

Subject - Termination of Employment

**ARBITRATION AWARD**

BETWEEN:

COMMUNICATIONS, ENERGY AND PAPERWORKERS  
UNION OF CANADA, LOCAL 60N  
(hereinafter called the “Union”)

AND:

HIBERNIA PLATFORM EMPLOYERS ORGANIZATION  
(hereinafter called the “HPEO”)

GRIEVOR: Mike Cooze

COUNSEL: For the Union

John J. Harris, Q.C.

For the Employer

Michael F. Harrington, Q.C.

ARBITRATOR: James C. Oakley



The arbitration hearing was held at St. John's on November 28, 2006, January 15, 16, 18, 19, 22, 23, February 12, 13, 14, and 15, 2007. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter for thirty (30) days following publication of the Award in the event there was a question of interpretation or compensation arising from the Award.
5. Witnesses were excluded from the Hearing.

The following exhibits were entered at the hearing:

- Consent 1 - First Collective Agreement between Communications, Energy and Paperworkers Union of Canada, Local 60N and Hibernia Platform Employers Organization effective May 1, 2006
- Consent 2 - Letter dated August 22, 2006 from Harvey Stone, Rig Superintendent and Nicole Parsons, Human Resources Coordinator of Noble Drilling (Canada) Ltd. to Mike Cooze
- Consent 3 - Record of Employment for Michael Cooze dated September 13, 2006
- Consent 4 - Complaint/Grievance Form submitted August 23, 2006
- Consent 5 - Letter dated September 5, 2006 from Nicole Parsons, Human Resources Coordinator, Noble Drilling (Canada) Ltd. to Sheldon Peddle, Communications, Energy and Paper Workers Union of Canada stating denial of grievance at step 2 of the grievance procedure
- Consent 6 - Letter dated September 14, 2006 from David J. Rahal, HPEO representative to Sheldon Peddle stating denial of grievance at step 3 of the grievance procedure
- Consent 7 - Memorandum dated September 18, 2006 from Sheldon Peddle, Communications, Energy and Paperworkers Union of Canada to David J. Rahal of HPEO stating Union's intention to proceed to arbitration
- Consent 8 - Letter dated September 20, 2006 from Charles Shewfelt, National Representative of

Communications, Energy and Paperworkers of Canada to David J. Rahal, HPEO representative referring the grievance to arbitration

- NP - 1 Mike Cooze's 2006 work schedule
- NP - 2 Extract from booklet "Employment Standards in Newfoundland and Labrador, February, 2004"
- NP - 2A Booklet "Employment Standards in Newfoundland and Labrador, July 2002"
- NP - 3 Noble Drilling (Canada) Ltd. - Temporary seniority list as of September 30, 2006
- NP - 4 Memo dated August 21, 2006 from Nicole Parsons to Kevin Roche, Harvey Stone - Subject: Mike Cooze - Abandonment
- TC - 1 Extra Contribution Nomination Record for Mike Cooze, nominated by Tony Chaytor dated January 23, 2001
- GS - 1 Electrical Maintenance Log Book
- BO - 1 HPEO/CEP, Local 60N Agreed Document # 17 - August 25, 2004
- BO - 2 HPEO/CEP Local 60N collective bargaining proposals, page 25
- BO - 3 HPEO proposal # 23 dated August 18, 2004 - Article 11.9
- BO - 4 HPEO proposal # 24 dated August 19, 2004 - Article 11.9
- BO - 5 HPEO proposal # 25 dated August 24, 2004 - Article 11.10
- KC - 1 *Labour Standards Act*, RSNL 1990, c. L-2, sections 39 to 43.16
- KC - 2 Booklet "Employment Standards in Newfoundland and Labrador, 2004"
- KC - 3 Booklet "Employment Standards in Newfoundland and Labrador, 2005"
- KC - 4 *Labour Standards Act*, RSNL 1990, c. L-2, section 62
- SP - 1 Magna Services Limited temporary seniority list as of May 1, 2006
- RD - 1 Response to grievance at Step I dated July 12, 2006 signed by Kirk Barrington for management, Mike Cooze, Grievor and Dennis Flood for the Union
- MC - 1 Letter dated July 20, 2006 from Nicole Parsons, Human Resources Coordinator to Mike Cooze with summary of change in payroll status effective July 16, 2006

- MC - 2 Resume of Mike Cooze
- MC - 3 Certificate of Attendance awarded to Mike Cooze, Siemens Master Drive Training Seminar, May 4, 2001
- MC - 4 Achievement award to Mike Cooze, completion of DuPont safety course, STOP, March 15, 2002
- MC - 5 Noble Drilling (Canada) Ltd. Certificate of Completion to Mike Cooze, ISO 14001:1996, November 15, 2002
- MC - 6 Certificate of Training issued to Mike Cooze for WHMIS, chemicals awareness, v4.1a, March 28, 2003
- MC - 7 Certificate of Completion issued to Mike Cooze, Siemens, Step 7, Maintenance 1, May 21 - 23, 2003
- MC - 8 Nova Scotia Community College Certificate of Completion issued to Mike Cooze, Electrical Apparatus and Hazardous Areas, November 14, 2003
- MC - 9 Certificate issued to Mike Cooze, Control of Work H2S Awareness Training, February 23, 2004
- MC - 10 Certificate of Accomplishment awarded to Mike Cooze, Safety Leadership V, October 12-14, 2004, Noble Drilling (Canada) Ltd.
- MC - 11 Memo dated August 13, 2001 from Clark Stokes to E&I Systems Lead stating commendation to Mike Cooze
- MC - 12 Letter dated November 13, 2002 from Noble Drilling (Canada) Ltd., Louis Puddister, Human Resources Coordinator to Mike Cooze expressing appreciation for a successful 2002
- MC - 13 Letter dated March 21, 2005 from Liam Mallon, President, Exxon Mobil Canada Ltd. re selection for Exxon Mobil Canada East President's Safety Award for the month of February, 2005
- MC - 14 Letter dated October 6, 2005 from John Lowrey, Eastern Canada Field Drilling Manager, HMDC to Mike Cooze on selection as SH&E Leader of the Month, September, 2005
- MC - 15 Certificate for SH&E Leader of the Month, October, 2005
- MC - 16 Performance Appraisal for Mike Cooze dated February 26, 2001

- MC - 17 Performance Meeting Summary Sheet for Mike Cooze - September 30, 2001
- MC - 18 Performance Meeting Summary Sheet for Mike Cooze - July 19, 2002
- MC - 19 Performance Review Summary Sheet for Mike Cooze dated August, 2003
- MC - 20 Performance Review Summary Sheet for Mike Cooze and Performance Appraisal dated August 15, 2004
- MC - 21 Performance Review Summary Sheet for Mike Cooze dated August 21, 2005
- MC - 22 Summary of Mike Cooze attendance, January, 2000 to August 21, 2006
- MC - 23 Memorandum dated June 17, 2006 from Tony Chaytor, Rig Manager to Mike Cooze re letter of complaint - refusal of family responsibility leave
- MC - 24 Insurance proof of loss form dated August 11, 2006
- MC - 25 Letter dated August 12, 2006 from Neil Lacey, Crawford Adjusting to Mike Cooze
- MC - 26 Estimate of water damage repairs from Power Vac Services dated August 15, 2006
- MC - 27 to  
MC - 31 Photographs showing laundry room floor and interior of Mike Cooze's house
- MC - 32 Email dated April 23, 2006 from David Williams with attached request from Mike Cooze for time off starting July 10, 2006

### **Nature of the Grievance**

The Union grieves the termination of employment of the Grievor, Mike Cooze. By letter dated August 22, 2006, Noble Drilling (Canada) Ltd. ("Noble" or the "Employer") advised the Grievor that he failed to report to work without just cause and was deemed to have terminated his employment under Article 27.10 (c) of the Collective Agreement. The grievance concerns the interpretation of the Collective Agreement and the application of the Collective Agreement to the facts of the case.

### **Collective Agreement**

The relevant Articles of the Collective Agreement between Communications, Energy and Paperworkers Union of Canada, Local 60N and Hibernia Platform Employers' Organization are as follows:

Article 5 - Management Rights

Subject to the terms and conditions of the agreement, the employers maintain the exclusive rights to manage and direct all aspects of the platform's operation and the work force:

These rights include:

- (a) manage operations in a safe, efficient and profitable manner to maintain Hibernia's competitive capability;
- (b) hire, lay-off, recall, transfer on the platform, promote, evaluate, classify or demote employees;
- (c) discipline, suspend or terminate the employment of any employee for just cause;

...

All management rights, whether enumerated or otherwise, shall be reserved unto the employers, except as specifically abridged by this agreement.

...

Article 15 - Arbitration

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15.3 The Arbitrator shall determine the procedure, but shall give full opportunity to all parties to present evidence and make representations. The Arbitrator shall hear and determine the difference or allegation and render a decision within sixty (60) calendar days from the arbitration hearing.

15.4 The decision of the Arbitrator shall be final and binding on all parties. The Arbitrator shall not have the power to change this agreement or to alter, modify or amend any of its provisions.

...

15.9 The Arbitrator or Arbitration Board has the power to substitute for the discipline or discharge of an employee any other penalty that the Arbitrator or Arbitration Board deems to be just and reasonable.

...

Article 27 - Seniority

27.1 Each employer shall have its own regular rotation employee seniority list and

temporary employee seniority list as applicable.

...

27.10 An employee shall lose seniority, shall be removed from the employer's seniority list and shall be terminated for any one of the following reasons:

- a) The employee quits, resigns or retires.
- b) The employee is terminated for just cause and not reinstated.
- c) The employee fails to report for work without just cause.
- d) The employee fails to return to work from a leave of absence on the expiration date, unless the leave is extended for extenuating circumstances as approved by the employer.
- e) The regular rotation employee is laid off and fails to return to work when requested to do so by the employer in accordance with Article 28.3.
- f) The regular rotation employee has been on layoff for a period of twelve (12) consecutive months.
- g) The temporary employee, on three (3) consecutive occasions, having been notified of a recall in accordance with Article 28.4, declines the recall.
- h) The temporary employee has not worked for the employer on the platform for a period of twelve (12) consecutive months.

