

- Promotion
- Sufficient Ability Clause
- Scope of Review
- Bad Faith
- Privilege

AWARD

BETWEEN: UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 1252

(hereinafter called the “Union”)

AND: NEWFOUNDLAND ASSOCIATION OF PUBLIC
AND PRIVATE EMPLOYEES

(hereinafter called the “Employer”)

AND: COLLEEN MORRISON

(hereinafter called “Ms. Morrison”)

AND: CHRISTINA KENNEDY

(hereinafter called “Ms. Kennedy”)

GRIEVOR: JUDY SNOW

FOR THE EMPLOYER: Stuart Morris, LL.B.

FOR THE UNION: David Goodland LL.B.

FOR MS. MORRISON Self Represented

MS. KENNEDY: Self Represented

ARBITRATOR: David G.L. Buffett, QC

THE GRIEVANCE

This case concerns a grievance by a Grievor who claims a Collective Agreement violation by her Employer, a Labour Union. The claim is that the Employer acted

contrary to the Collective Agreement by not granting her a promotion from her position as Public Relations Communications and Research Officer to the position of Employee Relations Officer or ERO.

The Grievance is dated April 21, 2006 and reads, inter alia, as follows:

Date of Occurrence April 21, 2006, Nature of Grievance - Denial of Promotion to ERO by letter dated April 19, 2006, Remedy Sought - to be placed in the ERO position and to be compensated for all loss salary, benefits, allowances, and lieu days.”

The Hearing was convened on January 16, 2007 at St. John’s.

At that time the Parties agreed that:

1. I, as Arbitrator, am a properly constituted tribunal and have authority to hear the case.
2. I, as Arbitrator, will take notes and that in the event of a dispute as to what transpired at the hearing or a conflict in the evidence, my notes will prevail.

I was made aware by the Parties that there was a preliminary issue to be dealt with concerning a claim by persons that they were affected by the proceeding and were thereby entitled to standing.

The hearing was set over to February 19, 2007 for argument on an application for standing and to give Ms. Morrison and Ms. Kennedy, incumbents in the position to which the Grievor was seeking promotion, time to secure legal representation if they so wished.

The hearing was reconvened on February 19, 2007 for argument on the application for standing.

On March 13, 2007 I published a ruling granting both Ms. Morrison and Ms. Kennedy standing at the hearing.

The matter was reconvened for hearing as to the merits on September 20, 2007 and proceeded on that day as well as on September 21, October 1, October 2, October 3 and October 29, 2007.

The following items were received into evidence as Exhibits either through consent or through witnesses who testified:

1. Consent 1 – The Collective Agreement between NAPE Staff (UFCW Local 1252) and the Employer;
2. Consent 2 – A Job Posting for the position of Employee Relations Officer (Temporary) Location: St. John's, Closing Date April 7, 2006;

3. Consent 3 – A Job Posting for the position of Employee Relations Officer (Temporary for three months under review) Location: St. John's, Closing Date April 7, 2006;
4. Consent 4 – A letter dated April 6, 2006 from the Grievor to Carol A. Furlong, President of the Employer applying for either one of the positions of Temporary Employee Relations Officer to which letter was attached the Grievor's Resume;
5. Consent 5 – A letter dated April 19, 2006 from Carol A. Furlong, the President of the Employer, to the Grievor indicating that she did not meet the qualifications for the position and would therefore not be contacted for an interview;
6. Consent 6 – The Grievance dated April 21, 2006;
7. Consent 7 – A letter from Ms. Furlong dated April 28, 2006 advising that the grievance was denied;
8. Consent 8 – A Job Posting for two positions of Employee Relations Officer: Employee Relations Officer (Temporary Full time) and Employee Relations Officer (Temporary for Three Months, Under Review) closing on May 10, 2006;
9. Consent 9 – A letter to Carol A. Furlong from Ms. Morrison dated May 4, 2006 applying for the position of Employee Relations Officer as advertised in the Saturday, April 29, 2006 edition of the Telegram to which was attached her resume;

10. Consent 10 – A letter to the Employer dated May 10, 2006 from Ms. Kennedy applying for the position of Employee Relations Officer to which was attached her resume.
11. JS# 1 – a memo dated July 8, 1998 from the President of the Employer advising that the Grievor had been appointed to the Public Relations, Communications, Research Officer (PR) position with the Employer.
12. JS# 2 – a list of some writing and editing projects of the Grievor.
13. JS# 3 – a Job Description for her PR position drafted by the Grievor.
14. JS# 4 – a position description form for the PR position.
15. JS# 5 – a Nape Communications Plan dated September 1999.
16. JS# 6 – a Nape Picket Captains Manual dated March 21, 2001.
17. JS# 7 – a Nape Submission to the Provincial Government White Paper on Public Post Secondary Education.
18. JS# 8 – a Job Posting for two temporary positions as Employee Relations Officer closing date of January 29, 2003.
19. JS# 9 – a Position Description Form for the position of Employee Relations Officer dated June 2003.
20. JS# 10 – two pages of the 2003 Nape Constitution (pages 28 and 29).
21. JS# 11 – two pages of the 2001 Nape Constitution (pages 28 and 29).
22. JS# 12 – an Agreement between the Employer and First Contact Communications Limited.
23. JS# 13 – an Invoice from First Contact to the Employer dated September 12, 2005.

24. CF# 1 – a Grievance Form dated June 18, 2007 concerning the Grievor and concerning an alleged denial of the right to teach at the Employer’s Labour School.
25. CF# 2 – a letter concerning punctuality from Carol Furlong, the President of the Employer, to the Grievor, dated June 16, 2007.
26. CF# 3 – a letter from Ms. Furlong to the Grievor dated April 12, 2006.
27. CF# 4 – a list of questions asked by Ms. Furlong and Ms. Price during the external interviews.
28. CF# 5 – a letter from another individual (Person X) dated May 5, 2006 applying for the ERO position together with that person’s resume.
29. CF# 6 – a policy statement from the Board of Directors arising from the Biennial Convention, 1985 regarding hiring practices.
30. CF# 7 – a list containing a breakdown of how weight would be allocated to different areas in assessing external candidates, which list Ms. Furlong was unable to say was the final list used.
31. CF# 8 – a letter to the Eastern Vice President of Nape from Chris Henley dated September 11, 2006.

The Union called three witnesses, the Grievor herself, Thomas Hanlon, a former President of the Employer, and Linda Marie Chafe, President of the Union. The Employer called one witness, Carol Furlong, the current President of the Employer. All witnesses were sworn. Neither Ms. Kennedy or Ms. Morrison gave or called evidence.

RULING ON AN EVIDENTIARY ISSUE

Ms. Chafe's time testifying was very brief. The Union sought to ask her about a thing or things said by Ms. Furlong at a meeting on August 10, 2006 which involved Ms. Furlong, Ms. Chafe, Sheila Greene, a Lawyer with the Employer and a member of the bargaining unit of the Union, and Deborah Smith, a member of the Union's National staff.

The Employer objected to the line of questioning and I was required to render a ruling on the admissibility of the evidence that the Union was seeking to adduce. The argument on the point was made in the afternoon of October 1, 2007 and I ruled on the admissibility of the evidence on the morning of October 2, 2007. My ruling was delivered orally. The Union asked that I include and set forth my ruling in this Award and I now do so based upon the notes that I made in order to render my ruling. My ruling was as follows.

The Union desires to adduce evidence through its witness, Ms. Chafe, the Union President as to whether, during discussions between the Union and the President of the Employer, Ms. Furlong, Ms. Furlong ever offered a reason or reasons for the denial of the promotion of the Grievor to the position of ERO.

It has stated that if Ms. Chafe's answer was yes that it intends to adduce evidence to show what the reason was or reasons were. It intends to explore this whole area with Ms. Chafe.

The Union appears to want to demonstrate or hopes that it can demonstrate that a reason or reasons different in nature from those stated in its letter to the Grievor were articulated by Ms. Furlong during the meeting in question.

I can only assume based upon the opening statement of the Union and based on the evidence that has been adduced thus far that it will contend that these communications were relevant because they serve to demonstrate that a lack of qualifications was not the real reason for the employer denying the Grievor the promotion in question and/or that it impacts on how I would assess the credibility of Ms. Furlong.

The meeting in question took place after the filing of the grievance and during the grievance process.

The Employer and the Third Parties object to this line of questioning and the adducing of any such evidence on the basis that it violates the Employer's privilege and they contend that privilege applies to all communications between the parties made during the course of the grievance process.

Privilege evidentiary rules are not like most evidentiary rules. Most other ones are rooted in the reliability or trustworthiness of the evidence or the relevance of the evidence. On the other hand privilege evidentiary rules, where privilege exists, exclude relevant and quite possibly very trustworthy and cogent evidence on the basis that there is a more

important interest at stake and a more important interest that must be upheld than the interest of getting to the truth of the matter.

Arbitral jurisprudence accepts that, generally speaking, privilege attaches to communications made by the Union and Employer to each other, written or oral, during the course of the grievance procedure and while a grievance is in process and which involves the dispute between the Union and the Employer. The idea is that it promotes resolution of disputes to have this privilege apply and promotes a healthy labour relations environment and furthermore the parties go into the session where the communications occur believing that privilege pertains to anything said in the meeting.

The Arbitral jurisprudence suggests that generally speaking privilege applies and the parties do not really differ on this point.

The rule, that because the communication occurred during a meeting between the Employer and the Union while the grievance process was underway it is privileged, is not without exception however. The parties do not really dispute this either.

Where they disagree is as to whether this case falls within an exception to the general rule.

