

-ARBITRABILITY
-ADMISSIBILITY OF EVIDENCE

**FINDINGS AND AWARD
IN A DISPUTE**

BETWEEN: **NEWFOUNDLAND AND LABRADOR ASSOCIATION OF
PUBLIC AND PRIVATE EMPLOYEES**

(hereinafter called the "Union")

AND: **TREASURY BOARD, on behalf of THE DEPARTMENT OF
JUSTICE, GOVERNMENT OF NEWFOUNDLAND AND
LABRADOR**

(hereinafter called the "Employer")

GRIEVORS: **GEORGINA SOMERTON and JEANETTE MARTIN**
FOR THE UNION: **CHRIS HENLEY**
FOR THE EMPLOYER: **DAVID MARTIN**
BEFORE: **W. JOHN CLARKE, C.Arb., C.Med., Sole Arbitrator**

PRELIMINARY

The hearing of the preliminary objection in this matter took place at St. John's on November 20, 2006 at which time the parties agreed as follows:

1. The Arbitrator was acceptable.
2. There was a preliminary objection made by the employer going to the jurisdiction of the arbitrator to hear the grievance.
3. The grievance procedure had been properly followed or requirements had been waived.



4. The arbitrator would remain seized of the matter in the event the parties could not agree on the interpretation of the award or in the event there is a question of compensation arising from the award.
5. Witnesses were permitted to remain throughout the hearing.
6. The time limits for the filing of the award were waived.
7. There were other persons in similar circumstances as the grievors but the other grievances have been held in abeyance by agreement of the parties until the outcome of the within matter.

The following Exhibits were entered by consent and identified as follows:

- C#1 General Service Collective Agreement between the Employer and the Union signed June 27, 2001 with expiry March 31, 2004.
- C#2 Letter from Chris Henley of the Union to David Hickey of the Employer attached to which was a grievance form dated February 20, 2004.
- C#3 Record of the classification request by thirteen employees not including the two grievors.
- C#4 Agreed Statement of Facts between the parties.
- C#5 Classification request, portion of exhibit C#4.

No witnesses were called to testify.

THE FACTS

At the commencement of the hearing the parties entered an agreed Statement of Facts which reads as follows:

“The employer and union agree that the following constitute the material facts of the grievance of Georgina Somerton and Jeannette Martin:



1. On February 20, 2004 Ms. Georgina Somerton and Ms. Jeannette Martin filed a grievance alleging a violation of Article 30 of the General Service Collective Agreement. The grievance was filed in response to the Classification Appeals Board decision, dated February 17, 2004 concerning a classification review request by a number of Court Clerks in the Department of Justice received by Classification & Pay Division of Treasury Board on November 28, 2000.
2. The above noted classification review request was signed and submitted by the following employees:

Patricia Furlong	Michele Hunter	Leah Pitcher
Ronald Whelan	Margaret Williams	Kelly Dyer
Janice Baker	Ivy Blake	Bernice Pittman
Patricia Badcock	Mary Keough	Sheila Tapper
Sharon Hynes		
3. Neither Georgina Somerton nor Jeannette Martin were signatories to the above noted classification review request.
4. The request received November 28, 2000 was reviewed and completed by Classification & Pay Division on January 23, 2001 and did not result in a change in the classification of the court clerk positions included in the request.
5. The employees appealed this decision to the Classification Appeals Board which rendered a decision on February 17, 2004. The Appeals Board decision was to reclassify the employees positions' as indicated in item 2 above included in the request from Court Clerk I (GS-26) to Court Officer I (GS-30) effective November 28, 2000.

Notice of appeal was signed by nine (9) clerks of the Supreme Court and the union



successfully argued that the appeal should at least cover all thirteen (13) of the employees who signed the original request for reclassification.

6. On February 19, 2004 a request for classification review was received by Classification & Pay Division of Treasury Board signed by the following Court Clerk I's of the department of Justice:

Jeannette Martin
Marilyn White
Rebecca Kendall
Lynn Maher Boyles

Georgina Somerton
Lynette Payne
Sandra Oxford

Tamara Chafe
Michele Drake
Vicki Budgell

7. Lynn Maher Boyles was originally included in the request received February 19, 2004 but was subsequently dropped from the request. It was determined Ms. Boyles was covered by the Appeal Board decision of February 17, 2004 and reclassified to a Court Officer I (GS-30) effective November 28, 2000. See attached letter from Mr. David Hickey to Mr. Alf Gosse dated February 19, 2004.
8. The review of the request received by Classification & Pay Division on February 19, 2004 was completed October 12, 2004 and did not result in any change in the classification of the employees positions.
9. The employees included in Item 6 above (with the exception of Lynn Maher Boyles) appealed this decision to the Classification Appeals Board which rendered a decision on November 21, 2005. The decision was to reclassify the employees positions included in item 6 above from Court Clerk I (GS-26) to Court Officer I (GS-30) effective February 19, 2004."