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Article 28 - Layoffs and Recall

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28.3 Regular rotation employees must notify their Human Resources Department of their intention to return to work within three (3) calendar days of the employer's recall by telephone. The employee must be available to report to work within seven (7) calendar days from the date of the recall, unless the employee's current employer requires greater notice, which shall not exceed fourteen (14) calendar days after the employee's response to the recall.

...

Article 34 - Leaves of Absence

34.1 This article only applies to employees, who have successfully completed the required probationary period. Employees must apply in writing to their supervisor, provide any required documentation satisfactory to the supervisor, and receive approval from their supervisor for all leaves of absence.

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34.4 Maternity, Parental, Adoption and Family Responsibility Leaves

Employees are entitled to Maternity, Parental, Adoption and Family

Responsibility leaves as provided for in the applicable legislation.

### **Evidence**

At the commencement of the hearing, the Arbitrator heard submissions from the parties with respect to the order in which the parties would present evidence. The Arbitrator directed that the HPEO present evidence first. It was unnecessary to decide at that stage of the proceedings whether the termination of employment of the Grievor was disciplinary, as alleged by the Union, or a nondisciplinary deemed termination, as alleged by the HPEO. Where the Employer had knowledge of the facts upon which it proceeded to terminate the employment of the Grievor, it was more practical and in the interests of fairness that the HPEO proceed first. The fact that the HPEO was directed to present evidence first did not mean that there was any finding that it had the burden of proof with respect to any of the issues in dispute.

The witnesses called by the Employer were Renee Mahon, accountant, David Williams, drilling maintenance coordinator, Nicole Parsons, human resources coordinator, Anthony Chaytor, rig manager, Gerard Shea, drilling maintenance coordinator, David Rahal, HPEO representative. The witnesses called by the Union were John Whalen, radio operator, Bill O'Neill, Union bargaining committee member, Ken Clements, Director of Labour Standards for Newfoundland and Labrador, Gerard Ryan, Union bargaining committee member, Sheldon Peddle, Union bargaining committee member, Bill Holloway, electrician, Robert Dean, instrumentation technician and Mike Cooze, Grievor.

The Grievor, Mike Cooze, was employed as an electrician by Noble Drilling (Canada) Ltd. on the Hibernia offshore production platform. His employment was terminated by letter dated August 22, 2006 which stated as follows:

Dear Mr. Cooze:

On Monday, August 21, 2006 you failed to report to work without just cause. Therefore in accordance with Article 27.10 (c) of the CEP and HPEO Collective

Agreement, you are deemed to have terminated your employment without notice and your last day of employment with Noble Drilling (Canada) Ltd. was Sunday, August 20, 2006.

Your final pay cheque covering the period of August 16 - 20, 2006 will be directly deposited to your bank account on August 31, 2006. A record of employment will be issued on that day and sent to you in the mail.

Be advised that your group insurance benefits (medical, dental, life insurance, accidental death and dismemberment) ended the date your employment ended, August 20, 2006. Should you wish, you should make alternate insurance arrangements. An information sheet concerning your Thrift Plan is attached; you have one year to exercise options related to this benefit. The completed form should be returned to the address noted. Questions regarding this information should be addressed to Jennifer Mercer.

Yours truly,

Noble Drilling (Canada) Ltd.

Harvey Stone  
Rig Superintendent

Nicole Parsons  
Human Resources Coordinator

The Hibernia oil production platform is located on the Grand Banks in the North Atlantic Ocean approximately 315 kilometres from St. John's. The licensed operator of the platform is Hibernia Management and Development Company Ltd. ("HMDC"). Noble has held a commercial contract with HMDC for the past 12 years to provide personnel, drilling and maintenance services to the 2 drilling rigs on the Hibernia platform. The Noble management employees working offshore consist of the drill rig manager, drilling team leads, assistant drilling team leads, safety health and environment advisor, and maintenance coordinator. The Grievor's immediate supervisor was the drilling maintenance coordinator. The drilling maintenance department provides maintenance services to the drilling rigs on the platform. The drilling maintenance department has 13 personnel on board the platform ("POB"), consisting of the drilling maintenance coordinator, data entry person, 2 electricians, 4 instrumentation technicians and 5 mechanics. The drilling maintenance coordinator is responsible to the rig manager for the drilling rig. The senior management person on the platform for HMDC is the offshore installation manager ("OIM").

The regular rotation employees work a schedule of 3 weeks offshore followed by 3 weeks onshore. The 3 week rotation offshore is also called a “hitch”. Schedules are prepared for employees showing onshore and offshore periods for an entire calendar year. There are 2 electricians on board the platform in the drilling maintenance department, one for the day shift and one for the night shift. The electricians alternate from day shift on one rotation to night shift on the next rotation.

Employees are transported to the platform by helicopter from the heliport in St. John’s. Most helicopter flights landing at Hibernia are dedicated to the Hibernia platform. Some flights may also land at the Terra Nova or White Rose production platforms or one of the drilling platforms located in the same area on the Grand Banks. Employees may also be transported by supply boat in the event that fog or other inclement weather prevents the helicopter from landing.

Noble is one of the employers on the Hibernia platform who are members of the Hibernia Platform Employers Organization. The HPEO was formed following the certification order of the Labour Relations Board of Newfoundland and Labrador dated October 11, 2001. The HPEO has the authority by legislation to bargain collectively with the certified bargaining agent, the Communications, Energy and Paperworkers Union of Canada, Local 60N. The HPEO and the Union entered into negotiations for a first Collective Agreement. During the negotiations the parties reached agreement on several articles in the Collective Agreement, including Article 27.10. A proposed Collective Agreement was submitted by the Union to a vote by the employees in the bargaining unit and was rejected. Issues in dispute were referred to an Arbitration Board pursuant to the *Labour Relations Act*, RSNL 1990, c. L-1. The Collective Agreement settled by the Arbitration Board included the articles agreed by the parties in collective bargaining, together with the articles that were settled by the Arbitration Board. The Collective Agreement is effective from May 1, 2006 to June 30, 2009.

Noble has an office onshore in St. John’s. The office employees include: Kevin Roche, general manager, Harvey Stone, rig superintendent, Nicole Parsons, human resources coordinator and Renee Mahon, accountant, formerly receptionist and human resources assistant. Nicole Parsons reports to the general manager. Her duties include assisting the managers to administer the Collective Agreement. The Noble office hours are Mondays to Fridays from 8:00 a.m. to 4:30 p.m. When the office is closed, there is a pager number for the human resources department available on a 24/7

basis. In August, 2006, the time relevant to the grievance, the pager was carried by Nicole Parsons or Renee Mahon, for one week at a time. Employees used the pager number to notify Noble outside regular office hours of issues such as illness or death in the family.

The Grievor's schedule in the summer of 2006 was to be offshore from July 10 to July 31, onshore from July 31 to August 21, and offshore from August 21 to September 11. On Sunday, August 20, 2006, the Grievor reported to his Employer that he had a broken water pipe in his house and he required time to make repairs before he would be able to return offshore. The testimony of various witnesses will be reviewed with respect to the events that occurred between the Grievor's reporting of the broken pipe on August 20 and the termination of his employment on August 22.

David Williams, was the drilling maintenance coordinator offshore on August 20, 2006. He testified that at about mid-day he received a call from Mike Cooze who stated that he was unable to return offshore the next day. Mr. Cooze told him he had trouble with a water leak from a pipe set in concrete in his house. Mr. Williams testified that he told the Grievor he would try to get somebody from "downstairs" for the next day. The reference to "downstairs" meant the electricians employed to provide maintenance services to the production department on the platform. He told the Grievor "that's fine if you can't come back, you can't come back". He asked the Grievor when he could return to the platform. The response from the Grievor was either "what about Wednesday" or "what about Thursday", he was not certain which day was mentioned. Mr. Williams testified that he told the Grievor he could not say if that day was OK and the Grievor would have to contact the office. Mr. Williams said he received a call from Renee Mahon later that day. Ms. Mahon told him that the Grievor had contacted her and said he would not be going out to the platform the next day. Mr. Williams discussed with Ms. Mahon the need to get a replacement for the next day. He probably asked her to see if one of the Ozark employees was available. He did not believe he would have had the discussion about a replacement with Ms. Mahon if his intent was to find a replacement from "downstairs". He did not have any further involvement with the selection of the person assigned as a replacement.

Renee Mahon testified that on Sunday, August 20<sup>th</sup>, at about 1:30 p.m., she called Mike Cooze in response to a message left on her pager. Mr. Cooze told her that he had a problem with a broken

water pipe in his house and that he was not able to go offshore the next day. He told Ms. Mahon that he had called offshore and Dave Williams had told him that he would get someone from “downstairs” as a replacement. Mr. Cooze told her that he would need a day to find a jackhammer to break up the concrete and repair the pipe. The Grievor told her that Nicole Parsons knew he had been working on his house. Ms. Mahon told the Grievor that she would contact Dave Williams. She did not believe the Grievor was asking for leave. The Grievor said that he had a problem and he was not going offshore. The Grievor told her that it was possible he would be off work until Wednesday. The impression she had was that his absence would be for a few days. Ms. Mahon did not recall if the Grievor said he needed a flight on Tuesday or Wednesday. She told the Grievor that the only leave available under the Collective Agreement was bereavement leave (Ms. Mahon acknowledged in her testimony that, in fact, there were other provisions for leave in the Collective Agreement). After the conversation ended she realized she did not have Dave Williams’ phone number offshore and she called the Grievor back to get the number. Ms. Mahon then spoke to Dave Williams and told him that the Grievor said he would get someone to replace him from “downstairs”. Dave Williams said he would need a replacement sent to the platform if Mike Cooze was not coming offshore. Ms. Mahon then called Nicole Parsons and told her about the conversation she had with Mike Cooze. Nicole Parsons told her that Mike Cooze would be considered absent without approved leave. Ms. Parsons did not ask her to call Ozark or any other company to arrange for a replacement.

Ms. Mahon testified that she did not inform the Grievor that Dave Williams wanted a replacement sent offshore, or that he would be considered absent without approved leave if he did not report to work. She did not recall telling the Grievor to call the office.

