

actions, I have no further jurisdiction but to dismiss the grievance before me.

Decision

On the basis of the evidence and by the foregoing considerations, I find that the Employer's termination of the grievor for unsuitability in accordance with Article 11.01(c) was not subject to the test of just cause.

I further find that the Employer's termination of the grievor for unsuitability in accordance with Article 11.01(c) was done in a manner that was not arbitrary, discriminatory, or in bad faith.

Therefore, the grievance is denied.

Respectfully submitted as the decision of the arbitrator.

Dated at Mound Pearl, Newfoundland and Labrador this 25th day of February, 2009.

David L. Alcock
Sole Arbitrator

time employee). There is no evidence that Ms. Pijogge was ever given notice of lay-off as required by 24.01(a) each time she finished a scheduled or a called-in shift. Under the circumstances I am satisfied that she was never laid off as contemplated by the collective agreement. Since she was not laid off, she was not subject to “recall.” She was simply subject to the shift schedule as posted and to being called to work on relatively short notice as needed.

Even if one accepts that the grievor was a temporary employee, Article 12.04(f) did not apply to her circumstances because she was not laid off and, therefore, the notion of “recall” expressed in that clause had no application to her situation during her probationary period. Recall contemplates being notified to return to work from layoff. Since Ms. Pijogge was never laid off, she was not subject to recall. She was simply subject to being called to come to work as needed on evenings and weekends. Weekends shifts were particularly needed because they were 12 hour shifts and two employees were required to work the night shifts. As such, Ms. Pijogge's call-in shifts were not recalls. Therefore, the notion that she had the right to refuse recall for less than three (3) consecutive occasions without just cause had nothing to do with the calls she received to come to work on relatively short notice. In the result, I am satisfied that the Employer did not deny the grievor any 12.04(d) rights. Therefore, no violation of that clause occurred on the occasions when she refused to come to work as scheduled or as called.

On balance, I am satisfied that no violation of any part of Article 12.04 occurred in Ms. Pijogge's circumstances. Nothing the Employer did in its assessment of her unsuitability was unlawful in relation to any provision of the collective agreement. Therefore, I find no evidence of bad faith in the manner the Employer assessed and terminated the grievor for unsuitability.

Having found nothing arbitrary, discriminatory or in bad faith associated with the Employer's

abolition of her post (see Article 3.01(h)). At all times she was employed but she was not scheduled to work at all times.

The grievor's letter of hire states that she was selected for the "casual position" at the Home. No such position is described in the collective agreement. The parties have referred to her as a "temporary employee," which is defined by Article 3.01(p) as "a person who is employed for a specific period or for the purpose of performing specific work and who may be laid off at the end of such period or following the completion of such work." Ms. Pijogge's employment situation did not fit that definition. She was not employed for a specific period, and she was not employed to perform specific work and subject to lay-off after that work is completed. Her letter of appointment also does not "outline the duration of the exact, or the expected, period of employment." If anything, she fit the definition of part-time employee in 3.01(l) because she was regularly scheduled in advance for various evening and weekend shifts. However, she was also subject to being called to work on relatively short notice.

In essence Ms. Pijogge appears to have been hired as an undefined type of employee to do casual work which was sometimes scheduled and sometimes arranged by phone call on relatively short notice. Since such an employee is not defined in the agreement, this anomalous creation would be problematic in determining how some collective agreement provisions such as layoff and recall apply to it. Frankly, I have no intention of opening up that can of worms. Therefore, for the purposes of this dispute I will accept the parties' understanding that Ms. Pijogge was a temporary employee. As such I note that Article 24.01 requires a period of notice for lay-off of a temporary employee who has not been hired for a specified period. Since Ms. Pijogge was not hired for a specified period, she would be subject to notice of 14 calendar days prior to the date of layoff (30 calendar days for a part-

an employee. Absent that status, seniority has no application and no meaning. Similarly, merely because Article 12.04 does not list termination for unsuitability which has been properly assessed under Article 11.01(c) as causing the loss of an employee's seniority, does not make the employee unlawfully terminated or her seniority unlawfully lost. There again, I might accept that the grievor might have retained her seniority upon termination, but since she is no longer an employee, she could not exercise that seniority to attain any other collective agreement rights, and most certainly, she could not exercise that seniority to defeat a legitimate termination taken under the same agreement. In other words, it does not matter if the grievor's seniority was lost or retained upon her termination. In the absence of employment status, seniority is of no consequence.

Article 12.04 (c) has not been violated in these circumstances. The grievor did not lose seniority for being "absent from work in excess of three (3) working days without the approval of the Co-ordinator/Supervisor unless absent for just cause." Ms. Pijogge was terminated from employment validly and legitimately in accordance with the Employer's right to assess unsuitability under Article 11.01(c). Once again, if her seniority is somehow deemed to be retained by virtue of subsection (c), it is of no consequence because it cannot be exercised unless she is an employee.

Article 12.04(d) has no application to the grievor's circumstances. This clause applies to the loss of seniority for failing to return to work from layoff on a timely basis. It also contemplates that an employee who is recalled for casual work (not the recall of a casual employee, which is not a category recognized by the collective agreement) when she is employed elsewhere for a longer period than the recall period, will be able to refuse to return to work without losing her recall rights. Contrary to Ms. Pijogge's and, apparently, Ms. Fox's understanding, the grievor was not on layoff status at any time. Her employment during probation was not terminated because of lack of work or because of the

of unsuitability. As I see it, the LOA request was not relied upon as a separate reason to terminate; rather it simply confirmed for Ms. Fox that the grievor's unavailability on weekends was as significant as she had already determined. There is some doubt therefore that the grievor's LOA request would have been granted by the Employer in light of the considerable indications of unsuitability that already existed. In one sense, the letter of termination could be interpreted as effectively answering the grievor's request.

Although I think the Employer could have responded more respectfully to the grievor's LOA request before issuing the letter of termination, I am satisfied on the basis of the foregoing considerations that the Employer's assessment of the grievor's unsuitability was not made in a manner that was arbitrary, discriminatory, or in bad faith.

The issues arising from Article 12.04 – loss of seniority.

The Union argued that the Employer's decision to terminate the grievor for unsuitability had the effect of removing her seniority despite the fact that this was not a reason for loss of seniority listed in Article 12.04. In the Union's view, this was a violation of the agreement, an unlawful act, on which the Employer could not rely without its action being considered a matter of bad faith.

On balance, I am not convinced by this argument. It occurs to me that Article 12.04 also does not mention what happens to a person's seniority on retirement. Surely it cannot be argued that since a retiree's seniority is not lost under 12.04 that it is a violation of the collective agreement and somehow unlawful that a retiree should retire. At best I might accept that a retiree's seniority might be retained upon retirement, but the question would then be what possible benefit could it provide unless he was also an employee. Clearly, seniority is not a benefit that one can exercise unless one is

it. If Ms. Pijogge's request dated September 13th were to be rejected solely and exclusively on the basis of Ms. Fox's incorrect belief, I would consider such action unacceptable. Although Ms. Pijogge never received a direct answer to her request, Ms. Fox's evidence in the original hearing was that her request was given consideration, but Ms. Fox's view was that the letter confirmed that the grievor was indeed unavailable to work the shifts assigned to her. While Ms. Fox may have given consideration to this request before she wrote her recommendation to the Board, the evidence is not clear whether the Board also considered the grievor's request, or was even aware that the request had been made. Therefore, I have no way of knowing whether the Board had an opinion on the request at the time. However, what I do know is that there was ample evidence of previous unavailability during the grievor's probationary period on which to assess unsuitability and support Ms. Fox's recommendation for termination.

The evidence in the original hearing was that Ms. Fox was upset about an incident on Saturday September 4th when the grievor called her at home asking if she could leave work early at 11:00 p.m. She told the grievor she could leave if she found somebody to cover the remainder of her shift. On Monday September 6th, Ms. Fox found out that she did not arrange any alternate coverage but left work early anyway. This upset Ms. Fox and caused her to be concerned about the pattern of absences that Ms. Pijogge had developed. I note that, despite being understandably upset by this September 4th incident, Ms. Fox did not immediately run to the Board with a recommendation for termination. In other words, there was no knee-jerk reaction on Ms. Fox's part. In fact it was only after the grievor's pattern of absences persisted on September 11th and she again refused to work on the weekend prior to her termination despite sufficient notice for her to find child care that Ms. Fox wrote her recommendation. At that point Ms. Fox was confident that she possessed ample indication

paragraphs made it clear that the grievor had declined to work on some other weekends and that there were operational implications for those instances as well. That too was equally unacceptable and equally relevant. Therefore, I reject the notion that I should consider only the most recent incident. All of those matters were valid considerations going to the issue of unsuitability. This was not a situation where the employer failed to discipline or issue adverse reports for the earlier incidents, and then attempted to avoid the grievance procedure by claiming protection under 11.01(c) after the latest incident occurred. The Employer was aware from the very beginning that it had the right to assess the grievor for unsuitability during her probationary period. Therefore, it did not unnecessarily need to expose itself to the grievance and arbitration period during its assessment process by imposing discipline and/or adverse reports for incidents of unavailability. I am satisfied that the Employer kept track of the grievor's incidents of unavailability consistently throughout until it had sufficient indication of unsuitability on which to ground Ms. Pijogge's termination. I also do not accept that it was wrong or misleading for Ms. Fox to advise the Board that the grievor could work only evenings and weekends. That was part of the context of Ms. Pijogge's employment, which the Board was entitled to know. Similarly, I consider it neither wrong nor misleading for Ms. Fox to advise the Board that the Employer was authorised under the collective agreement to terminate the grievor for unsuitability during her probationary period without being subject to the grievance or arbitration period. That too was something the Board was entitled to know in determining whether to support Ms. Fox's recommendation.

There was one matter that Ms. Fox was wrong about, namely, her belief that probationary employees were not entitled to request an unpaid leave of absence. The fact of the matter is that she was entitled to make that request. It would then be the Employer's decision whether to accept or reject

i.e., to be reasonably available come to work when she was needed. This was not a situation where the grievor had a disability, which would have obliged the Employer to make a reasonable attempt to accommodate her. Her unavailability was a serious employment issue and there were no reasonable indications that it would be resolved. Her absences were adversely affecting the Employer's operation. Seven (7) incidents of unavailability (actually 8 incidents including the one in the week prior to Ms. Fox's recommendation to the Board) provided sufficient reason for the Employer to assess her as being unsuitable.

Whether the Employer's assessment of the grievor for unsuitability was made in a manner that was arbitrary, discriminatory, or in bad faith

The Employer was entitled by Article 11.01(c) to assess the grievor for unsuitability during her probationary period and it did precisely that on the basis of the extent of her unavailability to come to work. This was not a one off decision; it was a measured conclusion based on a rational assessment of many instances of unavailability during her probationary period when she was properly under greater scrutiny for unsuitability.

There is no evidence that this was a contrivance without foundation on the Employer's part, or that some ulterior motive existed. I do not accept the Union's suggestion that Ms. Fox's written recommendation to the Board was based solely upon the most recent incident of unavailability she described in the third paragraph such that she was actually attempting to discipline Ms. Pijogge without just cause. In my view there was no colourable attempt at improper disciplinary action here. While that paragraph stressed that the grievor's unavailability was unacceptable, the preceding

there is evidence of her indicating that she “had other plans.”

I am satisfied that Ms. Pijogge’s concern for her child resulted in her not being able to rely on the child’s father to provide care (because he had an alcohol problem) and, when family members could not provide assistance, she was not comfortable leaving her child in the care of anybody else in the community. There is no doubt that this generally contributed to the extent of her unavailability, including the times when she left work early, thereby causing the Employer to be short staffed on nights, and prompted her to request a LOA on September 13th. I note that there was also an 8th incident that occurred in the week before Ms. Fox made her recommendation to the Board.. That incident involved discussions with Ms. Fox who wanted her to come to work on the upcoming weekend, but she refused to do so because her only sitter was going hunting at the time. However, I am satisfied on the evidence that she sometimes had other reasons for not wanting to come to work, such as wanting to spend time out with her boyfriend on some Saturdays because he was otherwise working 12 hour shifts. By her own admission, she also felt that she was entitled to refuse being called to work on three consecutive occasions – a matter I will address later..

It is unnecessary to examine the evidence further on this point as the Employer’s assessment was not an exercise to determine blame. And the merits of the Employer’s decision are not the subject of this arbitration. The important consideration is whether the focus of the assessment was properly one of unsuitability. All things considered, the evidence is sufficient to demonstrate that the grievor’s unavailability had developed into a significant problem which left the Employer unable to depend on her to cover shifts during weekends in particular, which were times when she knew she would be expected to work. That constituted an unsatisfactory employment situation – the grievor effectively demonstrated that she could not fulfil the most fundamental aspect of her employment relationship,

relationship. Unless the latter is what Ms. Pijogge clearly explained to Ms. Fox in her interview -- and I do not accept that she did so -- it is my view that Ms. Fox's consent to such an unusual arrangement would need supporting evidence to confirm it. There is no supporting evidence to confirm this. While it might be possible that both individuals left the interview with completely different understandings of what was agreed, that situation would not lend credence to a claim that a clear representation was made. Therefore, I do not accept that there is sufficient reliable evidence of a clear representation of the type claimed by the grievor.

In the result, I reject that the doctrine of estoppel has been established by the Union in these circumstances. Although an occasional incident of unavailability was to be reasonably anticipated, Ms. Pijogge was expected to demonstrate her overall availability to work during her probationary period, especially in light of the fact that Article 11.01(c) permitted the Employer to assess her for unsuitability and to terminate her on that basis without being subject to the grievance and arbitration procedure.

Whether the Employer's assessment of the grievor was an honest exercise of determining unsuitability

The shift schedule indicates that there were few unavailability difficulties encountered by the grievor from May 15th through July 2nd. Incidents did occur on July 3rd, July 30th, July 31st, August 14th, August 21st, September 4th and September 11th. These events involved a mixture of the grievor declaring herself to be unavailable, declining to come in when called, and leaving work early. Ms. Pijogge said she always advised that the reason for not being available was that she could not get a sitter for her child. This was disputed by the Employer, whose position was that she sometimes mentioned babysitting, but more often gave no reason except "unavailable." However, I do note that

she essentially denied the grievor's account of their understanding.

For an estoppel to be established, the first component to be met is that a representation was made by a party which was intended to be relied on by the other party. In my view, the evidence does not clearly establish the representation by Ms. Fox that is claimed by the grievor. In the absence of any mention of such a representation in her letter of hire on May 14, 2004, we are left with a classic "she said, she said" situation. Since I was not present at the interview, I do not know for certain what was said by whom. Therefore, I find that the onus is on the Union to establish that the representation claimed by Ms. Pijogge was clearly and unequivocally made. The way I see it, Ms. Fox needed to hire somebody to perform shifts for the Employer on evenings and weekends. It is inconceivable to me that Ms. Fox would knowingly accept an arrangement that would not be reliable on weekends, its greatest time of need, and would result in the Employer being short-staffed or might force it to incur the extra cost of overtime for a regular employee to cover shifts. An arrangement as described by the grievor would leave the Employer with an unreliable employee whom it could not reasonably depend upon to cover the shifts it needed to cover. It simply does not make sense that Ms. Fox would hire anybody under those conditions for it would not meet the Employer's needs.

The fact that babysitting was discussed at the interview does not strike me as particularly unusual. After all, other employees may well have faced child care considerations when first hired, and no doubt some will encounter some problems from time to time. However, it is the extent of the problem that is the important consideration. In my view, it would be one thing for an employee to indicate that problems finding a babysitter on short notice might prevent him/her from coming to work on occasion, but it would be quite another thing to indicate that childcare problems will be so great that it will significantly impair his/her availability to work throughout the employment

only to matters of unsuitability and incompetence, nothing else. Similarly again, a decision by the Employer not to render formal performance evaluations during probation so as to avoid the grievance and arbitration procedure, would result in the Employer having to start performance evaluations from scratch once probation was completed. Indeed, the evidence is that the Employer does not begin performance evaluations until after an employee's probation has been completed. Effectively then, if the Employer's approach is to use the 11.01(c) process, and that process does not provide reasonable indication of unsuitability, the Employer may well find itself in the position of having nothing on an employee's record during probation that might otherwise be relevant if the employee's subsequent conduct required an adverse report and/or disciplinary action by the Employer.

