

**FINDINGS AND DECISION  
IN A DISPUTE**

between

**EASTERN HEALTH**  
("the Employer")  
and

**NEWFOUNDLAND & LABRADOR NURSES' UNION**  
("the Union")

**Grievances:** Policy and Individual (heard as one by agreement of the Parties)

**APPEARANCES:**

**For the Union:**

Presenter: Ms. Tracey L. Trahey, NLNU  
Advisor: Ms. Rosalie Gillis  
Witness: Ms. Nada Sooley  
Ms. Eileen Humphries

**For the Employer:**

Presenter: Ms. Bernadette Cole, Solicitor  
Advisor: Ms. Marilyn Nichols  
Witnesses: Ms. Marilyn Nichols  
Ms. Kelly Martin

**The grievances were heard** in St. John's, Newfoundland, on March 24, 2009.

**The Policy Grievance** (#15544) reads: "The Employer's Policy of not including service as an Unregistered Nurse when calculating and awarding an Employees' service for Step Progression is in violation of the Collective Agreement."

**Corrective Action Requested** reads: That the Employer rescind their policy of not including service as an Unregistered Nurse when calculating and awarding an Employees' service for Step Progression and that the Employer include service as an Unregistered Nurse when calculating and awarding an Employees' service for Step Progression in accordance with the Collective Agreement. Full retroactivity. Full redress."

**The Individual Grievance** (#15545) reads: The Employer is not including my service as an Unregistered Nurse when calculating and awarding my service for Step Progression in violation of the Collective Agreement."

**Corrective Action Requested** reads: That the Employer include my service as an Unregistered Nurse for calculation and awarding my service for Step Progression in accordance with the Collective Agreement. Full retroactivity. Full redress."

**THE PARTIES AGREED THAT:**

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were either properly observed or are waived;
- there are no other points to be raised as to arbitrability or other preliminary objections;
- witnesses are permitted to remain in the Hearing;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within sixty (30) calendar days they will be referred to the Arbitrator for resolution;
- the Arbitrator will remain seised of the matter for period of sixty (30) calendar days after its publication should issues of interpretation of the Award arise.

**ITEMS TAKEN INTO EVIDENCE:**

- Consent #1 The Collective Agreement, expiring June 30, 2008
- " #2 Grievance #15544 (policy)
- " #3 Grievance #15545 (personal)
- " #4 Referral to arbitration
- " #5 ARNNL Bylaws 2007
- " #6 Letter: Hare to Sooley April 4, 2006
- " #7 Probationary licence
- " #8 ARNNL Bylaws 1984

**COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED**

**Article 2 - Interpretations and Definitions**

- 2.01 (f) **"Employee** means any person included in the bargaining unit who is employed by the Employer for remuneration including all full-time, part-time, temporary, and casual employees.
  
- 2.01(h) **"Experience"** means time worked as a registered or graduate nurse where such work is acceptable for the purposes of obtaining and maintaining an active licence to practice nursing. In order for an employee to receive credit for any past experience, she/he must make every reasonable effort to provide written documentation from her/his previous Employer(s) to her/his Employer outlining the length and type of experience worked.

- 2.01(m) **"Month of Service"** means a calendar month in which an Employee is in receipt of full salary or wages in respect of the prescribed number of working hours in each working day in the month and includes a calendar month in which an employee is absent on special leave without pay not in excess of one hundred and fifty (150) working hours.
- 2.01(s) **"Service"** means any period of employment either before or after the date of signing of this Agreement in respect of which an employee is in receipt of salary or wages from the Employer and includes periods of special leave without pay not in excess of one hundred and fifty (150) working hours in the aggregate in any year unless otherwise specified in this Agreement.
- 2.01(y) **"Unregistered Nurse"** means a nurse who has graduated from an approved school of nursing, but whose registration with the Association of Registered Nurses of Newfoundland and Labrador is pending.