Nicole Parsons testified that on Sunday, August 20<sup>th</sup>, she called Renee Mahon in response to a message. Ms. Mahon told Ms. Parsons that the Grievor reported that he had a broken pipe and flooding in his house and he had called offshore to Dave Williams. Ms. Mahon reported that she told the Grievor that the only leave available in the Collective Agreement was bereavement leave. Ms. Parsons testified that Ms. Mahon had attended an information session for payroll clerks where she would have been informed that bereavement leave was the only paid leave for payroll purposes in the Collective Agreement. Ms. Parsons testified that she advised Ms. Mahon to call the maintenance operations team onshore to arrange a replacement. Ms. Parsons felt it was unlikely that

a replacement could be arranged for the next day and she decided to wait and see if the Grievor attended at the heliport on Monday morning. Ms. Mahon told her that the Grievor said he would be off work until Wednesday, that he had called David Williams and that Ms. Parsons knew about renovations on his house. Ms. Parsons felt that she had sufficient information and did not need to call the Grievor that day.

Ms. Parsons testified that on Monday, August 21<sup>st</sup>, she arrived at work at about 7:30 a.m. and learned that the helicopter flight was delayed. She did not recall receiving any messages from the Grievor to call him. She called the Grievor at his home. He told her that he had a broken pipe and it was an unplanned event. She told the Grievor that the flight was delayed and he had time to get to the heliport for the flight that day. The Grievor replied that he needed to do repairs to his house. She asked him if anyone else could do the repairs. The Grievor told her that he had a friend with a jackhammer who was coming to the house to break up the concrete. He would stay to fix the problem and he did not want to burden his family with the problem while he was offshore. Ms. Parsons testified that she told the Grievor that it was expected that he get the flight offshore and make other arrangements to take care of the problem with his house. There was no certainty that a seat on the helicopter would be available for him on Tuesday or Wednesday. There was no discussion with the Grievor of his eligibility for leave. The Grievor had not asked for leave. The Grievor referred to returning to work on Wednesday. The Grievor said he would not be getting the flight that day. Ms. Parsons did not recall telling the Grievor that she would “get back to him”. She acknowledged that if the Grievor intended to get the flight on Monday, she would have to get back to him about the time of the flight. She concluded that the Grievor was doing the house renovations for which he had previously requested a leave of absence. This was the Grievor’s first opportunity to extend his time onshore after the Employer had denied his previous request for leave.

Nicole Parsons concluded that the Grievor was absent without approval because he had not requested leave and he was not on the flight. The events did not give rise to a family emergency. The Grievor was expected to make arrangements for his household repairs. She considered that he did not have a good reason not to report to work and his employment was deemed terminated by his own actions. Ms. Parsons testified that she discussed the Grievor’s situation with Harvey Stone. She understood that Mr. Stone discussed the situation with Kevin Roche on Monday evening. She

called David Rahal, HPEO representative, to discuss the situation. She also obtained a legal opinion from Noble's lawyer. On Tuesday morning she arranged for a letter to be prepared giving the Grievor notice of termination of his employment. The Grievor left messages for her on Tuesday. She did not return the calls. She did not believe there was a requirement to interview the Grievor at the time of termination of employment. The letter of termination dated August 22, 2006 was signed by Nicole Parsons and Harvey Stone and delivered to the Grievor's house that day.

Mike Cooze testified with respect to the broken pipe in his house and the events leading up to the termination of his employment. On Friday, August 11, 2006 he observed a depression in the floor next to the hot water boiler in the laundry room of his house. He looked under the floor covering and observed water on the floor. His house does not have a basement and the main floor of the house is built on a concrete floor. He reported the water damage to his insurance company. He assumed that the cause of the damage was water leaking from the hot water boiler. An insurance adjuster attended at his house on Tuesday, August 15, 2006. The Grievor completed an insurance "Proof of Loss" form. He received a letter from the adjuster dated August 15<sup>th</sup> advising with respect to his insurance coverage and that he was responsible for the deductible of \$1,000.00. He received a written estimate of the damages from Power Vac Services dated August 15<sup>th</sup> in the amount of \$2,814.51. The Grievor was advised by the insurance adjuster that he had the option to do the repairs himself and be paid a cash settlement for the amount of the estimate less the deductible. The Grievor decided to do the work himself. He did not receive final approval of his insurance claim until about 1 ½ months later, however, he was told at the time to continue to do the work and no problem was expected. The Grievor identified photographs that he took showing damages to the floor, new wood strapping placed on the concrete floor during repairs, and a patch made in the concrete floor.

Mr. Cooze testified that on Sunday, August 20<sup>th</sup> he was nailing down wood strapping into the concrete floor in the laundry room and a concrete nail punctured the copper pipe set in the concrete floor. Water sprayed out of the pipe for about five minutes. He had difficulty shutting off the main water valve. There was about one inch of water over the hallway, laundry room and kitchen of the house. The Grievor said he wanted to clean up the water and repair the water pipe before he went offshore. He did not want to wait until he returned home at the end of the hitch because he would be

“burnt out” at that time, and he was concerned there could be mold damage.

The Grievor testified that he wanted to inform his supervisor, Dave Williams, about the situation and ask about getting Monday off work. He called Mr. Williams and told him that he had a punctured pipe in the concrete floor in his house and that he needed to clean it up. He testified that he told Mr. Williams he was not able to go offshore on Monday, but he could go offshore on Tuesday or Wednesday, if Mr. Williams would give him the time off. Mr. Williams said to him “that’s all you can do” and to let him know how it was going. He may have said “we’ll make do”. Mr. Williams told him to let the office know. The Grievor testified that he understood he had approval from Mr. Williams to be off work and that if there was any problem someone would have told him. The Grievor called the pager number, left a message and then spoke to Renee Mahon at about 1:30 p.m. He told Ms. Mahon about his discussion with Mr. Williams and that he was told to call the office. He told Ms. Mahon that there was water damage in his house and he had to get a jackhammer to make the repairs. Renee Mahon told him that she would get back to him. Ms. Mahon called him back and told him to call Nicole Parsons at the office on Monday. He agreed to do so. He did not recall Ms. Mahon saying anything about bereavement leave. The Grievor testified that at the time he was not thinking about what type of leave might be available.

The Grievor testified that he proceeded to clean up the flooded area of his house. He made calls to arrange for a jackhammer to break up the concrete and repair the broken pipe. He said that on Sunday evening he felt comfortable in his belief that he would hear from the Employer on Monday about getting a later flight offshore. The flight on Monday morning had a 7:00 a.m. check in. He did not receive any call on Sunday to tell him his job was “on the line” if he did not get the flight. If he had received such a call, then he would have reassessed the situation. He thought that his absence from work would probably be without pay, but that decision would be made by the office. At about 8:30 a.m. on Monday morning he called and left a message for Nicole Parsons. Ms. Parsons called him and he told her he had been talking to Renee Mahon and he was available to go offshore on Tuesday or on Wednesday if he could get it. By that time he had borrowed a jackhammer from a friend, but had not yet started to break up the concrete floor. He explained to Nicole Parsons the situation of the broken pipe and said “what else can I do”. Ms. Parsons asked him if there was anyone else who could look after the repairs and he replied that his mother was elderly and his brother lived in another community and had a full time job. Ms. Parsons told him she was not

certain what provision was in the Collective Agreement to cover the situation, but to leave it with her and she would get back to him. He assumed that she meant she would get back to him about a flight offshore. He testified that Ms. Parsons did not tell him that he needed to get to work or direct him to get on a flight on Monday. If he had been given such direction he would not have knowingly jeopardized his job. He proceeded to make repairs to the pipe and the concrete floor and completed the work at about 8:00 p.m. He expected to hear back from Ms. Parsons some time on Monday about getting a flight on Tuesday or Wednesday. The Grievor testified that he did not recall any conversation with Nicole Parsons about the Monday morning flight being delayed or about whether he still had time to get the flight. He believed there were discussions about the flight on Tuesday.

The Grievor testified that he called the office on Tuesday and left messages with reception to say that he was trying to go offshore. On Tuesday afternoon the letter of termination was delivered to his house. He called the Union and was advised by Charles Shewfelt, Union representative, to make detailed notes as to the events that had transpired. During his testimony, the Grievor was permitted to refresh his memory by referring to several pages of notes that he had made at the time.

Evidence was presented concerning the helicopter flight schedule from St. John's to the Hibernia platform. There are seats reserved for Noble on scheduled helicopters flights on Monday, Tuesday, Thursday and Friday. Most of the drilling maintenance crew go offshore on Monday or Tuesday for rotation changes. The electricians change rotations on Monday. There is no regularly scheduled flight to the Hibernia platform on Wednesday, but an "add on" flight may be arranged. Noble may request that seats be provided in addition to its reserved seats. When an employee needs to leave the platform for a reason such as a death in the family, then there will be an effort made to find a vacant seat, and if necessary, another person may be bumped off a flight with approval of the OIM. Renee Mahon testified that when the Grievor came onshore for Union business in 2005, she arranged for his flight onshore and his return flight offshore. Nicole Parsons testified that if there are no seats available on the helicopter to travel onshore, then a leave request may be denied, except in cases of sickness or bereavement leave.

John Whalen, radio operator on the platform, has duties that include communication by radio with the helicopter dispatcher in St. John's to receive flight information. He testified that there are one or two flights to the Hibernia platform each day from Mondays to Fridays. On Wednesdays there is

usually an “add on” flight. The Wednesday flight is often used for modifications employees or for office employees and is not always full. Mr. Whalen said it was common to have extra flights. On Mondays, Tuesdays and Thursdays, 9 of the 11 seats are reserved. Flights may also be shared with other platforms. Sometimes an employee has to leave the platform for bereavement leave, or as a result of illness. In those situations, Mr. Whalen may be directed by his supervisor, the services supervisor, to check on flight availability. If the regular flights have left for the day, then Mr. Whalen may contact other platforms to determine if there is a flight that can make a landing at the Hibernia platform. If there are no flights available, as a result of weather conditions, then the employee may return to shore by supply boat.