In the result, it should be apparent that disadvantages might result if the Employer invokes its Article 11.01(c) right. Each time an incident occurs involving a probationary employee, the Employer has a decision to make, which it ultimately may regret.

The estoppel issue

The Union's position is that the issue of babysitting was discussed in Ms. Pijogge's interview with Ms. Fox. It is common ground that Ms. Pijogge also had another job elsewhere in the community. That was not an unusual situation for it appears that other employees also have jobs with other employees. On the one hand, the grievor's claim is that her hiring arrangement with Ms. Fox was that she would work evenings and weekends only if she could get a babysitter for her little girl. In other words, she understood that, if she could not get a sitter, the Employer would accept her unavailability. On the other hand, while Ms. Fox does not dispute that the issue of babysitting was discussed and that the only time Ms. Pijogge could conceivably work was evenings and weekends,

reasonable time period, gradually results in a picture taking shape of an unsuitable employee. For example, one act of unavailability during probation may not signal anything. Therefore, it leaves the Employer wondering what approach it should use. Such an event could be blameworthy or not blameworthy, but at that point there might not be any indication of unsuitability. Therefore the Employer would have to first make a decision whether to address the event by discipline or by adverse report, which would be grievable, or to invoke its right to wait things out during the remainder of the probationary period and keep an account of subsequent events without taking direct action each time, which would not be grievable.

The Employer is entitled to avoid the grievance procedure in such circumstances by exercising its Article 11.01(c) right. Since unsuitability is unlikely to be apparent early in an employee's probation, but could be determinable at some later point before probation is completed, it might well be in the Employer's best interest to exercise its right of assessment under 11.01(c) and avoid the grievance and arbitration procedure. However, the remainder of the probationary period might not see sufficient subsequent incidents or events to warrant a finding of unsuitability. If for some reason, a series of incidents were to occur post-probation, which, taken together with relevant incidents that happened during probation, may support a determination of unsuitability, the Employer would be barred from considering anything that occurred during probation that was not previously recorded and communicated to the individual. Similarly, if the Employer chose not to discipline during probation, it could not rely on such incidents after the employee finishes probation to increase a penalty after a second offence. In my view, the Employer is wrong to assume that it does not have to discipline probationary employees for serious blameworthy conduct, but may instead terminate an employee without being subject to the grievance and arbitration procedure. Its protection under 11.01(c) extends

11.06 says shall not be considered adverse reports) in which issues touching on unsuitability and incompetence may be addressed. And each time any discipline, adverse report, or performance evaluation is placed on file, the employee would have the right to grieve it.

In contrast, an assessment of unsuitability or incompetence for a probationary employee is not subject to any of the above requirements. The Employer is free to assess such employees at any time during their 520 hour probationary periods unencumbered by a requirement to justify each relevant incident or event by discipline, adverse reports, or performance evaluations.

Complications arising from the Employer applying Article 11.01(c)

While Article 11.01(c) does permit the Employer the authority to apply it, the Employer is not compelled to do so. In effect, the Employer may decide to exercise its right to apply its 11.01(c) right, but there is nothing to prohibit the Employer from deciding not to invoke that clause, in which case it would be compelled to adhere to all the employee rights and benefits contained in the agreement because every action it takes will be subject to the grievance and arbitration procedure. Although it might appear at first blush that applying 11.01(c) would be the most logical and most advantageous decision by the Employer, it strikes me that this may not always be the case. Article 11.01(c) does have downside considerations.

I think the best way to explain the various complications that might be caused by the Employer exercising its Article 11.01(c) right for unsuitability (based on unavailability), is to trace through some of the nuances it might face in taking that approach.

Unsuitability is not normally a finding that can be made on the basis of a single incident. Usually, it involves observing a number of incidents or events, which, pieced together over a

This makes the distinction between probationary and non probationary employees huge.

Being unavailable on 7 occasions during probation, as the *viva voce* and documentary evidence establishes in Ms. Pijogge case, provided the Employer with sufficient indication of her unsuitability. I am satisfied that the Employer was aware that the grievor had child care problems, but the Employer was also aware that other probationary employees before her also had child care obligations, which they reasonably managed to overcome so that they could meet their employment obligations. The fact that Ms. Pijogge was unable to make suitable arrangements to overcome her child care problems essentially made her different from other probationary employees. It strikes me as reasonable that the Employer's valid comparison group for matters of unavailability was other employees while they had been probationary, not other non probationary employees. This is not a case of letting one group of employees pick their own shifts to work, while denying another group the same choice. Article 11.01(c) makes probation a special circumstance where an assessment of unsuitability is concerned. Therefore, the Employer is entitled to make its assessment in the context of what is expected of employees on probation. That is precisely what it did in Ms. Pijogge's situation.

Since an action against a non probationary employee for unsuitability or incompetence would be subject to the grievance and arbitration procedure, the test the Employer would have to meet would be much more demanding. In my view, ultimate success for the Employer there would be unlikely unless it produced an accurate and complete paper trail documenting every relevant incident and event along the way over time that, taken together, would support a determination of unsuitability or incompetence and, therefore, justify a decision to terminate. That process of documenting would require placing on the employee's file any disciplinary action taken, any adverse reports that might later be used to affect standing or advancement, and any performance evaluations (which Article

In my view, the expectation that a probationary employee should make every attempt to ensure that he/she is available to come to work is a matter of common sense. It is a fundamental element of employment that should be self-evident. As such, it does not require specific instruction or communication by the employer to make an employee aware of it and that he/she is under extra scrutiny while on probation. Since the Employer is contractually entitled to assess a probationer for unsuitability, there is no requirement that an employee must be reminded that availability is an expected standard to be met. There is also no requirement for the Employer to bring its dissatisfactions on incidents of unavailability to the employee's attention on each occasion. Silence by the Employer to an incident of unavailability during probation should not be interpreted as condonation or representation of acceptance of such a practice. This is not a matter of discriminating against a probationer; rather it is a matter of recognizing that Article 11.01(c) grants the Employer the right to determine unsuitability as assessed entirely by itself and not subject to the grievance and arbitration procedure. In that respect, probationary employees are contractually subject to implications that could be much more serious than would be the case for other employees. This does not mean that the Employer is entitled to accept a non probationer's reasons for unavailability while not accepting the same reasons from a probationer. Article 11.01(c) does not go that far, but it does permit the Employer to determine unsuitability on the totality of the amount and number of occasions of unavailability. That is why a probationer would be ill advised to assume that her unavailability will be considered in the same way as a non probationary employee's unavailability. Identical occurrences, irrespective of the reasons, could potentially cost the probationer her job without having recourse to a ruling on just cause from an arbitrator, whereas the non probationer would have the advantage of challenging each incident as it occurs through the grievance and arbitration procedure.

demonstrate their suitability and competence, their employment status could be in jeopardy. This is not a management rule or policy that requires management communication or notification. No warning independent of the contractual provision itself is required. New employees on probation are automatically subject to it. Other employees are not. That does not constitute discrimination. A probationary employee who ignores this clear and unequivocal contractual admonition does so at his or her own peril. In my view, Mr. Dicker's and Ms. Winter's testimony that they advised Ms. Pijogge not to miss shifts while on probation indicates that they clearly understood the true nature of the probationary period under their collective agreement. Indeed, Ms. Winter testified that, upon commencing her own probationary period, she took particular pains to ensure that she had child care arrangements in place so that she would not be unavailable to work. The fact that those two employees shared their conviction with the grievor that she should make herself available on probation reinforced what should be self-evident in Article 11.01(c).

Unsuitability may involve a number of issues, including *inter alia* a probationer's fit with co-workers. However, at the most basic level, one's unavailability to work is a fundamental element of employment. I am satisfied on the jurisprudence presented that it is a reasonable standard for any probationary employee that he/she be expected to be dependable. And the most obvious aspect of dependability is to expect an employee to reasonably attend work. It is reasonable to anticipate that employees will miss work occasionally for valid reasons. But it is equally reasonable to expect an employee not to be unavailable to such an extent, especially during probation when he/she is subject to greater scrutiny, that it strongly indicates that he/she cannot be depended on to come to work when needed. Therefore one's unavailability is a valid indicator of unsuitability. No distinction is made between culpable and non culpable unavailability.

Article 11.01(c), for the singular matters of unsuitability and incompetence as assessed by the Employer. It is not the case that, in this collective agreement, all the various provisions providing rights and benefits for probationary employees effectively negate or nullify the Employer's 11.01(c) right. Rather, it is precisely because Article 11.01(c) exists that the Employer has reserved to itself a limited, but significant, authority to exercise a right to assess probationary employees for unsuitability and incompetence without the merits of such assessments being subject to the grievance and arbitration procedure. Such decisions, including the decision made in Ms. Pijogge's circumstances, are not subject to the test of just cause.

Article 11.01(c) essentially carves out a right for the Employer to assess probationary employees differently from non probationary employees in matters of unsuitability and incompetence. In my view, this clause recognizes the unique features of probation and of probationary employees being worthy of special scrutiny and action by the Employer that would not otherwise be permitted in the case of non probationary employees. It recognizes that probationers are expected to use this initial time period to demonstrate their suitability and competence to remain employed in their positions. In other words, probation is not merely an amount of time that must expire at the beginning of one's employment or a time to prove one's ability in performing one's duties; it is an exercise that must be successfully completed by an employee in terms of demonstrating his or her suitability and competence to maintain employment status. One's probationary period is a very serious matter; its implications can be detrimental to one's future employment with the Employer. Article 11.01(c) is clear and unequivocal: if the Employer assesses a probationer as unsuitable or incompetent, he/she may be terminated. In my view, 11.01(c) is an express contractual notification to probationary employees that, if they do not use this initial limited period of opportunity to

As a matter of interpretation, I respectfully disagree with the Union's position that other provisions of the collective agreement required the Employer to issue Ms. Pijogge an adverse report for the incidents of unavailability identified by Ms. Fox. In my view, the exemption in 11.01(c) is not effectively rendered void or impotent by any of the rights and benefits afforded to the grievor by Article 12.03. While this agreement gives probationary employees seniority and other rights and benefits to which all other employees are entitled, it does so subject to a condition which is firmly and unequivocally expressed in 11.01(c), namely, the specific right for the Employer to terminate a probationary employee for unsuitability on its own assessment and without being subject to the grievance and arbitration procedure. In other words, the Employer is entitled to avoid having its decision to terminate a probationary employee for unsuitability subject to the grievance and arbitration procedure. In effect, the collective agreement contemplates that probationary employees may indeed be treated differently from other non-probationary employees where unsuitability and incompetence is concerned, in spite of the fact that they all are seniority rated.

Some of the jurisprudence submitted and argued by the parties distinguishes between seniority-rated employees and non seniority-rated employee on the general premise that the attainment of seniority sets them apart, thereby entitling the employer to take action against a probationary employee (who presumably does not have seniority) with a somewhat greater measure of impunity than would be the case with non probationary employees. Essentially, some of the jurisprudence submitted by the parties uses the term "seniority-rated" to distinguish between probationary employees and non probationary employees. Since the instant collective contemplates that all employees have seniority, there would be no distinction between the rights and benefits of a probationary employee *vis a vis* a non probationary employee unless the agreement expressly provided otherwise, as it does in

disciplinary in nature, to which the test of just cause would apply, and sometimes it could potentially be non-disciplinary in nature, but still be grievable and arbitrable on that same test. In essence, the Union's position sees the grievor's right to grieve an adverse report trumping the Employer's right to assess and terminate for unsuitability without being subject to the grievance and arbitration procedure.

I quite agree that the collective agreement contemplates that any employee, including a probationary employee who receives an adverse report, is entitled to grieve it if he/she disagrees with it, and the Union may arbitrate it if it wishes to do so. I also quite agree that any disciplinary action against a probationary employee may be grieved and arbitrated. And I also agree, with one caveat, that Articles 11.04(a) and (c) prohibit the Employer from relying on a "dissatisfaction relating to his/her work or otherwise which may be detrimental to an employee's advancement or standing with the Employer" that has not been previously brought to her attention in writing. This prohibition is based on the premise that an employee is entitled to be notified within 10 calendar days of the Employer becoming aware of the matter giving rise to the dissatisfaction, so that he/she can contest it in a timely fashion by grievance and arbitration. Otherwise the accusation will be null and void.

However, the *caveat* I mention is the one specifically expressed in Article 11.01(c) where a probationary employee is concerned, namely, "The termination of probationary employees for reasons of unsuitability or incompetence, as assessed by the Employer, is not subject to the grievance and arbitration procedure." In other words, if unsuitability or incompetence of a probationer is assessed by the Employer, it is specifically exempted from the grievance and arbitration procedure (except for issues of arbitrary, discriminatory or bad faith actions on the Employer's part – i.e., the implied term now substantially favoured by jurisprudence, which was the subject of the original award).

and the extent, if any, to which there is a clash between the Employer's discretion to assess her for unsuitability and to terminate her on those grounds under Article 11.01(c) without its action being subject to the grievance and arbitration procedure, and the rights and benefits to which the grievor is entitled under Article 12.03.

The Employer's position is simple: since Article 11.01(c) expresses the Employer's unfettered right to terminate a probationary employee for unsuitability, that is the end of the matter. The Union's position is that every right provided to the grievor under Article 12.03 is a fetter to management's right under 11.01(c).

Is just cause required in determining unsuitability for probationary employees

The evidence is that the Employer readily agrees that it did not attempt to discharge the grievor for just cause. Its view was that, as a probationary employee, she was under greater scrutiny for unsuitability and, therefore, the Employer relied entirely and exclusively on its rights in Article 11.01(c). The Union insists, however, that Ms. Pijogge was entitled to the test of just cause because the Employer did not warn her about her unavailability and did not bring its dissatisfaction to her attention in writing at any time in the form of adverse reports as required by Article 11.04.

At the root of the Union's position here is the notion that, if the Employer is dissatisfied with any aspect of its employees' performance, including Ms. Pijogge's availability as a probationary employee, it is required on every occasion to issue an adverse report so that it would be placed on her personal file, which she would then have the right to grieve. The purpose of an adverse report after all is to make an employee aware of the Employer's dissatisfaction in a timely manner so that he/she can grieve it if he/she disagrees with it. Sometimes, the issue in an adverse report could potentially be

In the result, the Union requested that the arbitrator uphold the grievance, reinstate the grievor in her old position and compensate the grievor for all lost pay and benefits.

CONSIDERATIONS

Has the Union established that the Employer discharged the grievor without just cause ?

Although this issue is inextricably intertwined with all other aspects of this case, I think it must be dealt with before any examination may be given to the issue of arbitrary, discriminatory or bad faith action on the Employer's part.

The just cause issue has consistently run through the Union's submissions from the very onset of hearings in October 2007. When one clears through the clouds of details that have become contentious issues in this case, it is abundantly clear that the Union's essential position is that the Employer failed to adhere to the requirements of a number of collective agreement provisions in determining whether the grievor was unsuitable. There are two related facets to that position. The first is that the Employer did not properly terminate the grievor for unsuitability, rather it discharged her without just cause. The second is that the Employer's action violated several collective agreement articles which denied the grievor rights and benefits to which she was entitled and, therefore, it arrived at its decision by illegal, i.e., unlawful, means. Both facets require wide ranging rulings on collective agreement interpretation, particularly on the question whether the issue of just cause was required to apply to the grievor in her particular circumstances as a probationary employee.

For all the interpretation issues arising, the starting point is the grievor's probationary status

grievor's circumstances, but knew nothing about the other employees' unavailability. She was often vague and unresponsive and her story kept moving with the evidence at the moment.