The letter to Mr. Alf Gosse of Treasury Board from David Hickey, Director, Human



Resources Division dated 2004 02 19 reads in part as follows:

“Re: Linda Maher-Boyles, Court Clerk I

As discussed in a meeting today with Ms. Judi Evans, Human Resource Manager, we would like to request that this position be reclassified to Court Officer I, GS-30, retroactive to November 28, 2000, similar to the other thirteen (13) positions which have been recently reclassified.

By way of background Ms. Maher-Boyles has been a Court Clerk in the Supreme Court Trial Division for many years. In September 2000, she signed the Job Description with other Court Clerks (see attached) which was submitted to the Director of Supreme Court Services in order to proceed with a classification review. This Job Description was sent back by the Director for revisions and was re-submitted in November 2000, however, she neglected to sign the request for review. I note, however, that the request which I sent to treasury Board on November 22, 2000, indicated that there would be a review of fourteen (14) positions and only thirteen (13) positions have since been reclassified. In fact, it is our understanding that Margaret Williams signed the request on her behalf at that time since Ms. Williams signed the request twice (see attached).

Furthermore, when the Job Description was submitted for these Court Clerks, only one position control number (ie. PCN: 05313) was indicated on the Job Description. The Position Control Numbers were then hand-written on the Job Description by yourself at the time when you conducted the classification review. As noted on the attached, her permanent Position Control Number 05312 was noted by you as one of the positions under review at that time.

In view of the above circumstances, we believe that her position should be treated similarly to the four (4) Court clerks at the Unified Family court that were recently reclassified accordingly. I note that we have reviewed this matter thoroughly and this is the only other exceptional situation which we feel warrants a reclassification and the retroactive pay accordingly.

If you require further clarification or wish to discuss, please feel free to contact me. Thank you for your cooperation...”

THE GRIEVANCE

On February 4, 2004, a grievance was filed on behalf of Georgina Somerton and Jeannette

Martin which alleged as follows:

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“Violation of Article 30 and all other pertinent articles”

The “Requested Adjustment” was:

“Complete re-dress.”

In its Reply, the employer answered:

“No violation of Article 30 or other pertinent articles”

THE UNION’S POSITION

In its presentation, the Union sought to adduce much information which was not included in the “Agreed Statement of Facts”. The history of the dispute including the procedures invoked by the Grievors to attain relief as well as the chronology of the events leading up to the arbitration hearing were all set forth by the union. It was the union’s position that it all should be considered by the arbitrator in arriving at the decision in this matter.

The union does not take issue with the premise that the employer has the right to make decisions. In this case, the Classification Appeal Board heard and ruled upon an appeal from a decision of the employer and granted the appeal. The Appellants in that Appeal as listed in the heading of the Tribunal’s “Record of Decision” were: Patricia Furlong, Bernice Pittman, Kelly Dyer, Ivy Blake, Janice Baker, Margaret Williams, Michelle Hillier, Leah Pitcher and Ron Whalen all of whom had been Court Clerk I’s (pay scale GS 26). As a result of the successful appeal, they were all classified as Court Officer I’s (pay scale GS 30) with the appropriate retroactive pay to the effective date of the decision. However, the actual review request was presented on behalf of 13 individuals who were the 9 listed in the heading of the Appeal Tribunal in addition to: Patricia

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Badcock, Sharon Hynes, Mary Keough, and Sheila Tapper. (It should be noted as well that the appeal decision lists “Michelle Hillier” as one of the appellants. There is no such person mentioned in the “Agreed Statement of Facts” in paragraph 2, however, a “Michele Hunter” is listed there. She does not appear on the appeal board listing.)

The other exceptional circumstance is that Court Clerk I Lynn Maher Boyles had been an original signatory to the request for reclassification but due to some oversight after revisions were made to the original application, she omitted to sign the application as remitted the second time. This situation was rectified in correspondence between the Director of Human Resources and the Director of Classification and, Organization & Management Division of Treasury Board such that Ms. Maher Boyles was granted the reclassification as well.

The remaining four individuals, namely Patricia Badcock, Sharon Hynes, Mary Keough and Sheila Tapper were granted reclassification by the employer. The Grievors were part of a group which sought a reclassification of their position on February 19, 2004; some two days after the Classification Appeals Board rendered its decision on February 17, 2004. The two Grievors were not part of the original application for reclassification which was filed on November 28, 2000.

