

**FINDINGS AND AWARD
IN A DISPUTE**

BETWEEN:

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

(hereinafter called the "Union")

AND:

MEMORIAL UNIVERSITY OF NEWFOUNDLAND

(hereinafter called the "Employer")

GRIEVOR:	KEVIN BURKE
FOR THE UNION:	CHRIS HENLEY
FOR THE EMPLOYER:	CLAUDE HORLICK
BEFORE:	W. JOHN CLARKE, C.Arb. C.Med.

PRELIMINARY MATTERS

This matter was heard at St. John's on September 19, 2007 and was a somewhat unusual proceeding.

The matter began with a grievance filed on behalf of the Grievor on May 25, 2005, wherein it was alleged on his behalf that he had been dismissed without just cause. An Arbitration hearing had been conducted and an award issued on November 24, 2006 in which the Arbitrator upheld the grievance and reinstated the Grievor in the following terms:

"I find that the grievance is allowed and the Grievor is to be reinstated but only in accordance with the terms and conditions outlined above."



The terms and conditions which were outlined above are set forth as follows:

“The Grievor is to provide the Employer with a medical certificate which clearly states that he is fit to work his shifts and to resume all duties as a Custodian I. A new Last Chance Agreement containing the usual terms and conditions shall be executed. Over the life of the new Last Chance Agreement no existing grievances are to be pursued by the Union pertaining to this particular Grievor.”

The parties tried to agree on the wording of a Last Chance Agreement but were unable to reach a successful conclusion. As a result, on April 19, 2007 Mr. Henley of the union wrote to Lisa Hollett of the employer in the following terms:

“Further to your correspondence of February 19, 2007 concerning the “Last Chance Agreement” for Mr. Kevin Burke, the Union is in agreement with your suggestion that the matter be put forward to another Arbitrator for adjudication. In this regard, we wish it clearly understood that the mandate of the new arbitration will be to deal with the “Last Chance Agreement” only.

In this regard, I would like to put forward the name of John Clarke as sole Arbitrator”

On May 11, 2007 Mr. Horlick on behalf of the employer wrote to Mr. Henley in the following terms:

“Further to your letter of April 19, 2007, to Ms. Hollett, regarding the Last Chance Agreement for Mr. Burke, this is to advise that we are agreeable to the use of Mr. John Clarke, as sole Arbitrator. As stated in your letter, it is agreed that Mr. Clarke will only deal with the issue of the “Last Chance Agreement” for Mr. Burke’s return to work as set out in the Browne Arbitration decision. Any other issues arising from the Browne decision will be resolved between the parties prior to Mr. Burke’s return to work.”

On May 18, 2007 the union set an e-mail to the undersigned the text of which reads as follows:

“You have been selected as arbitrator in the above case. Could you please

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provide dates you have available for this matter.”

After a series of questions with respect to dates the hearing ultimately convened on September 19, 2007 at which time 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 had been properly followed and all requirements had been waived.
4. The Arbitrator would remain seized of the matter for a period of 60 days in the event the parties could not agree on the interpretation of this award or in the event there is a question of compensation arising from the award.
5. The time limits for filing the award were waived.
6. There is no person who is not a party to the proceeding who is potentially affected by the outcome.
7. No witnesses were called by either party.

The following exhibits were entered by consent:

- C#1 Collective Agreement between the Union and the Employer effective April 1, 2004 to March 31, 2008
- C#2 Findings and Decisions in a Dispute between Memorial University of Newfoundland and Newfoundland Association of Public and Private Employees, Local 7804 – Kevin Burke Grievor dated November 24, 2006
- C#3 E-mail from Claude Horlick of the employer to Chris Henley of the union dated December 19, 2006, attached to which was a draft Last Chance Agreement
- C#4 Letter from Kevin Burke to Chris Henley dated December 21, 2006 attached to which is a draft “Return To Work Agreement – Kevin Burke”
- C#5 Letter from Mr. Horlick to Mr. Henley dated January 26, 2007
- C#6 Letter from Mr. Henley to Lisa Hollett of the employer dated February 5, 2007
- C#7 Letter from Lisa Hollett to Mr. Henley dated February 19, 2007
- C#8 Letter from Mr. Henley to Ms. Hollett dated April 19, 2007