The issue of what was said at the interview is a matter of credibility. In the Union's view, the arbitrator must find in favour of Ms. Pijogge's testimony. The fact is that the issue of child care was brought up in the interview, and an arrangement was made with the Employer that Ms. Pijogge could only work if she could find a baby sitter.

The Employer also asserted that the Union did not lead evidence that the grievor was terminated without just cause. However, the Union pointed out that it was unnecessary for it to lead any evidence on that matter because the Employer submitted sufficient evidence of that in MF#2, Ms. Fox's recommendation to the Board. Her recommendation did talk about unsuitability, but it did not list any of the incidents for the Board to consider.

With respect to the issue of discrimination, it must be remembered that the evidence is that employees who had finished probation were given greater rights than the grievor, who was on probation. They were given the rights and entitlement in the collective agreement. The grievor was not. For the Employer to argue that probationary employees are different from other employees is an indication of the weakness of its position. The Employer's own evidence was that temporary employees (see Article 3.01(p)) continued to be laid off. Ms. Pijogge was a temporary employee. Therefore, she was no different from any other employee in that respect.

The Employer questioned the fact that the Union submitted a Human Rights decision, *Canada (Treasury Board - Employment and Immigration)*. A reading of that case reveals that that dispute was not based on Human Rights legislation. Rather it was decided on issues contained in the collective agreement, as should be the case in Ms. Pijogge's dispute.

probationary employee cannot be less rigorous than in the dismissal of a seniority-rated employee. The evidence demonstrates that the Employer acted in bad faith by terminating her for an “unlawful motive” (see p. 10), as evidenced by the Employer’s unlawful breach of the grievor’s collective agreement rights.

In *Grace Sparkes House, supra*, the arbitrator indicated that it is not the arbitrator’s role to substitute his opinion for that of the Employer’s assessment in matters of terminating for unsuitability. In the instant dispute, the Union does ask the arbitrator consider those aspects of the Employer’s assessment of the grievor that were violations of the agreement, e.g., adverse reports were not communicated to the grievor. Also, the arbitrator should question what would have happened had the Employer recognized that grievor’s rights under Article 12.04. Clearly, the standards used by the Employer were not communicated to the grievor. Also, the Employer was not entitled to invoke a standard of unsuitability that breaches the grievor’s collective agreement rights.

With respect to the issue of the Employer’s standards, Duane Dicker testified that he worked with the grievor only on three (3) occasions as senior counsellor. Tracy Winter testified that there were two (2) incidents when she was involved with the grievor. But both of them mentioned to the grievor standards that were in violation of the collective agreement. Therefore, the Employer cannot rely on what they told the grievor as grounds to use against her.

On the one hand, the comment by counsel for the Employer that the grievor’s testimony was not credible is not justified. The fact was that she could recall one occasion of the 7 or 8 in dispute, but she was uncertain about the rest. There is no evidence that she ever read the original award. She was simply shown it and agreed to it.

On the other hand, Ms. Fox’s testimony is in question. She knew everything about the

In *St. Lawrence College, supra*, at p. 6, the second paragraph distinguishes between seniority employees and non seniority-rated employees. However, the instant collective agreement between the parties is unique. By virtue of Article 12.03, probationary employees have fundamental substantive rights, including seniority (Article 12.01); the conditions under which seniority may be lost (Article 12.04); a right under Article 11.04 to be notified in writing in a timely manner of dissatisfactions concerning their work; the right to apply for leaves with or without pay, etc. It should be noted that the grievor properly applied for a LOA, but the Employer's response was not to deny her request, but to terminate her. The Employer's violation of the above substantive provisions were the very "unlawful considerations" mentioned in the third paragraph of p. 6. The grievor was entitled to all those rights, but the Employer simply ignored them. The Union's position is that the test here is what the board said at the end of page 7, namely: "... the test to be applied in determining if a probationary employee was properly dismissed is ... illegality or obstruction. The Union has demonstrated above the illegal considerations in the grievor's circumstances. Therefore, *St. Lawrence College* actually supports the Union's case.

The arbitrator should also be mindful that the Employer's jurisprudence (*St. Lawrence College* and *Air Canada*) and the authorities (Brown & Beatty) distinguish between the rights of seniority-rated vs non seniority-rated employees, i.e., those serving probationary periods. However, the instant collective agreement does not distinguish between such employees; they are all entitled to the same rights and benefits of the collective agreement. Ms. Pijogge was a seniority-rated employee. Therefore, she was entitled to the greater rights afforded to such employees. She should not be treated differently from any other employee with seniority and, contrary to that indicated at the bottom of p. 9 of *Hydro Electric Commission, supra*, a review of the employer's actions against the grievor as a

might have expected of him in the future.

In summary then, the Employer took the position that the Union has not met its onus of establishing that the grievor was dismissed without just cause. The Union has also not discharged its onus of establishing grounds for estoppel or that the Employer's decision was made in a manner that was arbitrary, discriminatory, or in bad faith. The evidence is that the Employer did nothing to prevent the grievor from attending work. Therefore, the grievance should be denied..

Union Rebuttal

Except for the *Grace Sparkes House* award, none of the Employer's jurisprudence was on point. The awards submitted make a distinction between probationary employees and employees who are seniority-rated. However, the Employer here has ignored the fact that the parties' own collective agreement specifically provides that probationary employees attain seniority in the same way that non-probationary employees do.

In the Union's view, an unlawful consideration in these circumstances is a violation of the collective agreement by the Employer. For example: 1) contrary to Article 11.04, the Employer did not give the grievor any adverse reports on the events Ms. Fox was dissatisfied with; 2) contrary to Article 12.04(f), the Employer did not allow the grievor to refuse recall on three consecutive occasions without just cause; 3) the Employer did not permit the grievor to avail of her unfettered right under Article 12.04(d) to refuse any and all shifts less those she would get at her other employment at the Child Care Centre; 4) the grievor was a seniority-rated employee, but the Employer dismissed her without just cause, thereby illegally causing her to lose her seniority under Article 12.04(a).

bad faith and in a discriminatory manner. It also pointed out that the Divisional Court

. . .noted that if a board of arbitration reviewed the “reasonableness” of the cause for dismissal it was placing the probationary employee in the same position as the employee with seniority and therefore exceeding its jurisdiction under the collective agreement.

In the board’s view at p. 8:

. . .bad faith is defined as being “motivated by unlawful considerations” or as having “resulted from management actions which precluded the probationary employee for doing his best.

In *Re Air Canada, supra*, the issue was the dismissal of a [probationary employee for unsatisfactory work performance. At p. 4, mention is made that the employer had “always underscored how vital it was that assigned work shifts not go uncovered. . .” Action was taken by the employer in that case after the grievor, without excuse, failed to present himself for a second work shift. The Union contended that the grievor’s termination was disciplinary in character.

In Ms. Pijogge’s circumstances, the Employer’s decision on unsuitability was made after 7 incidents of unavailability, not 2 incidents as in *Air Canada*.. At p. 8 the board commented:

. . . Thus, unlike the seniority-rated employee, an employer will be entitled to terminate a probationary employee on administrative grounds where it has reason to conclude the employee has not and will not render satisfactory service or does not or is not likely to meet its standards of job performance.

At p. 12, the board concluded that the grievor’s termination was administrative and that the issue was whether the employer

. . .has demonstrated that its decision to terminate the grievor’s services for failure to met its standards was a reasonable one in terms of his suitability for the position and what it may have expected of him in the future.

At p. 13, the finding was that the grievor’s failure to provide coverage for his two absences was

. . .not unreasonably ... a reflection on the grievor’s reliability and what the company

other probationary employees have been treated.

In *St. Lawrence College, supra*, the court “remitted the matter to the board of arbitration to determine whether the conduct of the employer involved bad faith in [a] broader sense. At p. 6 of the second arbitration award, in discussing the standard of review required by the Divisional Court of the Supreme Court of Ontario when it reviewed an award *Re Municipality of Metropolitan Toronto and C.U.P.E., Loc. 43*(1980), 26 L.A.C. (2d) 320 (Simmons), the board quoted in part from a subsequent arbitration *Re Municipality of Metropolitan Toronto and C.U.P.E., Loc. 79*(1984), 18 L.A.C. (3d) 52 (O’Shea), which cited the Divisional Court’s decision at p. 56:

... A probationary employee would be entitled to succeed on a grievance in relation to discharge only if she were to affirmatively establish that the action of the employer was taken in bad faith in the sense that the decision was motivated by unlawful considerations or resulted from management actions which precluded the probationary employee from doing his best.

Noting that the Divisional Court was reviewing a conclusion by the board of arbitration at p. 326 of its award, namely:

The remaining issue is, what is the standard of review of management’s decision to terminate the services of a probationer? While the collective agreement does not make any distinctions between probationers and employees who have acquired seniority, arbitral jurisprudence establishes that the employer need not meet the same standard of just and reasonable cause when dismissing probationers ... It is noted that some arbitrators will not overturn employers’ decisions to terminate the probationer’s services at will providing there is no element of discrimination present. All that is required is for the employer to establish that the probationer is unsatisfactory.

the board continued that:

It is therefore clear that the Divisional Court was looking at a case where a board of arbitration had placed the onus on an employer to show that the probationary employee was unsatisfactory. The Divisional Court rejected this standard and held that the standard of review was illegality and obstruction on the part of the employer and that the union bore the onus of establishing that.

The board also found at p. 7 that it had jurisdiction to determine whether the employer had acted in

. . . The union did not argue that the employer acted in bad faith. In this respect, I note that there has been no suggestion nor evidence that the employer terminated the grievor's employment for some ulterior or unlawful motive or for any reason whatsoever other than her absenteeism. Without dilating unduly on the point, I consider it to be well-established and self-evident that an employee's absenteeism is a legitimate concern for an employer and something which can lawfully be the basis of a decision regarding the employee's suitability for continued employment.

At p. 11, the board commented further that:

The issue is not whether the employer is ultimately correct that the grievor's future attendance would in fact be unacceptable. Instead, the issue is whether the employer was arbitrary in reaching that conclusion

Ms. Fox was clearly not arbitrary in deciding that the grievor was unsuitable because she could not be available to work when she was needed.

On the question of whether the employer had a measurable standard, the board said:

There can be no question that the grievor was fully aware that the expected standard was that probationary employees would not be absent.

The evidence is that Ms. Fox, the senior counsellor and other staff members made it known to Ms. Pijogge that not being available to work was not acceptable for a probationary employee. The evidence was also that, on two occasions, the grievor called work numerous times to ask if someone else had been found to cover a shift that she had been asked to work.

Finally on p. 13, the board concluded that

There is no evidence whatsoever that the grievor was discriminated against in the sense that she was treated differently from some other employee in like circumstances.

. . .

In the final analysis, the union has failed to discharge its onus of showing that the employer's decision to terminate the grievor's employment was arbitrary, discriminatory, in bad faith or contrary to specific provisions of the collective agreement. . .

In the instant case, Ms. Pijogge was not discriminated against. She was treated no differently than

In *Hydro Electric Commission, supra*, a file clerk was terminated for absenteeism of 5 days on 3 separate occasions during probation. The Employer did not question the validity of the grievor's absences. Similarly, in the instant case, the Employer does not question the validity of the grievor's reasons, namely that she had baby sitting problems. However, the Employer maintains that she must still be available to come to work. In *Hydro*, the Union argued at p. 6 that :

. . .the grievor was discharged in a manner that was arbitrary, discriminatory and in bad faith. Its arguments are based on the principle that an employer is required to advise a probationary employee both the standards expected to be met by the employee and whether the employee was deficient in meeting those standards.

Ms. Pijogge was made aware of the standards expected of her and was specifically advised that it is not acceptable to miss shifts while on probation. At p. 8, counsel for the Employer argued that "arbitral jurisprudence has long recognized absenteeism as a legitimate factor in determining the suitability of an employee." And he further argued that "arbitral authority does not require the employer to give a warning to a probationary employee such as argued by the union." At p. 9 the Employer's position was described, viz:

. . . its decision was not made on a whim, but was a judgement based on the total number of the grievor's absences, as well as the number of different occurrences, measured in the context of its experiences with other probationary employees.

Also, at p. 9-10 the board

. . . emphasized that issue in dispute centres on the employer's decision to terminate a probationary employee during probation. By and large, it is recognized that arbitral review of an employer's actions in that contest is less rigorous than in the case of dismissal of a seniority-rated employee. More specifically, in this case I have previously ruled in the preliminary award that, at least under this collective agreement, the employer does not have to demonstrate just cause in order to terminate the employment of a probationary employee....the employer need only show that its decision was not arbitrary, discriminatory or in bad faith and that it did not contravene the collective agreement directly.

arbitration awards. One was *Re Brantwood Residential Developmental Centre and ONA* (1992), 31 L.A.C. (4th) 18 (Starkman) at p. 34:

It is clear that in order to release a probationary employee, the employer does not have to demonstrate just cause for their action and the collective agreement provides only limited rights to a probationary employee to grieve their release. The restricted grievance rights under this agreement place a burden on the association to demonstrate that the employer has acted in bad faith.

On the evidence presented to me, I have concluded that the employer did not act in bad faith. Further, the employer presented evidence which satisfied me that they had a reasonable basis for the belief that the grievor would not fit in at Brantwood. This belief was based on information and opinions provided by the grievor's co-workers. In the circumstances of a probationary employee the employer has wide latitude and discretion as to whether they wish to continue such person's employment during the probationary period.

Also at p. 26 is a quote from *Re Canadian Forest Products Ltd. and P.P.W.C., Loc 25 (Aken)* (2002), 108 L.A.C. (4th) 399 (McPhillips) at p. 411:

The concept of "unsuitability" is more comprehensive than what is considered by the phrase "just and sufficient cause" as applied to seniority-rated employees. For example, the suitability of a probationer would include his character, compatibility with fellow employees, potentiality for advancement within the company and so forth, which are not ordinarily supportive of a discharge of a seniority-rated employee. On the other hand, more common grounds for discipline such as insubordination, theft, absenteeism, or sabotage of company property would also seem to come within the rubric of "unsuitability". The decision of management cannot be made in an arbitrary, bad faith or discriminatory manner.

At p. 34, the board made the following finding:

The Board finds that the Employer's assessment of the Grievor under Article 11.01(c) was reasonable and was not arbitrary, discriminatory or made in bad faith. Further, the Board finds that the Employer's actions generally were not arbitrary, discriminatory or made in bad faith.

It is the Employer's view that the arbitrator in the instant dispute should reach the same conclusion as the board did in *Grace Sparkes House, supra*.

The Union claims that the instant collective agreement does provide such protection. However, the Employer's position is that it does not do so – Article 11.01(c) specifically makes that clear.

At para. 7: 5020, p. 7-191, the authors state:

It is inherent in the status of probationer that a person can be terminated if he or she cannot satisfy the employer of suitability for the job. Given its purpose, employers can let probationary employees go for reasons that would not constitute just cause for the dismissal of a seniority-rated employee. . . in reviewing an employer's decision to terminate someone on probation, arbitrators apply a more limited and deferential standard of review, like the one they use in promotion and job vacancy cases. . . Whatever the choice, legislatures, courts and arbitrators are all agreed that making it easier to terminate the services of a probationary employee is perfectly legitimate and legal. . . . Although in some early cases arbitrators ruled that it was within the sole discretion of the company whether to retain or discharge a probationary employee, it is now accepted that an employer cannot act in ways that are unlawful or arbitrary, discriminatory, or in bad faith, for example by hindering someone from doing his or her best. . .

In *Grace Sparkes House, supra*, the same language and same issues were dealt with for a probationary employee. At p.21-22, the Employer argued that

it was not appropriate for the Arbitration Board to substitute its own assessment of the Grievor for the assessment made by the Employer. The Employer was not required to prove unsuitability. The onus of proof was on the Union to show that the Employer's actions in the exercise of its discretion were arbitrary or discriminatory . . . There was direct evidence to substantiate the Employer's findings. The Employer's assessment was based upon observations made by the Administrator, reports from senior staff members, reports from residents, and statements made by the grievor. . . .