David Williams testified that in the absence of a technician in drilling maintenance for a day, he would try to find a replacement from “downstairs”, meaning a technician in the production department. There have been occasions when maintenance technicians from “downstairs” have assisted with maintenance on the drilling rigs. Also, the drilling maintenance technicians sometimes assist with maintenance “downstairs” in production. There are also qualified tradespersons on the platform for the purpose of modifications projects. However, it was not clear from the evidence to what extent the modifications technicians assist with drilling maintenance or production maintenance. David Williams testified that there is no certainty that the technicians from “downstairs” will be available when needed. He said that they could be called upon to perform necessary repairs, but not to perform the regular preventative maintenance tasks. It was Mr. Williams’ preference to always have a full complement of employees and to try to get a replacement from shore in the event an employee was absent.

To be qualified in the role of electrician on the Hibernia platform, it is necessary to have the designation of AEP, meaning Authorized Electrical Person. The AEP designation means that the electrician has completed an orientation on the platform and is qualified to perform isolations of electrical equipment. An isolation means that power is turned off and locks are applied to ensure that the equipment remains de-energized while maintenance is performed. The AEP designation will authorize isolations up to various voltage levels, of 120V, 600V, 4.16kV or 13.8kV. An AEP designation for 600V is sufficient for maintenance on the drilling rigs. An AEP designation of 13.8kV is needed for some equipment in the production area. The Grievor testified that he has an AEP designation for 13.8kV. A replacement electrician is required to have the AEP designation.

Nicole Parsons testified that on the morning of Monday, August 21, 2006, she requested the maintenance adviser, Gerry Dalton, to locate a replacement for Mike Cooze. She testified that arrangements were made for Terry Philpott, an instrumentation technician, to depart on a flight to the Hibernia platform that day. Ms. Parsons testified that if the Grievor had arrived at the heliport for the flight on Monday, then his replacement would have been cancelled. Terry Philpott did not have the AEP designation and therefore he was unable to assist with any maintenance work that required electrical isolations. Arrangements were made with Ozark to provide Richard Bartlett, an electrician with an AEP designation. Mr. Bartlett arrived on the platform on Friday, August 25, 2006. The drilling maintenance department has an electrical maintenance log book with entries made daily for work activity. The first entry made by Richard Bartlett was on Saturday, August 26, 2006. Gerard Shea testified that the entry by Richard Bartlett on August 26, 2006, and the fact there were no entries for the night shift for August 22 to 25, 2006 indicated that August 26<sup>th</sup> was the first day that someone with an AEP designation was available on the night shift. Bill Holloway testified that commencing August 21, 2006, he was scheduled to work the day shift as drilling maintenance electrician and Mike Cooze was scheduled to work the night shift. Mr. Holloway testified that when the Grievor did not arrive on the platform on Monday, August 21<sup>st</sup>, coverage for the night shift was provided by electricians from “downstairs”. Mr. Holloway testified that drilling maintenance work was slow that week because one of the drill rigs was not drilling.

The Grievor testified that he knew that one of the drill rigs was not drilling from about June to September, 2006, and both rigs were not drilling for a period of time in August. He understood there were several options available to the Employer to find a replacement for him. A replacement could be found in the production department “downstairs”, or from the modifications electricians employed on the platform.

In April, 2006, the Grievor requested leave to be taken in July, 2006 to perform renovations on his house. The Employer denied the request. The Grievor testified there were family circumstances that led to his request for leave. He is divorced and shares joint custody with his former wife of two children, an 8 year old boy and a 10 year old girl. He has custody of the children during the 3 weeks that he is onshore. He was informed by a medical doctor that his son had asthma and allergies and he was advised by the doctor to remove the carpet and make other changes to the house. As a result

of wanting to spend time with his children, and not wanting to have the house disrupted by repairs during his 3 weeks onshore when he had custody of the children, he requested a period of leave without pay of up to 3 weeks. The Grievor was planning to do the renovations himself at a time when he would have been scheduled to be offshore. He estimated the renovation work would take at least 1 ½ weeks. He believed the request was reasonable because he had been granted a 10 day leave of absence in the summer of 2005. He did not believe that any other options were suitable, such as having a contractor do the work when he was offshore or making a temporary change in custody arrangements. He made the request by email dated April 23, 2006 to his supervisor, Dave Williams. Mr. Williams forwarded the request to the Noble office onshore. The request was denied by the Employer for the reason that it did not meet the requirements of family responsibility leave as provided in the Collective Agreement and the *Labour Standards Act*. The Grievor filed a letter of complaint and received a response dated June 15, 2006 denying the complaint.

The Union filed a grievance of the denial of family responsibility leave. The Grievor reported to work offshore on July 10, 2006, which was the start of the rotation for which he had requested leave. A Step 1 meeting under the grievance procedure was held on July 12, 2006 attended by Kirk Barrington, OIM, Dennis Flood representing the Union and the Grievor. A written report of the meeting outlined the reason for the Grievor's request for leave and stated that the request could not be supported under the guidelines for family responsibility leave described in the booklet issued by the Newfoundland and Labrador Department of Labour. A Step 2 grievance meeting was held offshore on or about July 26, 2006 attended by Nicole Parsons, Tony Chaytor and Gerard Shea on behalf of the Employer, Robert Dean, shop steward and the Grievor. The Grievor testified that Nicole Parsons attended the meeting and informed him that his request did not fall under the guidelines for family responsibility leave. The Grievor testified that, at the end of the meeting, he said "if it comes to the health of my children, I'll have the time off". He agreed in his testimony that the comment was inappropriate, but he was upset at the time. To the Grievor's knowledge, the grievance remained outstanding on August 22<sup>nd</sup>, the date of his termination from employment. Robert Dean testified that he attended the Step 2 meeting as shop steward. He testified that he was aware that the Grievor applied for leave for the purpose of removing carpet from his house related to the health of his child. Mr. Dean said that Nicole Parsons referred to a page from a booklet that was attached to the reply to the grievance. The Employer's response at the meeting was that the request did not fit within the guidelines. Mr. Dean testified that the Grievor became upset and said that he

would have the time off. After the meeting, Mr. Dean told the Grievor that he should not have made that comment. Tony Chaytor and Gerard Shea testified about the meeting and confirmed the statement made by the Grievor at the end of the meeting.

Nicole Parsons testified that she was familiar with the Grievor's request for leave to do renovations on his house in July, 2006. The request was denied because it was not within the guidelines for family responsibility leave. Ms. Parsons testified that Article 34 of the Collective Agreement referred to family responsibility leave as provided for in the applicable legislation. Section 43.11 of the *Labour Standards Act*, RSNL 1990, c. L-2 stated as follows:

#### Sick and family responsibility leave

- 43.11 (1) An employee, having been employed under a contract of service with the same employer for a continuous period of 30 days, shall be granted by his or her employer a period of 7 days unpaid sick leave or family responsibility leave in a year.
- (2) An employee shall provide his or her employer with a certificate of a qualified medical practitioner for a period of 3 or more consecutive days of sick leave.
- (3) An employee shall provide his or her employer with a statement in writing of the nature of the family responsibility where the leave is of 3 or more consecutive days in duration.
- (4) An unused portion of the period of leave provided for in this section expires at the end of the year in which it was granted.

Ms. Parsons testified that she consulted a booklet entitled "Employment Standards in Newfoundland and Labrador", prepared by the Department of Labour (the "Employment Standards Booklet") which stated, in part, as follows:

#### Introduction

...

This booklet has been prepared with a view to answering the most commonly asked questions on the practical application of the *Labour Standards Act*, R.S.N.L. 1990 c. L-2, as amended. It is meant as a ready reference for general information only. . .

Sick/Family Responsibility Leave

Q. Who is entitled to sick/family responsibility leave?

A. An employee who has been employed with the same employer for a continuous period of 30 days is entitled to 7 days unpaid Sick or Family Responsibility Leave in a year.

An employer shall not dismiss an employee or give notice of dismissal to an employee because they are off on Sick/Family Responsibility Leave.

...

Q. Does the employee have to provide a note to the employer for family responsibility leave?

A. An employee must provide a written statement outlining the nature of the family responsibility leave where the employee is absent from work for 3 consecutive days or more.

Q. What types of family responsibilities would be considered suitable in order to take family responsibility leave?

A. Examples of when family responsibility leave can be used is when the employee has to:

- a) care for a sick family member living in the same household
- b) care for a close family member (i.e. father, mother, dependent child) who may be living outside the household.
- c) attend to needs relating to the birth of the employee's child
- d) accompany a dependent family member living in the same household to a medical or dental appointment
- e) attend meetings with school authorities

Ms. Parsons testified that the reply to the grievance referred to the five situations listed in the Employment Standards Booklet and the Grievor's situation did not fit within these guidelines. She testified that at the Step 2 grievance meeting she told the Grievor that he was expected to do the renovation work during his scheduled time onshore. The Grievor was not pleased about the denial of the grievance and said he would be taking the time off for the health of his child.

Nicole Parsons testified that prior to the coming into force of the Collective Agreement on May 1, 2006, Noble did not have leave called family responsibility leave, but had compassionate leave. She testified that after the Collective Agreement came into effect, it was her responsibility to ensure that family responsibility leave was managed consistently and that employees used it for reasons listed in the Employment Standards Booklet.

Ms. Parsons testified that it was the Employer's interpretation that having broken water pipes in a house was not a reason for family responsibility leave. It would not be an emergency that would justify sending an employee onshore from the platform. The Grievor's situation on August 20, 2006 did not fit within the guidelines for family responsibility leave. Tony Chaytor testified that when considering a request for family responsibility leave, he would refer to the guidelines of the Employment Standards Booklet and determine if the request fit within the situations listed. He would also consider operational needs and whether an employee could be replaced at the time of the request. The operational risk increased the longer the position was vacant. Gerard Shea testified that if he received a request for family responsibility leave he would forward it to the Human Resources office. He would only recommend that leave be granted if a replacement electrician was available who had an AEP designation and was familiar with the platform.

Ken Clements, Director of Labour Standards for Newfoundland and Labrador, testified that family responsibility leave was added to the *Labour Standards Act* in 2001. The Employment Standards Booklet was published in 2002 and reprinted in 2004 and 2005 without changes to the relevant section. The "Frequently Asked Questions" section of the Government website had the same information as the booklet. The purpose of the booklet was to disseminate information to employers and employees in a user friendly manner. The booklet provided examples of common issues that would give rise to family responsibility leave. Mr. Clements did not recall making any formal determinations, as Director, related to the issue of family responsibility leave. It was not a topic on which there were many public inquiries, to his knowledge. His guidance to the public was that family responsibility leave was related to issues of health, safety and security of the family and the immediacy of the requirement that the employee address any of those issues.