### **Article 3 - Recognition**

#### **3.04 Agreement Overrides Hospital Policy**

The provisions of this Collective Agreement shall take precedence over any and all policies, rules and regulations made by the Employer concerning wages, benefits or working conditions affecting employees within the scope of this Collective Agreement.

### **Article 4 - Management Rights**

- 4.01 The Union recognizes and agrees that all the rights, powers and authority both to operate and manage the hospital under its control and to direct the working force is vested exclusively with the Employer except as specifically abridged or modified by the express provisions of this Agreement. Should a question arise as to the exercise of management's rights in conflict with the specific provisions of this Agreement, failing agreement by the parties, the matter shall be determined by the Grievance and Arbitration Procedure.

### **Article 26 - Salaries**

#### **26.01 Receive Salaries as Per Schedule A**

Subject to Article 26.02, all employees covered by this agreement shall receive salaries as specified in Schedule "A".

#### **26.02 Unregistered Nurses**

- (a) Subject to the provisions of Schedule "A", unregistered nurses shall receive a salary of nine hundred and fifty dollars (\$950.00) below the minimum salary of a Nurse I and such nurses shall not advance up the salary scale nor hold a position above a Nurse I level.

#### **\*SCHEDULE A** **STEP PROGRESSION**

- (a) Employees shall advance one step on their respective salary scales on the date when twelve (12) months of service is accumulated.

- (b) The phrase "effective and (*sic*) date" shall mean as follows:
- (i) if the anniversary date falls on any of the calendar days one (1) through seven (7) inclusive of the pay period, the effective date shall be the commencement of the pay period in which the anniversary date falls.
  - (ii) if the anniversary date falls on any of the calendar days eight (8) through fourteen (14) inclusive of the pay period, the effective date shall be the commencement of the pay period immediately following the pay period in which the anniversary date falls.

### **OPENING STATEMENTS**

**For the Union,** Ms. Trahey pointed out that both grievances were to be heard as one. On the question of the balance of proof, the matter is a question of law, since this is an interpretation issue. The issue is whether the Collective Agreement requires the Employer to calculate service for step progression purposes from the date of hire or from when it receives confirmation of registration with the *Association of Registered Nurses of Newfoundland and Labrador* (ARNNL), its current practice.

In the Union's view, the Employer has been improperly discounting the service of unregistered, or graduate, nurses when calculating step progression. The Union's argues that a nurse's date of hire is the effective date for calculating step progression required by the Collective Agreement. The Collective Agreement sets out the conditions for step progression in Schedule "A". In general terms, the Collective Agreement calls for employees to advance one step each twelve months of service.

The matter came to light when Ms. Sooley discovered the Employer's current policy. Ms. Sooley's original date of hire was April 24, 2006. The step progression adjustment which she had expected to take effect under the Collective Agreement did not show up on her pay for that date; however the adjustment did occur on the date coinciding with her date of registration with the ARNNL, which, she was informed, is the date that the Employer uses in calculating step progression . Both grievances were then filed.

The remedy sought by the Union is a declaration that there has been a breach of the Collective Agreement and an order that the Employer not use the date of a nurse's registration as the anniversary date in calculating step progression.

**For the Employer**, Ms. Cole Gendron confirmed the Employer's position that the matter before the Arbitrator is one of interpretation and as such a matter of law. The issue simply is, Which date applies: the date of hire or the date of registration? Hours of service are calculated as 1950 full time service hours. The question is whether the time worked as an unregistered nurse is to be calculated as part of the hours of service. Since a nurse is unregistered from graduation until the date of registration, the question becomes whether those hours are to be included in the next step. It is the Employer's position that these hours do not count as service for step progression; only hours as an ARNNL Registered Nurse count.

Ms. Cole Gendron acknowledged that Schedule A says employees move up after twelve months of service. However, other provisions are specific to "unregistered nurses", and these specific provisions modify the general provision by exempting unregistered nurses from the provisions of Schedule A.