At p. 24 the board found that:

(1) the dispute concerning the termination of a probationary employee is arbitrable on the basis of the express terms of Article 11.01(c) and on the basis of the implied term that arbitrators may review the decision to dismiss a probationary employee where the decision was arbitrary, discriminatory or made in bad faith. . .

That is now precisely the role of the arbitrator in the instant dispute.

At p. 25, the board considered the application of similar standards of review in other

by the Employer that prevents the grievor from doing her very best. The Employer's evidence is that it did nothing to prevent Ms. Pijogge from showing up for work and doing her best.

Ms. Fox has relied heavily on her senior counsellor for orienting and training new staff and evaluating them on probation. This practice has been consistent for some time and many employees have passed through their probationary periods under those same circumstances. All of them were treated in the same way that Ms. Pijogge was treated. She was not discriminated against. There is no dispute that Ms. Pijogge was competent in performing her duties while she was at work, but unfortunately because of reasons, some of which were her fault and some not her fault, over a period of three (3) months, she demonstrated that she could not be depended on to be available to work when she was needed.. That constituted unsuitability as assessed by the Employer.

In the Employer's view, the grievor's testimony has been rife with uncertainty. This dispute revolves around her employability, yet in the second hearing she contradicted evidence she gave in the first hearing when she said she could not remember things. For example, the Employer noted that she said she only refused one shift without giving a reason. At the next hearing, she said that the Employer had the evidence to look at before this hearing. Therefore the Employer suggests that the arbitrator carefully scrutinize the credibility of the grievor.

At para. 7:5000 of Brown & Beatty, the authors state:

With respect to matter os employment security generally, and discharge and dismissal in particular, the status of employees who have not completed their probationary periods is more vulnerable than those who have. Although arbitrators have differed as to precisely what rights, if any, probationary enjoy with respect to their security of employment, there is a firm consensus that, from the very nature of a probationary period, such persons cannot expect the same protections from a "just cause" clause as those employees who have completed their probationary periods unless, of course, the collective agreement extends them that right.

Pijogge was under constant scrutiny. The Employer's assessment of her during probation supports the finding of unsuitability.

On the issue of estoppel, the Employer's position is that there was never in the first instance any clear or unequivocal representation made by the Employer that Ms. Pijogge did not have to come to work every time she could not get a babysitter. There was no clear and universal recognition on Ms. Fox's part that the grievor would be excused any and every time she wanted to claim she was unavailable to work because of baby care problems. In the absence of such a clear representation from the Employer, there is no basis for an estoppel argument.

5. *If the Union fails to establish that the issue to be arbitrated is just cause for disciplinary discharge, then the primary issue will be unsuitability as assessed by the Employer under Article 11.01(c). However, the merits of the Employer's unsuitability assessment, including the reasonableness of that assessment, will not be arbitrable.*

Since the Union has not established that the issue to be arbitrated is just cause for disciplinary discharge, the issue is automatically unsuitability as assessed by the Employer. The merits of that assessment, including reasonableness, is not arbitrable.

6. *Since my ruling is that the Employer has a duty to act in a manner that is not discriminatory, arbitrary, or in bad faith in terminating the grievor for unsuitability as assessed by the Employer, an allegation of the existence of either or all of those three elements will be arbitrable.*

In all instances above, the Employer will be free to offer its own evidence and argument.

The Employer agrees that discrimination, arbitrariness and bad faith are arbitrable matters here. However, the Union has not provided proof of any of them. Bad faith is some unlawful action

Clearly, the third paragraph of this letter sets out the continuing unavailability problem on Ms. Pijogge's part. The next paragraph does mention the specific incident mentioned by the Union, but it is by no means the only aspect of that letter. Ms. Fox's communication to the Board was not grounded on 1 incident. There were 7 incidents involving her not being available to work on weekends. All those matters together indicated her unsuitability.

2. *Shift schedules shall be made available for the Grievor and Union to check against the grievor's attendance record previously submitted by Ms. Fox.*

The shift schedules were supplied by the Employer for the second hearing.

3. *The Union will be entitled to present any evidence and argument it might have that the Employer did not terminate the grievor for unsuitability.*

The Union led no evidence that the Employer did not terminate the grievor for unsuitability.

There was certainly no evidence strong enough to seriously challenge the Employer's reasons that her unavailability to work constituted unsuitability.

4. *The Union will be entitled to lead evidence and argument on the substantive issues of loss of seniority, alleged improper performance evaluation and alleged human rights violations. The Union will also be entitled to lead evidence and argument on the issue of the common law doctrine of estoppel.*

There was no evidence led on loss of seniority. The Union merely argued the point. There was no improper evaluation of the grievor as the Union suggests. As a probationary employee, Ms.

as the others) is not on point.

The original award by arbitrator Alcock set down six (6) bases upon which this recent hearing was to proceed:

1. *The Union has the substantive right to grieve that Ms. Pijogge has been discharged without just cause. The Union will have opportunity to lead any evidence it may have to establish a case for discharge without just cause.*

The Union has submitted much argument but has led no evidence to establish that the grievor was discharged without just cause. Ms. Fox's letter to the Board (MF#2) was relied on by the Union to claim that Ms. Pijogge was discharged without just cause for one incident. That is not so. MF#2 states:

September 20, 2004

As of September 20, 2004 Connie Pijogge has 368 hours banked.

She is only available to work evenings and weekends and has declined to work on some weekends leaving me stuck to find staff to work and giving overtime to some staff members.

She has called in to work and left messages in the staff communications book saying that she is not available to work on Saturday nights because it is the only night her spouse is not working and her only opportunity to go out with him.

Last week she called me and said that she is not available to work for the upcoming weekend because her spouse is going hunting and she don't have a babysitter. I told her she still has a few more days to find a babysitter, but she said "who'll want to get up at 7 a.m.?" I explained that at the moment we are very short staffed and she is requested to be at work as per her scheduled shifts. She said that she will not be coming in. To me, this is unacceptable.

Connie is still on her probationary period. As per the collective agreement, if an employee is unsuitable or incompetent, as assessed by the employer, is not subject to the grievance or arbitration procedure.

I am therefore, asking that the Board of Directors consider terminating her employment because she is unsuitable for the position

unavailable, the fact of the matter is that Ms. Pijogge has clearly shown herself to be an unsuitable employee for her job because of her unavailability to come to work.

It is agreed that Ms. Pijogge could not come to work on some of the 7 occasions because she could not obtain child care. However, she admitted to a number of occasions (3 or more) when she did not give that reason when called to work. Ms. Fox was made aware of most of those incidents by her staff who reported same. Ms. Fox kept her own notes, relied on the information given to her by her staff, and did discuss these matters with the grievor on occasion.

In the Employer's view, adverse reports are not relevant or applicable where a determination of unsuitability of a probationary employee is concerned. As indicated in *Brown & Beatty* para. 7:5020 at the bottom of p. 7-192, the Employer must clearly communicate the standards it expects of a probationary employee. This was done in the grievor's orientation, i.e., during peer on-the-job training conducted by the senior counsellor who, when she talked about not being available to work on weekends, advised her that she should make herself available to work. The evidence is that the senior counsellor acts on Ms. Fox's behalf when she is absent. Therefore, Ms. Fox is entitled to rely on the fact that Ms. Pijogge was properly informed by the senior counsellor of this deficiency. It is entirely reasonable to expect a probationary employee to come to work on the occasions she agreed upon when she was hired. Availability to work is a reasonable standard.

Ms. Pijogge is one of only two probationary employees who have been let go for unsuitability. The Employer has proven the basis on which unsuitability was decided in Ms. Pijogge's circumstances. That fully satisfies the requirement of Article 11.01(c).

In *Canada (Treasury Board-Employment and Immigration)*, *supra*, submitted by the Union, the grievor was disabled. That was not the situation with Ms. Pijogge and, therefore, that case (as well

L.A.C. (4th) 303 (Frumkin).

The Union alleges that the Employer is misguided about probationary employees being entitled to less than non-probationary employees. That is not the evidence. The real evidence is that probationary employees are under greater scrutiny for determining unsuitability. Most probationary employees would automatically know that they have to do their best to demonstrate their suitability for full time employment. They should probably not expect to avail of some of the entitlements otherwise provided under the collective agreement. For example, one might be advised to not ask for too much sick leave and other time off. While on probation, they must demonstrate that they are available to work at all times they are expected to work.

The Union argued that Article 12.03 was where the Employer erred because probationary employees are entitled to all benefits and rights of the collective agreement. As the Employer argued in the original hearing, Article 12.03 is subject to Article 11.01(c), which makes it clear that the Employer has the right to assess probationary employees for unsuitability and to terminate them upon such an assessment without being subject to the grievance or arbitration procedure.

The Union also claims that temporary employees may also be probationary employees. However, the Employer points out that the agreement contains two different definitions for those types of employees.

In the most recent hearing, witness testimony and documentation all establish that the grievor was unavailable to work on 7 separate occasions while she was a probationary employee. The work schedules show that the incidents did happen. Those events were not proven untrue. Regardless of the terminology one uses to describes those events, e.g., refusal to work, leaving work early, being

grievor's availability, one would think that the Employer would have talked to her once the problem became apparent. However, that did not happen. Instead, the Employer simply decided to fire her. In the Union's view, Ms. Fox's letter to the Board dealt with a specific event that Ms. Fox took disciplinary action against. Any rational person would see that Ms. Pijogge was terminated for cause as alleged by the Employer and that the Employer conveniently hid behind the cloak of unsuitability.

On the basis of the evidence, particularly the shift schedule, it is clear that other employees were given privileges to which the grievor was denied solely because she was a probationary employee.

Ms. Pijogge should be reinstated with full seniority . She should be returned to employment under the same conditions that the Employer accepted in the first place, namely, working evenings and weekends, subject to the availability of child care for her child.

The Employer

The Employer submitted the following authorities and jurisprudence in support of its positions:

1. Canadian Labour Arbitration, 3rd edition, para . 7:5000 at p. 7-188.3;
2. *Re Newfoundland and Labrador Association of Public and Private Employees and Grace Sparkes House* (August 16, 2006) unreported (Oakley);
3. *Re Hydro Electric Commission of the Corporation of the City of North York and Canadian Union of Public Employees, Local 11* (December 7, 1992) unreported (Solomatenko);
4. *Re St. Lawrence College and Ontario Public Service Employees' Union* (1987), 32 L.A.C. (3d) 322 (Brent);
5. *Re Air Canada and Canadian Automobile Workers, Local 2213* (1990), 10

such discretion did not permit the employer to act in a manner that was arbitrary, discriminatory or in bad faith. “Arbitrary” decisions were those deemed to “demonstrate a failure to put one’s mind to the issue and engage in a process of rational decision-making.” Clearly, that did not happen in Ms. Pijogge’s circumstances. Ms. Fox was frustrated with her unavailability and went to the Board with a recommendation that the grievor be found unsuitable. In the Union’s view, the Employer exercised its discretion to find the grievor unsuitable in a manner that was arbitrary, discriminatory and in bad faith.

In *Delaney v. Bay St. George Senior Citizens’ Home, supra*, the court dealt with a collective agreement provision granting the arbitrator with “the power to dispose of the grievance by any arrangement which it deems just and equitable to do so.” Article 8.04 of the instant collective agreement is identical in that respect. Therefore, the arbitrator has wide sweeping powers to resolve Ms. Pijogge’s grievance by any arrangement which he deems just and equitable. In the Union’s view, such an arrangement should include the grievor’s reinstatement into her former position and compensation for all lost pay and expenses incurred as a result of the Employer’s improper action.

The final issue raised by the Union is whether the Employer disciplined the grievor or determined her to be unsuitable. In the middle paragraph of her letter to the Board, she outlines a specific incident in which she was involved with the grievor concerning her availability to work. In the Union’s view, while Ms. Fox invoked her discretion to conclude that Ms. Pijogge was unsuitable, the real reason for terminating her was dissatisfaction with the grievor’s conduct during their telephone conversation. The reason she could not come to work on the weekend in dispute was her inability to find a babysitter. That was a specific event that would give rise to discipline, but it should not be clouded with the notion of unsuitability. If the Employer had been having a problem with the

under the collective agreement. Clearly, the Employer cannot rely on reasons contrary to the provisions of the agreement so as to prop up a claim for unsuitability. At page 28 of the above award, the arbitrator states:

I am of the opinion that if the cause used by the employer under s. 28 of the Public Service Employment Act is a violation of the employee's rights under the collective agreement or indeed, the Canadian Human Rights Act then the employer has not acted in good faith.

In Ms Pijogge's case, the Employer had no right to nullify her rights under the collective agreement so as to prop up its claim for unsuitability. Since Ms. Fox did exactly that, the Employer acted in bad faith.

In *McRae Waste Management, supra*, at page 7, the arbitrator relied on the fact that the B.C. Labour Relations Board in *Honeywell Ltd., Protection Services Division and Construction and General workers' Union Loc. 602*, I.R.C. File No. C196/91, 1991 clarified the point that "words such as 'reasonable' and 'fair' have a meaning in administrative law that is different from the use of such words in a labour relations context." The precise quote of the Board at p. 7 of *Honeywell, Ltd.* reads:

It is important to add a caveat. We share the panel's concern in Government of the Province of British Columbia, *supra*, regarding the application of fairness, The administrative law notion of fairness does not exist under the terms of a collective agreement. Fairness, to the extent that it is applicable comes from the terms of a collective agreement and not from the arbitrator's own judgement. Many provisions of an agreement, if viewed in isolation, might appear unfair. It is trite to say that a collective agreement is comprised of compromises made at the bargaining table; certain proposals are conceded in order to achieve success in other areas. It is obviously inappropriate for an arbitrator to conclude a single provision in a collective agreement is unfair and, therefore, not applicable.

Under the agreement in *McRae*, the arbitrator noted that "the employer may terminate a probationary employee at any time during this period at the employer's discretion". In his opinion, the exercise of

dealt with Article 9.08, which listed the various reasons that would cause a loss of seniority. At page 28 of the award, the arbitrator found that the termination of the grievor's employment resulted in a denial of a negotiated benefit, namely, his seniority rights. Similarly, Ms. Pijogge has the right not to lose her seniority for any reason other than those expressed in Article 12.04. The Union further argued that, should the arbitrator rule otherwise, he would violate Article 8.04 of the agreement by altering, modifying or amending the collective agreement. (See also *Torngait Services* for a discussion on how seniority may be lost).

The Union does not argue a violation of Human Rights legislation in Ms. Pijogge's circumstances. However, *Canadian Union of Postal Workers*, as commented on in Lancaster House: Women/Pay Equity Employment Law, the arbitrator ruled that a casual employee was "reasonably available" for work and could not be dismissed despite refusing the majority of work assignments offered to her because of significant difficulties with childcare. At page 64, the arbitrator is quoted:

In the construction of the phrase 'reasonably available,' the parties did not seek the termination of an employee who is faced with the serious obstacles concerning the case of a child and who in good faith is unable to obtain daycare arrangements on short notice; however, should the parties have in fact intended this result, I would nevertheless construe that phrase consistent with the statutory and common law obligations (of parents to care for their children).

This case stands for the proposition that the arbitrator must take into consideration that the grievor has an obligation to act upon safety considerations for her child.

In *Canada (Treasury Board - Employment and Immigration, supra*, the grievor was rejected on probation for innocent absenteeism. It was found that the Employer must act in good faith in such circumstances and that it was not in good faith to reject the grievor for cause due to incapacity arising out of physical disability. In that case, the employee's rights were not as strong as Ms. Pijogge's rights

Article 19.11.

