

The Arbitration hearing was held on April 18, 2008, at the Vinland Motel, in St. Anthony, Newfoundland and Labrador. At the commencement of the hearing, the parties agreed as follows:

1. That the sole Arbitrator was acceptable to the parties and had jurisdiction to deal with the dispute.
2. That the Arbitrator would take written notes and in the event of conflict, these notes would prevail.
3. That the grievance procedure had been properly followed.
4. That there were no preliminary objections to be argued with respect to arbitrability.
5. That the Arbitrator would remain seized of the matter for a period of sixty (60) days following the date of the Award in the event that any interpretation of the Award or its effect was necessary.
6. That witnesses would not be excluded from the hearing.
7. That all parties likely to be affected by the outcome of the arbitration had received adequate notice.
8. That Collective Agreement and statutory time limits for making the Award would be waived.

THE EXHIBITS

The following exhibits were entered by consent:

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| C1 | Collective Agreement – July 22, 2002 – June 30, 2004 |
| C2 | Grievance Form – February 22, 2005 |

Other Exhibits:

RH1	Correspondence – Employer/Hicks – February 8, 2005
RH2	Pay Stub – Rhonda Hicks – February 3, 2005
RH3	Pay Stub - Rhonda Hicks – February 17, 2005
AW1	E-mail correspondence – Morrissey/White/Mansfield – April 16, 2008
AW2	E-mail correspondence – Whalen/Mansfield/Morrissey – June 14, 2007
AW3	Former Health Labrador Corporation – Periods of Employment

NATURE OF THE GRIEVANCE

In a grievance dated February 22, 2005, the Union alleges that a group within the bargaining unit was improperly deducted annual leave hours. The Union alleges that the Employer did not calculate all hours worked for the purpose of annual leave entitlement. The Union requests that the group be credited with all annual leave hours deducted by the Employer according to the provisions of the Collective Agreement.

In a Reply, the Employer stated that the grievance had been reviewed and discussed. The Employer found no violation of the Collective Agreement and therefore denied the grievance.

THE FACTS

This is a group grievance pertaining to four members of the bargaining unit who are registered nurses. At the relevant time members of the group were working at the Charles S. Curtis Memorial Hospital in St. Anthony. That hospital now falls under the jurisdiction of the Grenfell Regional Health Services Board.

On February 8, 2005, a bargaining unit member within the group, Rhonda Hicks, received the following letter from the Employer:

According to the terms of the Newfoundland and Labrador Nurses' Union Collective Agreement, hours worked as a casual nurse do not count towards credit for vacation.

You were given ten (10) years for vacation purposes in February, 2004. However, you were not entitled to increased vacation at that time. Instead, you attained the ten (10) years on February 21st, 2005. An adjustment will be made to your vacation bank to reflect this correction.

Please accept our apologies for this error.

If you have any questions, please do not hesitate to contact me, Scott or Sandra.

The letter was signed by Selda Strangemore, a Human Resource Specialist with the Employer.

Subsequently, the Employer adjusted Rhonda Hicks' annual leave to reflect the contents of the letter. Her February 17, 2005, pay stub indicated the additional benefit for hours worked as -4.423 toward vacation, whereas the previous pay stub of February 3, 2005, indicated, by way of additional benefit hours put toward vacation, that the Grievor had earned 27.678 hours.

Rhonda Hicks commenced casual employment in October 1993 and became a fulltime permanent with the Employer in 1999. In February 2004, as a fulltime permanent, she initially received five weeks annual leave. Following receipt of the letter, Rhonda Hicks' pay stub was deducted 37.5 hours from her vacation bank, which is essentially one week vacation pay. Rhonda Hicks assumed that she was entitled to accumulate vacation pay based on her years of service as a casual employee. Bargaining unit members Bonnie Decker, Daphne Drodge, and Connie Woodward were also affected and are included in the group of employees who comprise the group Grievors.

However, Loretta Noble, Branch President with the Union when the grievance was filed, testified that there were others besides the four nurses who had been similarly affected since that time. The Union President testified that casual hours worked by nurses is included in the definition of service as found in the Collective Agreement. Casual employees who become permanent are therefore able to commence work as permanent employees with their service as a casual employee to be included in the calculation of their entitlement to length of vacation as found in Article 17 of the Collective Agreement.

Human Resources Manager Allison White testified that the Employer had calculated the hours for Rhonda Hicks in error. Casual employment should not have been brought into the calculation for

annual leave entitlement. There is no obligation on the part of casual employees to come to work. Casual employees receive 20% in lieu of benefits, as is stated in the Collective Agreement. Allison White testified that the Employer's practice has been consistent in reference to the calculation of annual leave. Casual service has not been included. The calculation of annual leave in this instance was made in error.

