Cited as:
Muskoka Board of Education

**The Ontario Secondary School Teachers' Federation,
Applicant v. Muskoka Board of Education, Responding Party**

[1996] O.L.R.D. No. 3369

File No. 3143-95-U

Ontario Labour Relations Board

**BEFORE: M. Kaye Joachim, Vice-Chair, and Board Members
W.H. Wightman and D.A. Patterson**

September 20, 1996

APPEARANCES: Eric del Junco for the applicant; Ted J. Kovacs for the responding party

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DECISION OF THE BOARD

1 This is an application under section 96 of the LABOUR RELATIONS ACT, 1995, alleging a violation of section 86 of the Act. In a prior decision dated February 14, 1996, the Board dismissed the allegations under sections 5, 70, 72, 76 and 87 of the Act, without a hearing, on the basis that the application did not assert material facts which amounted to violations of those sections of the Act. The hearing reconvened on March 18, 1996 to hear the responding party's motion to dismiss the remainder of the application under section 86 on the same basis.

2 Section 86 states:

> 86. (1) Where notice has been given under section 16 or section 59 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or

any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,

(i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or

(ii) 14 days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated, whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 16, in which case subsection (1) applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

(3) Where notice has been given under section 59 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) of this section was complied with may be referred to arbitration by either of the parties as if the collective agreement was still in operation and section 48 applies with necessary modifications thereto.

3 At the time of the events, the applicable provision was section 81 of the LABOUR RELATIONS ACT 1992, c. L.1, (the "old Act"). Except where specifically noted below, the provisions of section 81 are identical to the provisions of the current section 86 and all references shall be to the current section of the Act.

THE FACTS ASSERTED BY THE APPLICANT

4 For many years, the custodial employees of the Muskoka Board of Education ("MBE" or the "employer") were represented by the Service Employees Union, Local 478 ("SEU"). The employer and the SEU were parties to a series of collective agreements, the last one being in force from 1992

to 1994. This collective agreement expired on October 31st, 1994. Prior to the expiry of the collective agreement, the parties commenced bargaining to renew the agreement, and section 86 of the Act (the "freeze" provision) came into effect. During the freeze period, certain employees in the bargaining unit applied to terminate the bargaining rights of the SEU. Following a vote ordered by the Board, pursuant to this application, the bargaining rights of the SEU were terminated by decision of the Board dated September 22, 1995.

5 On or about October 2nd, 1995, the applicant ("OSSTF") applied to be certified as bargaining agent for this bargaining unit, triggering a new freeze under section 86(2) of the Act. By decision dated October 24, 1995, the Board certified the applicant as a bargaining agent for this group.

6 Ernest Blundell has been employed as a custodian by the MBE since 1985. Around March, 1993, he contracted Chronic Fatigue Syndrome and was forced to book off sick. He has been off work continuously since that time as a result of the Chronic Fatigue Syndrome. He remains disabled today.

7 On or about November 1, 1995, the employer purported to terminate Mr. Blundell's employment, because of his ongoing absence.

8 Following Mr. Blundell's termination, the applicant filed a grievance on Mr. Blundell's behalf. Dan Maycock, the Manager of Human Resources responded to this grievance stating that the collective agreement between SEU and the MBE was no longer operative and did not apply to the members of the new bargaining unit represented by OSSTF. Prior to these letters, the employer had provided no notice to the applicant or to any of the members of the bargaining unit that any of the terms and conditions of employment set out in the collective agreement between the SEU and the respondent had been altered by the employer.

9 The union argued that one of the terms or conditions of Mr. Blundell's employment as of November 1, 1995 was the right not to be dismissed without just cause. The union alleged that by terminating Mr. Blundell's employment without just cause, the employer altered a term or condition of Mr. Blundell's' employment during a statutory freeze period, contrary to section 86 of the Act.