The employees in this Home are misguided on what the rights and benefits are for someone on a probationary period. At para. 7:3120 - Leaves of absence, the authors state:

. . . Regardless of whether or not a collective agreement expressly limits the employer's discretion to grant or withhold leave, more often than not arbitrators have required that discretion be exercised reasonably and only after it has considered all the relevant factors. To adhere to this standard, an employer must balance its own interest in having its production free from the disruptive effects of an employee's absence against the interests of the employee who feels it is necessary to absent himself or herself from the workplace. On this approach, to properly deny a request for a leave of absence, the employer bears an onus of establishing that granting a leave would be costly, inefficient and result in a loss of production or that to could not easily be accommodated, as for example where an emergency existed, where it would leave the employer short-handed or where it was made on too short notice. Conversely, it has been held to be improper for an employer to deny an employee's request for a leave where the reason for the absence is to attend to important personal matters, such as his or her wedding, his or her own baptism, or to breastfeed a child, and/or where granting it would entail only minor administrative problems and financial costs.

A *quid pro quo* arrangement was in effect when Ms. Pijogge was hired: she agreed to work evenings and weekends if she could find a babysitter; in return, the Employer would benefit from her services if she was available.

In *Golden Heights Manor, supra*, the arbitrator found that the Employer must have implicitly accepted the grievor's reason for refusing recall. In the Union's view, the same thing has happened in the grievor's circumstances each time she refused. Nobody prevented her from reporting for work the next time. At page 27 of the award above, the arbitrator made the point that "if one individual is not afforded the same treatment as all others, she has been discriminated against." Similarly, Ms. Pijogge has been discriminated against by the Employer. Also, the Employer is estopped from renegeing on its acceptance of the grievor's original hiring arrangement.

In *Bakery, Confectionary & Tobacco Workers' International Union, supra*, arbitrator Oakley

unsuitability, “In setting standards, an employer cannot, however, insist on conditions other than those set out in the collective agreement, without the consent of the union.”) In other words, to terminate Ms. Pijogge, the Employer was obliged to communicate the standards it expected of her. Except for her hiring interview, the Employer never communicated the standards she was expected to meet as a probationary employee. And the Employer never informed her of any deficiencies. While the Employer will argue that other employees spoke to her, the fact is that they are not the Employer.

Here, the Employer failed to prove the facts for specific cause because it did not issue the adverse reports required by the collective agreement. Ms. Fox never had any first hand knowledge of the events concerning the grievor. Except for one or two instances, she obtained all her information from others. It should be noted that Ms. Pijogge called Tracy Winter to enquire whether the Employer had managed to cover a shift they wanted her to work. That does not indicate a person who does not want to work.

Ms. Pijogge requested a LOA. What the Employer did was dismiss her as less than a conscientious employee who didn't care. The facts were that the grievor's partner had problems with substance abuse, which, in turn, caused her concern about the safety of her child. It seems to have been the Employer's position that she should grin and bear those matters. Until she received Ms. Fox's termination letter, Ms. Pijogge had no idea that the Employer was dissatisfied with her. She was simply trying to deal with some personal problems. Indeed, Ms. Fox admitted that she viewed the grievor's LOA request as confirmation that she was unsuitable because she was not available to come to work. Although Ms. Pijogge did not apply for family leave under Article 19.10, her request for unpaid LOA shows that she was trying to deal with her problems. However, Ms. Fox had her mind already made up despite that fact that the grievor had a valid right to apply for unpaid leave under

and that the grievor acted on that assurance to her detriment by relying on what was told to her in her interview. It is the Union's position in the instant dispute that the arbitrator should take the same approach and find that the Employer hired the grievor on the understanding that her availability to work was subject to her finding a baby sitter.

By virtue of Article 12.01, a probationary employee accumulates seniority. Article 12.04 then establishes how seniority can be lost. None of those factors apply in the grievor's circumstances. Therefore, she did not lose her seniority when the Employer declared her to be unsuitable. In other words, the Employer had no right to terminate her seniority. Ms. Fox said that temporary employees are not guaranteed hours; therefore, they are on recall status each time. This means that, as a temporary employee, Ms. Pijogge was entitled to refuse recall on three consecutive occasions. Ms. Pijogge was working elsewhere as were other employees. She was entitled to recall as other employees were. Article 12.04(d) permitted her to refuse recall. Therefore, the Employer cannot rely on the fact that she exercised her right to refuse to come to work as a valid reason to terminate her.

The Employer also cannot use illegal means to arbitrarily cause the grievor to lose her seniority. Article 12.04 contains 6 reasons why an employee can lose seniority. None of them apply in Ms. Pijogge's situation. She was entitled to the same treatment afforded to all other employees. Essentially, the Employer discriminated against Ms. Pijogge on the basis of her status. (See Brown & Beatty, p 6-8 and 6-9 for a discussion how seniority may be forfeited. See also para. 7:5000, which makes the point that, unless the collective agreement provides otherwise, probationary employees are entitled to all the rights and benefits enjoyed by other employees. See also para 7:5020, which cautions that if an employer wishes to terminate the services of a probationary employee for

Clearly then, because they were actually expressions of dissatisfactions, Ms. Pijogge was entitled to receive adverse reports for the incidents complained of by Ms. Fox. Since Ms. Fox failed to produce those adverse reports on a timely basis, the Employer has no grounds to support its claim that the grievor was unsuitable.

It was also the Union's position that the Employer should be estopped from its claim in these circumstances. In its view, the grievor was completely up front in testifying that, in her hiring interview, she outlined for the Employer that she could not work for the Employer except evenings and weekends because she already had a full time job. Ms. Pijogge quit another job in reliance of the fact that the Employer gave her this job with the Home on the understanding that she would work when she could. All employees were hired with the same understanding that they would work for the Employer when they could do so. This privilege was granted to everybody, including the grievor. It is the Union's position that the Employer has no right to allow other employees to pick and choose when to come to work while taking action against the grievor for doing the same thing.

It is simply not true that temporary or probationary employees must be held to a higher standard in this regard. In these circumstances, the Employer 1) made a representation to the grievor by its silence when it never brought to her attention that there was anything wrong with her refusing to work because she had child care problems; 2) the Employer intended the grievor to act on that representation and 3) the grievor did rely on the Employer's representation to her detriment. The evidence demonstrates that Ms. Pijogge was the only employee who was penalized for not being available to work. (See *Grey Bruce Regional Health Centre, supra*, for a discussion on evidence supporting promise and detrimental reliance). (See also *Communications, Energy and Paperworkers' Union, supra*, where the arbitrator found that the Employer gave the grievor assurances of permanence

discharge suspension, and discipline of that employee.” Had Ms. Fox done what the collective agreement required, there might not have been need for this arbitration. On page 7 of the appeal decision, the court stated:

Articles 13.05 and 13.06 do not abrogate management’s right to maintain such records as it may deem necessary for the proper operation and management of the hospital. They do however abridge those rights to the extent that no report, detrimental to an employee, can be used against that employee unless he has been given five days notice in writing of any dissatisfaction concerning his work and, such reports, if they are to be used against an employee, must be kept in the designated official file. The restriction on management’s rights applies not to the maintenance of records, but to the manner in which reports, detrimental to employees, may be used.

In *Government of Newfoundland & Labrador, Dept of Social Services, supra*, arbitrator Alcock referenced the above quote at page 10 and commented that “the focus in arbitration should be on the Employer’s use of detrimental reports.” And at page 11, he wrote:

If an Employer’s representative can be found to have used an improper expression of dissatisfaction in his reference letter to the PSC, a violation of Article 13.05 will result. The general thrust of providing a remedy in that situation would be, as always, to put the parties in the position they would have been in had the violation not occurred in the first place.

In *Workers’ Compensation Commission, supra*, arbitrator Alcock dealt with the issue of expressions of dissatisfaction. At page 16, he concluded that the language in Article 35.03 (a) covered more than disciplinary matters, i.e., it covered dissatisfactions “that may affect their standing or advancement with the Employer.” Expressions of dissatisfaction included in performance appraisals were found not to be exempted from the requirement to place them on file within the required time limits. At, page 19, the arbitrator found that

Since the Employer failed to notify the grievor in writing of those expressions of dissatisfaction “within five (5) days of the event of the complaint,” both expressions shall not be part of her record for use against her at any time.

separate adverse reports from disciplinary action. Clearly an employee could have an adverse report (having nothing to do with discipline) to ground unsuitability. In other words, to establish unsuitability, the Employer is required to issue adverse reports. Performance evaluations, which are not adverse reports are grievable under Article 11.06. All such information must be placed in the individual's file, but there is absolutely no evidence that this was done in the grievor's circumstances.

In the Union's view, the arbitrator cannot proceed further in the absence of proof of the incidents complained of. In *Waterford Hospital, supra*, at p. 4, the Trial Division judge commented on a similar Adverse Report provision (13.05) and a Personal Files provision (13.06), viz:

While they in my view lack the precision which is desirable, they clearly intend to deal with expressions of dissatisfactions relating to work which may be detrimental to advancement or standing. There is, therefore, more involved than probation, discharge, suspension and discipline.

It is implicit in the agreement that an employee shall have a right to grieve in respect of an expression of dissatisfaction. It is wrong, therefore, for the Hospital to keep a record of an expression of dissatisfaction that has not been communicated to the employee in accordance with the agreement. It is wrong because it is an expression which may be detrimental to the employee's advancement or standing and in respect of which the employee has no opportunity to grieve.

The binding nature of Article 13.05 specifies how an expression of dissatisfaction should be handled. Where it is [*page 495] handled otherwise, in the absence of a provision to the contrary, it is a violation of the collective agreement.

....

Clearly, therefore, the Employer has a positive obligation under the instant collective agreement to bring to the grievor's attention any deficiencies about her raised by Ms. Fox. Ms. Fox's failure to meet this obligation constituted a violation of the agreement. The decision above was appealed and on page 4 of the Appeal Court's decision the Court quoted the arbitrator as finding that "an employee's personal file is to be the sole source of information for making decisions concerning the probation,

than full time employees – almost like a private sector probationary employee without seniority. However, the parties' collective agreement says that, as a probationary employee, the grievor had seniority, recall rights and entitlement to all other benefits and rights of the agreement. On the interpretation of Article 12.03 subject to Article 11.04(c), the Employer has erred. The Employer has used unlawful considerations in its assessment of unsuitability in the grievor's circumstances. The result is a flawed assessment. It simply cannot claim that, because Ms. Pijogge took advantage of her right under Article 12.04(f) to refuse recall on three consecutive occasions, it can use such information to find unsuitability on her part.

Article 3.01(d) effectively means that the grievor was an "employee." Subsection (n) describes a probationary employee and subsection (p) describes a temporary employee. Article 11.01(a) provides a probationary period for all types of employees. An employee can be full time and probationary, or temporary and probationary at the same time. Ms. Pijogge was such an employee.

On the issue of adverse reports, Ms. Fox testified that she received much of the information concerning the grievor from other staff members. That is hearsay evidence. The Employer must prove in arbitration that the incidents actually occurred. Ms. Fox's evidence does not do this. All she did was say that all the incidents were duly noted (see p. 12 of the award). Nothing was provided either verbally or in writing to the grievor. Therefore, the Employer did not prove that the incidents occurred as claimed. Article 11.04(a) requires the Employer to notify an employee of any dissatisfaction concerning her work. Article 11.04(c) applies to any expression of dissatisfaction relating to an employee's work or otherwise which may be detrimental to an employees advancement or standing. While the Employer may claim that this applies only to matters of discipline, that is not the case. It applies to probationary matters as well. In Article 11.05(a) – Personal Files, the parties

8. Canadian Labour Arbitration, 4th edition. Chapter 6 Seniority; para. 6:1200 Duration and Loss of Seniority; para. 7:5000 Probationary Employees; para 7:5020 Employment Security; para. 7:3120 Leaves of absence;
9. *Re Golden Heights Manor Senior Citizens Home and Newfoundland Association of Public Employees* (March 28, 1985), unreported (Alcock);
10. *Re Bakery, Confectionary & Tobacco Workers' International Union, Local 410 and Eastern Bakeries Limited* (January 9, 2002), unreported (Oakley);
11. *Re Torngait Services Inc. and Labourers; International Union of North America, Local 1208* (1999), 81 L.A.C. (4th) 294 (Alcock);
12. Lancaster House. Women/Pay Equity Employment Law, December 16, 2006) Issue No. 2. Comment: *Re Canadian Union of Postal Workers v. Canada Post Corporation* (September 28, 2006), [2006] C.L.A.D. No. 371 (QL);
13. *Re Canada (Treasury Board – Employment and Immigration) and Dekoning* (March 2, 1993), 33 L.A.C. (4th) 203 (Public Service Staff Relations Board, A.S. Burke, Member);
14. *Re McRae Waste Management and I.U.O.E., Loc. 115 (Philip)* (1998), 71 L.A.C. (4th) 197 (Sanderson);
15. *Re Delaney; Province of Newfoundland and Newfoundland Hospital Association on Behalf of Bay St. George Senior Citizen's Home v. Newfoundland Association of Public Employees* (June 28, 1983); [1983] N.J. No. 252; 42 Nfld & P.E.I.R. 238; 122 A.P.R. 238; 1982 No. 7, Newfoundland Supreme Court Court of Appeal (Mifflin, C.J.N., Gushue and Mahoney, JJ.A.);
16. *Re N.A.P.E. v. Her Majesty the Queen in Right of Newfoundland* (June 21, 1989), Newfoundland Judgements: [1989] N.J. No. 145, Action 1988 St. J. No. 963; 76 Nfld. & P.E.I.R. and 235 A.P.R. 353 .

The grievance submitted is not simply about a probationary employee being let go for unsuitability. There are all kinds of other issues involved in this dispute. In the Union's view, the Employer had the misguided concept that probationary employees were entitled to less entitlement

Asked further by counsel for the Union why would it be inappropriate to advise an employee that there are problems, Ms. Fox said that other staff members did talk to the grievor about her unavailability, but Ms. Fox did not do so herself.

ARGUMENT

The Union

In support of its various positions, the Union submitted the following jurisprudence and authorities:

1. *Re Waterford Hospital Corporation v. Newfoundland Association of Public Employees, Local 6901* (March 8, 1979), [1979] N.J. No. 104, 25 Nfld. & P.E.I.R. 490, 68 A.P.R. 490, No. 1060, Newfoundland Supreme Court Trial Division, (Goodridge J.);
2. *Re Waterford Hospital Corporation v. N.A.P.E., Local 6901* (Nfld. C.A.) (April 25, 1980), Newfoundland Judgements: [1980] N.J. No. 19, 1978 No. 1060, (1980) 24 Nfld. & P.E.I.R. 480, Newfoundland Court of Appeal (Mifflin C.J.N., Morgan and Gushue, J.J.A.);
3. *Re Government of Newfoundland & Labrador, Dept. of Social Services and Newfoundland Association of Public Employees* (July 15, 1991) unreported (Alcock);
4. *Re The Workers' Compensation Commission and Newfoundland Association of Public Employees* (September 11, 1991) unreported (Alcock);
5. Mitchnick, Morton and Etherington, Brian. *Use of Extrinsic Evidence to Found an Estoppel, Leading Cases on Labour Arbitration*, Vol 3, Contract Interpretation, Lancaster House 2002;
6. *Re Grey Bruce Regional Health Centre and O.P.S.E.U., Loc 235* (1993), 35 L.A.C. (4th) 136 (McLaren);
7. *Communications, Energy and Paperworkers Union of Canada, Local 410 v. Newtel Communications, Newtel Mobility* [2002] C.L.A.D. No. 628, (Thistle);

her unavailability, and the issue of her availability during probation had also been discussed with her by Duane Dicker and Tracy Winter. When her unavailability progressed, it became an issue. Ms. Fox did not discipline the grievor because she believed that Ms. Pijogge's probationary period was when such responsibilities should have been foremost in her mind. In her opinion, this was a given during probation and the grievor knew that she was permitted every opportunity to demonstrate that she could handle such responsibilities.

Asked by the arbitrator what "recall" meant in Article 12.04(f), Ms. Fox said it meant recall from layoff. Curiously, she added that a recall is when she calls somebody not on layoff to come to work.