- C#9 Letter from Mr. Horlick to Mr. Henley dated May 11, 2007
- C#10 Order of the Labour Relations Board dated March 20, 2007
- C#11 Executed Last Chance Agreement – Kevin Burke signed September 16, 2004
- C#12 Letter from Mr. Horlick to Rowena Best of the union dated September 8, 2004 and attached to which is a draft Last Chance Agreement – Kevin Burke

At the commencement of the proceedings Kevin Burke, the Grievor, applied to become an interested party in the proceeding as he felt throughout the course of the proceedings to date that his interests had not been properly represented by the union and, in fact, he had taken an application to the Labour Relations Board for a declaration that the union has acted in a manner that is arbitrary or discriminatory or in bad faith in the handling of his grievance. That application was rejected by the Labour Relations Board; reasons for that decision are still pending. Mr. Burke has other applications pending, one of which is before the Supreme Court of Newfoundland, Trial Division, and is scheduled to be heard in October 2007.

The application to the undersigned to become an interested party in these proceedings was denied. The set up of the collective agreement is such that there are two parties to it, the union and the employer. These two parties are charged with the administration of the agreement, the University on its own behalf and the Union on behalf of the employees employed with the employer. All grievances under the collective agreement are initiated and brought forth by the union on behalf of the employees. There is therefore, no place for the intervention of the Grievor as his interests are represented herein by the union.

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FINDINGS AND CONSIDERATIONS

As noted above, the sole jurisdiction conferred upon the Arbitrator in this matter is to determine the "usual terms and conditions" to be set forth in the Last Chance Agreement. Exhibit C#3 represents the draft which forwarded to the union by Mr. Horlick which presupposes that the medical certificate required by Arbitrator Browne has been provided to the employer. That draft agreement reads as follows:

"Last Chance Agreement – Kevin Burke

Whereas Mr. Burke was terminated for excessive absenteeism and his failure to live up to the terms of a previous Last Chance Agreement; and;

Whereas an Arbitration Award reinstated Mr. Burke under the usual terms and conditions of a new Last Chance Agreement, and;

Whereas Mr. Burke, in accordance with the Arbitration Award has provided the Employer with a medical certificate which clearly states that he is fit to work his shifts and to resume all duties as a Custodian I.

Therefore, the parties hereby agree as follows:

1. This Last Chance Agreement shall be in effect from the date of Mr. Burke's return to active employment, _____ and shall remain in effect for one (1) year from that date until _____.
2. During this period Mr. Burke will attend work regularly. Should Mr. Burke exceed fifty-six (56) hours sick leave during the above referenced year, it shall be grounds for immediate dismissal.
3. During this period the Union will not pursue any grievances on behalf of Mr. Burke.
4. This Last Chance Agreement will remain in Mr. Burke's file for eighteen (18) months following the completion of the one year referenced above and will be used by the Employer in any grievance or arbitration action. This agreement will be removed from Mr. Burke's file if he maintains a clear record through this eighteen (18) month period.
5. Following the one year of this Last Chance Agreement, Mr. Burke will continue

to be monitored in accordance with the University's sick leave policy and use of sick leave in excess of the Custodial average will result in consequences for Mr. Burke."

Provision is made at the end of the agreement for the signature of Mr. Burke, the union, the employer and the witness and for each to date their signature.

Mr. Burke had as well drafted an agreement which he forwarded to Mr. Henley on December 21, 2006. Unfortunately, Mr. Henley was on annual leave for a period of time just prior to Mr. Burke having sent this letter and other individuals at the union attempted to carry the matter forward for Mr. Burke in Mr. Henley's absence. What happened during that period is not entirely clear however, the net result was that the agreement drafted by Mr. Burke was not acceptable to the employer. Mr. Burke's draft of an agreement is as follows:

"Return To Work Agreement – Kevin Burke

Whereas Mr. Burke believes that given the circumstances, physical evidence and witness statements, a cautious and prudent person would be satisfied beyond mere suspicion that there is a reason to believe Mr. Burke was done an injustice.