EMPLOYER'S ARGUMENTS

10 The employer argued that section 86 of the Act provides for two situations in which the terms and conditions of employment are frozen: prior to the negotiation of a first contract and during the renegotiation of an expired collective agreement. In the latter situation, the Act specifically maintains the right of an employee to seek arbitration (section 86(3)). Conversely, in the first contract situation, there is no statutory provision for arbitration until a collective agreement has been negotiated. The employer argued that the applicant is in a position akin to a first contract situation, in light of the lapse of bargaining rights between September 22, 1995 and October 2, 1995. Accordingly, there is no right to arbitration.

11 The employer noted that there are significant differences between the old Act and the current Act with respect to the just cause protection provided to employees represented by a bargaining agent, prior to the negotiation of the first collective agreement. Under section 81.2 of the old Act, employees were protected from dismissal or discipline without just cause, in the period prior to the negotiation of the first collective agreement. Under section 81.2 of the old Act, an employee could bring his/her unjust discharge or discipline complaint to the Board for adjudication. Section 81.2 was repealed effective October 4, 1995. The employer argued that the repeal of section 81.2 indicated a legislative intention to remove this protection against discipline or dismissal without just cause, prior to the negotiation of the first collective agreement.

12 The employer relied on the case of BURLINGTON CARPET MILLS CANADA LTD., (1980) OLRB Rep. Oct. 1361. This case involved a first contract situation, in which an employee was dismissed prior to the negotiation of the collective agreement. The union argued that the freeze provisions of the Act should be interpreted in such a way as to foreclose the employer's right, during the freeze period, to discharge any employee without the consent of the union, or, alternatively, without just cause, the merits of which are reviewable by the Board under the freeze provisions. The Board dismissed the application, on the basis that the freeze provision of the Act did not provide a right not to be dismissed without just cause, prior to the negotiation of the first collective agreement.

> 15....There is nothing in section 70 (now section 86) of THE LABOUR RELATIONS ACT restricting the right of an employer to discharge an employee during the freeze period provided that the decision to discharge is not itself an unfair labour practice and is made and implemented in a manner consistent with the prior operation of the employer's business. Given the agreement of the parties that those were the conditions which obtained in the discharge of Gurdip Mushiana the Board must find that the complaint does not disclose any prima facie breach of the LABOUR RELATIONS ACT.

13 The employer argued that the Board has a discretion to inquire into an alleged unfair labour practice under section 96 of the Act. The Board should not exercise its discretion in this case, because what the union is essentially seeking is a rights arbitration. The Board has no jurisdiction to act as a rights arbitrator to determine whether Mr. Blundell was dismissed without just cause. Inquiring into this complaint would not serve any labour relations purpose which section 86 of the Act was designed to protect.

14 The employer argued that there are two primary purposes of the freeze provisions of the Act: to provide a point of departure for collective bargaining and to avoid any chilling effect which would prevent employees from exercising their rights under the Act (SPAR AEROSPACE PRODUCTS LTD., [1978] OLRB Rep. Sept. 859). Determining whether Mr. Blundell's dismissal was unjust would not serve either of those purposes.

15 The employer argued that when the Board terminated the bargaining rights of the SEU on September 22, 1995, the collective agreement ceased to operative forthwith, by virtue of section 58(6) of the old Act (now section 63(18)). From September 22, 1995, until the application for certification on October 2, 1995, the employees' terms and conditions of employment were subject to the common law of individual contract.

16 Under the common law, the employer is free to alter the terms and conditions of employment of the individual employee and is free to dismiss an employee for cause, or with reasonable notice. The only recourse for an employee under common law who believes he has been dismissed without cause or without reasonable notice, is to file a wrongful dismissal suit. This, the employer argued, is the regime which governed the employees of the MBE, including Mr. Blundell, from September 22, 1995.

17 On October 2, 1995, when the OSSTF applied for certification, the freeze provisions became effective. By virtue of section 86 (2) of the Act, the employer was prohibited from altering the terms and conditions of the individual employee's contract of employment, without the consent of the union. The freeze provision has not been interpreted as prohibiting an employer from implementing any changes in the workplace. Rather the employer is entitled to continue to conduct "business as usual". The employer continues to have the right to manage the workplace, subject to the prohibition against altering terms and conditions of employment. What was frozen, in the employer's view, was the above-mentioned common law regime, whereby an employer was free to dismiss an employee for cause or with reasonable notice. This regime was frozen until the union negotiated a new collective agreement. At the time Mr. Blundell was dismissed, no collective agreement had been negotiated, and accordingly, Mr. Blundell's employment was subject to the common law.