As a matter arising, counsel for the Employer asked Ms. Fox about when discipline is employed. Her response was that disciplinary action is typically reserved for those who have passed their probationary period. She also indicated that Article 11.01(c) shows how to deal with probationary employees if they are unsuitable. At no time in her mind or in the Board's discussion did the notion of discipline come up. At all times, the issue was the unsuitability of the grievor as a probationary employee. Asked by counsel what would happen hypothetically if a probationary employee stole \$500 three days after starting her probationary period, Ms. Fox said the employee would be terminated, but would not be disciplined because she was probationary and because discipline would require just cause. However, if a permanent employee committed such an offense, she would be disciplined, possibly terminated.

As a matter arising, counsel for the Union asked Ms. Fox about recalls. She said that temporary employees are not guaranteed any hours of work and, therefore, are considered to be on layoff.

Ms. Fox testified that every incident the Employer relied on in the grievor's circumstances was brought to her attention by staff, except for the September 10th/11th incidents in which she was directly involved. Ms. Fox agreed that her position was that, on September 10th, the grievor had a whole day to find a sitter for the 11th, but the important fact of the matter is that she did not try to find a sitter.

Ms. Fox agreed that her original testimony was that probationary employees were not entitled to a Leave of Absence and that was her belief at the time. On page 14 of the award, her evidence was that "the grievor's letter requesting a leave of absence for personal reasons was received prior to her termination and was given consideration." However, Ms. Fox viewed that letter as confirmation that the grievor was unavailable to work all shifts assigned to her. Ms. Fox explained that the Board was free to accept or reject her recommendations. Asked whether it was misleading for her to advise the Board that Ms. Pijogge could only work on evenings and weekends, Ms. Fox said that was the understanding with the grievor when she was hired.

With respect to the grievor's alleged comment about not wanting to get up at 7 am, Ms. Fox explained that was in reference to a babysitter not wanting to get up at 7 am. Ms. Fox did not recall discussing that matter with the Board.

Asked who crossed off the "P" scheduled for Ms. Pijogge on Saturday August 14th, Ms. Fox testified that she did not know. What the schedule indicates is that she worked only till 11 pm, thereby leaving Dotty alone on that shift for the rest of the night.

Asked by the arbitrator what she would do if an employee who had passed his/her probationary period developed a pattern of absence every Saturday, Ms. Fox said that happened and the individual improved when she spoke to him. In her view, Ms. Pijogge knew her frustration with

payroll.

Ms. Fox explained that it is important to have two (2) employees on shift at night because there have been problems with intoxicated people from the community coming to the Home. There is also a concern with a male employee being at work alone with a lot of female residents. Therefore, it was the Board's decision to require two employees to be on night shift at all times. Ms. Fox testified that on May 10th and 11th, 2004, there was only one person on nights because there was nobody else available to work. And on May 23rd, the reason was that somebody was sick. In other words, Ms. Fox testified that there were occasions when she could not fill the two positions at night because staff had valid reasons for being absent. She also explained that it could be possible on a weekend for more foster children to stay in their own homes, which would then require fewer staff at the Home.

Ms. Pijogge was hired on May 15th. She had another full time job at that time. Ms. Fox disagreed with counsel for the Union that it was reasonable for Ms. Pijogge to miss so much work at the Home. She had 4 sick leave hours and no other leave of any kind.

Asked why, in her opinion, probationary employees have less rights than other employee despite Article 12.03 stating that they are entitled to all benefits and rights of the collective agreement, subject to Article 11.01(c) – termination for unsuitability or incompetence not being subject to the grievance procedure, Ms. Fox used the example that Lisa Ivany had a greater right not to be available for work because she had passed her probationary period. She agreed that temporary employees do have the right under Article 12.04(f) to refuse recall on three consecutive occasions without just cause. That clause was not considered by Ms. Fox before recommending to the Board that the grievor was unsuitable. She also agreed that she would have considered family leave under Article 19.10 if she had received such a request from the grievor.

September 20th. The Board met on September 22nd, and the decision to terminate Ms. Pijogge was made by a letter dated September 23rd. Ms. Fox met with the grievor on September 28th and formally terminated her employment.

Ms. Fox testified that she has since terminated another probationary employee by the same method, namely, her recommendation to the Board.

In the period between September 11th and September 20th, the grievor worked 7 - 11 pm on September 12th. And there was one other date when she said that she didn't want to get up at 7 am.

Compared to the other Staff members, the grievor's absenteeism was higher. Ms. Fox testified that she never disciplined Ms. Pijogge. She also testified that she never doubted Ms. Pijogge when she said she had babysitting problems. Ms. Fox indicated that she had no problems with Ms. Pijogge's work at the Home. However, the problem was that she just could not seem to get her to come to work. Ms. Fox testified that it was irrelevant whether Ms. Pijogge's reasons were legitimate or illegitimate. If she could not be reasonably available to come to work, she was not suitable to be employed at the Home. To a certain extent, family leave is there to deal with occasions when staff are scheduled but have to call in to say that they had not been able to get a baby sitter. However, for the grievor, her overall availability eventually became a problem and was the deciding issue in determining that she was unsuitable. Most of the time when she was called, she would only say that she was unavailable or she had other plans. Her unavailability problems were her own. The Employer did nothing to prevent her from doing her best to attend work.

In cross examination, Ms. Fox explained that the "A" for Dorman on September 11th was actually overtime for him. The Employer never "schedules" employees for overtime. Ms. Fox indicated that C#8 is actually both of the shift schedules put together to assist her in determining the

Ms. Fox explained that a refusal would occur only when the grievor was called to work and would not come in. The other times, she was simply “unavailable.”

The date of August 1 is a typo in the award; it should state August 14th. On Saturday the 14th, Ms. Pijogge was scheduled “P” nights, but she worked only till 11 pm. This was the second time she left work early and it was the second time a staff member was left alone to work the night shift.

Saturday August 21st was shift for which Ms. Pijogge declared herself unavailable. The “X” was either written in or typed in afterwards. This was not acceptable to the Employer.

Saturday September 4th was an occasion when Tracy called Ms. Pijogge to work a 12 hour night shift, but she left at 11 pm. This was the third time that the grievor left work early. The result was that Lisa Ivany was left to work the remainder of that shift alone.

On Friday September 10th, Tracy called Ms. Pijogge to work on Saturday the 11th because the Home was short staffed. However, she did not give Tracy an answer. Ms. Fox testified that she ran into Ms. Pijogge in town that day and told her that they really needed her to work. Ms. Pijogge told her that she had other plans. When Ms. Fox arrived at work, Tracy advised her that the grievor had called her asking how many shifts she could refuse without problems. Ms. Fox noted that the Employer had to ask Dorman to work overtime to cover that shift because Ms. Pijogge would not come in.

Ms. Fox testified that, at this point she had become very concerned. Duane had told her about the grievor telling him about her child's father's drinking. Other staff members had also mentioned to her that, when they had called Ms. Pijogge to work, she had said she was “not available” or that she “had other plans.” All things considered, Ms. Fox felt that she needed to discuss the problem of Ms. Pijogge's unavailability with the Board and receive their direction. She wrote a memo to the Board on

authority. She testified that one schedule is kept in her office and the other one is posted upstairs in operations. When a schedule is made, a photo copy of it is made for the Staff. If subsequent changes need to be made to the schedule, the staff do so. However, any changes are not made on Ms. Fox's copy until later because the Staff schedule can sometimes be a big mess and may be unreadable. Therefore, she might find it necessary to retype it either during the scheduling period, or at the end for payroll purposes. For example on C#8, she retyped the August 30th - September 12th schedule, changing Dorman to an "A" on September 11th and then brought it upstairs for the Staff in operations.

All the handwriting on the bottom of that schedule was written in by one person upstairs; it is not Ms. Fox's handwriting.

Asked how some entries for 11 - 7 were handwritten in, Ms. Fox felt that she probably had not made those changes downstairs at that time.

On the issue of the seven (7) dates raised in the initial hearing, Ms. Fox offered the following:

Saturday July 3rd was one of three (3) occasions when Ms. Pijogge refused to work. On that date, the grievor was scheduled to work "A" days, but refused to come in. A couple of times she said she had babysitting problems, but Ms. Fox explained that this was 3 or 4 days before the shift was to occur, which gave her sufficient time to find a sitter.

Friday July 30th was one of two (2) occasions when Ms. Pijogge left work early. She was scheduled "P" 7 - 7 nights, but left at 11 pm, which resulted in Richard having to work alone that night. Ms. Fox testified that the grievor did not have approval to leave early that night. Ms. Fox further explained that, only if it was absolutely necessary would the Board allow only one person to be on shift at night. Ms. Pijogge did not receive Ms. Fox's authorization to leave early that night.

Saturday July 31st was one of those days when the grievor declared that she was unavailable.

Employer does not schedule people for overtime two weeks in advance. Therefore, somebody marked in the "A" for Dorman Angnatok on September 11th. She explained that Ms. Fox also has a schedule in her office upstairs. In her view, the above "A" was written in because it does not make sense otherwise. The only time a schedule is changed is when someone can't come to work and another person is needed. Having two shift schedules has always been the case. As far as she could determine, C#8 is the Staff shift schedule.

Ms. Margaret Fox testified that Lisa Ivany was not a probationary employee. Ms. Fox said she would accept a regular employee's reasons for not being available to work more so than she would accept a probationary employee's reasons because probationary employees are always scrutinized to see if they are suitable. After they pass probation, they are deemed eligible for permanent employment. As such they would have shown that they were suitable and their reasons for not being available would be accepted.

Asked about the blank spaces in the shift schedule, Ms. Fox felt that it was possible that the relevant employees gave advance notice that they did not want to work over those periods. She indicated that she is able to assign work as she sees fit, that there have never been any problems or grievances files on that matter.

When employees are probationary, they are assigned in order of seniority. Mary Ann Hurley was a probationary employee at the same time as Ms. Pijogge (one day between them). However, since Connie was not available to work days, Mary Ann's seniority jumped ahead on the basis of hours worked.

Ms. Fox or the Senior Counsellor can make out the shift schedule, but Ms. Fox is the final

necessary.

By way of cross examination, Ms. Denniston testified that it was difficult to get staff to work early in the mornings. While she was on probation, she told all her family about her situation and found a way to be available. When she could not find a sitter, she called Ms. Fox and explained the specific reason. This happened only occasionally when her husband was out of town and she was unable to find a sitter. Ms. Denniston said she knew about the family responsibility provision in the collective agreement.

On Saturday September 4th, Altina was scheduled to work a night, but she called at 2:00 pm to say that she was sick. So Tracy phoned Connie because it was her job to find a replacement for Altina. She also called Lisa who said she was getting off work (elsewhere) early that day and could come in from 11 pm - 7 am. She could not recall if she called Richard on that occasion, but she knew that Darrel was working nights at the Hospital at that time. Connie called her back 2 or 3 times to ask if she had managed to cover the shift. Since Tracy went off shift at 7 pm, she did not know what happened after that.

Asked what might have happened on September 11th to require an extra person on shift, Ms. Denniston said she didn't know unless a new resident came in which required one-on-one.

Ms. Denniston indicated that she never filled out a probationary evaluation form for Ms. Pijogge because she was let go before her probationary period was over.

In redirect, Ms. Denniston said that she knew she was under scrutiny during her probationary period. Baby sitting was not a problem for her because she alerted her family for assistance to ensure that she could be available when called.

Asked about the August 30th - September 12th schedule, Ms. Denniston testified that the

duties as a counsellor, adding that training new staff was part of her (and all other counsellors') responsibility. Ms. Fox worked in the office and the counsellors did the on the job training of new staff. Afterwards, the staff would complete a form evaluating how they found the probationary employee on their shift. The coordinator would then rely on these evaluations.

Ms. Denniston was excited having Ms. Pijogge work at the home because she was from her home town. She recalled that Ms. Pijogge's training was no different from that of other new staff.

Asked whether there were any issues with Connie during her probation, Ms. Denniston testified that there were a couple of times that she was not available to come to work, which was not good for a probationary employee who should be available most of the time. Ms. Denniston indicated that most staff felt the same way.

On another occasion (on Saturday September 4th) Ms. Denniston was working on days with Trudy Baikie. Only one employee was scheduled for nights, but two were required for that shift. Since they were understaffed, she called Connie in for the full 12 hours 7pm - 7am, but did not know until the last minute if she was going to show up. Connie told her that she would come in only if they were unable to find someone else. Ms. Pijogge subsequently called her two or three times to see if she had that shift covered by someone else. Finally she came in at 6:45 pm.

Once Ms. Pijogge asked her how many shifts she could miss without getting into trouble. Ms. Denniston told her that she should not miss shifts while on probation. However, she said nothing to the grievor about three (3) shifts. Ms. Denniston was working a day on Friday September 10th and it became apparent that somebody would be needed to work a day shift on Saturday the 11th. This was the first time she ever heard a probationary employee ask that question. She did not consider it to be her place to say that Ms. Pijogge was unsuitable, but it was understood that one's availability was

The Employer

Duane Dicker, a 14 year employee and full time Counsellor at the Home, testified that he is Senior Counsellor and acting Coordinator from time-to-time. His job is to ensure that the residents have a safe environment and receive the necessary counselling.

In his capacity a Senior Counsellor and Acting Coordinator, he is the person who shadows with new staff, provides help during shifts, does the admission forms and introduces new employees to the residents and answers their questions. Mr. Dicker testified that he trained Ms. Pijogge on the job. As Senior Counsellor at the time, he was more responsible for this duty than the other counsellors and he said he has trained other new staff as well. He recalled one situation when he and the grievor were working when she said she was not available on Friday and Saturday nights. She said she had to go home and mind her child because of her partner. Therefore, he wanted to keep an eye on her. Ms. Dicker told Ms. Pijogge to do her best to pass her probation, i.e., to work as much as she could. He advised her not to refuse shifts, but he felt she did not take this advice seriously. On balance, he said nothing different and treated Ms. Pijogge no different than he had any other probationary employee. He advised Ms. Pijogge and all others previously to get their hours in and pass their probation. Mr. Dicker could not recall any previous probationary employee failing to progress through probation successfully.

Mr. Dicker testified that, since he only worked with the grievor three (3) times on the day shift, he would not have much time to give her guidance, but he knew that others would do so.

Tracy Denniston (now a mental Health Worker, testified that she worked at the Group Home in late 2003 and for part of the summer in 2004, the latter time with Ms. Pijogge. She described her

(7pm - 7am) but left early. This shift was not scheduled in advance. Ms. Fox was not sure why Lisa was written in for 7 - 11 that night and speculated that she might have initially overlooked scheduling two (2) people in that night. Noticing that Lisa's "A" was crossed out for the next day, Ms. Fox felt that might have had something to do with the situation at that time.

Ms. Fox explained that, on Friday September 10th, Ms. Pijogge was called by a staff member and Ms. Fox to come to work on September 11th. The grievor told them that she had other plans. In other words, she refused. That same day (the 11th), Ms. Pijogge called Tracy asking how many days she could refuse to work. Tracy was not asked to cover that shift because she already had worked 80 hours. However, she was not sure why Darrel was not called. She was also not sure why an extra person was needed on that shift.

Ms. Fox explained that the posted schedule does not always show sick leave or vacation. She keeps a separate copy along with individual attendance records for the purpose of determining payroll.

In Ms. Fox's view, Ms. Pijogge developed a pattern of not being available for work (i.e., refusals to work). She did not speak to Ms. Pijogge about this pattern. However, the grievor was aware of Ms. Fox's frustrations whenever she called her to come to work. Since Ms. Pijogge was aware that she was on probation, Ms. Fox did not raise the pattern with her. However, other employees at work did so. The grievor's orientation was provided by the Senior Counsellor (a bargaining unit member) who would act as Co-ordinator in Ms. Fox's absence. The expectations of a probationary employee were raised by that person.

Ms. Fox explained that the expression "duly noted" on page 12 of the original award was a reference to Ms. Fox's own notes. It is her practice to take her own notes on problem employees.

“A” was dropped because she had too many hours worked.