THE EMPLOYER’S POSITION

The employer argued that the parties had submitted to the arbitrator an agreed statement of facts and that these were the only facts which are in evidence in this hearing. All the gratuitous commentary given by the union in its argument is simply that, gratuitous commentary, and should not be taken into account by the arbitrator as if it was evidence.



The gist of the employer's position on the merits of the objection is that the arbitrator has no jurisdiction to even hear this matter as it involves an issue of classification and pay. Jurisdiction over that topic is given to another body which has made rulings on the very issue in play in this proceeding and therefore the arbitrator should concede jurisdiction to that tribunal and disallow the grievance.

FINDINGS AND AWARD ON THE PRELIMINARY MATTER

The first issue in this matter is the evidence upon which the arbitrator can rely in assessing the merits of the case. The employer argues that the Parties submitted to the arbitrator an "Agreed Statement of Facts" which is the sum total of all the evidence that can be considered by the arbitrator. The Union disagrees with that position.

Much of the evidence which was proffered at the hearing cannot be reasonably classified as evidence unless it was adduced with the consent of the employer, which it clearly in this case was not.

Black's Law Dictionary, Revised 4th edition (West Publishing Co.) defines "Evidence", in part as:

"Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention."

Further:

"Facts admitted upon the trial of cause become 'evidence'."

The explanations of the events leading up to the re-classification of the Grievors' positions and

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other matters relied upon but not set forth in the “Agreed Statement of Facts” were not put into evidence in the manner suggested by this definition as being acceptable. They were, for the most part, explanations and factual assertions of events leading up to the hearing of the classification decision making process, given by the union representative. It is true that in matters of arbitration, arbitrators have significantly more leeway in terms of what will be accepted and what will not be accepted as evidence. When the matter of admissibility is contested, as it is here, and it is apparent that there was some degree of agreement on what had happened in the circumstances, it would be unwise to admit such “facts” contrary to the agreed ones or to permit the agreed ones to be supplemented as if such contrary allegations were proven through sworn testimony of a witness. Indeed, it would be most unfair to the other party, the employer in this case. The employer comes to the hearing believing that a set of facts is what the case will be argued upon only to find that the other side has proffered and the arbitrator has accepted allegations of what happened without affording that party the opportunity to cross-examine those assertions or to provide contrary “facts”.

As a result, the evidence which is admitted for consideration is what is contained in the statement as agreed upon by the Parties and the consent exhibits. The submissions of fact not given under oath will be disregarded.

The main contention on the preliminary matter is whether the arbitrator has any jurisdiction to review and, if necessary, interfere with the rulings made by the Classification Appeal Board.

It is important at the outset to have an understanding of the classification process of government. The font of all classification powers is found in The Financial Administration Act, RSNL 1990, c.F-8. That Act establishes a Treasury Board among the powers conferred upon which is that contained in subsection 7(1)(c) which reads:

“7(1) The board may...

(c) provide for the classification of positions within the public service and of a public body;”

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The collective agreement between the parties has two relevant provisions. The first is contained in Article 30 which reads as follows:

- ARTICLE 30**
- CLASSIFICATION**
- 30.01 Employees shall be notified, in writing, of any changes in their classification.
 - 30.02 The Classification Appeal Board shall carry out its functions in accordance with the Classification Review and Appeal Board Procedures as set out in Schedule 'F'.
 - 30.03 When an employee feels that his/her position has been unfairly or incorrectly classified, the employee may submit a request for review in accordance with the procedures outlined in Schedule 'F'.
 - 30.04 Classification decisions arising out of an employee's request for review or appeal shall be retroactive to the date the request was first received by the Classification, Organization and Management Division of Treasury Board."

Schedule "F" of the collective agreement is entitled "**THE CLASSIFICATION REVIEW AND APPEAL PROCESS**". It defines a "Review" in section 6 to mean:

"re-appraisal or re-assessment of an employee's position classification by the Classification, Organization and Management Division of Treasury Board upon request of the employee or the permanent head of the organization."

The balance of the Schedule deals with the procedures to be followed by the Division, establishes an appeal process from a decision of the Classification, Organization and Management Division of Treasury Board to a Classification Appeal Board and sets forth the guidelines by which an appeal may be initiated and concluded. In short, it is a code for dealing with issues of classification of positions and appeals from decisions made by the board at first instance.