18 The employer was free to dismiss an employee for cause or with reasonable notice, and the employee had no right to arbitration to grieve the dismissal. Mr. Blundell's only recourse at that time was a civil suit for wrongful dismissal.

19 The employer relied on the case of WEBER v. ONTARIO HYDRO (1995), 12 C.C.E.L. (2d) 1 (S.C.C.) a recent Supreme Court of Canada decision, for the proposition that disputes should be decided in one forum. The Court stated that where the essential nature of the dispute arises pursuant to a collective agreement, the dispute should be resolved by arbitration, and not before the Courts. The employer argued that, in this case, the essential nature of the dispute does not arise under the LABOUR RELATIONS ACT, 1995 but rather, under the common law of wrongful dismissal, and therefore, the Courts should deal with it.

UNION'S ARGUMENTS

20 The union argued that the terms and conditions of the collective agreement between SEU and MBE which expired on October 31, 1994, were frozen during the renegotiation of the collective agreement pursuant to section 86(1) of the Act. The union conceded that the freeze expired on

September 22, 1995, pursuant to section 86(1)(b) when the Board terminated the bargaining rights of SEU. The union argued that section 63(18) is not applicable in this case.

21 The union noted that until September 22, 1995, an employee had the right to seek arbitration for an alleged breach of the freeze pursuant to section 86(3) of the Act.

22 On October 2, 1995, when OSSTF applied for certification, a new freeze came into effect, pursuant to section 86(2). The key issue in this case is which terms and conditions of employment were frozen.

23 The union agreed that, on September 22, 1995, when the first freeze expired, the employees' employment rights were governed by the common law, such that each employee had an individual contract of employment with the MBE. However, the union argued that the content of that individual contract of employment included the substantive terms of the expired collective agreement. The union argued that all the terms of the collective agreement which are applicable to an individual contract of employment continue to apply. For example, the rate of wages or the vacation entitlement of the individual employee remained the same as it had been under the collective agreement. Those aspects of the collective agreement which related to collective rights, which were not applicable to an individual contract of employment, were not incorporated into the individual contract of employment. For example, the union conceded the right to arbitration was not incorporated into the individual contract of employment. The union argued that article 11 of the expired collective agreement, which provided protection against discharge without just cause, was incorporated into the individual employment contract of all employees, including Mr. Blundell.

24 The union argued that subsequent to September 22, 1995 and prior to October 2, 1995, either party was free to seek changes to the terms and conditions of the individual employment contract, by agreement of the parties. However, if the employer unilaterally changed a term of employment, the employee could treat that as a constructive dismissal and could bring a wrongful dismissal suit.

25 The employer did not seek to make any changes to Mr. Blundell's individual employment contract; in particular, the employer did not seek to renegotiate Mr. Blundell's right not to be dismissed without just cause. Accordingly, on October 2, 1995, Mr. Blundell continued to enjoy the right not to be dismissed without just cause.

26 From October 2, 1995, when OSSTF's certification application triggered a new freeze, the employer was no longer free to change the terms and conditions of an individual's employment, without the consent of the union. An attempt to unilaterally change the terms and conditions of employment would amount to a breach of section 86 of the Act, for which a complaint could be brought to the Board.

27 The union relied on the case of ONTARIO HYDRO, [1983] OLRB Rep. Sept. 1536 in support of its submissions. In that case, the employees had been represented for several years by the Office and Professional Employees' International Union ("OPEIU"). Prior to the expiration of the

collective agreement, an application was brought to terminate the OPEIU's bargaining rights and on June 21, 1982, they were terminated. Shortly thereafter, on June 24, 1982, the Canadian Union of Public Employees, Local 1000 applied for certification as bargaining agent for those employees formerly represented by the OPEIU. The freeze provisions of the Act were therefore triggered, effective June 24, 1982. An employee was terminated during the freeze period for theft. The union brought an application under the freeze provision (then section 79, now section 86) alleging that the employee had been discharged without just cause, contrary to the corrective discipline procedures established by the employer. The employer agreed that a regular employee could not be discharged without just cause.