These are facts relevant to this case.

POSITION OF THE PARTIES

The Union

It is the Union's position that service under the Collective Agreement is the same for all employees. The annual leave calculation is based on service. Here, the service of casual employees for calculation of annual leave has been denied by the Employer.

Employees who receive annual leave should have all of their service calculated including casual service. To carve out two types of service is not permitted under the Collective Agreement. The definition of "service" in the Collective Agreement makes no exclusions.

There is no ambiguity in the Collective Agreement. Article 17 favours the Union's position. An employee is entitled to their length of service. Article 17 in itself does not exclude casuals. Article 2.01(f) defines "employee" to include casual employees. The "month of service" is as defined in Article 2.01(m). "Service" as found in 2.01(s) can also apply to casual employees. Once casual employees move to permanent status, these employees are able to carry "service" with them.

The Union's position is that there is no onus to prove its case in matters of interpretation. The Union presented a number of cases in support of its position, including: Newfoundland and Labrador Nurses' Union and Eastern Regional Health Authority Re: M.A. Bean (Clarke) (Unreported, 2007); Newfoundland and Labrador Nurses' Union and Central Regional Integrated Health Authority Re: Trudy Lewis (Thistle) (Unreported, 2007). The Union also made reference to various excerpts from Brown and Beatty's Canadian Labour Arbitration. It is the submission of the Union that the Collective

Agreement favours the interpretation advocated by the Union. The grievance should therefore be allowed.

The Employer

This case is about service toward annual leave entitlement. The service in issue pertains to a casual employee. It is the Employer's position that casual employees have no entitlement to many benefits, including annual leave. Instead, casual employees are compensated 20% by wage premium in lieu of these benefits. Article 2.01(b) applies.

This grievance was triggered by an over-payment given by the Employer to some four nurses by mistake. Past practice favours the Employer's position. It is the Employer's position that the Collective Agreement specifically excludes casual employees from accumulating annual leave and carrying annual leave forward after these casuals become permanent. The Employer has had a consistent practice in reference to this policy over the years. There is no ambiguity in the Collective Agreement.

Casual nurses as free agents are not required to come to work, even when called. In the result, these employees are excluded from Collective Agreement benefits. Instead casuals receive the 20% additional premium as required under the Collective Agreement. Within the Collective Agreement there is an exclusion specifically disallowing casual employees from obtaining the annual leave advocated by the Union. It would simply be not fair to other employees in the system who are fulltime to allow casuals, who have no obligation to the workplace, to avail of such a benefit.

The Employer relies on Articles 2.01(b), 2.01(m), 4.01, 17.01, and Article 38. Further past practice favours the Employer's position. The Employer has consistently treated casual employees in the same manner over collective agreements. The onus is on the Union to establish that their interpretation of the Collective Agreement favours their position. Such an onus has not been discharged here.

The Employer presented a number of cases in support of its position, including the John Howard Society Group Home and CUPE, Loc. 1560 Re: Peters et. al. (Scott) (Unreported, 2005); Nova Scotia Government and General Employees' Union [206] N.S.J. No. 153. The Employer also made reference

to excerpts from Palmer's Collective Agreement Arbitration in Canada which specifically references the rule against pyramiding benefits.

It is the Employer's position that the grievance should be denied.

CONSIDERATIONS AND REASONS FOR THE DECISION

Articles relevant to this grievance include:

2.01 For the purpose of this Agreement:

- (b) **"Casual Employee"** means any employee who works on an occasional or intermittent basis. These employees have no obligation to the hospital to come when they are called and the hospital has no obligation to call any one particular employee. Casual employees shall be entitled to all the benefits of the Collective agreement except for the following articles: 9.06, 11, 17, 18 (not including 18.11), 19, 20, 21, 22, 23, 24 (not including 24.01(b), 24.02, 24.03, 24.04 (a), (b), (c) and (f), 24.10, 24.12), 25 (not including 25.01, 25.02, 25.03, 25.04, 25.05, 25.06, 25.07 (b), 25.08 (b) and 25.14), 27, 30, 33.02, 33.03, 33.05, 34.01, 38 (not including 38.03), 39, 41, 44.01 and 46. In lieu of the benefits outlined in these articles, effective April 1, 1999 the employees shall receive twenty (20) percent of their basic salary as in Schedule "A". A list of the casual employees used by the Employer in each work area shall be posted in that area. A casual employee shall receive a letter of appointment within thirty (30) calendar days of her/his appointment to casual status. Casual employees shall participate in the Government Money Purchase Pension Plan.
- (f) **"Employee"** means any person included in the bargaining unit who is employed by the Employer for remuneration including all full-time, part-time, temporary, and casual employees.
- (m) **"Month of Service"** means a calendar month in which an employee is in receipt of full salary or wages in respect of the prescribed number of working hours in each working day in the month and includes a calendar month in which an employee is absent on special leave without pay not in excess of one hundred and fifty (150) working hours.
- (s) **"Service"** means any period of employment either before or after the date of signing of this Agreement in respect of which an employee is in receipt of salary or wages from the Employer and includes periods of special leave without pay not exceeding one hundred fifty (150) working hours in the aggregate in any year unless otherwise specified in this Agreement.