Ms. Cole Gendron urged the Arbitrator to read the Collective Agreement as a whole. In her submission, such a reading will lead to the conclusion that these specific provisions modify the Collective Agreement. The Collective Agreement is clear that while nurses are unregistered, they are not on a step on a salary scale, and do not move up steps on that scale.

In effect, the Union seeks is a retroactive credit allowing nurses to move up earlier the year following their registration, a benefit to which they are not entitled while unregistered. This benefit was not bargained for, and would need appropriate language to sustain it.

It is the Employer's position it would exceed the Arbitrator's jurisdiction to accept the Union's interpretation.

## **EVIDENCE**

**THE FIRST UNION WITNESS** was Ms. Nada Sooley, a staff nurse with Eastern Health since April 24, 2006, her initial date of hire to the Cardiology Unit at the Health Sciences Centre. On April 24, 2006 Ms. Sooley's status was as a graduate nurse. Ms. Sooley worked for 9 months in that unit, and then went to the Orthopaedics Unit at St. Clare's in January 2007. In January 2008 she returned to Cardiology at the Health Sciences, the unit to which she was initially hired, where she currently works as a Staff Nurse.

Ms. Sooley graduated on April 11, 2006 just prior to being hired at Eastern Health. As a

Graduate Nurse, Ms. Sooley was required to obtain an Interim Licence from the ARNNL in order to take up work.

The ARNNL is the licensing body that governs our practice. In order to obtain the Interim Licence I was required to apply and pay a fee and then write the qualifying examination which I did in June of 2006. I obtained results of that exam in mid-August of 2006... I was required then to provide the Eastern Health corporate office with a confirmation copy of the Permanent Licence... I did that after getting my results, sometime toward the middle or end of August 2006... It was required in order to get the higher salary band, on the difference between grad and RN.

Ms. Sooley confirmed that Consent #3 is the grievance filed by the Union on her behalf as an individual...

I expected an increase on April 24<sup>th</sup>, my anniversary date, but did not get it; so I called payroll and was told that they were a bit behind and the increase would be forthcoming. I left it for a couple of pay cheques, and then I was finally told that I would not be eligible until the anniversary of the date I received the RN exam. I called the Union. I could not see that my services did not entitle me to the April date as my anniversary date. I spoke with Ms. Humphries who said that she felt the same, and she told me to call Management, which I did and spoke to Kathy Hare, Human Resources Officer. She felt that the Collective Agreement says Graduate Nurses do not accumulate services with application to step progression, but it is not the responsibility of Ms. Hare's department to determine this matter and she referred me to Kelly Martin in Payroll. She told me that was how it was done and, so far as she knows, it was always done that way. She also said it was not her responsibility to make a determination of changes on that. I called the Union back and reported that to them. ... I moved up the step progression on the September 8<sup>th</sup> 2007 pay period covering the September 29<sup>th</sup> pay period. ... There was no notice. It just appeared on the cheque.

Ms. Sooley testified that there was no difference between the work assigned to her after registration and what was assigned to her before registration.

There is no orientation period. We carry all the same loads, responsibilities and tasks and work side by side with registered nurses.

**ON CROSS EXAMINATION**, Ms. Sooley testified that at the time of hire in April 2006 she had understood that she would be an unregistered nurse until the results of her qualifying exam as an RN became known, at which point she would become a Registered Nurse. She said she was not aware of the Collective Agreement provisions governing these matters, but was aware of a salary difference. "Yes, I did know that we were paid a decreased rate."

Ms. Sooley also confirmed that she recognized Consent #6 as the letter she had received from Ms. Hare on April 4, 2006 which she accepted as her offer of employment and its terms and conditions. She also confirmed that the 2<sup>nd</sup> paragraph of Consent # 6 reads as follows:

"The salary for this position is \$21.65 per hour, in accordance with the Collective Agreement (for an unregistered nurse). When you have obtained your practicing license from the ARNNL, you must bring it to the **Human Resources Department** at the Corporate Office to be copied for your file. Your salary will then be adjusted to \$22.13 per hour, based on the salary scale NS 28 Step 1, for a registered nurse 1. This pay will be effective from the date we receive a copy of your practising licence and will not be retroactive."