28 The Board determined that the terms of the relationship between Ontario Hydro and the employee could be gleaned from the provisions of the expired collective agreement as well as from the employer's written policies respecting working conditions. The Board noted that protection from unjust discharge and the obligation to apply progressive discipline were part of the "frozen" terms and conditions of employment preserved by section 79 (now section 86) of the Act. The Board concluded that the employee had been unjustly discharged, that the employer had not applied its policy of progressive discipline as it should have done, and that, consequently, there had been a breach of section 79 (now section 86) of the Act. The Board reinstated the employee, with compensation for back pay, minus the equivalent pay for a three day suspension, which the Board determined would have been the appropriate response, in accordance with the employer's established policy concerning corrective discipline.

29 The union argued that, despite the employer's concession in that case that the employee had just cause protection, the decision should be given considerable weight.

30 The union distinguished the case of BURLINGTON CARPET, relied on by the employer, on the basis that BURLINGTON CARPET involved a first contract situation, in which the employees had never enjoyed a right not to be terminated without just cause, which right could be frozen during the freeze period.

31 The union also relied on the case of RE TELEGRAM PUBLISHING CO. LTD. AND ZWELLING (1975) 67 D.L.R. (3d) 404 (Ont. C.A.). This case concerned the amount of severance pay owed to two employees following the closure of the Toronto Telegram. Article 11 of the collective agreement between the Toronto Newspaper Guild and the Toronto Telegram provided for the payment of severance pay in accordance with a specific formula. The collective agreement expired on December 31, 1970, but the terms of the agreement continued to apply during renegotiations, by virtue of the freeze provisions of the LABOUR RELATIONS ACT, until September 23, 1971, when the freeze, and hence, the collective agreement, expired. On September 24, 1971, the employer gave each employee a notice of termination of employment, effective January 15, 1972, which corresponded to the 16 weeks notice period required by the EMPLOYMENT STANDARDS ACT. The two employees argued that they were entitled to both notice under the EMPLOYMENT STANDARDS ACT and severance pay as provided for in the

expired collective agreement. In determining the terms and conditions of employment governing the employment relationship of two employees in the bargaining unit after the expiration of the collective agreement, the Court stated:

> As a result, the accepted view appears to be that where, after the collective agreement has expired, the employee has continued to work for the employer and the employer has continued to accept the benefit of his services, there being no agreement to the contrary, and no other circumstances from which there may be implied terms and conditions of employment different from those set out in the collective agreement, THE TERMS AND CONDITIONS OF THE EMPLOYMENT AFTER EXPIRY ARE TO BE IMPLIED AND WOULD BE SIMILAR TO THOSE SPELLED OUT IN THE COLLECTIVE AGREEMENT WHICH RELATED DIRECTLY TO THE INDIVIDUAL EMPLOYER-EMPLOYEE RELATIONSHIP (at page 412; emphasis added.)

32 The union argued that this is still the law in Ontario, and that the right not to be dismissed without just cause "related directly to the individual employer-employee relationship".

33 The union argued that there are no policy reasons against incorporating the right not to be dismissed without just cause into the individual contract of employment

THE DECISION

34 Section 96(4) gives the Board a discretion whether to inquire into a complaint of an unfair labour practice. Further, Rule 24 of the Board's Rules of Procedure provides that the Board may dismiss an application without a hearing where the application does not make out a case for the remedies requested. As we stated in our previous decision of February 14, 1996, a motion to dismiss a complaint because no PRIMA FACIE case has been made out should only be allowed where there is no reasonable likelihood that the complainant can succeed. In J. PAIVA FOODS LIMITED, [1985] OLRB Rep. May 690, the Board stated at page 691:

> The Board's discretion to dismiss a complaint on the grounds that it does not disclose a prima facie case should not only be exercised in the clearest of cases, that is, when the Board is satisfied that there is no reasonable likelihood that a violation of the Act can be established on the facts as alleged.