On the July 19th - August 1st schedule, Connie’s “P” on July 30th was crossed out and 7 - 11 was written in to show that she left work early. Mary Ann was scheduled to work 7 - 11 that day, but she was crossed off because she already had 80 hours worked by the 29th. Ms. Pijogge did not take over Mary Ann’s shift. Dotty was written in to cover the 7 - 11 period on that shift. Two people were needed to cover that shift. Ms. Fox did not originally schedule Dotty for that shift because she already had 96 hours and, therefore, would have had to be paid overtime. Dotty was again written in as “A” for Sunday August 1st; again she already had too many hours worked previously in that period. On July 31st Tracy was called in (see “P” written in) because Ms. Pijogge was not available and her “P” was crossed out. The grievor was written in for 7 - 11 on August 1st – she did not refuse that shift.

On Saturday July 31st, four (4) people were scheduled. On Saturday July 24th, two (2) were scheduled “P,” one (1) for “A”. Although she could not recall when she became aware of it, Ms. Fox explained that one more resident was admitted on July 30th.

On the August 16th - 29th schedule, the dates for some people were marked “X” meaning “not available” (see Trudy from August 16th - 20th). Lisa had no “X’s”; the dates for her were left blank. Ms. Fox said that the use of “X’s” was so that nobody would call those people in. On August 21st, Ms. Pijogge was marked “X” (i.e., not available), but Ms. Fox explained that hours were otherwise available to her. Actually, Ms. Pijogge was called on August 20th for the 21st shift, but she said she was not available. The grievor called Ms. Fox to say she was not available – she did not know what shift she was asked to work. Ms. Fox was unsure why Richard could not have been called in on August 24th and 26th (no “X’s” were marked) – she did not have that particular information with her.

Ms. Fox testified that, on Saturday September 4th, Ms. Pijogge was called in to work 12 hours

11th. Ms. Fox stressed that there were no problems of this type with any of the other employees . Ms. Pijogge was the only one who refused because she was unavailable. The others would occasionally request and be approved for family leave in advance. Ms. Pijogge did not make any such request, but often she would say 4 days beforehand that she had childcare problems.

On the June 7 - 20th schedule, a note is written on the bottom, stating “8 hrs Holiday pay for Holiday on May 31/04 for Lisa.” And Ms. Pijogge wrote beneath it “If casuals can get this - me too - Connie ☺”. Ms. Fox explained that, if she was not in the Home on a particular shift, someone else would change the schedule. For example, on July 3rd the “A” was crossed out for the grievor; on June 29th an “A” was crossed out for Richard – one would have to have a good reason for not working as scheduled. Ms. Fox speculated that Lisa was not scheduled because her schedule at school might have changed. On Friday, July 2nd, Trudy and Richard obviously switched for each other. On July 3rd, the grievor’s “A” was crossed out. On July 1st, neither the grievor nor Lisa were scheduled to work, but each received holiday pay.

The point was that the others were not turning down shifts. Ms. Pijogge was doing so, and Ms. Fox was keeping a record of such times.

On the July 5th - 18th schedule, an “A” was crossed out for Dotty on the 12th. Ms. Fox noted that she received 58 hours in that two week period. On July 10th, Lisa’s “A” was crossed out because she did not work. On July 14th and 15th, an “O” was written in and crossed out on both days – Ms. Fox had no idea what those symbols mean. She was also not sure why on July 8th and 9th Altina was not scheduled while Connie and Mary Ann were. On July 14th, 15th and 16th, there were various written entries for Dorman Angnatok, but Ms. Fox had no knowledge what those entries meant. On July 14th, Duane Dicker was on overtime for the 7:30pm - 9am hours written in. And on July 18th, Mary Ann’s

scheduled for "A", but was scratched out and only worked from 4 - 7. On May 21st, Richard Ikkusek was written in with a "P," and Darryl Lyall's "P" shift was changed to "A" by Ms. Fox.

Ms. Fox testified that she does not allow other employees to refuse to work either.

On May 27th, Ms. Pijogge had more seniority than Mary Ann Hurley, but was scheduled for 7 - 11 while Mary Ann was scheduled for "A." On Friday May 28th, despite being the more senior employee, the grievor was not scheduled, but Mary Ann was scheduled for "P," i.e., nights. Ms. Fox explained that this was done because Ms. Pijogge was scheduled for "A" days on Saturday the 29th. On May 24th and 25th, two people were not on the seniority list. One went on maternity leave; Tracey Winter suffered a death in her family and the Board permitted her time off to care for her mother. On June 16th and 17th, Trudy Baikie went on Leave without pay to attend to some volunteer work out of town. On June 18th, Richard Ikkusek was senior to Mary Ann and the grievor. His shift on that date was crossed out while Ms. Pijogge worked 5 - 11 and Mary Ann worked 11 - 7. Ms. Fox could only guess that he had other employer responsibilities that day and that was why the two junior employees were scheduled. On June 8th, Ms. Pijogge was senior to Mary Ann Hurley, but she was given hours while Mary Ann was not. On June 20th, Mary Ann was senior but was written in for 7 - 11 while the grievor was scheduled "A." Also, on June 19th, Mary Ann had no hours while Ms. Pijogge was scheduled for 7 - 11.

Ms. Fox explained that the reason for employees not being scheduled were: 1) they were working at another job; 2) they had to travel for medical reasons; 3) they had to travel to escort family members to meetings out of town; 4) vacation; 5) sick leave, etc. Ms. Fox also testified that the grievor never told her that she was refusing or not available to work because of family reasons; she only told her that she was "not available" (see July 3rd, July 30th, August 21st, Sept 4th and September

Ms. Fox indicated that Lisa Ivany (hired August 28, 1992) was employed elsewhere as a Recreation Director and she worked some weekends too. Two weeks prior to posting the schedule, Ms. Fox would call her to see when she could work and would then schedule her accordingly. Ms. Ivany was not called in otherwise. On the shift schedule from May 10th - 23rd, anytime the schedule is blank for Lisa Ivany was because she was working elsewhere and others, including the grievor, would be scheduled. Only two (2) days were marked in for Lisa on the May 24th - June 6th schedule; three (3) days on the June 7th - 20th schedule; one (1) day on the June 21st - July 4th schedule. While Ms. Fox could not recall the specifics surrounding all those blanks, she testified that the only time Lisa was given the right to refuse was when she was unavailable to work because she was working in her other job. All told, Lisa Ivany was scheduled for 11 shifts from May 10th to July 18th. Although Ms. Fox could not recall the reasons she was not scheduled more often, she said that her hours were scheduled in advance when Ms. Fox called her for her upcoming availability. She recalled, however, that she would never schedule her when she was to go on shift at her other job the next day.

Dotty (Dorothy Ford) also had other employment. Ms. Fox was not sure whether that was the case from May 10th - 23rd, but she was scheduled from May 24th to June 6th. Richard Ikkusek also had other employment with the School Board. Ms. Fox did not recall if he worked on Saturdays. (The schedule shows him working some Saturdays, not others.) Mary Ann Hurley was scheduled for 12 hours on May 19th (her hire date). She kept her day care job and worked days Monday to Friday.

On May 22nd, the grievor had 19 hours seniority. Mary Ann Hurley had 24 hours seniority, but was not scheduled on the 22nd. Ms. Fox did not recall why that happened; the only explanation she could think of was that she did not count their seniority hours at that time. On May 17th, Trudy Baikie was scheduled for "A", but was scratched out and "S" was written in. On May 19th, Tracey Winter was

originally.

The grievor agreed that the Employer never did anything to stop her from coming to work or from doing her best work.

By way of re-direct examination, Ms. Pijogge testified that on Saturday, September 4th, the numbers "7-11" were written in on the schedule, but the Employer's evidence is that she left work early. Lisa Ivany was written in for "11-7," but the grievor did not know why the Employer did not give Lisa the full shift. Altina Tuglavina was scheduled for 7-7 nights, but was sick. Therefore, Ms. Pijogge was called in for 7-7 and Lisa for 11-7. Ms. Pijogge does not know why two (2) people were not scheduled for that night from the very beginning. Only Altima was scheduled that night, and her shift was covered by Lisa and Ms. Pijogge.

The grievor testified that the Employer did not speak to her about what was expected of her as a probationary employee that was different from what was expected of other employees.

Ms. Margaret Fox was called by the Union. She testified that she prepared C#7 the seniority list and posted it in the workplace in January and July.

Asked why Mary Ann Hurley (who was hired 4 days later than Ms. Pijogge) became the more senior, Ms. Fox explained that Mary Ann was available more time than the grievor on days and weekends from May through July 4th.

Similarly, Trudy Baikie passed Tracy Winter because Tracy had other employment elsewhere and Trudy was simply more available than Tracy. Richard Ikkusek went ahead of Tracy Winter for the same reason.

The grievor testified that she felt that it was her right to refuse three times without problems when she was not available to work the full shift. However, she was not sure whether that right was a matter of Policy or something in the collective agreement. She was also unsure what happens after the third refusal. Nevertheless she could not remember if she did refuse three times. In her view, it depends on the circumstances how many times being unavailable would be considered reasonable. It was also her view, that if those on probation don't get the same entitlements, it should be stated so. Since all the employees are unionized, they should all be equally entitled. Asked what probationary means if all employees are equal, Ms. Pijogge suggested that the purpose of probation is to decide if someone is capable of doing the work. She felt that, for a probationary employee to be terminated, the Employer would have to go through all the same steps that apply to employees who are not probationary. Nobody ever spoke to her about her work performance and no counsellors expressed any concerns about her missing work or her unavailability. It was Trudy Baikie who spoke to her about her rights to refuse. Nobody else mentioned anything to her.

The grievor testified that, to leave work early she would have to contact Ms. Fox at home. In such cases, Ms. Fox said that it would be okay if she got someone to relieve her, or the employee working with her was okay with her leaving.

Ms. Pijogge said that she could not remember if she was called on September 10th to come to work on September 11th. However, she agreed that, if she was called and was not available to come to work on that date, it would not show up on the shift schedule. Her reason for not coming to work would be because she had something else planned and was therefore not available to work. As indicated on p. 17 of the original award, Ms. Pijogge reiterated that "only once did she refuse without a reason." She said, however, that she probably did not finish the thought when she gave that evidence

her that she would be called in on week nights and weekends. Ms. Fox knew she was working at the Clinic 70 hours every 2 weeks. She was only to work evenings and weekends if she had a babysitter. When she got the job, she gave up the clinic and then she worked more.

Ms. Pijogge agreed that she was asked if she had problems being called in on short notice. She agreed with Ms. Fox that she would work on short notice provided it was on evenings or weekends.

As for incidents where she left work early, was not available or refused to work, the grievor said she could recall some, but not others. Asked about July 30th and September 4th where the schedule indicates she worked 7 - 11, she agreed that it was possible she left work early on those occasions; she simply could not remember. She testified that she left early once, but she does not know if July 30th was that date. She agreed that the P (crossed out) indicated that she was scheduled for 12 hours two weeks in advance and that the times 7-11 were actually worked as were written on the schedule. Ms. Pijogge said that the night shift on July 30th was broken up into two sections. Both she and Richard had to work overnight on the 30th. Although she agreed that she left early, thereby leaving only one person on that shift, she insisted that others have done the same thing. That night, she left because her partner came home under the influence of alcohol and the arrangement with the sitter was that she would go home when the father arrived. If he wasn't under the influence, everything would have been okay, but that was not the case. This happened once or twice and caused her to leave work early.

Asked whether she was called in or scheduled in on September 4th from 7-11, Ms. Pijogge noted that, since she was "written" in (not typed in), she could have been called in for 4 hours because she was not available to work the full shift.

to cover for her or the other employee on shift said it was okay with her, the grievor felt it was okay to refuse. In her view, the Employer accepted that she might not be able to come to work if babysitters were not available. In Nain nobody is available to babysit her shifts.

From phone conversations she had with Ms. Fox about leaving work, she felt she had permission to do so.

In July, there were no concerns brought to the grievor about her availability. There were others who were also unavailable, such as Mary Ann and Lisa (who were working full time somewhere else and were available to work only on their days off). On page 12 of the original award, Ms. Fox testified that "During the four month period she was on probation, her incidents of leaving early, not being available for work and refusing to work were duly noted and considered in determining her unsuitability." However, Ms. Pijogge said that she had never been provided with any of this information. Therefore, she had no reason to believe that the Employer had any concerns about her. Asked what she meant by reporting that she was "unavailable," the grievor said that she would sometimes say "I have something else planned. That was her explanation of "unavailable."

Ms. Pijogge's request for a LOA was given to the Employer on or about September 13th. At that time, she had no knowledge that the Employer was going to terminate her. She wrote her LOA letter because she had babysitting problems. The Employer did not give her a response to this request and has never explained why. Also, the Employer gave her nothing in writing about her job performance. Other than her letter of hire, Ms. Pijogge received nothing from the Employer outlining the standards expected of her. She was only referred to the Policy.

In cross examination, the grievor testified that, when she was interviewed, it was indicated to

was nothing on the Schedule indicating that she left work early on July 30th. And she insisted that she never left work early at any time without finding somebody to cover for her, or the person working with her said it was okay for her to leave. That was the understanding she got from Ms. Fox about leaving early. Ms. Pijogge also testified that, if she was marked in as a P and could not come to work, the Employer would then call in somebody from the list. For example, Tracy was written in as a P on the shift schedule for Saturday July 31st because she was not otherwise scheduled. Ms. Pijogge was also marked in as a P on that date, but it had a stroke through it indicating that she did not work. The Employer said she left early on Saturday September 4th, but the schedule indicates she was scheduled for 7-11 p.m. and the record shows she worked 4 hours.

She was not scheduled for the July 1st holiday and could not remember whether or not she worked. She was scratched out on Saturday July 3rd by somebody unknown, but the documents do not show that she refused to work. The sheet shows that on Sunday August 1st she was scheduled for 7-11 and the Attendance Record shows she worked 4 hours. Yet the Employer claims that she refused to work that day. On Saturday, September 11th she was not scheduled to work, yet the evidence is that she refused to work.

Ms. Pijogge testified that on Saturday, July 31st and Saturday August 21st, she declared herself unavailable to work. Almost in the next sentence, the grievor then testified that she could not recall if she declared herself unavailable on Saturday August 21st. As far as she was concerned, she only refused 2 or 3 shifts in total, all for babysitting reasons. Her daughter's father was working 12 hour shifts and she could not leave her alone. Sometimes he was under the influence of alcohol and could not look after the child. On weekends, Ms. Pijogge had to get sitters for 12 hours. Every time she did refuse to work, she stated that the reason was babysitting. As long as she was able to get someone

The grievor testified that she has seen her letter of appointment and she did read the Staff Communication Book, but there was nothing in that book dealing with availability to work. She also consulted the shift schedules to see when she was required to come to work. As for the incident reports, those concerned the residents; no incident report referred to her. And as for job shadowing, this involved being with a couple of people and occurred for a few shifts.

Nobody ever brought to her attention any problem with her work, problems with her unavailability to work, matters of refusing shifts, or concerns about her leaving work before a shift ended – which was always approved.

Ms. Pijogge was shown several names on the seniority list and asked why some had passed her and why some had passed others. Her explanations were equivocal. For the most part she speculated or simply did not know the reasons for the number of hours accumulated. For example, she said that Mary Ann Hurley passed her “probably” because she had no family constraints; she did not know why Richard Ikkusek passed Tracy Winter or why Trudy Baikie passed Tracy; she said that Lisa Ivany had less seniority than 4 others even though she was hired in 1994 “probably” because the others had full time positions.

In comparing the Shift Schedule with the Attendance record (and also referring to p. 11 of the arbitration award), the grievor pointed to the date of Friday July 30th, 2004, Friday, which showed that somebody (she didn't know who) put a stroke through the P (called in) for her, meaning that she did not work from 7 -11 that day. Similarly, a stroke had been put through Mary Ann's 7-11 hours. Ms. Pijogge said that, if Mary Ann did not work those hours, it would be worked by whomever was available. The evidence is that the grievor was once scheduled for 7-11. She said that it happened once, but she could not remember when. She could not recall leaving work early on July 30th (there

No formal performance evaluation was done on the grievor, but no such evaluation was required of a probationary employee. The fact of the matter is that a probationary employee is under scrutiny all the time.