Arbitral jurisprudence has recognized the exception of the admission of communications which serve to demonstrate whether or not a grievance was settled when that is a matter

of dispute. The decision of Arbitrator Brown in *Re Canadian Broadcasting Corporation and CUPE* (1975) 8 L.A.C. (2d) 368 is such a case as is the decision of Arbitrator Wakeling in *Canada Post Corporation v. CUPW* (1993) 38 L.A.C. (4th) 443. The jurisprudence has also recognized the exception where someone steps outside the acceptable parameters of the grievance procedure, for instance if someone assaulted someone or someone was subjected in the procedure to what amounted to harassment or illegal threats.

A close examination will reveal that where privilege seems to have not been found to exist, the cases are, for the most part, ones where someone has effectively either stepped outside the grievance process and his or her actions rather than being part of the process are somewhat antithetical to it or ones where to rule a communication inadmissible would be incongruous with settlement which itself is one of the very things the privilege rule is designed to try to promote. A quote from M. Mitchnick & B. Etherington, *Labour Arbitration in Canada* (Toronto, Lancaster House 2006) at page 99 makes this point:

“In Canada Post Corp. and CUPW (1993) 38 L.A.C. (4th) 443, where such evidence was admitted Arbitrator Wakeling noted the incongruity of encouraging parties to settle their differences through a prescribed grievance procedure while effectively rendering unenforceable any resulting agreement by precluding it from being proven. The Arbitrator stated as well that the evidence proving the settlement can be in either oral or written form.”

In the examples I noted reasons different from getting to the truth of the matter existed which caused the principle of privilege to give way.

Getting to the truth of the matter has traditionally not been a reason for dispensing with privilege. In fact as I said, at the outset, this is not what privilege is founded on.

The issue has arisen as to whether to be privileged the communication has to be one which is a settlement communication. In other words is it only to communications where there was a gesture of compromise or an offer that privilege is confined? I do not believe that it is. The quote from the Sopinka text that one sees referred to in some of the cases arises in the civil litigation context and not in the labour relations context.

Arbitrator Shime in the oft quoted case of *Re Scarborough (Borough) and I.A.F.F. Loc. 626* (1972) 24 L.A.C. 78 noted that often meetings generate more heat than light but that this too is intended and serves a useful function by allowing the parties to ventilate or by allowing an outlet for festering discontent.

Arbitrator Pamela Picher's comments at page 3 of her decision in *Re Regional Municipality of Carleton v. Canadian Union of Public Employees, Local 503*, 14 L.A.C. (3d) 445 are persuasive. She writes:

“The Board cannot accept the suggestion of counsel for the Union that the only statements made in grievance procedure which deserve protection are those statements that are specifically directed at reaching a settlement.” The purpose surrounding statements made during the grievance procedure is to foster an environment in which the parties may freely discuss the grievance at hand with a view to settling it. In our opinion, however, the free discussions that should be promoted within the grievance procedure requires that the privilege extend beyond offers of settlement or statements specifically related to the possible settlement of the issue. Without limiting our view of the full scope of the privilege, we conclude that,

ordinarily, it should extend at least to any statements that generally relate to the subject-matter of the grievance. To draw a fine line between those statements made with a specific view to settling a grievance and other statements made on the general issue at hand would unduly inhibit the free flow of discussion which should be achieved through the grievance procedure. Moreover, it may only be after a full and unrestrained discussion of the general issue that either of the parties would be prepared to make a specific offer of settlement. In our view, the narrow interpretation of the privilege attaching to the statements made during the grievance procedure advanced by the Union in this case would undercut the aim of the grievance procedure and fail to promote good labour relations between the parties.”

It is my view that the fact that this not a communication which amounts to an offer of settlement or an offer of resolution does not preclude privilege from applying.

Furthermore it appears that the reason for asking that the privilege give way in this instance is directed to getting at the truth of the matter, something that privilege is not founded on. I am of the view that it is not appropriate that privilege give way in this instance.

My ruling therefore is that the communications at a meeting during the grievance process are not admissible at the behest of the Union unless the Employer waives privilege.

The foregoing was my ruling.

The Employer declined to waive privilege.

THE FACTS AND EVIDENCE

For the most part the facts are not in dispute.

The Grievor, applied on April 6, 2006 for either of two positions that had been posted by the Employer.

She had served in the bargaining unit position of Public Relations Communications and Research Officer with the Employer since July 1998.

The two positions posted were for Employee Relations Officer (Temporary) and Employee Relations Officer (Temporary for three months under review). The closing date for the job competitions for both was April 7, 2006.

On April 19, 2006 the President of the Employer, Carol Furlong, wrote to the Grievor advising the Grievor that she did not meet the qualifications for the position and would therefore not be contacted for an interview. She was in fact not interviewed.

There was one other person within in the bargaining unit who applied in response to the job postings. That person was not hired. That person was also not granted an interview.

The Grievor filed her grievance on or about April 21, 2006. It was denied on April 28, 2006.

The jobs were advertised externally. Ms. Morrison's application discloses that she was responding to the advertisement placed in the April 29, 2006 edition of the St. John's newspaper, The Telegram. Ms. Morrison applied on May 4, 2006.

Ms. Kennedy applied on May 10, 2006.

These two persons were interviewed along with a number of other job applicants who applied once resort was had to the external advertising.

Ms. Kennedy and Ms. Morrison were hired into the positions. Ms. Morrison was not a member of the bargaining unit and Ms. Kennedy had only been a bargaining unit member for a short period. She had very little seniority when hired compared to the Grievor and Ms. Morrison had no seniority. The job duties and qualifications stipulated in the internal postings for both positions was the same. The contents of the postings did not change when the job was advertised externally.

The contents of the postings read as follows:

“Duties: Works closely with President and Secretary/Treasurer. The successful applicant will be responsible for, but not limited to, negotiating collective agreements, processing grievances, presenting arbitration cases and appeals, servicing locals and members and responding to inquiries, participating in education training for membership, serving on committees, dealing with employers on behalf of the membership and attending local meetings. Work is performed with considerable independence and involves working long hours on a regular basis. Extensive travel may be

required. May be required to provide relief to the satellite offices in Corner Brook and Grand Falls. Other duties as assigned by the President.

Qualifications: The successful incumbent will have a degree in Labour Relations, Law or related field and practical experience or the equivalent in experience and training. Considerable experience in the leading of and negotiating collective agreements; presenting arbitrations and appeals (*i.e.* workers compensation, classification, employment insurance and Canada Pension); and interpreting collective agreements. The incumbent will have extensive knowledge of labour and relevant legislation, extensive skills in collective bargaining including ability to draft and interpret contract language; write and present briefs and position papers; practical and effective workplace knowledge in the interpretation and application of collective agreements. The incumbent will have strong and effective communication skills and a dedicated commitment to union beliefs and principles. Must hold valid driver's licence."

The Grievor gave evidence disclosing that she held a BA Honors Degree in English and won the A. C. Hunter prize for English at Memorial University. She was accepted into law school but did not go because of her job and family commitments. She did complete some Masters level courses. She took a course in legal writing at the College level. She also completed an undergrad University course in Business Law. Her work history included being a legal secretary or assistant to a Barrister in St. John's who later went on to become a Supreme Court Justice. She detailed her work history with the Provincial Government and with the Newfoundland Medical Association, as well as her work and efforts on behalf of and with a company that was operated by herself and the person who was then her husband and is now her former husband.

She also gave detailed evidence of the nature of her work and job duties in her current position with the Employer.

Her Provincial Government work history was for the most part concerned either with communications or trade and business development. She was with the Newfoundland Medical Board for a short period of time which included a time when the physicians were endeavoring to improve the level of remuneration which they would receive. She had an involvement in that effort as a communications person.

Her work with her own business involved writing, editing, administration, and booking tours and the like.

As for her work at the Employer she noticed a considerable change in her duties and level of responsibility once Tom Hanlon took over as President. This continued when Leo Puddester succeeded Mr. Hanlon as President. Her budget was increased and Mr. Hanlon was intent on using her position to galvanize membership and public support for the Employer in its struggle with the Provincial Government. The effort was to secure more support for the Employer than for the Government and to secure an attitude on the part of the public that the Employer and Mr. Hanlon were more to be trusted than Government and the Premier. The Grievor was given a strategizing and a tactics development role in addition to having to execute the strategies and tactics. She was given decision making authority unlike any which had previously existed in that position.

During the 2002 strike and in the time leading up to it she was an integral member of a triumvirate consisting of Mr. Hanlon, his lead negotiator and herself. She was privy to and part of the highest level decision making and strategizing. Decisions were not made

without her input. She was part of a team embedded in the hotel where negotiations were ongoing. She spent most of her waking hours in the company of the President and the lead negotiator and met on a daily basis with the various negotiating teams. She claimed that she was privy to negotiations at the highest level. She did admit that she did not participate in the negotiations at the bargaining table or interact directly with the Employer. She was responsible for dealing with both the Provincial and National media.

In 2004 when a second strike occurred she had the same level of involvement as she had in 2002.

She did admit having never attended an arbitration proceeding.

She recounted how she had campaigned for Mr. Puddester against Ms. Furlong on two occasions. The first time Mr. Puddester was successful in getting elected as President. The latter time he was unsuccessful and Ms. Furlong became President. She stated that she campaigned for Mr. Deir when he ran against Ms. Furlong for Secretary/Treasurer and for Mr. Henley when he ran against Ms. Furlong for Secretary/Treasurer.