35 The Board has been guided by this principle in reaching its conclusions. For the purpose of the motion, the Board has assumed that the facts asserted in the application are true and provable.

36 We have considered this motion in two parts. First, do the pleadings make out a case of a breach of section 86? Second, should we exercise our discretion to decline to inquire into the complaint because it serves no labour relations purpose?

37 The union argues that it was a term or condition of Mr. Blundell's employment that he could not be dismissed except for "just cause" and that this term of employment was frozen by section 86 of the Act. The union also asserts that Mr. Blundell has been dismissed without "just cause". The union uses the term "just cause" to refer to the standard applied by arbitrators in interpreting the collective agreement.

38 Was it a term of Mr. Blundell's employment that he could not be dismissed except for "just cause", and, did this "just cause" protection survive the termination of the collective agreement?

39 When the collective agreement between the SEU and the MBE expired on October 31, 1994, and parties entered into renegotiations, the employer was prohibited from altering the terms or conditions of employment of the employees, except with the consent of the trade union, by virtue of section 86(1) of the Act. During the period of renegotiation, the mechanism for protecting the freeze rights was the process of arbitration, which, by virtue of section 86(3) of the Act, continued to apply, notwithstanding the expiration of the collective agreement.

40 On September 22, 1995, when the Board terminated the bargaining rights of the SEU, the freeze ended pursuant to section 86(1)(b) of the Act, and the collective agreement was no longer in effect between the SEU and the MBE.

41 From September 22, 1995, the employees' relationship with the employer changed from a situation where the employer must deal exclusively with the designated bargaining agent in accordance with the terms of the collective agreement, to a situation where the employer and the individual employee were free to set or modify the terms of the individual contract of employment, in accordance with the common law.

42 The case of RE TORONTO TELEGRAM stands for the proposition that, upon the expiration of a collective agreement, the terms and conditions of the individual's contract of employment are to be implied from those terms and conditions of the collective agreement which RELATE DIRECTLY TO THE INDIVIDUAL EMPLOYER-EMPLOYEE RELATIONSHIP, unless there is an agreement to the contrary, or other circumstances from which there may be implied terms and conditions of employment different from those set out in the collective agreement. However, the union conceded that some terms of the collective agreement confer rights of a collective nature (such as the right to arbitration) and do not survive the expiration of the collective agreement.

43 The employer did not attempt to modify the existing terms and conditions of employment between itself and Mr. Blundell after September 22, 1995. In accordance with RE TORONTO TELEGRAM, the terms of Mr. Blundell's individual employment contract can be determined by reference to the expired collective agreement, at least with respect to those terms which relate directly to the individual employer-employee relationship.

44 When OSSTF applied for certification on October 2, 1995, a new freeze was triggered pursuant to section 86(2) of the Act, freezing the individual terms and conditions of the employees'

employment as they existed in that brief period between September 22, 1995 and October 2, 1995. The specific question before this Board is whether it was a term or condition of Mr. Blundell's contract of employment during that period that he could not be dismissed except with "just cause".

45 In order to answer that question, it is necessary to examine briefly the situation of employees at common law, and how that situation changes with the advent of a collective bargaining agent and a collective agreement. At common law, the terms and conditions of employment between the employer and the employee are negotiated between the employer and the individual employee. Employees have limited protection against dismissal. An employee may be dismissed for "cause", or with reasonable notice or pay in lieu of notice. An employee who wishes to challenge any alleged breach of the employment contract, including whether the employer had "cause" for dismissal may bring an action in Court. In the case of a wrongful dismissal action, if the employee is successful, the measure of damages is generally limited to the amount of "reasonable notice" the employee should have received. Generally, reinstatement is not available at common law.