During the hearing the parties disputed whether the Director of Labour Standards could be asked his

opinion as to whether the Grievor's situation would be eligible for family responsibility leave. The Arbitrator did not allow the question because it was not an opinion for which expert evidence was required, it amounted to an opinion on an issue of statutory interpretation of labour legislation which was within the scope of the expertise of an arbitrator, and the same question could potentially be one of the ultimate questions to be decided in the case.

The Grievor testified that the renovations for which he had requested time off in July, 2006 were unrelated to the work that he was doing in his house on August 20, 2006. At that time he was performing repairs resulting from the water leak. He had not foreseen that any work would be required to repair water damage when he made the earlier request for family responsibility leave. The water damage was in a different area of the house than the area where the carpet needed to be removed. He said the status of the grievance of the denial of family responsibility leave was not on his mind on August 20<sup>th</sup>.

The Grievor had prior periods of approved absence from work. He commenced employment with Noble in January, 2000. He was absent on short term disability from December 14, 2000 to January 12, 2001, and from December 7 to 19, 2002. He was granted leave without pay for personal reasons from January 2 to 5, 2003, so that he would be able to go onshore earlier than scheduled to spend time with his children before they returned to school. The Grievor said that leave on that occasion was approved by his supervisor, Gerard Shea. He was approved for compassionate leave from April 26 to 28, 2003 on grounds that his mother was in hospital having heart bypass surgery. He had leave with pay when he was brought onshore for an investigation conducted by the Employer regarding an incident at the heliport in St. John's. The Grievor testified that he complained to a desk clerk about the treatment employees were receiving after the helicopter returned to shore and they were waiting for another flight. Following the Employer's investigation the Grievor received an apology about the incident. He was absent on bereavement leave from February 28 to March 2, 2005 when his father passed away. He received a telephone call when he was on the platform to inform him that his father was in hospital and wanted to see him. Arrangements were made for the Grievor to take the next available helicopter flight that day. His father passed away that night. He also received compassionate leave from March 3 to 6, 2005 for the purpose of dealing with his father's funeral and burial arrangements. The Grievor was granted leave in July, 2005 for personal reasons. He requested and was granted 10 days leave without pay to permit him to have personal

time off. The Grievor was also granted Union leave from November 9 to 14, 2005 and December 12 to 13, 2005 in relation to the arbitration hearing for the settlement of the first Collective Agreement.

Whenever the Grievor requested leave he dealt with his immediate supervisors, Gerard Shea or David Williams. Gerard Shea was his supervisor for 2 weeks and David Williams was his supervisor for one week of each 3 week rotation. In the situations where his mother and father were in hospital, his supervisor told him that he would be placed on the next helicopter flight and to his knowledge they did not seek approval from anyone else in management. He knew that his immediate supervisor did not have authority to grant his request for family responsibility leave to do renovation work on his house in July, 2006.

David Williams testified that when the Grievor's father was sick in hospital, he arranged for the first available flight for the Grievor to go onshore. He believed he had authority to grant leave in the circumstances. Nicole Parsons testified that in those circumstances it would be the responsibility of David Williams to respond to the Grievor's request for leave and to request a replacement. David Williams testified that when a worker onshore requested leave, he would forward the request to the Noble office onshore. Tony Chaytor testified that when the Grievor was granted time off for personal reasons in July, 2005, it was approved by the office onshore.

Evidence was presented concerning the absence from work of other employees. Gerard Ryan, instrumentation technician, testified that he missed his flight to the platform on Friday, May 19, 2006. When he checked the recorded flight information, the recording said there was a delay in the flight. The flight departure time was then changed to an earlier time, but Mr. Ryan mistakenly failed to listen to the updated information and missed his flight. He called his supervisor and arrangements were made for him to take a flight the next day. His wages were deducted for the one day that he was absent from work.

Sheldon Peddle testified about his periods of absence from work. He was absent for four days in 1999 as a result of the death of his grandmother. He was absent for 2 days for sickness in 2005. He was absent on two occasions for Union business. On one occasion, in late 2004 or early 2005, he had a vehicle breakdown and missed his early morning flight. He called his supervisor on the platform and arrangements were made for him to have a seat on a flight later that morning. Mr. Peddle testified that on another occasion, prior to the coming into force of the Collective Agreement, his hot water boiler leaked and water flooded his basement. He called his supervisor and informed

him that he needed a day to clean up the mess. A flight was arranged for him for the next day. Mr. Peddle is an employee of HMDC, and he is the only telecommunications technician on the platform. To his knowledge his position of telecommunications technician was not replaced when he was absent. Some of his duties could be performed by the information technology technician. Mr. Peddle testified that he was informed that the OIM approved leave for an employee to attend his child's graduation. The approval was given some time prior to May, 2006 for leave to be taken in May as a one time occurrence. However, the leave was not taken because, at the time the employee was scheduled to go onshore, weather conditions prevented the helicopter from landing on the platform.

John Whalen testified that after the Collective Agreement came into effect, he applied for family responsibility leave to attend his son's graduation from university. He was told by the OIM that he did not qualify for family responsibility leave and he was shown the Employment Standards Booklet that listed five situations where family responsibility leave could be granted. After leave was denied, Mr. Whalen was told by his immediate supervisor that if he left the platform to attend the graduation he would be considered to have resigned his position. He did not file a grievance. Mr. Whalen was familiar with other situations where employees were permitted to leave the platform. Some of those situations concerned family illness or accidents. He referred to the situation of Ron Keats whose house was damaged by fire in September, 2006 and his return to the platform was delayed so that he could deal with issues of insurance and repairs. Mr. Whalen did not know whether there were any medical issues in that situation. Mr. Whalen also referred to his own situation when his father died and there were no more flights scheduled that day from the Hibernia platform. He checked with the Terra Nova FPSO and a helicopter was arranged to pick him up on its way to shore.

The parties disputed whether the Union should be permitted to call extrinsic evidence of the bargaining history of Article 27.10. The Arbitrator ruled that the evidence could be presented at the hearing, and the Arbitrator would decide, when issuing the Award, whether the language in Article 27.10 was ambiguous and whether the evidence of bargaining history could be considered as an aid to interpretation. The reason to follow this procedure was that it was the prevailing practice followed by arbitrators, and it was more practical and expeditious to follow this procedure, rather than to hear submissions and make a ruling on the question of ambiguity and admissibility at the

hearing.

The language of Article 27.10 was settled during negotiations and signed August 26, 2004 by Dave Rahal for the HPEO and Ian Thorne for CEP, Local 60N. There was extensive discussion of the article during negotiations in August, 2004. Prior to those meetings, the HPEO prepared a document setting out the proposals of both parties in 2 columns for the purpose of comparison. The proposal by the Union under the heading “Loss of Seniority” stated, in part, as follows:

#### 8.8 Loss of Seniority

An employee who has established seniority shall lose all seniority if he/she:

- a) Quits the employ of the Employer,
- b) Is discharged and not reinstated,
- c) Fails to answer recall, or fails to report for work, in both cases without valid reasons, following leave of absence or recall from lay off,

The Employer’s comparative proposal stated, in part, as follows:

- 11.8 An Employee shall lose seniority, shall be removed from the Employer’s seniority list and shall be terminated for any one of the following reasons:
- a) The employee quits, resigns or retires.
  - b) The employee is terminated for just cause.
  - c) The employee is absent without leave for one (1) day unless excused by the Employer.
  - d) The employee fails to return to work upon expiration of an approved leave of absence.

Bill O’Neill, member of the Union negotiating committee, testified that the Union’s position on the Employer’s proposed Article 11.8 (c) was that additional language was needed to protect the employee so that the decision was not left to the discretion of the Employer. On August 19, 2004, the Employer proposed that Article 11.8 (c) read “The employee fails to report to work without just cause”. Mr. O’Neill said there was discussion as to the meaning of “just cause”. Lorne Bennett, one of the HPEO bargaining committee members, stated that there was jurisprudence to define “just

cause” and it could be referred to an arbitrator to decide what amounted to just cause. Mr. O’Neill said the Union was satisfied if the Employer had to prove “just cause” for termination, and that termination had to be found by an arbitrator to be justified. Mr. O’Neill said that various scenarios were discussed, such as an employee having a motor vehicle accident on the way to the heliport, or an employee who was unable to return from a remote location. Mr. O’Neill testified that the Union’s initial proposal was that the employee would have recourse to arbitration to settle the issue of having a valid reason for the failure to report to work. Mr. O’Neill understood the Employer’s reference to “without just cause” to be similar to the Union’s proposed language of “without valid reasons”.

Gerard Ryan, a member of the bargaining committee, testified there was extensive discussion of the seniority article. The Union was concerned about a situation where there could be stormy weather or the employee had a flat tire and missed the helicopter flight. The Union did not want the decision to be left to the discretion of the Employer. Mr. Ryan testified that Lorne Bennett explained in bargaining that the Employer’s interpretation of “just cause” was that it was a general labour term that had to be proven by the Employer and that an employee having a flat tire on the way to the heliport could not be a reason for terminating employment. Mr. Ryan understood that the burden of proof would be on the Employer. The Employer’s revised language addressed the Union’s concern that the employee not be terminated without recourse to arbitration.

David Rahal, HPEO representative, testified that there were several days of detailed discussions on the seniority provisions. There were a number of examples discussed in reference to the agreed language in Article 27.10. The Union objected to the Employer’s initial proposal because it did not address the potential for an arbitrary decision. For example, if an employee had a motor vehicle accident on the way to the heliport and missed the flight, it would be left to the Employer’s discretion to accept the reason. Mr. Rahal testified that “without just cause” was added to the language to address the Union’s concern that the Employer not be able to act arbitrarily. The HPEO stated in bargaining that the failure to report to work was a serious matter that could result in loss of seniority and removal from the seniority list.