Whereas Mr. Burke wishes to return to work prior to an appeal of the Arbitration decision, Judicial Inquiry, or any legal proceeding that may arise from Mr. Burke's pursuit for justice.

Whereas It is the opinion of the Employer, not the opinion of Mr. Burke, that Mr. Burke was terminated for excessive absenteeism and his failure to live up to the terms of a previous Return to Work Agreement, and;

Therefore, the parties hereby agree as follows:

1. In the event that there is conflict between the content of this Return to Work Agreement, and or any regulations made by the Employer, and the Collective Agreement, the Collective Agreement shall take precedence over the Return to Work Agreement and said regulations.
2. This Return to Work Agreement shall be in effect from the date of Mr. Burke's return to active employment, and shall remain in effect until the appeal of the



Arbitration decision, Judicial Inquiry, or any legal proceeding that may arise from Mr. Burke's pursuit for justices is completed.

3. During this period Mr. Burke shall continue to faithfully and to the best of his ability perform the duties assigned to him, shall continue to comply with all Rules, Regulations, and Bylaws applying to him that are consistent with the terms of the Collective Agreement and shall continue to use his best efforts, ability, and diligence to serve the University to advance its standard and to promote its interest..
4. The Employer shall not exercise its right to direct Mr. Burke in a discriminatory manner and shall exercise rights, powers and authority in a fair, equitable and reasonable manner.
5. The Employer is to provide Mr. Burke's physician with a list of all Mr. Burke's duties and time allowed for completing those duties, in order for the physician to reach a accurate conclusion.
6. Mr. Burke is required to provide the Employer with a medical certificate, stating he is fit to work his shifts and to resume all duties as a Custodian I."

Drafting of "Usual Terms and Conditions" is a somewhat onerous task in light of the lack of precedent provided between these parties. The only Last Chance Agreement tendered in evidence is the one which was previously executed by the Grievor on September 16, 2004. That Agreement is a situation similar to the one at hand. In that case, the Grievor had been accused of excessive sick leave usage followed by several warnings from the employer to discontinue the excessive usage of sick leave. In that case it seems that termination was contemplated and the agreement was executed in order to avoid the termination of the Grievor's employment, while at the same time attempting to satisfy the employer's legitimate demand that the Grievor show up for work and on regular occasions as required.

In the instant case a similar set of circumstances have arisen wherein the Grievor has been called to

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task because of his alleged abuse of sick leave and the employers ongoing concern that he be available for work. The Grievor's absenteeism had apparently reached a point where other co-workers were suffering as was the operation of that particular department of the employer. In many respects then, the situations are very similar to each other. One could expect therefore that usual terms and conditions of these two agreements would be similar.

During the course of the hearing of this matter before the undersigned, the presentations by the parties took the form, on occasion, of a negotiation session whereby the parties commented on various clauses in the draft which was supplied by the employer attached to the e-mail of December 19, 2006 from Mr. Horlick to Mr. Henley. The undersigned will compare this draft of Mr. Horlick with the agreement actually executed in September 2004 by the Grievor; apply the arguments made by each of the parties at the hearing to reach an agreement which, in the opinion of the undersigned, would represent the "usual terms and conditions".

The preamble clauses of the agreement signed by the Grievor recite events that the expending of effort by the employer, the combination of warnings in March 2003 and the continued pattern of excessiveness. The draft proposed by Mr. Horlick in December 2006 starts with a recital that the Grievor was terminated for excessive absenteeism and a failure to live up to the terms of the previous Last Chance Agreement. It further recites that an arbitration award reinstated Mr. Burke under the usual terms and conditions of a Last Chance Agreement. These two preamble clauses appear to reflect the reality of what happened and in my view they are acceptable.