46 The situation of an employee represented by a bargaining agent and protected by the terms of a collective agreement, may be substantially different. Generally, the collective agreement contains some form of protection against discharge, except for "just cause". The term "just cause" has been the subject of considerable arbitral jurisprudence, and is not necessarily coincident with the standard of "cause" under the common law. Additionally, all collective agreements must provide a grievance and arbitration system for resolving all disputes arising under the collective agreement, including disputes with respect to whether an employer had "just cause" to discharge an employee. A significant difference between the protection provided to employees at common law and under a collective agreement lies in the remedies available for "unjust" discharge. If a discharge is found to be "unjust" the arbitrator or arbitration board has the power to order reinstatement, as well as monetary compensation for back wages. This differs substantially from the common law regime, where the employee's remedy is limited to monetary compensation.

47 Another difference is the process for enforcing rights under the collective agreement. Once a collective agreement has been entered into, the employee loses some of his/her autonomy to challenge alleged breaches of the collective agreement, including discharge. Generally, an employee has the right to file a grievance alleging a breach of the collective agreement, but it is the union which has the right to decide whether or not to pursue a grievance through the grievance and arbitration procedure.

48 In this case, the collective agreement between SEU and the MBE did impose some restriction on the employer's common law right to dismiss employees in the bargaining unit for cause or with reasonable notice. Article 11 of the expired collective agreement, which relates to management's right to discharge an employee, states:

> Article 11 Management Rights

11.01 The Union acknowledges that it is the exclusive right of the Employer:

b) to hire, direct, classify, transfer, promote, demote, lay-off and discharge or suspend or otherwise discipline employees who have completed their probationary period for just cause.

49 The right set out in article 11 is the employer's right to manage its workforce, including the right, among other things, to discharge an employee for "just cause". We would not characterize this an employee's right not to be dismissed except for "just cause". Rather, the employee's right, in our view, is merely the right to file a grievance challenging the employer's assertion of "just cause". However, it is not the employee who decides whether to pursue the grievance through the various steps of the grievance procedure, and ultimately, to arbitration. It is the union. (See articles 8 to 10 of the collective agreement, attached as Appendix "A"). Thus, it cannot be said that each individual employee in the bargaining unit has the right to challenge whether his/her discharge was for "just cause". That right belongs to the union, for the duration of the collective agreement. What the collective agreement confers on the individual employee is the right to have his/her bargaining agent decide whether to pursue the individual employee's grievance to arbitration, in an effort to restore the individual employee's employment.

50 In our view, the protection against dismissal except for "just cause" is a package of rights, including the standard of review applied by arbitrators, the process of grievance and arbitration, and the arbitral remedies of reinstatement and compensation. We do not accept that this package of rights can be subdivided into separate rights, such that the arbitral standard of review of "just cause" and/or the arbitral remedy of reinstatement survive the expiration of the collective agreement.

51 In our view, "just cause" protection in the collective agreement between SEU and the MBE confers rights of a collective nature ON THE BARGAINING AGENT, not of an individual nature on the individual bargaining unit employee. This "just cause" protection does not survive the termination of the collective agreement. After September 22, 1995, when the collective agreement ceased to apply to the employees of MBE, the employees, including Mr. Blundell, correspondingly lost the right file a grievance and to request the union to pursue a challenge to the employer's assertion of "just cause" for discharge, through the grievance and arbitration process.

52 After September 22, 1995, Mr. Blundell's right to challenge his dismissal was governed by the common law, and the appropriate procedure for remedying any breach of the common law was a civil action in the Courts. If we accepted the union's argument, that suggests that in a wrongful dismissal action brought by an employee following the expiration of the collective agreement, the Court would have to apply the arbitral standard of "just cause" and, possibly, provide the remedy of reinstatement and compensation. We do not think that is the case. In our view, after September 22, 1995 the Court would apply the common law standard of "cause" in adjudicating a wrongful dismissal action.

53 The Board concludes that the "just cause" protection set out in the collective agreement between SEU and the MBE did not survive the termination of the collective agreement. Accordingly, the "just cause" protection was not "frozen" by the onset of the second freeze under section 86(2), when OSSTF applied for certification on October 2, 1995.