The second relevant provision contained in the agreement is found in Article 13 which reads in



part as follows:

“

ARTICLE 13
ARBITRATION

13.01 Where a difference arises between the parties to or persons bound by this Agreement or on whose behalf it has been entered into and where that difference arises out of the interpretation, application, administration or alleged violation of this Agreement and including any question as to whether a matter is arbitrable, either of the parties may within fourteen (14) calendar days after exhausting the grievance procedure notify the other party in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of the person appointed to be arbitrator by the party giving notice.

...

13.14 An arbitration board may not alter, modify or amend any provisions of this agreement but shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

As can be seen, an arbitrator under this collective agreement is given the ultimate authority for settling differences which arise between the parties to the agreement. This authority is enshrined in both the collective agreement and by legislative mandate in The Labour Relations Act, RSNL 1990, c. L-1, s.86 and The Public Service Collective Bargaining Act, RSNL 1990, c.P-42, s. 39. The power bestowed upon an arbitrator is wide in that it covers interpretation, application and administration of the collective agreement as well as alleged violations of the agreement including the power to determine if a matter is indeed arbitrable and to decide the issue as the arbitrator deems just and equitable – all short of altering, modifying or amending the agreement. It is an oversight power on the operation of the collective agreement as that agreement was written by the parties.

In the instant case, there is a provision whereby employees who feel aggrieved that their positions have been unfairly or incorrectly misclassified can refer that complaint to a creature of their agreement, the Classification, Organization and Management Division of Treasury Board.



That Board itself is governed by the processes set up by the parties in Schedule F of the collective agreement as drafted by them. It seems that the interrelationship of an arbitrator with that Board is one whereby the arbitrator must see that the referral to the Board is conducted in accordance with the provisions of the collective agreement. Once satisfied that the Grievor has the access to that Board as is granted to them by the agreement, the conduct of the matter from that point onward is completely within the realm and jurisdiction of that board. Whether that board makes a proper decision is an issue with which an arbitrator should not be involved. As pointed out in NAPE & HM The Queen in Right of Newfoundland, (Group Grievance, 2000 L. Rose, Q.C., Smith and Oakley, Chair, unreported) at p.23 of the Award:

“ The grievance and arbitration procedure in the collective agreement is not available to provide redress to an employee who is dissatisfied with the classification of his or her position.”

The parties have established a process for reviewing situations as defined in Article 30 and have set forth elaborate processes by which such requests and appeals made regarding those requests are to be dealt with. As long as the referral process is being properly followed, there is no room for arbitral involvement. On the facts before me, I cannot conclude otherwise than the process of dealing with dissatisfaction of a classification which the Grievors apparently hold has been properly referred to the Board established by the legislature and the parties to deal with such matters.

In The Nfld. Farm Products Corp. & NAPE (John Mitchell, Grievor – 1990, Browne, unreported) the arbitrator found, at pp. 13-14:

“The fact of the matter is that the Grievor was proceeding correctly under this Collective Agreement when he made his initial request for a classification review of his Storekeeper I position. That request was submitted to the Director of Classification and Pay Division of Treasury Board pursuant to the procedures outlined under the Classification and Appeal Board procedures at page 63 of the agreement. When the division denied his request, the Grievor chose, as was his right, to appeal the decision to the Classification Appeal Board...”

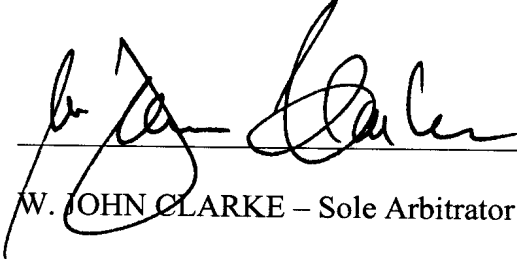
The parties saw fit to incorporate the Classification Review and Appeal Board procedures as a part of this collective agreement. In so doing they given (sic) a specific jurisdiction to the Classification and Pay Division of the Treasury Board and where applicable the Classification Appeal Board. The subject matter of this grievance is properly within the



jurisdiction of these bodies. The arbitrator cannot assume jurisdiction in a matter which the parties have agreed is to be the domain of the Classification and Pay Division and the Classification Appeal Board, it follows that the preliminary objection must succeed.”

In the instant case the referral was made to the Classification and Pay Division of Treasury Board thereby clothing it with the authority and jurisdiction to deal with it. The preliminary objection must therefore be upheld. As the arbitrator has no authority under the agreement to deal with the matter, the grievance must be denied.

DATED at St. John's, Newfoundland and Labrador this 12th day of March, 2007



W. JOHN CLARKE – Sole Arbitrator