Article 17 - Vacation

17.01 Length of Vacation

(a) Eight (8) Hour Shifts

An employee, other than Public Health Nurses employed by the Province of Newfoundland and Labrador, shall receive an annual vacation with pay in accordance with her/his years of employment as follows:

- (i) less than one (1) year – one and two-thirds (1 2/3) working days for each month of service;
- (ii) one (1) year or more but less than ten (10) years – four (4) weeks;
- (iii) more than ten (10) years but less than twenty five years of service – five (5) weeks;
- (iv) more than twenty-five (25) years of service – six (6) weeks.

(b) Twelve (12) Hour Shifts

An employee, other than Public Health Nurses employed by the Province of Newfoundland and Labrador, shall receive an annual vacation with pay in accordance with her/his hours of employment as follows:

- (i) Less than one thousand nine hundred and fifty (1,950) hours – twelve point five (12.5) working hours for each one hundred and sixty-two point five (162.5) hours of service;
- (ii) One thousand nine hundred and fifty (1,950) hours or more but less than nineteen thousand five hundred (19,500) hours, one hundred and fifty (150) working hours;
- (iii) Nineteen thousand five hundred (19,500) hours of service but less than forty-eight thousand seven hundred and fifty (48,750) hours – one hundred and eighty-seven point five (187.5) working hours;
- (iv) More than forty-eight thousand seven hundred and fifty (48,750) hours of service – two hundred and twenty-five (225) working hours;
- (v) The minimum period of vacation that can be taken is one (1) hour.

17.02 Length of Vacation (Public Health Nurses)

Public Health Nurses employed by the Province of Newfoundland and Labrador shall be entitled to annual vacation in accordance with the following:

- (i) Less than one (1) year – one and one quarter (1 1/4) working days for each month of service;
- (ii) One (1) year or more but less than ten (10) years – three (3) weeks;
- (iii) More than ten (10) years but less than twenty-five (25) years of service – four (4) weeks;
- (iv) More than twenty five (25) years of service – five (5) weeks.

38. Transfer and Portability

38.01 Benefits

(a) An employee transferring in good standing between hospitals covered in Schedule “C” or an employee who accepts employment in a hospital within one hundred and twenty (120) days of the resignation date from another hospital, shall retain the following benefits:

- (i) accumulated sick leave credits
- (ii) accumulated annual leave entitlement
- (iii) health and insurance plan

- (iv) pension plan in accordance with the provisions of the pension plan for hospital employees
 - (v) service for severance pay purposes
 - (vi) service for step progression
- (b) Employees who receive portability of benefits under clause 38.01 (a) shall be placed on the appropriate salary scale at their new place of employment in accordance with the following:
- (i) if the new position carries a pay range higher than that of the position just vacated, the employee shall be placed on the appropriate step of the new pay range in accordance with existing promotion procedures
 - (ii) if the new position carries a pay range equivalent to that of the position just vacated, the employee shall be placed on the same step of the equivalent pay range in accordance with existing transfer procedures
 - (iii) if the new position carries a pay range lower than that of the position just vacated, the employee shall be placed on the step of the new pay range in accordance with existing voluntary demotion procedures

The types of grievances which the parties have agreed can be brought under this collective agreement are found in Article 15.03:

15.03 **Types of Grievances**

Grievances arising out of the interpretation, application, administration or alleged violation of this agreement shall be subject to the Grievance and Arbitration Procedure set out hereunder. The following types of grievances concerning the application of Article 15 are recognized:

- (i) Employee Grievance: which shall be defined as the complaint of an individual employee.
- (ii) Group Grievance: which shall be defined as the complaint of a group of employees.
- (iii) Policy Grievance: which shall be defined as the complaint of the Employer or of the Union.

All grievance forms may be signed by a representative of the Union as agent for the employee, group or union, as the case may be.

The Union initiated this matter as a group grievance.

Sack and Poskanzer in Labour Law Terms define group grievance as follows:

“Grievance relating to a group of employees similarly affected by the employer’s action.”¹

Here there are four Grievors in the group. Other employees may have been similarly affected.

A review of arbitral jurisprudence is appropriate.