Mike Cooze testified that he was approached by various employees with concerns about the contents

of the proposed Collective Agreement and he presented these concerns to the spokesperson for the Union. One of his personal concerns about the Collective Agreement was that there was no provision for annual vacation. Mr. Cooze became a member of the bargaining committee after the proposed Collective Agreement was rejected by a vote of employees on the platform.

### **HPEO Submission**

The HPEO submitted that it was important to have employees report to work when scheduled, given the offshore environment, safety and transportation issues. The Employer has an interest in maintaining production and is entitled to take those interests into account when considering requests for leave of absence or considering whether to accept the reason given by an employee for his failure to report to work. The intent of Article 27.10 (c) is to ensure that employees report to work during the six months of the year they are scheduled to be offshore. Article 27.10 (c) is a deemed termination article. An employee is deemed terminated unless the reason given for failure to report to work is just and sufficient. A deemed termination is nondisciplinary and the Employer is not required to prove just cause for discharge. There is a reference to just cause for discharge under Article 27.10 (b). A similar provision was found to be a deemed termination article and not a dismissal for cause in *B.C. Rail and CUPE, Local 6* (1985) 21 L.A.C. (3d) 257 (Hope). Where there is a nondisciplinary termination with a specific penalty, the Arbitrator does not have jurisdiction to substitute a different penalty. The Union's authority in *Derlan Aerospace v. CAW, Local 1986* (1998) 74 L.A.C. (4<sup>th</sup>) 400 (Gorsky) (the "Derlan Aerospace" case) was not consistent with the weight of arbitral authority, which is to the effect that where an article provides for loss of seniority and termination of employment an arbitrator does not have discretion to substitute another penalty. In this regard, the Employer also referred to *J.I. Case Co. v. U.S.W.A., Local 2868* (1992) 26 L.A.C. (4<sup>th</sup>) 316 (Williamson), *Zettel Metalcraft v. CAW, Local 396* (1996) 53 L.A.C. (4<sup>th</sup>) 393 (Tims), and *Stelco Inc. v. U.S.W., Local 1005* (1985) 22 L.A.C. (3d) 65 (McLaren). The Collective Agreement distinguishes termination from discharge. The reference to "discharge" in Article 15.09 applies to a disciplinary discharge, and the Arbitrator has no authority to substitute a different penalty under Article 15.09 in this case. Article 27.10 was clear and unambiguous. There was no ambiguity that required the admission of extrinsic evidence of collective bargaining. The article may be interpreted within its context. The issue was whether the Employer acted reasonably and not arbitrarily when it

decided that the Grievor did not provide a valid reason to justify his failure to report to work. The scope of review by the arbitrator was similar to that applied in *Iron Ore Company of Canada and United Steelworkers of America*, July 28, 1985 (N.S.C.T.D.) (the “*Iron Ore Company*” case) where the arbitrator reviewed the employer’s decision to deny a request for a leave of absence by an incarcerated employee. The Employer acted reasonably based upon the location of the platform and the need to have employees attend at the workplace. The Grievor knew that he was not eligible for leave if he requested it, having regard to the Employer’s previous denial of the leave requested by the Grievor to perform house renovations. There was no emergency that required the Grievor to stay home. He had secured the water shut off valve. He could have made repairs when he returned home after his 3 week rotation offshore or made alternate arrangements for repairs to be performed when he was offshore. The Grievor was adamant that he would stay home and make the repairs. The Grievor misrepresented his conversation with David Williams. David Williams did not tell the Grievor that there was no replacement required. In fact, he requested a replacement. The Grievor knew that David Williams did not have authority to grant family responsibility leave, because he was familiar with the process that led to denial of his request for leave in July. The Grievor was told by Renee Mahon that he did not have the right to be off work and there was no leave applicable in the Collective Agreement. When asked by Nicole Parsons to go to work on Monday, he did not give her a valid reason to refuse. He simply said he was not going to work. The Grievor did not respect the views of his supervisors when they told him the situation did not appear to be an emergency. The Grievor decided to put his interest in doing repairs to his house ahead of the interests of his Employer. Nicole Parsons, as a representative of management, gave direction to the Grievor on Monday that the flights were delayed and he needed to get to work. He was being told at that time that he did not have a good reason to be off work. There was no obligation to tell the Grievor that if he did not report to work he would lose his job. The Employer did not act arbitrarily when considering the Grievor’s situation compared to other employees. The employee with fire damage to his house was absent on medical leave. The delays by other employees in reporting to work were brief absences from work and occurred prior to the Collective Agreement coming into force. During collective bargaining, and throughout the arbitration process leading to the First Collective Agreement, the Grievor felt that he should have a right to take vacation leave in addition to the 3 week rotation onshore. Family responsibility leave did not apply in this situation. An employee cannot decide to remain at home and declare that his absence is for family responsibility leave and not make an application for leave. The HPEO requested that the grievance be denied.

### **Union Submission**

The Union submitted that Article 27.10 (c) was not a deemed termination article because it did not use the word “deemed”. It was a disciplinary clause with a specific penalty based on the use of words “just cause”. The Union relied on the *Derlan Aerospace* case to support its submission that the Arbitrator could substitute another penalty where the language did not provide for a deemed termination. Article 27.10 (c) provided for termination for culpable behaviour, which included the failure to report to work. There was authority to substitute another penalty pursuant to Article 15.09 of the Collective Agreement and Section 88 (2) of the *Labour Relations Act*. The parties had used the words “discharge” and “termination” interchangeably and therefore Article 15.09 applied in these circumstances. It was not a case of a nondisciplinary termination with no authority to review the reasonableness of the Employer’s decision. There was an ambiguity in Article 27.10 (c) which meant the Arbitrator could consider extrinsic evidence of statements made in negotiations. At the bargaining table, Lorne Bennett on behalf of the HPEO, stated that the Employer had to prove just cause for discipline and prove that the appropriate penalty was termination. The issue was whether the Employer’s decision to terminate the Grievor’s employment was reasonable in the circumstances. The Employer had not considered all relevant factors. There was no language in the Collective Agreement limiting the review to whether the Employer made an arbitrary decision, which distinguished this case from the *Iron Ore Company* case. The Grievor reasonably believed that he had permission to be absent from work. His immediate supervisor, David Williams, told him that they would “make do” for a day or two and made reference to getting a replacement from “downstairs”. Mr. Williams asked the Grievor to inform the office, but did not instruct the Grievor to ask for permission. There was no written policy that required the Grievor to obtain permission from management onshore. In the past, the Grievor had requested leave from his immediate supervisor. The Grievor acted reasonably by proceeding to clean up the water in his house and make arrangements for a jackhammer to break up the concrete in the floor and repair the pipe. The Employer failed to make inquiries into the facts related to the Grievor’s insurance claim. The insurance claim was documented by evidence at the hearing. The Employer considered irrelevant factors when it concluded that the Grievor was doing the renovations for which he was denied leave in July. The Grievor understood that Nicole Parsons wanted him to go to work on Monday, but he

had to repair the damages in his house, and he believed he had permission from his immediate supervisor. Nicole Parsons was not in a management line of authority with respect to the Grievor. According to the *Derlan Aerospace* case, the Employer had to prove there was just cause to terminate the Grievor's employment and the arbitrator could review the decision and decide whether to substitute another penalty. The Employer had a duty to warn the Grievor before it terminated his employment. The Union referred to *York Finch General Hospital and OPSEU, Local 565* (1980) 27 L.A.C. (2d) 142 (Adams) and *Felec Services v. IBEW, Local 2085* (1986) 27 L.A.C. (3d) 163 (Schulman) in that regard. If the Grievor had been told he had to get the helicopter flight or lose his job, then he could have responded to that information. There was no reasonable explanation as to why the Grievor would abandon a job that paid him over \$100,000.00 per year, when he had a household and family support obligations and a good work record. In effect, the Grievor had requested family responsibility leave. The Grievor had just cause not to report to work because he was entitled to family responsibility leave. Family responsibility leave was an entitlement that was not subject to prior approval by the Employer. The Grievor was entitled to have up to 7 days family responsibility leave per year under the *Labour Standards Act*. The Employer did not have the discretion to refuse family responsibility leave based on operational requirements. The Employer incorrectly limited family responsibility leave to the examples listed in the Labour Standards Booklet. The Grievor was treated arbitrarily because other employees were granted leave in similar situations. The Union requested that the grievance be allowed and the Grievor reinstated with compensation.

### **Considerations**

The Arbitrator will consider the interpretation of Article 27.10 and other articles of the Collective Agreement, and the application of the Collective Agreement to the facts of the case.

When interpreting the Collective Agreement, the Arbitrator will have regard to the principles of interpretation applied by arbitrators. The Arbitrator refers to the principles of interpretation discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, in particular, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the

context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300). One of the principles of interpretation is that arbitrators apply a contextual approach, meaning that the words are to be interpreted within the context of the article and the collective agreement as a whole. The application by arbitrators of the contextual approach to interpretation was approved by the Newfoundland Supreme Court, Court of Appeal in *NAPE v. Newfoundland (Treasury Board)* [1997] N.J. No. 76.

Termination of employment pursuant to Article 27.10 results from the occurrence of certain events, which are listed from (a) to (h). Article 27.10 (c) states as follows:

27.10 An employee shall lose seniority, shall be removed from the employer's seniority list and shall be terminated for any one of the following reasons:

...

c) The employee fails to report to work without just cause.

...

According to arbitral authority, articles such as Article 27.10 (c) provide for a deemed abandonment of the job by the employee, or provide for a specific penalty. Pursuant to such language, an employer is not required to prove just cause for discipline or discharge. The function of the arbitrator is to determine whether the requirements of the article have been met. It also follows that an arbitrator does not have authority to substitute another penalty because either, (1) the employee is deemed to have abandoned the job, or (2) the parties have agreed on a specific penalty and another penalty cannot be substituted by an arbitrator.