Ms. Sooley said she was aware that Step 1 began the day she brought her exam result to the Corporate Office, and that there was no retroactivity.

I understood it to mean that, if we were delayed in delivering the exam result – for example, up to October or November – there would be no retroactivity. I did not understand anything else to be retroactive.

She testified she had not expected she would get retroactive pay for the unregistered period, and confirmed her Interim Licence (dated April 11, 2006) was valid up until November 2006.

Ms. Sooley said she was "not fully" familiar with the ARNNL bylaws, but recognized Consent #5 as a copy of those bylaws, and that Article 6, Section 3(b) states:

"Interim licences for graduate nurses and/ or graduate nurse practitioners... who are successful in the nurse registration examination and/or nurse practitioner examination, expire 30 days after the release of the results."

Ms. Sooley said this was the basis for her reference (above) to any delay "up to October or November." She also confirmed that Consent #7 is a copy of the "official practising licence receipt" with ARNNL which she had obtained after passing the examination, and had brought to Eastern Health on August 29<sup>th</sup>, which corresponds with her September 2007 step increase in pay.

There was no redirect examination.

**THE SECOND UNION WITNESS** was Ms. Eileen Humphries, a Registered Nurse working in labour relations with the Nurses Union where she was first hired in 1990, and converted to permanent in 1999. She had worked as a Staff Nurse at St. Patrick's Nursing Home from 1981 to 1999. Prior to that I worked at the Agnes Pratt, St. Clares, The Grace and North Haven Manor in Lewisporte. She graduated from the Grace Hospital and passed the RN exam in 1973.

On passing the examination the Practicing Licence to work as an RN is issued on payment of a fee; that's with the Association of Registered Nurses of Newfoundland and Labrador.

Ms. Humphries has also served on the Council of the ARNNL in various capacities, including on *ad hoc* committees and as President of the St. John's Chapter. She recognized Consent #3.

I did the grievance for Nada Sooley. I filed it on that date on her behalf. I also filed Consent 2, the policy grievance.... Consent #4 is the letter I wrote to the Vice President at Eastern Health referring the matter to arbitration on August 3, 2007.

Ms. Humphries described the events leading up to the referral to arbitration.

I got a voice mail message from Ms. Sooley enquiring as to the Union's interpretation of the service as an unregistered nurse for step progression. I had not been aware of any problem on this, so I put it on the agenda for our next representatives meeting on June 12, 2007. I brought it forward at that meeting and we discussed it with other officers and with John Vivian. I had not encountered such an enquiry before on my own knowledge of the Collective Agreement, nor was I aware of anything crediting work as an unregistered nurse. I wanted clarification on that. So on the 12<sup>th</sup> I contacted Nada Sooley, and told her of the meeting and what that meeting produced. I advised her to contact management people in HR, and tell them that the Union says that service as a non-registered nurse should be counted for step progression. I told her that if the Employer is not in agreement to get back to me to discuss grieving.

Then on June 20<sup>th</sup> I got a call from Nada that she had followed through and that the Employer was saying that she was not registered and it would not be counted for step progression.

She wanted to file an individual grievance, and I said: 'Yes, and a policy grievance as well.' Then I filed the grievances through the three steps... The basis on which I filed the grievance was Schedule A ... of the Collective Agreement which specifies a twelve month period of service – which is defined at 2. 01(s) as "... any period of employment...". In my view, it is clear that 'employment' is not further sub-categorized as 'employment as a registered nurse'.

Ms. Humphries also pointed to Article 26.02(a), the provision governing salary for unregistered nurses.