She described her relationship with Ms. Furlong throughout those times as not good, not friendly, not adversarial, but quite cool.

She recounted how, after she became President, that Furlong took issue with the fact that the Grievor was not in her office at 9:00 am or necessarily there at 5:00 pm and how Ms.

Furlong made it clear that she could no longer work from home. In the summer of 2007 she received a letter of reprimand from Ms. Furlong concerning this issue.

The Grievor testified how she had taught at the labour school for a number of years and said that in 2006 after Ms. Furlong became President the opportunity to do so was denied her.

She testified how the budget that was accorded for Public Relations was severely cut. She said she no longer was given the task of developing tactics or strategy or shaping the substance of the message. Whereas before, advertising concepts were developed by her, this is now being done by the President, when it is done at all.

She went through the duties described in her job description and outlined how many of them are no longer ones that she has.

She gave evidence as to the events in 2003 surrounding her application at that time for an ERO position and her subsequent withdrawal of her application. This was during Tom Hanlon's presidency.

At that time rumors were circulating that one of the Employee Relations Officers, Ms. Brake, was seeking to be accommodated in the Grievor's Public Relations position and was seeking to bump the Grievor.

It was understood by the Grievor that it was due to stress in the ERO position that Ms. Brake was seeking to bump into the PR position. The Grievor did not really desire the ERO position at that time because of her family circumstances but she applied for the position for fear of being bumped from the position that she held.

Mr. Hanlon became aware of her intention to seek the ERO position and approached her because he valued her in the PR position and thought that she was more valuable to the Employer in that position. She said that Hanlon stated to her that there was just as much stress in the PR position as in the ERO position and she said he indicated verbally though not in writing that she would not be bumped by Ms. Brake. At that time he also stated, but in writing, that she was qualified to be an ERO and he gave her a letter which contained words to ensure her that if the job became available in the future and if she wanted it, it was hers. On this basis she withdrew her application.

She testified that she does not have the letter at present. She stated that it was misplaced or lost when items were divided on her marriage breakup. She has not been able to find it. She has also searched for a copy of the letter at the Employer's offices but was unable to find a copy within the Employer's offices.

On cross examination, she maintained that prior to his testimony she did not discuss the letter with Mr. Hanlon. Contact was made with him twice about testifying and about the letter. She said she discussed the letter only to the extent necessary to identify to Hanlon the letter that she was speaking to him about. She testified as to what she understood to

be the educational backgrounds of some previous recent ERO hirees. None had University degrees to her knowledge but came from backgrounds such as Heavy Equipment Operator, Xray Technician, LPN and Correctional Officer.

She testified as to how she had Quick Law training and as to how she had researched and summarized cases where the Employer had been successful. This was for the consumption of the membership of the Employer.

While she admitted having no lead negotiating experience, she maintained that the knowledge she has qualifies her to do the job with mentoring. She maintained that mentoring was always required and said that she would need mentoring only to the extent that anyone else who assumed the position would need mentoring.

She stated that Furlong has belittled her. She indicated that her work has been referred to by Furlong as garbage. She stated that Furlong stated that she, the Grievor, was lacking in communication skills.

She claimed in cross examination that while she was not attributing malice to Ms. Furlong she was maintaining that Ms. Furlong was biased against her.

Tom Hanlon testified that he was the President of the Employer from April of 1999 until June 30, 2003. He indicated he started working with the Employer in or about 1980 as a Employee Relations Officer. Prior to being hired he did not have any experience in

leading negotiations but had been active within the membership of the Employer. He said that he observed for about a year before leading in negotiations. He described the primary duties of an ERO as the processing of grievances up to and including arbitration, the actual day to day interpretation of collective agreements and dealing with member complaints and workplace problems. Negotiations were described as a major part of the job though as not being day to day. When Mr. Hanlon started he stated he had no experience presenting arbitrations but he did state that as an activist he had attended some.

In Hanlon's words an ERO starting out has "to burn the midnight oil" and learn on the job and from senior Employee Relations Officers.

Hanlon listed 15 Employee Relations Officers that were involved with the Employer since 1980. Of these only 3 to his knowledge had University degrees. None of the persons that he hired had degrees. One was an LPN, one was a Correctional Officer, one was an Xray Tech, and one was a Heavy Equipment Operator.

He said that following his election as President the role of the Grievor as Public Relations Officer was expanded "a hundred fold". The Grievor exceeded her mandate and in his view excelled at her job.

He described her as being an invaluable member of his team particularly during the negotiations leading up to a strike and while the strike was ongoing. He stated that she

played a huge role in getting negotiating teams with different priorities on side. He testified that she was the part of the team that met with and discussed strategy with the EROs who lead the negotiations.

He described her as immersed in the whole process the same as he and his chief negotiator were.

He recalled in 2003 when the Grievor applied for the job of ERO and stated that he approached her because he considered her so valuable in the PR position. He said that he ascertained that she was concerned about Ms. Brake bumping into her PR position and consequently she applied for the ERO position. He recalls giving her a letter stating that if in the future she applied for an ERO position when it became available that he would give it to her. He says that it was on this basis that she withdrew her application. He did say that if she had insisted on applying he would have had no choice but to give her the job as she was “infinitely qualified”. In his view “she could be one of the best.” He felt “she could be excellent as lead negotiator”. He said “she understood the process”. He said “she understood the players”.

He stated that when he was President Ms. Furlong had no part in the process of hiring or interviewing Employee Relations Officers except for speaking out at Board Meetings.

In cross examination Mr. Hanlon stated that he did not give any assurance to the Grievor that Trudi Brake would not be permitted to bump into the PR position.

He indicated that the people he hired had some negotiating experience as part of negotiating teams and/or shop steward experience.

He stated in the past the Employer never had to move outside the membership to hire an Employee Relations Officer. If none of the bargaining unit staff got the position, it was invariably someone from the membership of the Employer who was hired.

Carol Furlong testified for the Employer.

She was elected President for a two year term after the 2005 convention and successfully sought re-election for a second term.

She has served as the Secretary/Treasurer of the Employer for a term as well.

Ms. Furlong testified that she holds an Arts Degree with a major in Anthropology and a minor in Sociology and has a Masters Degree in Educational Foundations. She also did courses sufficient to bring her up to the Grade 6 level teaching certificate.

She served in the past as a Shop Steward, as Vice President of a Local and as President of a Local. She has also served on various committees and been a member of a bumping tribunal and a Union Nominee on an Arbitration Board.

She described the Employer as having a huge backlog of grievances. The Employee Relations Officers were overworked. A number of persons in that position were off on sick leave and she was under pressure from the President of the Local, Mr. Henley, to hire people. As for the backlog of grievances there is around 200 in the General Service Unit alone.

She described the process whereby the positions were posted internally. Two people applied including the Grievor. Neither of these two people were hired or interviewed. She felt that it would be demeaning to interview people and reject them and if they clearly did not qualify she did not want to subject them to an interview.

She said in the case of the Grievor she reviewed her letter and resume setting forth her employment history and compared it to the job posting. She said that in the course of doing this she ascertained that the Grievor did not meet the minimum standards of the job posting. The major deficiencies were the lack of a labour relations focus in her work or academic background. She did not think the Grievor's qualifications and the posting were a match.

Consequently she wrote the Grievor a letter saying she would not be interviewed.

She said that the Employer needed someone who could move in and do the job right away with minimal orientation.

She maintained there was no malice or bias on her part. She said she did not feel good about rejecting co-workers but she had a responsibility to the Employer and its membership.

On cross examination counsel for the Union asked Ms. Furlong what types of experience she would look for in place of a degree in the right area. Ms. Furlong replied “experience in the negotiating process and arbitration process, familiarity with labour legislation and grievance handling experience.” She said knowledge of bargaining units would be an asset but she’d be more concerned with knowing that someone was able to deal with the processing of grievances and doing arbitrations.

As far as leading negotiations was concerned her response was that if someone could show they had negotiating experience falling short of being the lead negotiator but had been part of a negotiating team, they would be considered. She said that the stipulated qualifications are what she would look for but if someone had a background in some of these areas they would be considered whereas if someone did not have a background in one or some of these areas she would characterize that person as not suitable.

She admitted that neither Ms. Kennedy or Ms. Morrison had experience in leading negotiations but stated that they had involvement in drafting collective agreement proposals.

As far as arbitration presenting experience was concerned it was not mandatory and some experience or training in arbitrations could be a substitute.

She said when she reviewed the Grievor's resume and application she did not see anything near to an equivalent in experience and training.

For instance, it did not show she took part in or attended at arbitrations.

Ms. Morrison had experience in negotiations. The Grievor had none in the sense of sitting across the bargaining table from the Employer. Ms. Morrison had a background in presenting arbitrations as part of her Masters in Employment Relations Degree. Ms. Kennedy had a background in the area as well. She was a lawyer. She did a course with the labour law scholar George Adams and did mock cases in law school. She had also made presentations in Court.

She spoke about Bert Blundon, one of the recent hirees who did not have a university degree, having negotiating experience as an assistant for Austin Deir and knew that he had presented an appeal for highway operators on a classification issue prior to being hired as an ERO. He had also served on the Federation of Labour in various roles.

She understood that Bert Blundon and Rowena Best, another of the recent hirees without a university degree, were involved in the negotiating process, involved with grievances

and with arbitrations in the capacity of an advisor prior to being hired as Employee Relations Officers. In her view, they brought experience to the table.

Where she saw the Grievor's application as lacking was in the practical and hands on experience areas. She was of the view that what the Grievor acquired through her involvement with Mr. Hanlon and Mr. Puddester during the two strikes was of a general knowledge but not practical and hands on experience.