There are several examples of the approach taken by most arbitrators to such language. In *B.C. Rail and Transportation Employees* (1985) 21 L.A.C. (3d) 257 (Hope) (the "*B.C. Rail*" case), several employees were absent without leave and were terminated. The relevant provision in the collective agreement stated "an employee absent from duty without written authority for a period in excess of five (5) working days shall be considered as having left the services of the railway of his own accord and the railway shall be under no further obligation to such employee". The arbitrator stated that, although the facts would have supported imposition of discipline, no discipline had been imposed by the employer. The employer did not rely upon dismissal for cause, but relied upon the provision that employees absent without authority will be deemed to have quit. The employees in the *B.C. Rail*

case were aware of the article, failed to contact the employer in a timely fashion and the result was automatic termination. Under the circumstances there was no requirement to apply any test associated with dismissal for cause. The arbitrator found that the authority in labour legislation to review a dismissal for cause and substitute a penalty did not apply. The arbitrator stated, at page 273, as follows:

Here I must conclude that the provision in question does not fall within s. 93(1) and the test of proof of just cause for dismissal does not apply. In my judgment the provision falls within a line of arbitral authority relied on by the railway as a support for the proposition that a provision such as art. 9.9 amounts to a “deemed quit” provision.

Another example of the approach followed by most arbitrators is found in *Quality Meat Packers Limited and UFCW* (2002) 109 L.A.C. (4<sup>th</sup>) 183 (E. Newman) (the “*Quality Meat Packers*” case). The arbitrator considered an article that stated “seniority service records shall be considered broken and employment terminated when an employee ... is absent without notifying the company for more than two (2) working days, unless excused by the company”. The article was interpreted as providing for a deemed abandonment of the job. The arbitrator stated the following at page 190:

A deemed termination provision is not a disciplinary tool that an employer invokes for the primary purpose of enforcing the obligation to notify. Rather, it is intended as a clear and as a strict point of definition. After the time which is stipulated has passed, the employer is entitled to conclude that the uncertainty is over. Whatever the reason for the absence, after that time has expired, the employer is entitled to conclude that the job has in fact been abandoned.

It is noted that the opening lines of Article 27.10 provide that the employee “shall lose seniority” and “shall be terminated”. The history of arbitral case authorities indicates that there is a reasonable explanation as to why the parties agreed to language that provides for termination of employment in addition to loss of seniority. In the absence of such language, termination of employment would not necessarily follow. In that regard, the Arbitrator refers to Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition at paragraph 7:3114 as follows:

At one time, some arbitrators equated the removal of seniority rights with discharge or automatic termination. Others concluded that the effect of removing an employee's seniority rights was to relegate him or her to the status of a probationary employee.

Over time, however, arbitrators have come to reject both positions. It is now generally accepted that, unless the agreement expressly provides for such effects, loss of one's seniority does not entail losing one's job.

The language agreed by the parties in the opening lines of Article 27.10 states that under one of the circumstances listed, the employee "shall be terminated". The language agreed by the parties does not state that employment is "deemed" terminated. However, a review of the arbitral authorities indicates that the same result follows whether the words chosen are "shall be terminated" or "shall be deemed terminated". In that regard, the Arbitrator refers to the *B.C. Rail* case, the *Quality Meat Packers* case and the cases of *Stelco Inc., Hilton Works and United Steelworkers, Local 1005* (1985) 22 L.A.C. (3d) 65 (McLaren), *Riding-Regency Meat Packers Limited and UFCW, Local 1000A (Kelesis)* (2006) 155 L.A.C. (4<sup>th</sup>) 382 (Crljenica), and *Hertz Canada Ltd. v. UFCW, Local 175* [2007] O.L.A.A. No. 19 (Bendel).

The Arbitrator will consider the Union's submission, based on the authority of *Derlan Aerospace v. CAW, Local 1986* (1998) 74 L.A.C. (4<sup>th</sup>) 400 (Gorsky) that even where the circumstances exist that give rise to loss of seniority and termination of employment, the Arbitrator has authority to substitute another penalty, under Article 15.9 of the Collective Agreement or Section 88 (2) of the *Labour Relations Act*, R.S.N. 1990, c. L-1. Article 15.9 of the Collective Agreement states as follows:

Article 15      Arbitration

...

- 15.9      The Arbitrator or Arbitration Board has the power to substitute for the discipline or discharge of an employee any other penalty that the Arbitrator or Arbitration Board deems to be just and reasonable.

Section 88 (2) of the *Labour Relations Act* states as follows:

- 88 (2) Where an arbitration board determines that an employee has been discharged or disciplined by an employer for cause, it may, except when the penalty is prescribed in the collective agreement that is binding upon the employees and employer, review and modify the penalty imposed by the employer and, in the case of the discharge of the employee, substitute another penalty that to it seems just and reasonable in the circumstances.

Article 15.9 and Section 88 (2) of the *Labour Relations Act* apply when there is a discharge or discipline of an employee. Article 27.10 states that, when one of the events listed occurs, an employee shall be terminated. I find, based on a reading of the Collective Agreement as a whole, and the weight of arbitral authority, that Article 15.9 and Section 88 (2) do not apply where there is a termination of employment under Article 27.10 (c). The parties have provided in Article 27.10 (b) for loss of seniority and termination of employment where an employee is terminated for just cause and not reinstated. Article 5 states that management rights include the right to discipline, suspend or terminate an employee for just cause. Where an employee is terminated for just cause, then the authority of the Arbitrator under Article 15.9 applies. Article 15.9 applies when there is a “penalty” imposed by the Employer. The authority of the Arbitrator under Article 15.9 is to substitute “any other penalty”, and it follows that the Employer must have imposed a penalty of discipline or discharge in the first place. However, as stated above, I find that Article 27.10 (c) is a deemed abandonment clause, such that when an employee fails to report to work without just cause, the employee is deemed to have abandoned his employment. The termination of employment is not a penalty imposed by the Employer, but is a result that automatically follows from the deemed abandonment. In that regard, the Arbitrator refers to the authorities already cited, and also to *Zettel Metalcraft Ltd. and CAW Canada, Local 396* (1996) 53 L.A.C. (4<sup>th</sup>) 393 (Tims) and *Oran Industries Ltd. and USWA (Alharazi)* (2006) 150 L.A.C. (4<sup>th</sup>) 441 (Nairn).

The above comments with respect to Article 15.9 also apply to Section 88 (2) of the *Labour Relations Act*. Section 88 (2) applies when an employee has been “discharged or disciplined by an employer for cause”, and refers to substitution of another penalty. Where there is an abandonment of position there is no discharge for cause. The Supreme Court of Canada held in *Alberta Union of Provincial Employees v. Lethbridge Community College* [2004] 1 S.C.R. 727 that a provision in Alberta legislation similar to Section 88 (2) applied in the case of a nondisciplinary discharge on

grounds of unsatisfactory work performance, in addition to applying in the case of a disciplinary discharge for culpable conduct. The court reviewed the history of such provisions, which were introduced into labour legislation across Canada, following the decision by the Supreme Court of Canada in *Port Arthur Shipbuilding v. Arthurs* [1969] S.C.R. 85. The purpose of such legislation was to restore to an arbitrator the authority to substitute another penalty when the arbitrator found that the employer did not have just cause for the penalty imposed. Having regard to the language of Section 88 (2) and the history of such legislative provisions, I find that it does not have the effect of extending to an arbitrator the authority to substitute a different consequence for a deemed abandonment of a position where the parties have agreed that termination will automatically follow.

I decline to follow the *Derlan Aerospace* case because it is not consistent with the weight of arbitral authority and it may be distinguished from the present case on the basis of the difference in collective agreement language. As stated above, in my opinion, the authority to substitute a penalty does not arise from the agreed language in Article 27.10 (c) where there is an automatic termination of employment as a result of a deemed abandonment.

The Union submitted that use of the phrase “without just cause” in Article 27.10 (c) means the Employer has to prove just cause for termination. However, when Article 27.10 (c) is read in its entirety, it is evident that “without just cause” is a qualification on “fails to report to work” and refers to the employee and not the employer. In order for the clause to apply, not only must the employee fail to report to work, but that failure must be “without just cause” on the part of the employee. As noted above, the parties have referred to termination by the Employer “for just cause” in Article 27.10 (b) and it would be redundant to interpret Article 27.10 (c) to refer to termination for just cause by the Employer. Article 27.10 (c) provides for termination of employment for the failure to report to work where that failure is without just cause. Whether or not the employee has “just cause” to fail to report to work will need to be assessed based on the circumstances of each case.

The interpretation of Article 27.10 (c) will also be considered within the factual context of the workplace. The workplace is the Hibernia offshore oil production platform. Because of its location in the North Atlantic Ocean, employees are transported to the platform by helicopter or, when helicopters are unable to land on the platform, by supply boat. Regular rotation employees have a scheduled 21 day rotation, and their schedule for the entire year is known in advance. The

helicopter flights have a regular schedule and employees know in advance the time they are required to report to the heliport for their flight. Within this context, the requirement to “report for work” means reporting to the heliport on time for the helicopter flight to the platform. If the employee misses the flight, then the next available flight could be at least one day later and transportation to the platform depends on availability of seats. If the employee misses the flight then, according to Article 27.10 (c), he is deemed to have abandoned his employment and termination of employment automatically follows, provided that the employee’s failure to report to work was “without just cause”.

The Arbitrator has considered the context of Article 27.10 (c) and the legitimate interest of the Employer to maintain production. The number of positions on the platform is based on operational requirements. In the case of Noble’s drilling maintenance department, it has been determined that there is a need to have 2 electricians on the platform with one electrician assigned to the day shift and the other electrician assigned to the night shift, to provide 24 hour coverage. It is in the interest of maintaining production and also for reasons of health, safety and the environment, that the required positions be filled at all times, unless there are extenuating circumstances. There was evidence that replacement by employees who are working in other positions on the platform is sometimes arranged. For example, an electrician from the production department “downstairs” may be called upon to assist with maintenance of the drilling rigs. Employees will assist each other as much as possible. However, these arrangements tend to be for a brief duration and are used to provide coverage for essential work. Given the necessity to fill every position, it is important that employees accept their responsibility to report to work on schedule.

Whether an employee has “just cause” to fail to report to work under Article 27.10 (c) is a question that may be decided by the Arbitrator. The clause does not say that “just cause” is a question to be determined at the discretion of the Employer. For example, there is no language to say that “just cause” is to be “assessed by the Employer”. The reasons for the Employer’s decision may be taken into consideration. However, the Arbitrator’s decision on “just cause” is not limited to a review of whether the Employer’s decision was made in good faith, was not arbitrary, was reasonable or complied with some other standard of review. Therefore, the Arbitrator is not limited to reviewing the reasons for the Employer’s decision that the Grievor did not have just cause.