The Union is trying to extend rights to probationary employees that simply do not apply. A probationary employee has a completely different status than a non probationary employee. However, the Union is not able to meet the burden of proof in this case. Therefore, the arbitrator has no choice but to dismiss the grievor's grievance as all previous arbitrator's have done for employees in similar cases.

EVIDENCE

The Union

Ms. Connie Pijogge was asked by counsel how she obtained her job and what questions she was asked in the interview process. She testified that applied for a casual position even though she was then working in another job, i.e., Hospital Clinic Day Care. The issue of child care was discussed in the interview. Her daughter's father was working 6 days a week and babysitting was a problem on weekends. However, because it was so long ago, she could not remember if that concern was brought to the Employer's attention at that time. (Note: on page 16 of the original award, the grievor testified that she was asked what shifts she would be able to work and that "she told Ms. Fox about her two (2) jobs and that she would be able to work evenings and weekends when she could get babysitting. Her boyfriend was working 12 hour shifts and she had a four (4) year old child at the time."). Ms. Pijogge said that the Employer did not express any concerns about this at the time.

Opening statement – The Employer

The Union is trying to obtain a landmark decision from the arbitrator that would run counter to all relevant jurisprudence holding that the grievor, as a probationary employee, does not have the right to grieve if termination occurs because of unsuitability or incompetence.

Jurisprudence demonstrates that the only opening for the Union is to show that the Employer's decision to terminate the grievor for unsuitability was made in a discriminatory or arbitrary manner, or was made in bad faith. Those factors are the only ones the arbitrator has the jurisdiction to consider in this dispute. This is not a case where the Employer has to show just cause to terminate. For unsuitability the lesser test involves only looking at the issue of bad faith. Here the Union cannot prove bad faith because there was none.

Although the grievor can accumulate certain benefits under the collective agreement, her rights differ because she is a probationary employee who may be terminated for unsuitability without recourse to the grievance and arbitration procedure.

The Employer did not treat the grievor differently from other employees. Ms. Pijogge was given the opportunity during her probationary period to do her very best. The Employer did nothing to prevent her from doing so.

While the arbitrator has ruled that the Union is entitled to prove estoppel exists in these circumstances, the fact is that none of the components of estoppel can be established by the Union.

The arbitrator also ruled that the Union is entitled to prove that there was no just cause in this case. Adverse reports are discipline. The Employer did not rely on such reports because it purposefully did not discipline the grievor in any way. The Employer relies on her unsuitability as demonstrated by her inability or failure to answer calls to come to work.

Opening Statement – The Union

1. The Employer should be estopped from firing the grievor because her availability for work set by her conditions of employment permitted her to refuse shifts.
2. Notwithstanding anything stated in the collective agreement, nothing says that the grievor cannot refuse shifts or pick and choose her shifts. Those are the Employer's standards for temporary and all other types of employees in the bargaining unit. All employees are entitled to be treated equally in this collective agreement. therefore, it would be discriminatory to treat the grievor differently.
3. Adverse reports are required by this collective agreement, but they were not employed in the grievor's circumstances. The Employer cannot now rely o concerns that it did not act on in accordance with the agreement.
4. All employees, including probationary employees, are entitled to all the benefits under the collective agreement. If other employees can refuse recall, the grievor also has the same right.
5. Seniority may be lost under this agreement only in certain conditions. Unsuitability is not one of those conditions. It would alter article 12.04 and undermine the collective agreement if unsuitability was permitted to result in the grievor's loss of seniority.
6. The ability to find suitable child care was an issue here. Ms. Pijogge requested a leave of absence for that reason. The Employer terminated her instead. One reason for paid leave is for family reasons. Ms. Pijogge had a statutory obligation to care for her children. It was not reasonable for the Employer to deny her request for LOA. Probationary employees are not excluded from that entitlement.
7. The grievor's termination was not for job performance. It was for external factors not within her control.
8. The arbitrator has the power under article 11.02 to dispose of a grievance by any arrangement which it deems just and equitable.
9. The Employer's decision was arbitrary and it discriminated against the grievor *vis a vis* other employees.
10. The grievance should be upheld and the grievor reinstated as of the date of termination and reimbursed for all lost pay and benefits.

2. Shift schedules shall be made available for the grievor and Union to check against the grievor's attendance record previously submitted by Ms. Fox.
3. The Union will be entitled to present any evidence and argument it might have that the Employer did not terminate the grievor for unsuitability.
4. The Union will be entitled to lead evidence and argument on the substantive issues of loss of seniority, alleged improper performance evaluation and alleged human rights violations. The Union will also be entitled to lead evidence and argument on the issue of the common law doctrine of estoppel.
5. If the Union fails to establish that the issue to be arbitrated is just cause for disciplinary discharge, then the primary issue will be unsuitability as assessed by the Employer under Article 11.01(c). However, the merits of the Employer's unsuitability assessment, including the reasonableness of that assessment, will not be arbitrable.
6. Since my ruling is that the Employer has a duty to act in a manner that is not discriminatory, arbitrary, or in bad faith in terminating the grievor for unsuitability as assessed by the Employer, an allegation of the existence of either or all of those three elements will be arbitrable.

In all instances above, the Employer will be free to offer its own evidence and argument.

A second hearing was held on May 6, 2008 at Happy Valley - Goose Bay, Newfoundland and Labrador.

For the Union: Mr. Bert Blundon, *et al.*
For the Employer: Mr. Mark Gill, *et al.*
Sole arbitrator: Mr. David Alcock

The hearing proceeded on the basis of the rules established at the original hearing and under the conditions above established by the first arbitration award

Two additional consent items were submitted in evidence:

- C# 7 Seniority List, dated July 4, 2004;
- C# 8 Shift Schedule

With the approval of the Employer, an employee may be granted leave of absence without pay and without loss of seniority in exceptional circumstances, provided that the employee has no current or accumulated annual leave available to him/her.

The relevant sections of the Public Service Collective Bargaining Act are as follows:

Arbitration provisions

39.(1) A collective agreement which does not contain provisions for the final settlement, by arbitration or otherwise, of all differences between the parties or to persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the collective agreement, including a question as to whether a matter is arbitrable, shall be considered to contain the provisions set out in subsection 86(2) of the *Labour Relations Act*, but the reference to the Minister of Employment and Labour Relations shall, for the purposes of this section, be a reference to the chairperson.

(2) Where, following representations to the board by a party to a collective agreement that provisions contained or considered to be contained in the collective agreement for final settlement of a difference are inadequate, the chairperson shall, where the board is of the opinion that the provision is inadequate, prescribe the procedure to be followed for the final settlement of that difference, and that procedure shall be substituted for the provisions contained or considered to be contained in the collective agreement.

In an award dated February 20, 2007, the arbitrator's decision was that the Union was entitled to arbitrate the substantive issues summarized below, subject to the limitations expressed in the Considerations section of the award:

1. The Union has the substantive right to grieve that Ms. Pijogge has been discharged without just cause. The Union will have opportunity to lead any evidence it may have to establish a case for discharge without just cause.

rights of this Agreement.

12.04 Loss of Seniority

An employee shall lose his/her seniority only in the event that:

- (a) he/she is discharged for just cause and is not reinstated by an Arbitrator or under the Grievance Procedure;
- (b) he/she resigns in writing;
- (c) he/she is absent from work in excess of three (3) working days without the approval of the Co-ordinator/Supervisor, unless absent for just cause;
- (d) he/she fails to return to work from layoff within ten (10) working days of being notified by registered mail to do so, except where such failure is caused by sickness verified by a doctor's certificate or by other just cause. . . .
- (e) he/she is laid off for a period longer than twenty-four (24) months;
- (f) he/she is (sic) temporary employee and refuses recall on three (3) consecutive occasions without just cause.

....

14.01(a) The normal hours of work shall be on the average of forty (40) hours per week.

(b) The normal daily hours of work for full-time employees shall be eight (8) hours per day, subject to the twelve (12) hour shift schedule.

(c) Notwithstanding that part-time employees and temporary employees may work less than eight (8) hours per day, such employees shall not be scheduled to work less than three (3) consecutive hours per day.

(d) Part-time employees will advise the Employer in writing of their desire to work additional hours up to full time hours. Those part-time employees shall be scheduled or recalled before temporary employees in accordance with seniority for these additional shifts.

....

19.07 General Leave

11.01(c) Termination of Probationary Employee

The termination of probationary employees for reasons of unsuitability or incompetence, as assessed by the Employer, is not subject to the grievance or arbitration procedure.

....

11.02 Unjust Suspension or Discharge

Should it be found that an employee has been unjustly suspended or discharged, the employee shall be immediately reinstated in his/her former position, without loss of seniority and shall be compensated for all time lost in an amount equal to his/her normal earnings during the pay period next preceding such discharge or suspension, or by any other arrangement as to compensation which is just and equitable in the opinion of the parties or in the opinion of a Board of Arbitration if the matter is referred to such a Board.

....

11.06 Performance Evaluations

An employee who feels that she has not been given a proper evaluation shall have the right to grieve in accordance with Article 7. Performance evaluations shall not be considered an adverse report.

....

12.01 Seniority is defined as length of service with the Employer and subject to Clause 12.04 shall date from first date of hire by the Employer and shall be calculated based on hours of work. Seniority shall operate on a bargaining unit wide basis.

12.02 Seniority List

The Employer shall maintain a seniority list showing the date upon which each employee's service with the Employer commenced. An up-to-date seniority list shall be sent to the Association and posted in January and July of each year.

12.03 Probation for Newly Hired Employees

Employees hired after the signing of this Agreement shall be on a probationary basis in accordance with Clause 11.01 of this Agreement. Subject to Clause 11.01(c), during their probationary period, such employees shall be entitled to all benefits and

....

(p) "Temporary employee" means a person who is employed for a specific period or for the purpose of performing specific work and who may be laid off at the end of such period or following the completion of such work. A letter of appointment shall be given to the employee within forty-eight (48) hours of hire or recall. This letter shall outline the employee's hours of work, the date of hire and the duration of the exact, or the expected period of employment. A new letter will be issued should the employee's employment status change. Where the duration of the exact period of employment is known, temporary employees will be given their date of layoff in writing and if any extensions are necessary, the new layoff will also be in writing.

....

4.05 Temporary and part time employees are included in the bargaining unit.

....

8.04 Decision of the Board

The decision of the majority shall be the decision of the Board. Where there is no majority decision, the decision of the Chairperson shall be the decision of the Board. The decision of the Board of Arbitration shall be final, binding and enforceable on all parties, and may not be changed. The Board of Arbitration shall not have the power to change this Agreement or to alter, modify or amend any of its provisions. However, the board shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

11.01(a) Probationary Period

The probationary period shall be 520 working hours for all employees (full time, part time and temporary). Temporary employees shall be allowed to accumulate periods of employment in order to complete their probationary period. For the purpose of this Clause, time off with pay approved by the Employer shall be considered as time worked.

11.01(b) Discharge Procedure

The Employer has the right to discipline and discharge employees for just cause. However, any employee who has completed the probationary period and claims to have been unjustly disciplined, discharged or suspended shall be provided with written notification within seven (7) calendar days of the occurrence or discovery of the matter giving rise to the discipline, discharge or suspension.

Your probationary period is for 520 hours as per the collective agreement.

Your orientation will take place next week. Please call me for a time that you will be available.

If you have any question, please call me.

Margaret Fox
Coordinator

The relevant collective agreement provisions are as follows:

3.01(d) "Employee or Employees" where used, is a collective term except as otherwise provided herein, including all persons employed in the categories of employment contained in the bargaining unit, as outlined in Schedule "A".

....

(h) "Layoff" means the termination of employment of an employee because of lack of work or because of the abolition of a post, but retaining all recall rights in accordance with Article 24. Permanent employees who have a reduction of their hours shall have access to the layoff provision of Article 24.

....

(b) "Part Time employee" means a person who is regularly scheduled to work less than the full number of working hours in each working day or less than the full number of working days in each work week of the Board Operated Residential Service concerned. A letter of appointment shall be given to the employees within two weeks from the date of hire. This letter shall outline the employees (sic) hours of work, date of hire and the duration of the exact, or the expected, period of employment.

(m) "Permanent employee" means a person who has completed his/her probationary period and is employed without reference to any specific date of termination. A letter of appointment shall be given to the employee within two weeks from the date of hire. This letter shall outline the employee's hours of work.

(n) "Probationary employee" means a person who has worked less than the probationary period.

come back on a part time basis then. I am willing to work as scheduled until September 26, 2004.

I really enjoy working here with the residents and staff, but it is difficult to work at this point in time. Please contact me if you need more information. I look forward to hearing from you. Thank you for your time

Sincerely,
Connie Pijogge

C#6 2004-2005 ATTENDANCE RECORD for Connie Pijogge, Casual Counsellor.

Margaret Fox, Co-ordinator of the Home, submitted MF#1 the grievor's letter of hire, viz:

May 14, 2004

Connie Pijogge
Nain, NL
AOP 1L0

Dear Connie,

Congratulations!

The Hiring Committee selected you for the casual position at the Martin Martin Group Home.

Your pay scale (GRH 25 Step 1) is as follows:

- salary: \$15.89/hour
- Labrador Allowance: \$2.62/hour dependant - #1.31/hour single
- weekend premiums are .25/hour for every hour worked between Saturday 12:00 a.m. and Sunday midnight
- shift differential is .31/hour for every hour worked between 4:00 p.m. and 8:00 a.m.

At first you will be job shadowing, which means that you will be working with another staff member to watch and learn from them.

Please read the residents log books, staff communications book, shift schedule, incident reports and other forms.

- C#1 Group Home Master Collective Agreement expiring June 30, 2004, and Memorandum of Understanding – Martin Martin Group Home, July 30, 2002;
- C#2 Grievance form, September 28, 2004;
- C#3 Letter of dismissal dated September 23, 2004, viz:

Connie Pijogge
Nain, NL
AOP 1L0

Dear Connie,

The Board of Directors met in September 22, 2004 at which time they reviewed your job performance.

Because you are unavailable and have refused to work some shifts the Board of Directors feel that you are unsuitable for the position as counsellor at the Martin Martin Group Home, they have decided to dismiss you from your job responsibilities effective immediately.

Your final cheque (including your vacation leave entitlement) and your record of employment will be sent to you on the 27th of September, 2004.

If you have any questions, please call me at the above number.

I wish you all the best in your future endeavours.

Sincerely,

Margaret Fox
Coordinator

- C#4 Public Service Collective Bargaining Act, RSNL 1990 Chapter P-42;
C#5 September 13, 2004 letter from Connie Pijogge requesting Leave of Absence, viz:

Martin Martin Group Home
Board of Directors

I would like to ask for a leave of absence until the beginning of November. My babysitter(s) are leaving town and it is very difficult to work a full time and a part time job at this time. Sidney will be laid off by November and I will be willing to

In The Matter of a Dispute

between

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND & LABRADOR

(MARTIN MARTIN GROUP HOME

(hereinafter referred to as the "Employer" or the "Home")
(represented by Newfoundland & Labrador Health Boards Association)

and

NEWFOUNDLAND & LABRADOR ASSOCIATION OF PUBLIC & PRIVATE

EMPLOYEES

(hereinafter referred to as the "Union")

THE GRIEVANCE

On September 28, 2004, a written grievance was filed by NAPE Employee Relations Officer, Mr. Bert Blundon, on behalf of Ms. Connie Pijogge, Counsellor, claiming full redress for:

Violation of the Group Home Master Collective Agreement re: Article 11.01, 12.04 and all other pertinent articles.

The first hearing in this matter was held at Nain, Newfoundland and Labrador, on October 25th and 26th, 2006, during which time the Employer objected to a hearing on the merits on the ground that the matter was not arbitrable. Both parties agreed that a hearing on the merits would be deferred pending the arbitrator's written decision on the preliminary matter.

At the commencement of the above hearing, the following evidence was entered by consent: