1978 CarswellOnt 2032
Ontario Arbitration

Carleton University and CUASA, Re

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Re Carleton University and Carleton University Academic Staff Association

E. E. Palmer

Judgment: September 28, 1978
Docket: None given.

Counsel: J. Sack and others, for the union
B. H. Stewart, Q.C., and others, for the employer

***E. E. Palmer*:**

1 The present arbitration arises out of a grievance filed by Miss K. Marwah on July 5, 1977. The exact nature of this grievance is the subject of an initial dispute between the parties. A hearing in relation to this matter was held in Ottawa, Ontario, on June 28, 1978, at which time the parties were given an opportunity to present evidence and argument. At the conclusion of this, an oral award was made favouring the association's position with the undertaking that written reasons would follow. These then, are the reasons so noted.

2 Initially, it should be stated that the facts in this matter were not in dispute in so far as they touch on the issue dealt with at the above hearing. Thus, on the date already mentioned, Miss Marwah, an associate professor with the university in the department of economics, filed the grievance which gave rise to this case. The important part of this document for present purposes reads (ex. 2):

> By a letter of June 10th, 1977, from President Oliver, I was denied promotion contrary to Article 5 of the current Collective Agreement in that I was wrongfully discriminated against on grounds of colour, national origin, race, and sex.

3 It appears that this grievance resulted from an earlier decision of President Oliver to recommend to the board of governors of the university that Miss Marwah not be granted the rank of full professor even though she received a unanimous recommendation from her departmental and faculty promotion committees but only a majority of a university-wide committee. It should be noted that the instant grievance had been preceded by what is termed an informal grievance in basically the same language: ex. 3.

4 Additionally, it should be noted that Miss Marwah laid a complaint with the Ontario Human Rights Commission in September of 1977, which gave rise to some question between the parties as to the appropriate jurisdiction to deal with this matter: the present arbitration or the Ontario Human Rights Commission. In any event, it was agreed to go forward at the present hearing, which was preceded by some correspondence between the parties. This correspondence can be summarized in the following manner:

5 June 1, 1978 — a letter was written by Mr. Sack, counsel for Miss Marwah, to Mr. Stewart, counsel for the university, setting out the particulars of their case. In that letter, three types of facts were depended upon to support a case for discrimination against the grievor. It was also noted that Mr. Sack would supply "such other particulars as would come to his attention."

6 June 6, 1978 — Stewart to Sack. This correspondence arose out of a telephone conversation between both counsel and related to the particular issue in front of us. Specifically, it would appear that Mr. Sack had told Mr. Stewart that the association would take the position that as all committees dealing with Miss Marwah's promotion had, at least by majority, ruled in her

favour up to the level of the president of the university, the president had no authority to recommend otherwise than in a positive fashion in relation to Miss Marwah's case. Such a stance was taken on the basis of the wording of the then collective agreement and it was Mr. Sack's position that if this were dealt with as an initial matter, it might be dispositive of the case. In any event, Mr. Stewart responded that he could not agree, even if Mr. Sack's submission was successful, that it would determine the arbitration and therefore he declined to agree to treat this as a preliminary matter.

7 To this, Mr. Sack responded on June 9th to the effect that, absent Mr. Stewart's agreement, it would be a matter to be resolved by the present arbitrator at the hearing scheduled for June 28th.

8 There exists a further letter from Mr. Stewart to Mr. Sack, dated June 19th, which in part touches on the present matter. Specifically, he reiterates his position with regard to the present matter and also notes that a separate policy grievance regarding this would be coming forward from the association.

9 It is on the basis of the foregoing, then, that the instant matter is to be resolved.

10 The position of the university in this matter is rather uncomplicated. Basically, they take the position that throughout the initial proceedings of this grievance the grievor took the stance that she was unjustly denied advancement because of the alleged discrimination. Indeed, it was their view that the whole grievance procedure went forward on this basis up until the telephone call relating to the June 6, 1978, letter mentioned above. It was the view of the university, then, that the refusal and the impugned reason for this refusal were integrally related and that, therefore, the new argument could not properly be brought up at this arbitration at this time.