The factual context of Article 27.10 (c) includes the circumstances that could potentially arise amounting to “just cause” for an employee to miss the flight to the platform. There were situations that occurred prior to the coming into force of the Collective Agreement where an employee missed the flight. For example, one employee missed the flight because he failed to listen carefully to the recorded flight information. He was accommodated on a flight later the same day. Another employee was cleaning up a leak from a hot water boiler in his house, and he was accommodated on a flight the day after his scheduled flight. The Arbitrator has also considered the hypothetical situation of an employee who has a motor vehicle accident on the way to the heliport. In any of these situations, the employee may be absent from work without an approved leave of absence, and may not have requested a leave of absence. In some situations, the employee may be unable to contact the Employer to give notice that he will not arrive at the heliport on time for the flight. The reasonable probability that such situations may occur, indicates that an employee may have “just cause” under Article 27.10 (c) in situations where an employee is absent from work and does not have prior approved leave. There may be situations where the absence from work does not qualify for any of the leave entitlements specifically stated in the Collective Agreement, but the employee has “just cause” to fail to report to work. There are various provisions for leave in the Collective Agreement. For example, bereavement leave is a paid leave under Article 34.2. Employees are entitled to jury duty/court hearing leave under Article 34.3 and to maternity, parental, adoption and family responsibility leave under Article 34.4. Had the parties intended “without just cause” in Article 27.10 (c) to apply only to absence on approved leave, then the parties could have used language to that effect. It is also noted that Article 27.10 (d) refers to an employee who fails to return from a leave of absence on the expiration date. While absence on approved leave would provide “just cause” for an employee to fail to report to work, there may also be “just cause” in other situations.

In cases where termination of employment automatically follows from a deemed abandonment article, arbitrators have interpreted such articles narrowly to limit their application. It is consistent with this approach to interpret Article 27.10 (c) narrowly. The reasons advanced by the Union for the Grievor’s failure to report to work include (1) he had permission to be absent from work, or he reasonably believed he had such permission to be absent from work, or (2) he was eligible for family responsibility leave. When deciding whether the Grievor had a reason that amounted to just cause, the Arbitrator will consider that Article 27.10 (c) is to be interpreted narrowly to limit its

application, given the serious consequences that flow from a deemed abandonment of position.

The Arbitrator finds that the language of Article 27.10 (c) may be interpreted by applying principles of interpretation. The language is not ambiguous. It is therefore unnecessary to consider extrinsic evidence of bargaining history and such evidence will be disregarded.

The Employer submitted that it was justified to conclude the Grievor did not have “just cause” because it believed he was doing the same renovation work on his house for which he had been previously denied a leave of absence. The Employer based its conclusion, in part, on the Grievor’s statement at the Step 2 grievance meeting in July, 2006 that, when it came to the health of his children, he would have the time off. Although the Grievor’s statement was inappropriate, and it is understandable how the Employer reached its conclusion about the renovation work, the Employer’s conclusion is not supported by the facts. The work being performed by the Grievor on August 20, 2006, the day before he was scheduled to report to work, was work required to repair water damage for which he had submitted an insurance claim. The Grievor’s testimony in this regard was supported by documentary evidence including an insurance Proof of Loss form, a letter from the insurance adjuster and an estimate of damages all dated between August 11<sup>th</sup> and 15<sup>th</sup>. The Grievor was given permission by the insurance adjuster to perform the repairs himself. The repairs included replacing the floor in the laundry room. The Grievor was in the process of replacing the floor on August 20<sup>th</sup> when he drove a nail into the water pipe in the concrete floor. This led to flooding in the laundry room and adjacent rooms. To repair the pipe the concrete needed to be broken up and removed. This was not the renovation work for which the Grievor had requested family responsibility leave in July, 2006. That renovation work included removal of carpet from other rooms in the house and was unrelated to repairs to the laundry room. Therefore, the Employer mistakenly concluded that the Grievor was not entitled to leave and did not have just cause to fail to report to work, because he was doing the same renovation work on his house for which leave was previously denied.

Did the Grievor reasonably believe that he had permission not to report to work on Monday, August 21, 2006? I have reviewed the evidence of the Grievor and the evidence of the Employer’s witnesses, David Williams, Renee Mahon and Nicole Parsons. To the extent that the testimony is in conflict, issues of credibility may be addressed having regard to what is the most likely and probable

event in the circumstances. The Grievor testified that after the flooding in his house from the broken pipe on Sunday, August 20<sup>th</sup>, he called offshore to his supervisor, David Williams. It was reasonable for the Grievor to seek permission from his supervisor and to rely on the supervisor's response, having regard to the practice by the Grievor on prior occasions to make the initial request for leave to his supervisor. The Grievor testified that Mr. Williams told him to "do what you can do", and inform the office. David Williams testified that he told the Grievor he would try to get someone from the production department "downstairs" for the next day. It was reasonable for the Grievor to conclude that he had permission from Mr. Williams not to report to work on the next day. Mr. Williams testified that when the Grievor asked him about reporting to work on Wednesday or Thursday, he told the Grievor he would have to get in touch with the office. It is likely that Mr. Williams' was prepared to find a replacement for the Grievor on the platform for a brief absence, but if the Grievor's absence was extended to 2 or 3 days, then another person would need to be sent offshore as a replacement. On Sunday, August 20<sup>th</sup>, the Grievor also spoke with Renee Mahon, human resources assistant at the time. She was informed by the Grievor that he was unable to go offshore the next day. The Grievor communicated to Ms. Mahon his belief that he had permission from Mr. Williams not to report to work on Monday. Ms. Mahon incorrectly told the Grievor that bereavement leave was the only leave available under the Collective Agreement. Ms. Mahon spoke to David Williams that day and was informed that he needed a replacement. It is likely that Mr. Williams was contemplating a 2 or 3 day absence by the Grievor at that time. Ms. Mahon did not tell the Grievor that he did not have permission to be absent from work after she was informed by David Williams that he needed a replacement. Ms. Mahon spoke to Nicole Parsons, human resources coordinator and informed her of the situation. Neither Ms. Parsons nor Ms. Mahon informed the Grievor on August 20<sup>th</sup> that he did not have permission to be absent from work from Mr. Williams or anyone else. The Grievor was not informed at that time that if he failed to report to work, he could lose his seniority and be terminated.

Under these circumstances, it was reasonable for the Grievor to believe that he had permission to be absent from work on Monday, August 21<sup>st</sup>. It was reasonable for the Grievor to fail to report to work for his scheduled rotation. On Monday, August 21<sup>st</sup> he had a discussion with Nicole Parsons and she suggested that he make alternative arrangements to complete the repairs on his house. At that time, the Grievor had borrowed a jackhammer and was in the process of completing the repairs himself. He had not been given direction on Sunday that he was incorrect in his belief that he had

permission to be absent. On the basis of his understanding on Sunday, he planned to carry out the repairs on Monday. In those circumstances it was reasonable for the Grievor to continue to complete the repairs on Monday. He completed the repairs Monday evening and was available to report to work on Tuesday.

The Arbitrator concludes that the Grievor had just cause to fail to report to work because he reasonably believed on August 20<sup>th</sup> that he had permission from the Employer to be absent from work for at least one day. He was not given direction on August 20<sup>th</sup> to report to work after he had expressed his belief that he had permission to be absent, and he was not informed that if he failed to report to work he could be deemed to have abandoned his position and his employment would be terminated. After the first day of his absence, the Grievor continued to have just cause to fail to report to work because he was not informed of helicopter flight arrangements for any day after his first day of absence.

The Union submitted that the Grievor had just cause to fail to report to work because he was eligible for family responsibility leave. This raises several issues, including the meaning of family responsibility leave, whether family responsibility leave applies in situations not listed as examples in the Employment Standards Booklet, and whether the Employer has any discretion to refuse family responsibility leave for operational considerations. It is unnecessary to make any finding with respect to these issues, because the Arbitrator finds the Grievor had just cause to fail to report to work for the reason that he reasonably believed he had permission to be absent.

The Union also requested that the grievance be allowed for the reason that there is an overriding obligation on the Employer to act reasonably in the administration of the Collective Agreement, relying on authorities such as the *B.C. Rail* case. This raises issues of the authority of the Arbitrator to conduct such a review, the scope of such a review and the standards to be applied. It is unnecessary to address these issues based on the findings made above under Article 27.10 (c).

The Employer terminated the Grievor's employment on the basis of Article 27.10 of the Collective Agreement. The Employer has not proceeded on the basis that there was just cause to take disciplinary action against the Grievor. There was no disciplinary action taken. The Arbitrator finds that the Grievor had "just cause" to fail to report for work within the meaning of Article 27.10 (c).

As a result, he did not lose seniority and was not deemed terminated by operation of Article 27.10. It was therefore a violation of the Collective Agreement for the Employer to inform the Grievor that his employment was terminated and to proceed with the termination.

As stated above, the Arbitrator does not have authority to substitute another penalty pursuant to Article 15.9 of the Collective Agreement or any other provision. The remedial authority of the Arbitrator in these circumstances is to place the Grievor in the position in which he would have been had the Collective Agreement not been violated. Therefore, the Grievor is entitled to be reinstated with no loss of seniority and with full compensation from August 20, 2006, the effective date of his termination. If the Employer had accepted that the Grievor had “just cause” not to report to work for one day, it is likely that he would have been absent from work for one offshore day. There is no provision in the Collective Agreement for paid leave in these circumstances. Therefore, the Grievor shall be considered to be absent from work without pay for one offshore day and compensation shall be adjusted accordingly.

### **Decision**

The grievance is allowed. The Employer did not have authority to terminate the Grievor’s employment under Article 27.10 of the Collective Agreement. It is ordered that the Grievor be reinstated effective August 20, 2006, the date of his termination of employment, without loss of seniority and with full compensation, except that he shall be considered absent without pay for one offshore day. The Arbitrator retains jurisdiction if the parties are unable to agree on the amount of compensation.

**DATED** this 16<sup>th</sup> day of April, 2007.

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James C. Oakley  
Arbitrator