when considering if an employee has a priority right to be considered for a new partial-load assignment.

The College needs to keep a record of all courses the employee has taught in whatever capacity. The requirement to keep a record of the courses taught is not retroactive. It begins in the Fall of 2017 when the new language was introduced. However, if an employee can demonstrate they had previously taught a course prior to October 2017, the College will need to consider that course.

The Arbitrator rejected the Union's assertion that the record of every partial-load employee's course assignments and their partial-load service needs to be compiled and provided to the Union. She found there is no such obligation in the Collective Agreement. Obviously, if an employee has a dispute concerning whether they should have been hired for a partial-load assignment, the records for that employee and the employee who may have been assigned the course will become relevant.

Current part-time employees do not have priority status

In November 2019, a Niagara College arbitration award (*Colleges of Applied Arts and Technology v Ontario Public Service Employees Union, Local 242*) clarified the right of prior partial-load employees currently employed on a part-time basis. The grievor was previously employed on a partial-load basis and had registered her interest in being employed for partial-load assignments in the Winter 2019 semester. In the Fall of 2018, when the decision was made to offer a partial-load assignment for the Winter semester, the grievor was working as a part-time employee.

The relevant portion of Article 26.10 E states:

"…where the school or department within a College determines that there is a need to hire a partial-load employee to teach a course that has previously been taught by that registered partial-load employee in the department/school, it will give priority in

hiring to such partial-load employee if:

(i) they are currently employed or have been previously employed as a partial-load employee for at least eight (8) months of service as defined in 26.10 C within the last four (4) academic years;

The grievor did not have the threshold partial-load service specified above. The Union asserted that she still had a right to be considered for the job because she was currently employed as a part-time employee.

The Arbitrator dismissed the grievance. Only current *partial-load* employees or previously employed partial-load employees with the necessary amount of partial-load service could claim priority hiring status. Since the grievor did not have the necessary partial-load service and was only currently employed as a part-time employee, she had no priority rights under Article 26.10 E. The College was free to hire any employee it wished for the partial-load assignment.

Does the College need to notify employees of their rights?

Article 26.10 D requires partial-load employees who wish to be considered for partial-load assignments in the following calendar year to register their interest by October 30. This is a positive obligation imposed on the employee. If an employee fails to take this step, they would be excluded for priority consideration for that year. This is important to recognize as it affects the rights of other employees who did register their interest. The Union local at Seneca College grieved that the College had a positive obligation to notify all past partial-load employees of the need to register by the cut-off date. While efforts were made to let current partial-load employees know, it was agreed that past employees were not contacted.

In *Seneca College and OPSEU (Re Article 26)* (21 November 2019, Starkman) (unreported), the Arbitrator concluded there is nothing in the Article that imposes a positive obligation on the College to notify employees of their opportunity to register. If that was intended, it could easily have been included. While the College did develop a process to allow employees to register and did notify some current employees, those actions did not impose a positive obligation to do more when no such requirement was included in the Agreement.

Limited Application: Employees from Private Career College Not Covered by Public College’s Collective Agreement

In Ontario Public Service Employees Union v St. Lawrence College, the Union commenced an Application under s. 71 of the CCBA against St. Lawrence College (College) at the OLRB, seeking a declaration that employees of a private career college (Alpha International Academy) were in fact employees of the College, and therefore covered by the terms of the respective Collective Agreements.

The College has a contractual relationship with Alpha whereby Alpha delivers some College programs to primarily international students in the Greater Toronto Area. International students who successfully complete a program at Alpha can obtain a College diploma. The College provides the curriculum, controls admissions and monitors educational outcomes. However, all courses and student support services are delivered by Alpha, using Alpha staff. The College’s relationship with Alpha is similar to arrangements some other Colleges have with private career colleges.

The Union’s position in the Application was, in essence, that the College was avoiding Collective Agreement obligations and was improperly providing education through a third party.

At the OLRB, the College argued, on a preliminary basis that:

1. the OLRB was without jurisdiction to adjudicate the Application as Alpha was not a College and therefore not covered by the CCBA, and
2. on the basis of the Union’s allegations, the OLRB could not make the declarations sought by the Union.

On the first issue, the OLRB determined that it did have jurisdiction as the Union's allegation was that the employees of Alpha were in fact employees of the College. Accordingly, the fact that Alpha was not covered by the CCBAwas irrelevant and the Union was entitled to have the issue of who was the "true employer" adjudicated.

However, on the second issue, the College was successful. For the purposes of the preliminary decision, the OLRB assumed all of the Union's allegations to be true. The College's argument was that the Union's allegations did not indicate the College provided any direction to Alpha employees or otherwise exercised control over Alpha staff. The College did not hire, fire, determine remuneration, hours of work, assign duties, or provide any day to day direction to Alpha staff.

The OLRB relied heavily on a 2015 *Cambrian College* arbitration decision of Louisa Davie which found that issues of student integration were separate and distinct from issues of staff integration. The OLRB concluded that the Union's allegations against the College focused almost exclusively on the closeness or relatedness of the College and Alpha and the integration of students. For example, the Union relied on the fact that admissions and tuition payments were handled by the College, curriculum was provided by the College, the College issued diplomas, Alpha students could attend the College convocation and the College controlled educational outcomes. The OLRB determined that none of those allegations related in any way to alleged control over Alpha employees by the College and accordingly determined, on a preliminary basis, that the Union could not succeed in its Application. Put another way, the OLRB determined, based on the allegations, it would not find that the individuals employed by Alpha were in fact employees of the College.