It was established that she interviewed Person X when resort was had to external advertising. That person worked in a production facility as a lead hand. He/she was not qualified in the view of Ms. Furlong. He/she sat on the Board of the Employer. All Board members who applied but one were interviewed. That one person was someone who had manifested an anti union animus. She said people who were interviewed had extensive labour backgrounds.

She was asked when resort was had to external advertising how did she conduct herself differently. Her response was "you are looking for the best person you can find and can depart from minimum standards". She was questioned "if you are an internal applicant and do not have lead experience you get overlooked". Her reply was that "if you had other experience and training in the area that would be considered". She did say that once the Employer goes external it does not have to accept the minimal standards. She maintained that the collective agreement does not dictate what happens in the external context and the Employer is free to conduct the job search as it deems appropriate. She

stated that when the Employer went external the bar could be lowered but she said that she would not say it was lowered in this instance because the people hired had the requisite degrees and experience and training in the areas. She admitted that she moved away from lead negotiating experience as a qualification.

She maintained that during the external process the Employer had the right to chose the best candidate and the person who came closest to the stipulated standards.

She said that the factors that she looked at did not change when she moved from the internal search to an external one. Likewise she maintained the weight she ascribed to various factors did not change when the process became an external one.

She knew that both Trudi Brake and Brenda White had come from the Grievor's position directly into an ERO position.

UNION ARGUMENT

The Union takes issue with the actions of the Employer on a number of fronts.

It contends that the Employer lowered the bar on the required qualifications for the position in question when it moved to consider external or non-bargaining unit candidates. It also contends that the Grievor qualified for the standards that the Employer had set internally and that she most certainly qualified for the lowered external standards.

The argument was made that the Grievor's academic qualifications, a B.A. Honors in English and having won the A.C. Hunter prize for English at University along with some Masters course work reflect a person of high intellect and confirms that she is as capable as any and more capable than most. She was accepted into Dalhousie Law School but declined to go because of family and business commitments.

Her career in Government and her period of time in the public relations position with the Employer have provided her with the communications, advocacy and persuasion skills necessary to perform the role of an ERO. Furthermore her public relations position with the Employer has caused her to have an impressive knowledge of the collective agreements that the Employer's various bargaining units have in place.

Her closeness to the President and Chief Negotiator during and in the period leading up to two strikes, one in 2002 and one in 2004, where she was involved in strategizing and in briefings with all negotiating teams allowed her an insight into negotiations that few persons have.

While it is true that she never led negotiations or presented arbitrations, neither did anyone else who had been hired to the position of ERO. This is bargaining unit work and only EROs can do it.

The Union maintains that it is just not the Grievor saying that she is eminently qualified for the position but it is also Tom Hanlon, a Past President of the Employer and a person who was an ERO for 15 plus years, who is saying this.

It argues that the Grievor taught at the NAPE Labour School for 4 years.

It notes that Tom Hanlon said that during the strike which occurred during his Presidency the Grievor was one of a handful of people in the inner circle of the Union and she spent significant time dealing with Hanlon and his chief negotiator during that time and during the time leading up to the strike when negotiations were underway.

It stressed that Tom Hanlon is an independent witness who has now retired and who has nothing to gain or nothing at stake by the outcome of the arbitration and his evidence and opinion therefore is deserving of great weight.

Hanlon, in 2003, put in writing to the Grievor that she was qualified for the position of ERO when he wrote a comfort letter to her. This occurred when she had concerns that Trudi Brake might bump into her Public Relations position. As a result of these concerns the Grievor applied for the position of ERO and Hanlon was anxious to keep her in the PR position because he considered her so valuable in that position. Hanlon testified that if she kept her application in place for the ERO position and did not withdraw it, he would have had no choice but to give her the job above anyone else.

He gave her the so called comfort letter which was to the effect that if she wanted the job in the future when it came open her qualifications were such that she would be awarded the job.

In the Union's view it is almost beyond belief that in 2006, after her insights and knowledge had been further increased by continuing in the same high end role under President Puddester and by her repeat involvement at the highest Union level in the 2004 strike, she is not even accorded an interview.

They contend that this is all the more startling in light of the fact that a person who I shall identify as Person X was granted an interview when the Employer posted the job externally. Person X works as a lead hand in a production facility and is a member of one of the Employer Union's bargaining units. He/she is a member of the Board of Directors of the Employer but does not have a University education or any experience in presenting arbitrations or leading negotiations. The parties agree that his/her name should not be mentioned in this award but that he/she should be referred to as Person X. That Person X would receive an interview and not the Grievor, in the Union's view, speaks volumes about the Employer's mala fides and lack of good faith.

The Grievor's two predecessors in the Public Relations position, Trudi Brake and Brenda White, progressed directly from that position into an ERO position. In fact academically Trudi Brake's credentials were similar to those of the Grievor. Ms. Brake holds a Masters Degree in English. Neither Ms. White nor Ms. Brake had as challenging a role in the

Public Relations position as did the Grievor since under Tom Hanlon the Public Relations incumbent was given greater decision making authority and had more challenging work than was required of her predecessors. The same continued under the Presidency of Mr. Puddester.

If one looked at all the people who went on to become incumbents in the position of ERO neither had lead negotiating or arbitration presenting experience. Yet each of these persons went on to become successful and competent in the position.

Tom Hanlon testified that there is a period of mentoring and learning that is always required.

Even the persons who were hired instead of the Grievor did not have experience as lead negotiators or arbitration presenting experience.

None of the Employee Relations Officers hired during Hanlon's Presidency had University degrees to his knowledge or to the knowledge of the Grievor or Ms. Furlong. They were an LPN, an X-Ray Tech, Heavy Equipment Operator and a Correctional Officer. They had all went on to become competent Employee Relations Officers.

The Union maintains that Carol Furlong has clearly exhibited bad faith. It points out that the Grievor campaigned against Ms. Furlong when she was defeated by Mr. Puddester in her bid to become President of the Union and again when Ms. Furlong defeated Mr.

Puddester in a subsequent election. In addition the Grievor campaigned for Austin Deir in the election for Secretary/Treasurer which Ms. Furlong lost and for Chris Henley in the election in which Ms. Furlong defeated Mr. Henley for Secretary Treasurer.

It cites the fact that the Grievor was not afforded the opportunity of teaching at the Employer's Labour School while Ms. Furlong was President and the fact that she received a letter of reprimand from Ms. Furlong, related to her punctuality, as evidence of Ms. Furlong's dislike for the Grievor.

It maintains that Carol Furlong placed an interpretation on Article 11.03 of the Collective Agreement during the course of giving her evidence that can't possibly be placed on it. It maintains that she contended that once she determined there was not an applicant from within the bargaining unit who met the standards required for the position and went external that she could get the best person possible even if it meant lowering the standards required to get someone.

It also suggested that this is exactly what did occur. It is the Union's contention that the Employer ruled the Grievor out because she had no lead negotiating experience and no experience presenting arbitrations. Yet, when the external posting occurred the Employer no longer insisted upon these requirements.

Carol Furlong applied non-posted criteria for external candidates to the detriment of the internal candidates.

The external candidates received credit for non-lead negotiations yet the Grievor received zero for that despite her involvement in the negotiations leading up to the strikes that occurred during the Presidencies of Mr. Hanlon and Mr. Puddester.

That somebody with top English marks in University gets zero academically just does not make sense.

The arbitral jurisprudence has evolved from a position where an arbitrator is confined to reviewing an Employer decision as to promotion based on the reasonableness of that position and/or whether there was bad faith. It has now reached the state where unless the collective agreement wording restricts the arbitrator's power by using words which make it clear that the issue is one exclusively for the Employer's judgment, the arbitrator is free to consider the decision as to its correctness and is to determine whether or not the collective agreement was complied with.

However even if the arbitrator is constrained so as to consider only the reasonableness of the Employer's decision or whether or not bad faith was present, the decision in this case was an unreasonable one and was made in bad faith.

The Union stressed however that an arbitrator is no longer so restricted based on the decision of Cory J. in *Great Atlantic and Pacific Company of Canada Limited v. Canadian Food and Allied Workers Union, Local 175* (1976), 76 C.L.L.C., 14, 056 and

the law now is that arbitrators have an obligation to ensure that the agreement has been complied with and cannot restrict themselves to considerations of whether the Employer has acted reasonably and in good faith. The Union referenced this position as stated in the textbook M. Mitchnick and B. Etherington, *Labour Arbitration in Canada*, 2006 Lancaster House, Toronto, Ont. page 231. The writers of that text state as well:

“If the parties desire a more lenient standard of review to apply, they can say so in the agreement. Thus where an Employer has misjudged an Employee’s skill, ability, or qualifications, or otherwise failed to appraise the relative entitlement of applicants in accordance with the collective agreement, an arbitrator has jurisdiction to overturn the results of a job competition.”

The standard of review is one of correctness. Did the Employer make the correct decision?

Due to the nature of the job sought, the Union suggests that I, as an arbitrator, am well positioned to make the decision and deference to the Employer is not warranted. It stresses that I have the added advantage in this case of the opinion of Tom Hanlon, a past President of the Union and a person who has been an ERO for more than 15 years who has himself hired persons for the position of ERO. Mr. Hanlon’s position is that the Grievor is well qualified for the position.

The Union also noted the case of *Saskatoon v. CUPE*, *Loc. 59* 134 L.A.C. (4th) 129 Sask. Q.B. This case dealt with a threshold or sufficient ability clause such as we have here and was one where an arbitrator upheld the grievance by an unsuccessful job applicant.