54 The regime which governed the employees of the MBE with respect to discharge after September 22, 1995 was the common law and it was that common law regime which was frozen when the OSSTF applied for certification on October 2, 1995. It is not in dispute that the employer was asserting its common law right to terminate an employee for what it believed to be sufficient "cause".

55 We agree with the Board in BURLINGTON CARPET MILLS, SUPRA, that there is nothing in the statutory freeze provisions of the Act which restricts "the right of an employer to discharge an employee during the freeze period provided that the decision to discharge is not itself an unfair labour practice and is made and implemented in a manner consistent with the prior operation of the employer's business." (at paragraph 15). The union has not asserted that the employer has acted in a manner inconsistent with the prior operation of its business (apart from failing to apply a "just cause" standard, which argument we have rejected).

56 Accordingly, we conclude that, the applicant has not established an arguable case that the employer has altered any "term or condition of employment or any right, privilege or duty of the employer or the employees", contrary to section 86(2), in dismissing Mr. Blundell because of his ongoing absence. Mr. Blundell 's avenue to challenge the correctness of the employer's reason for discharge is the Court, not the Board.

57 The case of ONTARIO HYDRO is distinguished on the basis that the employer in that case did not dispute that it could not discharge an employee without "just cause" and both parties apparently AGREED that the Board should adjudicate whether the employer had just cause to dismiss the employee in question.

58 In any event, even if we were to conclude that it could be a breach of the statutory freeze to dismiss an employee without "just cause", the Board would exercise its discretion in this case to decline to inquire into this application. Having regard the purpose of the statutory freeze provisions, we are of the view that adjudicating the merits of an individual employee's discharge does not serve the labour relations purpose of the statutory freeze.

59 It is well established that the purpose of the statutory freeze is to maintain the prior pattern of the employment relationship while the parties are negotiating for a collective agreement "providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union." (Spar Aerospace Products Ltd., [1978] OLRB Rep. September 859; 1 Can LRBR 61 at 68-69) It should be noted that "the freeze does not attach to a particular employee, but rather to the totality of the employment relationship" (REST HAVEN NURSING HOME, [1979] OLRB Rep.

June 554 at paragraph 19). The focus of section 86 is on the PATTERN of employment practices, not on the application of that pattern to an individual employee. We fail to see how adjudicating the merits of an individual employee's discharge, addresses the statutory purposes of the freeze. Whether or not the employer was correct in its assessment of the "justness" of dismissing Mr. Blundell for his ongoing absence, does not give any party an unfair advantage in bargaining the collective agreement.

60 Assuming the Board has jurisdiction to adjudicate the merits of the individual's discharge under section 86 of the Act, that jurisdiction is shared with the Courts. Accordingly, the Board's exercise of discretion to decline to inquire into the merits of Mr. Blundell's discharge does not leave him without an alternative avenue to adjudicate his discharge.

61 The application is dismissed.

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APPENDIX "A"

ARTICLE 8 GRIEVANCE PROCEDURE

8.01 INTENT AND DEFINITION OF GRIEVANCE

It is mutually agreed that it is the spirit and intent of this article to settle, in an orderly procedure, grievances arising from the interpretation, application, administration or alleged contravention of this Agreement. All grievances arising between the employee and the Employer shall be dealt with in accordance with the following procedure.

8.02 INFORMAL STAGE

Any dispute to be recognized as a grievance must first be discussed with the grievor's immediate supervisor. For the purpose of clarity in this Agreement, an immediate superior shall mean the immediate superior of the employee who is outside the bargaining unit.

STEP 1

If the dispute is not to be considered as settled on the basis of the informal discussions as set out above, the employee, who may choose to be accompanied by a steward, shall, within ten (10) working days of the alleged grievance, submit a formal grievance notice in writing to the employee's immediate superior. The written notice shall contain the complete grievance, list all clauses alleged to

have been violated by specific number, the settlement requested, and shall not be subject to change after submission. The immediate superior shall provide an answer in writing to such employee within five (5) working days of receipt of the alleged grievance.