11 To buttress this point, the university stressed certain aspects of the matters leading up to this arbitration which showed that the grievor, herself, acquiesced in the view taken by the university. In short, it was the view of the university that the grievor's action and correspondence showed she was not challenging, indeed was accepting, the procedure followed; but rather was basing her case on the discrimination alleged. Second, the university took the position that the wording of the collective agreement in effect between the parties relating to the grievance procedure was followed in this case and, therefore, the attempt of the grievor to"expand" her case should be denied. One assumes that the basis for this is the expression in art. 30.5 which is the requirement, *inter alia*, to attempt to identify "the unresolved issues". To the university, of course, this would mean the refusal for the reasons then alleged, not the refusal for any reason whatsoever. Finally, the university takes the position that by not raising the point now at issue at an earlier stage in the proceedings, the grievor precluded the various "in-house" proceedings, especially those set out in art. 30.7(a), from being properly used and so, such detriment having occurred, the matter should be decided in their favour; at the worst, it was contended the issue should at least go back to the grievance procedure to be reconsidered.

12 The association's argument was equally as straightforward as that of the university and completely to the opposite effect. Put in its simplest terms it was their view that the issue here was whether the denial of promotion was in accord with the terms of the collective agreement and, in this regard, they were entitled to put forward any arguments that were relevant, subject to the possibility of adjournment in cases where the other side was caught by surprise. Thus, in their opinion, it was completely open to them to raise the reason to support their case that they wished to do so, as well as that of discrimination. To this end they cited the well-known case of *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters & Joiners of America, Local 2486* (1975), 57 D.L.R. (3d) 199, 8 O.R. (2d) 103 (Ont. C.A.), reversing 48 D.L.R. (3d) 191, 4 O.R. (2d) 423 (Div. Ct.), to the effect that arbitrators should not be overly technical in issues such as that presently in issue.

13 As noted above, it was my view that the position of the association in this case was correct. It is my view then, that the essence of the grievor's complaint (and this grievance) is the denial of promotion; the reasons for such are not limited to those on the original grievance or, indeed, those discussed during the grievance procedure. The issue raised in this case is, to an extent, unique, but it has counterparts in reported awards which support this conclusion. Thus, it would seem established arbitral jurisprudence that a grievance need not disclose particulars of a case, nor need this be done during the grievance procedure, unless there is a specific clause in the collective agreement governing the matter to that end: see, *e.g., Re Fleet Industries and Int'l Assoc. of Machinists, Lodge 171* (1975), 10 L.A.C. (2d) 69 (Arthurs), and the discussion in Palmer, *Collective Agreement Arbitration in Canada* (Toronto: Butterworths, 1978), at pp. 174-5. Thus, it is not fatal to a grievance that it merely states, for

example, that a grievor has been "unjustly discharged". The grievor and union can, in the absence of appropriate collective agreement language, remain mute up to the point of the arbitration hearing. Of course, the risk run is that at that point the employer is fully justified in requesting an adjournment and particulars to properly prepare a case. It seems difficult to see why the situation should be different where the grievor has exposed only part of the case. Thus, in the present case, while one reading the collective agreement senses a desire that exposure of the complete case will occur during the grievance procedure and undoubtedly such would be preferable, there is no explicit requirement that such be done and I see no reason to imply one. It is only understandable that persons such as the grievor would not be aware of the nature of the agreement now raised by Mr. Sack, it being a technical or, if you will, a "legal" one. During the grievance procedure it is hard to see that this would necessarily become apparent to the normal grievor. Thus, to accept the university's position would be to drive grievors to silence or use of legal assistance at the earliest stage in the proceedings. Neither course commends itself to me. This result, then, it seems to me, reflects the philosophy in the *Blouin*, as well as many other, cases decided by both arbitrators and Courts where there is an attempt to restrict "technicalities" in the grievance procedure and the hearing of grievance, while balancing the rights of both sides to a fair hearing.

14 While the above would appear to be dispositive of the issue, certain issues should be mentioned. First, I would note that the distinction made above seems to be buttressed by art. 10.4(g). There, it will be noted, a distinction is drawn between a denial of promotion and the reasons which can be arbitrated, those reasons being the two now advanced by the association.

15 A second point which should be mentioned is the argument of the university that the failure to put forward the second reason to overturn the president's action deprived the persons in the grievance procedure and, more particularly, the grievance committee at the final step, from adequately deciding this matter and, therefore, due to this detriment the union's position should not be accepted. This, it appears to me to be fallacious. Put simply, if the various steps could not result in the decision to prevent the arbitration upon one of the grounds depended upon by the grievor, the addition of further grounds would not seem to improve the university's position in this regard. The only way in which the university would seem to prejudiced is in a determination whether it would accede to the argument put forward by the association and the grievor. That route is still open to them. By the same reasoning it seems unnecessary to return the matter to the grievance procedure, even if this were possible.

16 Having said this, it is only necessary to reiterate my ruling that the grievor is entitled to advance its alternate argument.