In upholding the arbitrator's decision the Court noted that the Board saw itself as having to address three issues (a) the reasonableness of the qualifications (b) the scope of review of the arbitrator, and (c) management's decision in light of the scope of the review adopted.

The Board in that case ruled that there was no absolute requirement for a certain pedigree and if a certain University degree was called for the Employer was not at liberty to insist on it and no other thereby ignoring clearly equivalent qualifications.

The Union argued that, here as in that case, the collective agreement did not give the Employer the right to set qualifications to the extent that clearly equivalent ones could be ignored.

The Board quoted Arbitrator Teplitsky in *Re St. Catherines General Hospital v. Service Employees Union, Loc. 204*, (1984) 13 L.A.C. (3d), 378 wherein he distinguished between the "narrow" standard of review where a collective agreement specifically empowered management to set qualifications, from the situation where a broader standard of review is appropriate because no such authority was expressed in the collective agreement.

The Board awarded the Grievor the job in that case despite his not having the called for Bachelor's Degree in Social Sciences and held that his possession of a Bachelor of Science Degree coupled with near completion of an MBA would not be detrimental, but

would be instead helpful. It recognized that research skills were transferable from one field or discipline to another.

In support of its position the Employer also cited *Health Employer's Association of British Columbia v. British Columbia Nurses Union* [2004] B.C.C.A.A.A. No. 316 (Hope); *Re Corporation of City of Ottawa v. Ottawa Carleton Public Employees Union, CUPE Loc. 503*, 102 L.A.C. (4th) 160(Hornung) and *Re Capital Regional District v. Canadian Union of Public Employees, Local 1978*, 8 L.A.C. (4th) 307 (Munroe).

In *Re Corporation of City of Ottawa* supra the arbitrator found the selection process was skewed against the Grievor and was wrong and where it did not deal fairly with the Grievor, the arbitrator awarded the Grievor the job rather than remitting the matter to the Employer for reconsideration. The Union urged that I do likewise, there being very clear bias on the part of Ms. Furlong.

In *Health Employer's Association of British Columbia* supra the arbitrator declined to remit the matter to the Employer where the person responsible for selection exhibited a clear preference for persons who had worked in her particular facility. Even though there was not improper motive on that person's part, it would be expecting too much of the Employer to expect that it could function with objectivity if the matter were remitted. The Union suggests that likewise I should decide the matter and not remit to the Employer.

In *Re Capital Region District* supra, the Employer was faced with a collective agreement which in one clause required it to give preference to certain employees and in another clause required it to give certain employees first consideration. The Employer argued that first consideration must mean something different from preference. The arbitrator held that to agree that first consideration meant simply a procedural and sequential sort of thing would strip the collective agreement article in question of any substantive meaning and would be inconsistent with the parties' true intent. Similarly here, the Union suggested that to interpret Article 11.03 in the way Ms. Furlong does and as she indicated in her evidence it should be interpreted, would mean the Employer is given free rein to hire whomever it likes once the process moves to be an external one. That strips Article 11.03 of any meaning and strength.

The Union asks that I find that the Grievor was improperly refused the position of ERO and that I order her placed in that position with all salary and other benefits accruing thereto retroactive to April 19, 2006. It maintained that I should feel free to do so notwithstanding that there were two bargaining unit applicants for the position. There were two positions available and based upon the evidence of Carol Furlong both positions still remained in existence. I should have no concerns about the existence of a second bargaining unit applicant for these reasons.

THE EMPLOYER'S ARGUMENT

The Employer's position is that the case before me is quite simple. The Grievor was not qualified. It was not even close. It stressed that the onus is on the Union to show that she was qualified and it failed to discharge this onus. The Union called the Grievor to the witness stand and in the Employer's words "she had the longest interview in the history of NAPE". Despite this she was not able to expand upon her resume and demonstrate that she was qualified.

There was not any labour focus to her studies and not any labour focus to her past work.

While she has extensive experience in writing and editing and in communications and public relations and while some of the skills she has developed in these fields would serve her well they do not touch on the core duties of an ERO.

The Employer considers the malice and bad faith allegations to be wild and without foundation. It suggests that the Union is asking to me to draw all sorts of inferences and to make leaps of faith in order to arrive at a conclusion that there was malice and bad faith.

The Employer says that the Grievor is hanging its allegations on very thin facts.

The first fact is that she campaigned against Carol Furlong in the past. The Employer points out that so did other people at the Union including Mr. Henley who is an ERO.

The Grievor claimed that it is common knowledge that Carol Furlong neither likes nor trusts her yet she called no person to say that this is the case.

The Grievor claims that her being denied the right to teach at the Labour Relations School is further evidence of Carol Furlong's dislike for her. Yet the collective agreement does not give her a right to teach at the school.

The fact that she was given a letter about punctuality and told to provide a sick note is put forward as further evidence of bad faith and dislike on the part of Carol Furlong for the Grievor. On this issue, the Employer takes the position that the letter speaks for itself. Punctuality is a legitimate interest for the Employer to have.

There is an allegation that Carol Furlong told the Grievor that her lack of communication skill caused Leo Puddester to lose the election. Furlong denies saying this and says that she said that Puddester was lacking in communication skills and that she, Furlong was as well. There are differences between Ms. Furlong and the Grievor as to what was said. This calls the Grievor's credibility into question.

Differences are alleged to have arisen as to how news stories which appear in the paper and in other forms of media should be dealt with and stored.

The Employer suggests that this is nothing more than a difference of opinion.

The last ground put forward was the cuts to the Public Relations Budget.

The Employer points out that the Grievor admitted to the severe debt that the Employer was in after the 2004 strike and that all areas, not just her area of PR, were seriously cut in terms of the finances that were made available to these departments or areas.

The evidence of bad faith and malice is purely circumstantial evidence and circumstantial evidence of the worst and weakest sort.

In order for circumstantial evidence of bad faith to carry the day bad faith must be the only inference that one can draw from it. The Employer suggested that one can draw another and more probable inference in this case, namely that the Grievor intensely dislikes Carol Furlong and is waging a campaign against her still. It suggests that the Grievor shows Ms. Furlong no respect, and applied for the position of ERO and when she didn't get it because she is not qualified she became very bitter and her subsequent actions reflect her bitterness.

The malice allegation is scandalous and unfounded in the submission of the Employer. The Grievor is a bitter person who does not socialize with anyone at Nape or go to the lunchroom and by her own words "she's in and out".

The Grievor claimed Hanlon assured her that Brake would not bump her from her Public Relations position and that Brake would not be accommodated in that position. Hanlon contradicted her on this and said that he did not say that and would not have said that. He simply assured her that she was qualified for the ERO position and could go into that position if it became available in the future and she wanted it. The Employer suggests that this also speaks to the Grievor lack of credibility.

As far as negotiations were concerned she has never been at the bargaining table in either a lead position or a non-lead position. She has never experienced the processes of bargaining and negotiating. Her role during the strike and in the periods leading up to the strike was to generate public and union support. Her role was one of a spin doctor, no more or no less. The Grievor had no shop steward experience and had never as much as attended at an arbitration.

The most that Tom Hanlon could say was that she could become one of the best. The problem is there is no present ability. The Employer is plagued with over worked people in the ERO position and a great deal of back logged grievances. It needs someone now. It needs someone who can hit the ground running.

A College level legal writing course and an undergrad business law course in the 1980s really do not give the Grievor the type of knowledge required.

By the Grievor's own admissions she has no present ability to do the job. The Employer contends that she admitted that she could do the job with mentoring and said if she has to ask a question she knows who to ask. This, the Employer suggested, is an admission that she cannot do the job at present. It suggested being an ERO was not about knowing who to ask but is about doing the job oneself and the Employer is not required to provide training.

It argued that Tom Hanlon mentioned that the persons he hired into the position of ERO had extensive Union activism. They served on local executives, bargaining committees, and had shop steward service under their belts. The Grievor had none of this.

Ms. Furlong is a long time Union activist. She served a term as President and was into her second term at the time of this job becoming open. She has also served as Secretary/Treasurer, been a nominee on an arbitration board and served as a nominee on a bumping tribunal. She has knowledge of what it takes to be an ERO. Her credibility on the punctuality issue was not challenged on cross examination. The Employer is in a difficult period at present from a financial point of view and it needs someone who doesn't have to be trained or mentored but who can function in the role immediately.

It argued the Grievor did not testify that she lowered the bar when the job was posted externally. It contends that all the Grievor said was that things changed. Internally she was required to accept the stated minimal qualifications whereas externally she was free to find the most qualified person.

The two persons hired had an LL.B and a Masters in Employment Relations, respectively. Given their qualifications, clearly there was not a lowering of the bar. Ms. Morrison had a Masters in Employment Relations plus Union experience and Ms. Kennedy was a lawyer, was on the Dean's list at Law School, and had worked with a firm in Ontario that did labour law. In addition she had the benefit of doing a course or program in dispute resolution from a well known labour law scholar and practitioner, George Adams. There is no evidentiary support for the fact that Ms. Furlong lowered the bar.

In support of its argument, the Employer cited a number of authorities.

School District No. 35 (Surrey) and CUPE Loc. 728, 109 L.A.C. (4th) 345 (Jackson) was cited in conjunction with several points.

One issue is that of bad faith. At page 13 it was noted that the party alleging bad faith has the burden of proving it and must do so to a high degree of probability. Proof of bad faith requires either direct evidence from which the element of motivation is proven or circumstantial evidence in which bad faith is the only inference possible on the facts.