STEP 2

If the grievance is not to be considered as settled on the basis of the answer given in Step 1, then a Committee comprised of the employee, a steward and the business agent of the Union shall, within five (5) working days of the date on which the answer was received in Step 1, present the written grievance to the Superintendent responsible for Human Resources or appointee, who shall discuss the matter with such Committee and give a written answer within five (5) working days following the next regular meeting of the Board.

8.03 POLICY GRIEVANCE

Where a dispute involving a question of general application or interpretation occurs, which may not be the subject of a grievance which could be processed under 8.01, the Employer or the Union may lodge a grievance and steps 1 and 2 of this Article may be by passed but the party grieving shall submit a written grievance to the other party within ten (10) working days of its occurrence and the other party will give his/her answer within five (5) working days of the next regular meeting of the Union or five (5) working days of the next regular meeting of the Board.

ARTICLE 9 ARBITRATION

9.01

If the grievance is not to be considered as settled on the basis of the appropriate answer given in Article 8, either party may refer the matter to arbitration within ten (10) calendar days of the receipt of the answer of the other party at Step 2 or within ten (10) calendar days of the receipt of the answer in 8.02.

9.02 When either party requests that any matter be submitted to arbitration as hereinbefore provided, it shall make such request in writing addressed to the other party to this Agreement and at the same time, appoint a nominee. Within five (5) calendar days thereafter, the other party shall appoint a nominee; provided however, that if such party fails to appoint a nominee as herein required, the Minister of Labour for the Province of Ontario shall have power to effect such appointment upon application thereto by the party invoking arbitration procedure. The two nominees so appointed shall attempt to select by agreement, a Chairperson of the Arbitration Board. If they are unable to agree upon such a Chairman within a period of ten (10) calendar days, either party may then request

the Minister of Labour for the Province of Ontario to appoint the chairman.

9.03 The Arbitration Board shall hear the evidence of both parties and shall render a decision which shall be final, binding and enforceable upon both parties. The decision of the Arbitration Board shall be the decision of the majority and if there is no majority, the decision of the Chairman of the Arbitration Board shall govern.

9.04 It is agreed and understood that the Arbitration Board shall have no authority to alter, modify or annul any part of this Agreement. However, the Arbitration Board shall have full authority to order that an employee be reinstated with full, partial or no compensation or any other decision which the Board may deem just and equitable. Additionally the Arbitration Board shall have full authority to order that the Employer be compensated with full, partial or no damages or any other decision which the Board may deem just and equitable.

9.05 The time limits mentioned in this Article and in the preceding Article may be extended by mutual agreement of the parties but otherwise, time shall be of the essence of these two Articles. For the purpose of this and the preceding Article, Saturdays, Sundays and paid holidays as defined in 24.01 shall not be included in calculating working days time limits.

9.06 Each of the parties hereto will bear the fee and expense of the nominee appointed by it and the parties will jointly bear the fees and expenses, if any, of the Chairman of the Arbitration Board.

9.07 WITNESS AND INSPECTION

At any stage of the grievance procedure, including arbitration, the parties may have the assistance of the employees or employee concerned and any other necessary witnesses, (two only at one time), and all reasonable arrangements will be made to permit the conferring parties or the Board of Arbitration to have access to any part of the Employer's premises, to view any working condition which may be relevant to the settlement of the grievance or arbitration and provided it does not interfere with the Employer's operation of a school.

ARTICLE 10 DISCHARGE CASES

10.01 A claim by an employee that he/she has been unjustly discharged shall be treated as a grievance if written statement of such grievance is lodged by the employee with the Superintendent responsible for Human Resources or his/her appointee within five (5) working days of the date of the employee's discharge. Such grievance shall be taken up at a special meeting with the grievance committee of the Union at Step 2 of the grievance procedure. Such special grievance may be settled by confirming the Board's action in dismissing the employee or by reinstating the employee with full, partial or no compensation for time lost, or by any other arrangement which is just and equitable in the opinion of the conferring parties or the Board of Arbitration or in accordance with the provisions for dealing with all grievances. When an employee has been dismissed with or without notice, his/her steward or the Chief Steward shall be notified.