The third preamble paragraph deals with the requirement by the arbitration award that a medical

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certificate be provided. This clause assumes that such a certificate has been provided by the Grievor to the employer. Presumably the agreement will not be executed until such time as the required medical certificate is provided. Mr. Horlick's draft, in the operative part, is 5 paragraphs in length. Paragraph 1 gives the effective date of the Last Chance Agreement and that it shall be in effect for a period of 1 year from the date of execution. The arbitration award of Arbitrator Browne does not stipulate the length of time that the Last Chance Agreement should remain in effect. The parties however, made no objection to the draft containing the term of 1 year from the date of execution. Accordingly, 1 year term is acceptable.

Paragraph 2 of the draft of Mr. Horlick stipulates that the Grievor is to attend work regularly. This wording is fairly close to that set forth in the agreement signed in September 2004 by Mr. Burke and is not found to be objectionable. Mainly, paragraph 2 deals with Mr. Burke exceeding 56 hours of sick leave during the term of the agreement and that it shall be grounds for immediate dismissal. Very similar wording was contained in the agreement signed by Mr. Burke in 2004 and is therefore found by the undersigned to be acceptable.

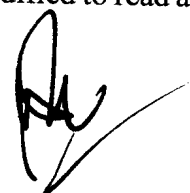
Paragraph 3 of the agreement stipulates that during this period the union will not pursue any grievances on behalf of Mr. Burke. It was pointed out by the union that the wording of the arbitration award by Arbitrator Browne says that no existing grievances are to be pursued by the union. The wording of Article 3 of the draft agreement has a different meaning and effectively prohibits the Grievor from filing any grievances during the currency of the Last Chance Agreement. It was pointed out by Mr. Henley at the hearing that this clause is somewhat redundant as the award of Arbitrator Browne stipulates that during the life of the Last Chance Agreement no

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existing grievances are to be pursued by the union. If the award already stipulates that condition, there is no need to place same in this agreement. The undersigned concurs with that logic and accordingly clause 3 is eliminated.

Article 4 of Mr. Horlick's draft agreement was hotly contested by the union. This clause deals with the length of time during which the Last Chance Agreement will remain in Mr. Burke's file. There seems to be consensus among the parties that the agreement should remain in Mr. Burke's file for a period of 18 months because of the provisions of Article 18.02 of the collective agreement which stipulates that any reprimand or warnings given in writing and becoming part of an employee's file shall be destroyed after 18 months have elapsed, providing another warning or reprimand relating to a similar offence has not been given within that period. The union asserts in this case that the 18 months should begin on the date of execution of the agreement while the employer asserted that the 18 month period should begin at the end of the 1 year term of the Last Chance Agreement.

The wording of Article 18.02 is instructive and deals with reprimands or warnings given in writing and becoming part of the employee's file. It is apparent that this Last Chance Agreement shall become a part of the file of the Grievor and will be so from the date of its execution. Therefore, it appears logical to the undersigned that the Last Chance Agreement should remain in the file of Mr. Burke from the date of execution of same to a date which is 18 months beyond that date of execution. It should be noted that this will still provide for the Agreement to be in the Grievor's file for a total of six months after its terms have expired. Paragraph 4 would be modified to read as follows:

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This Last Chance Agreement will remain in Mr. Burke's file for 18 months following the execution of same and will be used by the employer in any grievance or arbitration. This Agreement will be removed from Mr. Burke's file if he maintains a clear record through this eighteen (18) month period.

The final paragraph of the draft prepared by Mr. Horlick deals with the consequences after the first year of the Last Chance Agreement. It stipulates that the Grievor will continue to be monitored in accordance with the University's Sick Leave Policy. Use of sick leave in excess of the custodial average will result in consequences for Mr. Burke.

The union objected to this clause being contained in the Agreement as the Grievor feels that this sets him apart from his co-workers and that the degree of vigilance on his conduct will be greater than that of his co-workers. Bearing in mind that the mandate of the undersigned is to find usual terms and conditions and examining the Agreement signed by the Grievor in September 2004 where this paragraph in virtually identical wording is found and signed by the Grievor, I find it is a usual term and can remain in the Agreement.