Another issue was that management can determine the qualifications needed and can change them from time to time. At page 10 the arbitrator wrote:

“There is a wealth of authority to support the proposition that the company may unilaterally alter, modify and extend job qualifications and job descriptions during the life of the collective agreement in the absence of any clause in the collective agreement forbidding or preventing such company action. Such power is, of course, contained in the usual management rights clause to be found in most if not all collective agreements.”

He goes on to say:

“The only limitation on that right is that the qualifications should be reasonably related to the job and not the result of bad faith.”

While the collective agreement in the instant case does not contain the traditional management rights clause, management has that power in any event unless it is taken away by the collective agreement. In this connection the employer referred me to *Re United Steel Workers of America Loc. 1817 and Fittings Ltd.* 20 L.A.C. 249 (Weatherhill, Storey, and Morley).

School District No. 35 supra was also cited on the point of the practice of waiver of the strict job requirements and/or giving persons periods of time to learn the job and acquire the qualifications.

The Employer pointed out that there would have to be good evidence of this being done and done on a regular basis to show that the standards set were unreasonably high.

The Employer indicated here there is not solid evidence as to the qualifications and education of the previous recent hirees into the ERO position. No such persons were

called. All that was before me was the understanding of the Grievor, Hanlon, and Furlong as to what was their qualifications and education.

The Employer cited D.J.M. Brown and D.M. Beatty, *Canadian Labour Arbitration* 4th edition, Aurora: Canada Law Book, on the issues of the scope of arbitral review, the point that the onus was on the Union to show a present ability on the part of the Grievor and as to the remedial authority of the arbitrator.

Newfoundland Association of Public Employees and Her Majesty the Queen in right of Newfoundland (Grievor: Gerald Saunders), a 1983 decision of Arbitrator Thistle was also cited as an illustration of a case where an arbitrator denied the grievance of a vocational school employee involved in the Writing Program who sought, on lay off, to teach Business English and Mathematics in the Business Education Program. Despite his University training in English and some previous business exposure Arbitrator Thistle denied his grievance. He could not teach a number of subjects normally taught by Business Education Instructors. Arbitrator Thistle held the issue to be a largely pedagogical one that must be determined as a matter of policy by the Employer and that an arbitrator can only assess the qualifications and ability of an employee in light of the standards established for the position and provided the standards are reasonably related to the duties of the position, an arbitrator cannot interfere with a policy decision as to what background qualifies an individual to instruct in the Business Education Program.

Newfoundland Association of Public Employees v. Her Majesty the Queen in Right of Newfoundland (Grievor: Melvin Kennedy), another decision of Arbitrator Thistle in 1989, is put forward as an authority for the proposition that present and immediate ability to perform the job at the time it is claimed is what is required.

Two decisions of Arbitrator Dennis Browne were put forward as standing for the proposition that present ability is what is required and collective agreement language which provides for a trial period does not refer to a training or familiarization period. These cases are *Her Majesty the Queen in Right of Newfoundland and Newfoundland and Labrador Health Care Association* (Grievor: Thomey), April 26, 2002 and *Newfoundland Association of Public Employees and Union of Business Agents and Associate Employees* (Grievor: Bursey) October 3, 1991.

Western Memorial Hospital Corporation v. CUPE Loc. 488 [1980] N.J. No. 92, also reported at 32 Nfld. and P.E.I.R. 410 and 91 A.P.R. 410, a decision of Hickman C.J.T.D. was cited with respect to the scope of arbitral review as saying that deciding on the reasonableness of the decision of management was what an arbitrator is charged with and where the arbitrator decides what points or factors management should have emphasized and what weight it should have given to the qualifications of the applicant as opposed to determining whether the Employer failed to take into account the appropriate factors he oversteps his bounds and deals with questions which are clearly left to management under management's right to direct the working forces and manage and operate the institution under its control.

Lastly it referred me to the decision of Hall J. in *Newfoundland Association of Public and Private Employees v. Newfoundland* [2002] N.J. No. 125, Newfoundland and Labrador S.C.T.D. This was a case where the Court held that there was no bad faith where an Employer, in keeping with its past practice, stipulated 6 months recent experience in medical dicta typing as a requirement but had the practice of awarding the position to bargaining unit employees with some but not all of the required experience when no applicant possessed 6 months experience. It involved a policy grievance related to the job posting. Hall J. in addition to finding no bad faith wrote:

“I am not satisfied that there is any evidence upon which the arbitration board could come to the conclusion that experience in medical dicta typing was an arbitrary, discriminatory, un-necessary, and unreasonable requirement for a job posting as Stenographer II in the Medical Records Department of the James Paton Memorial Hospital. It is simply not logical to conclude that because the Employer had been able over time, to adequately train less than fully qualified employees to adequately perform the position of Stenographer II in the Medical Records Department, that therefore the requirement for 6 months recent experience is unnecessary”.

The practice in that case in the past where a potential employee with 6 months experience could not be found was to appoint someone with some experience that the Employer thought was a good candidate for training.

Hall J. held that there was nothing wrong with this practice. At page 12, paragraph 26 he wrote:

“I am satisfied that the collective agreement grants to the Employer the right to hire employees for the position for Stenographer II in the Medical Records Department without consideration to employees’ seniority where no prospective employee has the experience requirement for the position.”

This case was cited as authority for the position taken by the Employer that it acted in accordance with the collective agreement in selecting the candidates who to its mind came closest to the standards that it stipulated in its job posting when no internal candidate met the requirements, It was also put forth as authority for the point that simply because it had hired persons to the ERO position in the past without University degrees in the stipulated areas does not mean there was bad faith on its part or that it was being arbitrary, discriminatory, or unreasonable in insisting on the standards that it insisted on in this case.

Even if the law is as set forth by Cory J. in *Great Atlantic Pacific* supra and if it is the case that an arbitrator is not confined to an examination of the reasonableness of the employer’s decision, arbitrators are often deferential to employers recognizing that employers are in a better position to assess the candidate’s suitability and qualifications for the job. It cites commentary from *Brown & Beatty* supra to this effect, which commentary appears at paragraph 6:3100. Furthermore, it argues that Carol Furlong did what Cory J. indicated was required. She reviewed the Grievor’s qualifications against the job requirements. Cory J. at page 335 wrote:

“The issue to be determined by the Board will be one of comparing the respective skills and qualifications of Ms. Dawson and Ms. Holloway for the job in question.”

As to the remedy I should choose to invoke should I reject the Employer's arguments, it maintained that it would be inappropriate for me to appoint the Grievor to the position in that there was a second internal applicant whose grievance is outstanding. In addition, there is an entitlement on the part of the Employer to require the appointee to complete a trial period which entitlement is provided for in clause 11.04 of the collective agreement. This would impact on my ability to absolutely and irrevocably appoint and might well impact on any monetary award that it would be appropriate for me to make.

It requested that I deny the grievance. In the alternative it requested that I simply remit the matter to the Employer for further consideration.

THE ARGUMENT OF THE INCUMBENTS

Neither Ms. Morrison or Ms. Kennedy made any submissions.

CONSIDERATIONS AND REASONS FOR DECISION

The Collective Agreement Provisions

The collective agreement provision in question is Article 11 and in particular 11:03.

Articles 11:01, 11:02, 11:03, and 11:04 read as follows:

“11:01 – When a vacancy occurs, a new position is created, or the status of an existing position changes from temporary to permanent, either inside or outside the bargaining unit, the employer shall post notices of the position in an accessible place in the employer's premises for a period not less than

5 days. Posting of vacancies outside will not occur until the application(s) of bargaining unit employees has been fully processed.:

11:02 – For vacancies or new positions inside or outside the bargaining unit such notices shall contain the following information: title of position, qualifications, required knowledge and education, skills, wage or salary range. All job postings shall state ‘this position is open to male and female applicants’.

11:03 – Role of seniority and promotions and transfers

Both parties recognize:

- (a) the principle of promotion within the service of the Employer;
- (b) that job opportunity should increase in proportion to length of service.

Therefore, when a vacancy occurs in an established position within the bargaining unit, or where a new position is created within the bargaining unit, employees who apply for the position on promotion or transfer shall be given preference on a seniority basis for filling such vacancy, provided that the applicant’s qualifications meet the required standards for the new position. Appointment from within the bargaining unit shall be made within four (4) weeks of posting.

11:04 – The successful applicant shall be placed on trial for a period not exceeding two (2) months. Conditional on satisfactory service the Employer shall confirm the employee’s appointment after the period of two (2) months. Where the employer and the union agree, the employee may revert to his/her former position during the trial period. In the event that the successful applicant proves unsatisfactory in the position during the trial period, or if the employee is unable to perform the duties of a new job classification, he/she shall be returned to his/her former position, wage or salary rate and without loss of seniority. Any other employee promoted or transferred because of the re-arrangement of position shall also be returned to his/her former position, wage or salary rate without loss of seniority.”

This is what is known as a sufficient ability or threshold clause as opposed to a relative ability clause.

A sufficient ability clause is, generally speaking, one where if a bargaining unit member with the greatest seniority seeks a position that person is entitled to the position provided he or she has the qualifications required for the position even if he or she is not as qualified as someone with less or no seniority and even if he or she could not do the job as well as someone else with little or no seniority.

A relative ability clause on the other hand, generally speaking, provides that the candidate with the greatest seniority is entitled to the position claimed if he/she is relatively equal in ability to another candidate or other candidates.