This decision will be of particular interest to Colleges that have contractual relationships with third parties for the delivery of some College programs.

Overcoming Grid Lock: College Can Make Adjustments to Discretionary Steps in Appropriate Circumstances.

A recent arbitral award, College Employer Council For Northern College of Applied Arts and Technology v Ontario Public Service Employees Union, considered whether a College could allocate discretionary steps on the salary grid when hiring a professor and "deduct" steps, after it discovered an error in accounting for the grievor's qualifications.

The grievor was hired as a full-time professor at Northern College. Under the Academic Collective Agreement's Job Classification Plan (Plan), the College assessed the "experience" factor for the grievor at 7 points and the "qualifications" factor at 9 points, which would have resulted in a starting salary under the Plan at Step 8. However, the College then allocated three additional, discretionary steps to bring the grievor's starting salary to Step 11 in order to make its offer sufficiently competitive. The College provided the grievor with an offer of employment stating that his starting salary would be at Step 11. The grievor signed the offer of employment accepting a starting salary at Step 11.

The College subsequently realized that it had made an error in calculating the points to be assigned for the "qualifications" factor as it had not accounted for the grievor's Master's degree (the grievor's CV was not as clear as it could have been in this respect). Taking the grievor's Master's degree into consideration, the grievor would have been assessed additional points for the qualifications factor such that his starting salary under the Plan (without accounting for any discretionary steps) would have been Step 10 and not Step 8. However, since the grievor's initial step placement on the salary grid was already at Step 11, the College determined that it did not need to adjust his salary any further. It kept his salary at Step 11.

The Union filed a grievance claiming that the College was not permitted to "deduct" any discretionary steps after they had been granted. It argued that because the College had erred in thinking that the Plan generated a starting salary at Step 8 as opposed to a starting salary two steps higher at Step 10, the grievor's starting salary should be increased by two corresponding steps as a result (from Step 11 to Step 13).

The College argued that the purpose of discretionary steps is to ensure that the College can offer competitive compensation where the salary as otherwise determined under the Plan would be inadequate to attract a qualified candidate. The College

argued that the Step 11 starting salary was adequate in the circumstances as shown by the fact that the grievor accepted and signed the Offer of Employment with a Step 11 starting salary.

Arbitrator Michelle Flaherty dismissed the grievance. She began her analysis by noting that the College may grant additional steps in certain circumstances but that it is not required to do so. For purposes of her analysis, she assumed (without finding) that the College must exercise any discretionary powers reasonably, in good faith, and in a manner that is consistent with the Collective Agreement. She found that the purpose of allocating discretionary steps is to allow the College to make competitive salary offers to candidates where the starting salary as calculated under the Plan would be inadequate to attract them to the College. She rejected the Union's argument that discretionary steps require the College to assess the adequacy of an employee's starting salary in light of their experience and qualifications. Rather, she found that discretionary steps can instead be allocated based on what constitutes a competitive salary in the circumstances.

Addressing the Union's argument that a College may not adjust the number of discretionary steps after they are awarded, Arbitrator Flaherty found that the Collective Agreement "cannot reasonably be interpreted to mean that the Employer is strictly bound by its decision to grant discretionary steps and can never make adjustments." She determined that any decision to adjust the number of discretionary steps must be exercised in keeping with the College's obligations under the Collective Agreement and in a manner that is reasonable and in good faith.

In finding that the College had acted reasonably, in good faith and in accordance with its obligations under the Collective Agreement, Arbitrator Flaherty made two key findings:

1. it was significant that the withdrawal of discretionary steps did not result in a reduction to the grievor's salary.
2. there was nothing to suggest that the College withdrew the discretionary steps for any reason other than to maintain the salary at the level that it had determined to be adequate and competitive.

This award affirms that Colleges have fairly wide latitude in allocating discretionary steps on the salary grid for purposes of determining a professor's starting salary. A College may allocate discretionary steps to attract a qualified candidate where it determines that the experience and qualifications factors under the Collective Agreement generate a starting salary that is inadequate to attract the candidate.

It also affirms that a College will not necessarily be obligated to increase a professor's starting salary where the College has made an error in assessing the allocation of points for purposes of a professor's initial salary step placement. Where the College has made an error in good faith but had also allocated discretionary steps such that the professor's starting salary is already at the same or a higher step than the Plan would require, the College should have a good argument that it ought not to be required to increase the professor's starting salary. A key factor in this case was that the College's Offer of Employment expressly stated that the grievor's starting salary was at Step 11.

It is advisable for Colleges to issue offers of employment that state the starting salary and the corresponding step without detailing in the offer of employment how the starting salary was calculated or how many discretionary steps have been allocated.

And that's a wrap on significant cases in 2019. We will see what comes our way in 2020.

If you would like more information concerning any of the issues addressed in this College Update please do not hesitate to contact your regular Hicks Morley lawyer or any of the authors listed.