As a result of the foregoing, the Agreement referenced in the arbitration award of Arbitrator Browne will take the following format. Upon being executed by the Grievor he is to be reinstated in his employment:

"Last Chance Agreement – Kevin Burke

Whereas Mr. Burke was terminated for excessive absenteeism and his failure to live up to the terms of a previous Last Chance Agreement; and;

Whereas an Arbitration Award reinstated Mr. Burke under the usual terms and conditions of a new Last Chance Agreement, and;

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Whereas Mr. Burke, in accordance with the Arbitration Award has provided the Employer with a medical certificate which clearly states that he is fit to work his shifts and to resume all duties as a Custodian I.

Therefore, the parties hereby agree as follows:

1. This Last Chance Agreement shall be in effect from the date of Mr. Burke's return to active employment, [date of return] and shall remain in effect for one (1) year from that date until [a date one year from the date of return to active employment].
2. During this period Mr. Burke will attend work regularly. Should Mr. Burke exceed fifty-six (56) hours sick leave during the above referenced year, it shall be grounds for immediate dismissal.
3. This Last Chance Agreement will remain Mr. Burke's file for eighteen (18) months following the execution of same and will be used by the Employer in any grievance or arbitration action. This agreement will be removed from Mr. Burke's file if he maintains a clear record through this eighteen (18) month period.
4. Following the one year of this Last Chance Agreement, Mr. Burke will continue to be monitored in accordance with the University's sick leave policy and use of sick leave in excess of the Custodial average will result in consequences for Mr. Burke."

The Agreement is to be signed by Mr. Burke and on behalf of the union and on behalf of the employer and the date inserted. The signatures of each of these parties should be witnessed.

As noted above, the sole purpose of the appointment of the undersigned was to determine the "usual terms and conditions" for the Last Chance Agreement. However, during the course of the hearing, the parties argued over whether or not the Grievor should be paid for the period of time that has elapsed since his dismissal. The union argues that the reason the Grievor was not reinstated immediately is because of delays caused by the actions of the employer in the drafting of the Agreement. The employer states that the reason for the Grievor not being immediately reinstated are to do with the Grievor having launched various judicial proceedings in the effect of slowing down the process. The employer as well blamed the Grievor and the union for not having properly negotiated the terms for the Last Chance Agreement.

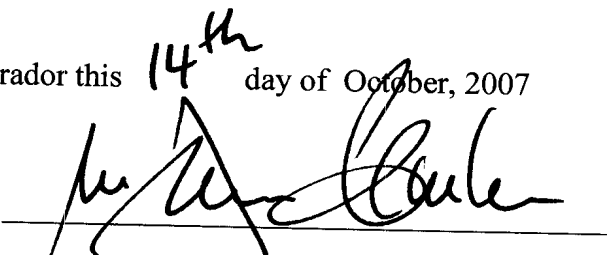
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Notwithstanding that the written terms of my appointment are as set forth above, the parties asked for my views on the issue of compensation. These views are as set forth following.

In my view, the issue of compensation up to the date of Arbitrator Browne's decision is a matter which clearly falls within his jurisdiction as Arbitrator. If, having reinstated the Grievor and set forth the terms for his reinstatement, he had felt that compensation at that point was appropriate he would have ordered same. On the issue of compensation since the date of the arbitrator's award, it is my view that both parties have contributed to the delay but, in my view, not in an equal amount.

From the evidence presented before me at the hearing and having listened to the arguments of the parties it is my view that a rough assessment of the responsibility for the non-reinstatement of the Grievor to date would be to apportion 2/3 to the Grievor and 1/3 to the employer. Accordingly, if it was within my jurisdiction, I would have awarded the Grievor 1/3 of the amount of salary he would have otherwise earned from a date one month beyond the date of the arbitration award. That month would have transpired in the normal course of negotiating the terms of such an agreement.

DATED at St. John's, Newfoundland and Labrador this 14th day of October, 2007


W/ JOHN CLARKE – SOLE ARBITRATOR