The Relevance of the Qualifications of the Incumbents

A relative ability clause necessarily involves a comparison of the qualifications of the various candidates whereas a sufficient ability clause does not but instead involves only a comparison of the senior candidate's qualifications as against those required by the job description. Despite this there has been some focus on the qualifications of Ms. Kennedy and Ms. Morrison. It therefore behooves me to articulate what I see as the significance of their qualifications.

As I have stated ordinarily their qualifications would not be relevant as this is a sufficient ability clause. Their qualifications are relevant in this case only to a limited extent and only because the Union has alleged that the Employer acted in bad faith and that it lowered the bar in terms of what it required when it proceeded to post the jobs externally

and to hire externally. The Union maintains the Employer hired someone who was no more qualified than the senior candidate who had applied internally, namely the Grievor.

The Employer contends that this was not the case and it points to the qualifications of Ms. Kennedy and Ms. Morrison as evidence of the fact that the bar was not lowered.

The Union alleges that because neither of these two persons or any recent previous hires into the position had lead negotiating experience or experience in presenting arbitrations, in this respect they were no different from the Grievor and the Employer is clearly acting in bad faith by reason of not having hired the Grievor.

Their qualifications are relevant only to the extent that they signify whether or not the bar was lowered or whether or not they signify that the Employer was acting in bad faith.

Credibility

Issues of credibility have been raised and at the outset of my reasons I believe it is appropriate that I set forth clearly where I see the evidence of the various witnesses falling in terms of credibility.

On the issue of credibility the Employer suggested that the Grievor's credibility is adversely affected as a result of the difference between her evidence and that of Tom Hanlon on the issue of what was said to the Grievor about Trudi Brake bumping into her position.

It also suggested that her credibility should be viewed adversely because she maintained that she did not discuss the contents of the so called comfort letter with Tom Hanlon prior to his testifying but that it subsequently became apparent that she did.

The Employer has also noted that the letter has disappeared and that a copy cannot be found.

The Grievor's view of what Ms. Furlong said to her about a lack of communication skills differs from what Ms. Furlong claims was said and in the Employer's submission this calls the Grievor's credibility into question.

I do not find that the evidence causes me to question the credibility of the Grievor at all.

I find that there was discussion between Tom Hanlon and the Grievor about Trudi Brake being able to bump into her PR position. The Grievor said that Tom Hanlon made the remark that if she was leaving the ERO position because of stress that she'd be bumping into a position where there is just as much stress. I believe it quite likely that Tom Hanlon did make a remark these lines. It believe that it is entirely probable that the Grievor attributed a meaning to this that Hanlon did not intend and concluded from this that Hanlon was expressing the view that Brake would not be permitted to bump into the position whereas in reality Hanlon was simply musing about the prudence of the move from Brake's point of view rather than giving an assurance to the Grievor that Brake

could not bump her. The Grievors' honest belief or emphatic statement as to what Hanlon said which differed from Hanlon's statement are not overly concerning to me. This episode occurred several years ago in 2003. Memories have understandably faded and misinterpretation of what was said is, in my view, quite probable.

As for the Employer's position that the Grievor's testimony changed on the point of whether she discussed the contents of the letter with Mr. Hanlon, I find that her testimony was consistent throughout and it was to the effect that the contents of the letter were not discussed except to the limited extent necessary to identify to Hanlon the letter that she was talking about.

I do not read anything sinister into the fact that the letter cannot be found. The Grievor gave an entirely logical, believable, and plausible explanation as to why she no longer has it, namely the breakup of her marriage and the fact that it was lost in the distribution of items between herself and her former spouse. While it is odd that a copy cannot be found at the Employer's offices, both the Grievor and Mr. Hanlon testified that it was given and their evidence as to its contents was consistent. Therefore I have no difficulty in concluding that the letter had existed and that its contents were as articulated by Mr. Hanlon and the Grievor.

As to the difference as to what was said to her by Furlong about a lack of communication skills, I believe it is more likely that the Grievor honestly misinterpreted what Furlong said than that Furlong meant it in the way the Grievor took it or that the Grievor is being

deceitful. The Grievor has a sincere belief that she is not liked by Furlong and therefore it would not be surprising that she would have interpreted the comment in such a way.

I therefore find that the Grievor was in all respects a credible witness. Similarly, I find that Mr. Hanlon and Ms. Furlong were credible witnesses. This being the case my decision will not turn on the credibility of witnesses.

The Appropriateness of the Job Requirements as Specified

In my opinion, the employer has the right to specify what qualifications it requires for the position, provided they are reasonably related to doing the job.

It can do this notwithstanding that the collective agreement does not contain a management's rights clause, unless there is something in the collective agreement which takes away this right. No such take away provisions exist in this instance.

It can also, over time, change what requirements it prescribes for the job to meet any changing conditions it finds itself in and to meet the changing nature of the job.

The words of Hall J. in *Newfoundland and Labrador Association of Public and Private Employees v. Her Majesty the Queen* (The James Paton Memorial Hospital case) supra at p. 13 are appropriate to this case.

“It is simply not logical to conclude that because the employer had been able, over time, to adequately train less than fully qualified candidates to

adequately perform the position of Stenographer II in the Medical Records Department; that therefore the requirement for 6 months recent experience is unnecessary.”

The fact that it has in the past appointed persons without a degree in law or labour relations, cannot be said to preclude it from now seeking a person that holds such a degree.

We have heard evidence to the effect that the existing Employee Relations Officers are stretched to the limit in terms of their workloads, and that there is a considerable backlog of arbitration cases. It does not seem unreasonable therefore to me, to seek a person whose academic background would likely provide the person with an appreciation for the concepts and principles of labour relations such that the person would require the least amount of mentoring time possible, and would as far as possible be enabled to hit the ground running.

An academic background that provides a person with an appreciation for such concepts as for instance, *res judicata*, issue estoppel, and the significance of past practice, is not an unreasonable requirement and it cannot be said that the requirements as specified in the job posting were not reasonably related to doing the job.

Certainly someone who has been exposed to those concepts and principles that come into play with regularity in an arbitration setting, even if they are gained in academic studies as opposed to through experience, is more likely to be able to function fully and effectively in the job more quickly than a person whose academic background has not

provided him or her with an appreciation for such concepts, if neither have practical experience in the area.

The same can be said with regard to drafting and negotiating.

In my view no criticism can be leveled at the employer for seeing a distinction between other types of degrees and a law degree or degree in labour relations and in taking the position that it is seeking someone with a law degree or a degree in labour relations.

The Employer's Review and Assessment of the Grievor's Qualifications

This brings me to consideration of the employer's determination that the Grievor did not meet the required standards.

There are two aspects to this as I see it.

Firstly, it has to be determined just what the scope of arbitral review is. Secondly, as against that scope of review, is the decision of management such that the grievance should be allowed?

It is unmistakable that there has been a shift in the arbitral jurisprudence in this country since the decision of *Great Atlantic Pacific* supra, wherein Cory J., then of the Ontario Divisional Court, wrote that by restricting itself to a consideration of whether the

management decision was an honest and reasonable one, an arbitration board was unduly restricting itself. At page 334, Cory J. wrote:

“By relying on this principle, the board has, I think, unduly restricted itself, and has failed to determine the issue placed before it.”

He went on to write:

“However, in light of the restriction, the board placed upon its decision, one cannot be certain that the board determined, as it must, whether the employer complied with the provisions of the collective agreement.”

Reading further he wrote:

“The board as a creature of the collective agreement must then see to it that the provisions of the collective agreement have been complied with, its role cannot be more or less than this. The honesty and lack of malafides in making the decision are factors to be taken into account. So, too, is the question of whether or not the employer has acted unreasonably. Indeed, in determining the ‘reasonableness’ of the employer’s decision, the board may go a long way to determining the issue submitted to it. However, once the collective agreement makes provisions as to the method of selection of employees for promotion, then the board must see to it that those provisions have been complied with, and in doing so, it cannot restrict itself to determining whether the employer acted honestly and reasonably. If the board is not to make such a decision, then the parties in the collective agreement should ensure that management’s right in this regard is unfettered.”

The provision before Cory J. read:

“When additional full-time employees are required, companies shall give preference to part-time employees on the basis of seniority, skill and qualifications for the job concerned, and availability for work.”

In Cory J.’s view, this was not wording that prevented the board from making the decision, or which suggested management’s right in that regard was unfettered.

One school of arbitral jurisprudence has since *Great Atlantic Pacific* adopted the reasoning of Cory J. The commentators suggest that arbitrators belonging to this school take the position that they have the ability and are required to, go beyond considerations of the reasonableness and honesty of the employer's decision. Arbitrators must determine for themselves whether the collective agreement has been complied with.

Brown and Beatty *supra* make it clear that despite this, arbitrators who have harkened to the admonition of Cory J. do some times defer to management. I suspect that this occurs for either or both of the following reasons. Firstly, there is a common sense and practical reason that in many instances great weight should be attached to management's decision. Who better than management can judge whether a person can perform a technical job, for instance. Secondly, Cory J. has indicated that the reasonableness of management's decision may go a long way in answering the question. This comment may connote to some arbitrators that a degree of deference is appropriate.

Nevertheless, I believe based upon *Great Atlantic Pacific* *supra* that the arbitrator is charged with deciding for himself or herself whether the employee in question should be promoted, based on the wording of the collective agreement, and in the appropriate case there is not deference due to the employer.

While there is much about the reasoning of Great Atlantic Pacific that commends it, I find that it is in conflict with *Western Memorial Hospital Corporation v. CUPE* supra. In that case Hickman C.J. T.D. wrote at page 10:

“The board has power to ascertain and to determine that the employer failed to take into account the appropriate factors in deciding whether or not to promote the Grievor in this case. It is clear that if the employer failed to show some real grounds for denying promotion, the board would probably have the right to reverse management’s decision. This is not what the board found in the case at bar.”