Brown and Beatty in Canadian Labour Arbitration at 4:2000 refer to the interpretation of Collective Agreements as follows:

Because the basic source of an arbitrator’s jurisdiction is found in the collective agreement, in most arbitrations the main task is to construe a word, phrase, section or group of sections in the collective agreement. Conceptually, however, the task of interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. And generally speaking, arbitrators view and approach their function in much the same way.

At 4:2100:

It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. As one arbitrator, quoting from *Halsbury’s Laws of England*, stated in an early award:

The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit.

And further:

But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.

Accordingly, in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have

¹ Sack, Jeffrey & Poskanzer, Ethan, *Labour Law Terms: A Dictionary of Canadian Labour Law*, (Toronto: Lancaster House, 1984).

said, and that the meaning of the collective agreement is to be sought in its express provisions. Thus, where the parties had detailed in the collective agreement specific elements of management rights, without limitation as to the manner in which they would be applied, an arbitrator was held to have erred in implying that those rights were to be exercised fairly and without discrimination. When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. But where a collective agreement is silent on an issue, yet a legislative provision is presumed to be incorporated and must be applied by the arbitrator, such a provision “must be interpreted on its own terms and not in light of the understandings of the parties”.

And at 4:2110 Brown and Beatty state:

In searching for the parties’ intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense

And at 4:2120:

Another related general guide to interpretation is that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning, and that they were not intended to be in conflict. However, if the only permissible construction leads to that result, resolution of the resulting conflict may be made by applying the following presumptions: special or specific provisions will prevail over general provisions; where a definition conflicts with an operative provision, the operative provision prevails; where the same word is used twice it is presumed to have the same meaning; where two different words are used, they are intended to have different meanings; where an incorporated document conflicts with an incorporating document, the conflicting provisions of the incorporated document will not be incorporated by reference; a clear expression of intention is required to confer a financial benefit; and finally, in the case of conflict between an earlier and later clause, there is some authority to the effect that “the part of the contract which is written first overrides that which is written later, and it is only otherwise when the later clause clearly spells out the overriding effect intended”, although the better view would seem to be that effect should be given to that part which best carries out the real intention of the parties. Furthermore, as a technique for resolving doubtful meaning, it is sometime said that where a party is seeking to come with an exception, the meaning of the exception should be construed more strictly against that party, known as the *contra proferentum* rule.

Essentially, the grievance is based on a breach of Article 17 of the Collective Agreement. Article 17 specifies entitlement to annual vacation for employees based on months and years of service. Article 2.01(s) states that “service” means any period of employment in respect of which an employee is in receipt of salary or wages. Service is a determining factor in the length of annual vacation to which an employee is entitled. Article 2.01(m) defines “month of service”.

The group Grievors were casual employees. Casual employee is defined in Article 2.01 (b) of the Collective Agreement. Casual employees are included within the definition of employee as found in Article 2.01(f) of the Collective Agreement. The Union maintains that when a casual employee becomes a full-time, part-time or temporary employee the previous periods of employment – the service - of that casual employee should be included in determining the length of vacation to which that employee is entitled under Article 17. The Employer maintains that casual employees have no such entitlement because casual employees are specifically excluded in Article 2.01(b) from the benefits provided under Article 17.

I have carefully considered the submissions of the parties and the relevant articles of the Agreement.

Casual employees, by definition, work on an occasional or intermittent basis, and, according to the evidence, are not required to come to work even when called. According to Article 2.01(b), casual employees are entitled to all the benefits of the Collective Agreement except for those articles listed in the article. One exception listed in Article 2.01(b) of which casual employees cannot avail is Article 17. Article 17 determines the length of vacation to which an employee is entitled. In lieu of the list of benefits from which casual employees have been exempted under Article 2.01(b), casual employees receive the benefit of 20% of their basic salary.

Based on the plain language of Article 2.01(b), I find that the vacation benefits as found in Article 17 of the Collective Agreement are not available to casual employees. To find otherwise would be to render the Article 17 exception, as found in Article 2.01(b), a nullity.

In summary, Article 2.01(b) prevents casual employees from any entitlement to the benefits contained in Article 17 of the Collective Agreement. The service, or previous periods of employment, of an employee while working as a casual cannot be used in the calculation of the length of service of that

employee toward vacation entitlement when that employee moves to permanent, temporary or part-time employment status. If it is the intention of the parties that casual employees should have such benefits, changes in the language to Article 2.01(b) would be required.

In the result, this group grievance cannot be sustained. I can find no violation of the Collective Agreement in these circumstances.

DECISION

In conclusion, having carefully considered the relevant Articles of the Collective Agreement, all of the evidence and arbitral jurisprudence as it relates to this matter, I find that the group grievance is denied.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of May, 2008.

Dennis M. Browne, Q.C. – Arbitrator