Later on in the same case the learned Chief Justice wrote:

“The board, rather than decide on the reasonableness of the decision of management, assumed the management function and decided what management should have emphasized and what weight it should have given to the qualifications of the applicant. Such an action constituted an unwarranted and unauthorized intervention in the rights of management by the board”

This, to me, directs that the arbitral review be on the basis of the reasonableness of the decision of management. Determination of whether its decision could be said to be reasonable is far as the arbitrator should go or is permitted to go. I am bound by *Western Memorial Hospital Corporation* supra.

With this as the scope of review, what do I make of the employer’s decision? Is there a reasonable basis for the employer to have decided as it did? The answer to that is yes!

The employer’s reasoning was that there was nothing in the academic background of the Grievor that touched on the core duties of an employee relations officer, namely presenting arbitrations and negotiating collective agreement provisions. This is clearly

the case. The Grievor had an Honours English degree with very high marks. One would have to conclude that she is a superior intellect, and anyone who had any dealings with her would have to conclude that she has a superior ability to communicate orally. This was obvious from the way she expressed herself and articulated her responses to questions at the arbitration. In order to obtain the highest marks in English at university, it is reasonable to conclude that her writing skills and comprehension skills are impressive and superior to most. The list of works or projects that she has written or edited suggests that this is the case, as well. The employer stated that it recognized all of this, but her academic background was viewed as something that did not equip her to be a Employee Relations Officer. The employer also took the position that her work history prior to taking up employment with the employer had no labour focus. From her viva voce evidence and the documentary material that she presented as to her background, this was obvious. The employer also took the position that her work as a communications officer with the employer did not equip her either. It stressed that she had no arbitration experience, and had not as much as attended at an arbitration. It said that while she may have interfaced with the Employer's President and the Chief Negotiator during two periods leading up to strikes, as well as with negotiating committees from various bargaining units, she had never sat across from the employer at the bargaining table and had no experience in drafting collective agreement language. Her focus was the spin which should be put on things for purposes of garnering union and public support and what collective bargaining positions were ones that would garner union support and public sympathy.

The employer's position was that on both the academic and the experience side, the Grievor did not meet the job posting requirement.

In my view, it cannot be said that this was a position that the employer could not reasonably hold.

That being the case, based on *Western Memorial Hospital* supra and with reasonableness being the scope of review, it would not be appropriate to interfere with the employer's decision.

Even if I am wrong in my reading of *Western Memorial Hospital* supra that it conflicts with *Great Atlantic Pacific* supra, and were I do to an assessment of the employer's decision based on *Great Atlantic Pacific* supra, I would find that it has not been proven that the failure of the employer to promote the Grievor amounted to a violation of the collective agreement.

The Grievor did not have the academic background. That is beyond question. Though her intellect is beyond question in my view, and while her writing and speaking ability have been honed to a high level by her academic background and her work experience, I am not persuaded that either her work experience or her academic background satisfied the stipulated job requirements. A degree at a high level of achievement in English is not equivalent to a law degree or a master's degree in employment relations. The principles, concepts and terminology that one is forced to come to appreciate and become aware of

in earning the latter two degrees is not something that comes with an English degree, and I do not see that any of the works, which the Grievor produced, participated in producing, or edited, had a labour focus or involved a canvassing of labour or employment issues.

Her time at the Employer involved producing documents such as a Picket Captains Manual and a paper on post-secondary education. She was also involved in producing much material which was intended to communicate messages to union members and to the public. While in her time at the employer, the Grievor undoubtedly developed a sense of what the union was about, and the issues confronting it as a whole, the evidence falls short of persuading me that she had acquired a significant practical experience in the areas that an ERO would be required to deal with on a daily basis or that she would have acquired them to the same degree as some one who had significant shop steward experience, advisor experience, or negotiating committee experience.

Three things were pointed to by the Union as indicating that the Grievor was qualified.

Hanlon assessed her as qualified back in 2003 and during the hearing expressed the view that he felt she was qualified.

The two prior occupants of the Public Relations position had progressed directly from that position to the ERO position which suggests that the Grievor is qualified.

Other persons previously hired to the position did not have University degrees, let alone labour relations or law degrees but came from occupations such as heavy equipment operator, LPN and XRay Technician.

While it is true that the Grievor may well have been able to fill the role as much as her two predecessors in the public relations position, we do not know what their degree of Union involvement or activism was prior to their appointment and the point is that in any event the Employer could require someone who could fill the role more quickly. As was stated earlier in terms of the qualifications which were prescribed, the Employer is not restricted to what standards it had insisted upon in the past. The same holds true for the Employee Relations Officers who did not hold University degrees. The Employer is not restricted to standards that these people may have met. Further there is some evidence indicating experience on their part from their Union roles over the years. These people were not called so it is not clear just what the extent of their Union experience was or how well it qualified them for the role of ERO.

In Newfoundland and Labrador Public and Private Employees v. Her Majesty the Queen

(The James Paton Memorial Hospital case) supra at p. 12, Hall J. wrote:

“I am satisfied that the collective agreement grants the employer the right to hire employees for the position of Stenographer II in the Medical Records Department without consideration to employee’s seniority where no prospective employee has the experience requirement.”

Hall J. appears to be saying where no prospective employee meets the required standards for the position, the employer is free to select a candidate without having regard to seniority.

At page 3 of the Decision, Hall J. noted:

“Where the employer could not find a potential employee with the full 6 months experience, the employer would appoint the bargaining unit applicant who had some medical-dictation typing experience, and who, in the opinion of the employer was a good candidate for training.”

Hall J. saw nothing wrong with this. He did not see the practice as being in violation of the collective agreement.

The collective agreement provision before Hall J., Article 15.04, was worded very similarly to the collective agreement provision before me, and like the one before me was a sufficient ability clause. It read:

“When a vacancy occurs in an established position within the bargaining unit, or when a new position is created within the bargaining unit, employees who apply for the position on promotion or transfer shall be given preference on a total seniority basis, whether seniority is temporary or permanent, for filling such vacancy, provided the applicant’s qualifications meet the required standards for the new position

Following on that logic, it was not inappropriate for the employer to seek the candidates that came closest to meeting the required standards that it had set, and the employer’s doing so could not be said to be violation of the collective agreement.

Bad Faith and Malice

Hall J. in *Newfoundland and Labrador Public and Private Employees v. Her Majesty the Queen in Right of Newfoundland*, (The James Paton Memorial Hospital case) stated at p. 13:

“I am satisfied there was no bad faith on the part of management in setting the job requirements. Clearly the position of Stenographer II in the Medical Records Department requires specialized knowledge of medical terminology adequate for the discharge of the job duties. Where the arbitration board found that the collective agreement contains a minimum ability clause for promotion or transfer, I am satisfied that the majority made a patently unreasonable error in concluding that management’s requirement for qualifications was arbitrary or discriminatory”

Similarly here, I do not find that setting the requirements as she did, that Carol Furlong acted in bad faith. She testified that she had no idea the Grievor was going to apply, or who was going to apply.

Nor do I find that bad faith generally exists on the part of the employer. Following on the logic of Hall J., it had a right, once the determination was made that the Grievor did not meet the standards required for the job, to find the best candidate, or the candidate who was most qualified and could fit into the job in the fastest time even if such person fell short of the standards required for the job. The fact that it acted in such a way, and the fact that in the past persons without university degrees had been hired into the position, do not signify bad faith. Firstly, there was some evidence that such persons who had been hired in the past were union activists who may have had some practical experience. The Grievor did not offer proof that this was not the case. Secondly, regardless of this, the employer was not prevented from insisting on the academic background that it did.

The changing nature of the job in that it has become increasingly legalistic in character, the need for someone who could function as quickly as possible given the backlog of arbitration cases, and the fact that the other persons in the position were overworked, to my mind all afford the employer with a reason for doing so.

While it is true that Person X was afforded an interview when the Grievor was not, Carol Furlong stated that Person X was not qualified either. Person X was on the Board of the Employer. All Board members but one who applied were granted interviews. That one person was someone who had manifested a clear anti-union animus. Politics, in my view, was what accounted for the fact that the Board members were interviewed. In my view the political situation likely made it difficult for Furlong not to grant interviews to such persons. While this may not, in the view of some, be appropriate, it does not establish bad faith towards the Grievor.

While her position had been forced to endure significant cuts in terms of its budget, so have many other positions and areas within the Employer. This has been necessary because of the heavy debt which the Employer found itself in after the 2004 strike. I am not persuaded that these cuts came about because of Ms. Furlong's dislike for the Grievor or because of a desire on Ms. Furlong's part to erode her duties and responsibilities or to render her less of a force within the Employer. I believe it is likely that Ms. Furlong was motivated by a desire to behave responsibly and a desire to right the ship financially.

Looking at the evidence as a whole and including the fact that the Grievor campaigned on a number of occasions against Ms. Furlong, the circumstances surrounding the letter regarding punctuality and the budget cuts to the Public Relations department or office, I am of the view that it falls short of establishing bad faith or malice.

DECISION

For the foregoing reasons I am of the opinion that the Union has not proved bad faith or malice on the part of the Employer and has not demonstrated that the Employer acted in contravention of the collective agreement when it failed to promote the Grievor. The grievance is denied.

DATED at St. John's, in the Province of Newfoundland and Labrador, this day
of November, 2009.

David G.L. Buffett, QC