I concluded that there was nothing specific pertaining to work as registered nurses governing step progression. She should have gone up to Step 2 after 1950 hours, that is to say, on April 24, 2007, in my view.

Asked to describe her understanding of what would happen if an unregistered nurse fails the qualifying examination, Ms. Humphries answered:

It used to be that you could take the examination 3 times over a 2 year period, but

after that the interim licence would have to be surrendered and you were no longer able to practise as a graduate nurse. When I qualified in 1973, the RN exam was completed prior to graduation. If I had been unsuccessful in my exam I would have continued to work as a Graduate Nurse for two years.

Asked how long Article 26.02 has been in the Collective Agreement, Ms. Humphries said:

It's certainly been there since we've been bargaining agent, and I was in the ARNNL, ever since the year I graduated, back to 1973.

**ON CROSS EXAMINATION** Ms. Humphries testified she is familiar with the current and previous Collective Agreement agreements over the period since her own graduation. She also confirmed that, at the time of her graduation, graduate nurses were permitted a two year period of work on interim licences according to the ARNNL bylaws.

She identified Consent # 8 as the ARNNL bylaws dating from 1984, where the following provision appears (page 11):

"b) An interim certificate will not be reissued if the applicant who is required to write the examination fails to write the examination within the specified time, or is unsuccessful with three (3) writings in the two (2) year period from the date of the initial examination."

The same bylaws (Section D, page 12) require that:

"The nurse registration examinations may be written by applicants a maximum of three (3) times within two (2) years, from and including the first writing. If still unsuccessful, the candidate will no longer be eligible to write the nurse registration examination. An interim certificate will not be reissued if the graduate fails to write and pass the registered examination(s) within the specified time..."

Ms. Humphries was unable to recall an instance of any difficulty encountered with this bylaw. Asked what Step on the salary scale she would expect a graduate nurse to be on if that nurse had written the examination three times, Ms. Humphries said: "If they came to work full time they would start at Step 3." Asked whether this means that they would never have been on Step 1 and Step 2, Ms. Humphries answered:

They would have been credited hours of service; but now they start on Step 1 on the NS 28 pay scale, and if they don't pass their exam, the Interim Licence is no longer valid. If they pass they get put on step 1. The Union accepts that they are at lower salary until they are registered, \$950 less than the pay scale.

Asked whether, Schedule A (p. 61) specifies that an unregistered nurse ("UNREG. NURSE") has one set salary, with no steps involved, she answered: "That is their salary, yes."

There was no redirect examination.

**THE FIRST EMPLOYER WITNESS** was Ms. Marilyn Nichols, Manager of Community Services and Human Resources with the Employer. She oversees staff who interpret the Collective Agreement. Ms. Nichols confirmed that her responsibilities include interpretation of the Collective Agreement and advising on its interpretation. She has been with Eastern Health since the summer/fall of 2005. Before that, she had held a similar position at the Healthcare Corporation from 1996 and 2005, and was at the Janeway Hospital for 12 years as an HR officer. Ms. Nichols confirmed that, in the Employer's view:

The Collective Agreement defines an unregistered nurse as a nurse who has finished the course work and written the exam, but has not got the results and therefore has not yet got the full licence. They have an Interim Licence... They're hired as unregistered graduate nurses, and they are advised that they are paid at below the entry level RN pay scale, and that when they get their licence, and the day they bring it to us, we will adjust to the nurses' pay scale... It has always been my understanding that that is the day that the step progression would start.

Asked for the basis of that understanding, Ms. Nichols said:

There is a single step for unregistered nurses in Schedule A. To advance on the scale they have to be already on it, and if you don't get on the scale until you have that licence in your hand, you're not on the scale.

Asked whether provisions of the Collective Agreement support her understanding, she answered:

Article 26.02 is the only one in the Collective Agreement, and that is what it means. You don't go up that scale unless you're on it: whether it is two years or two months. That is unchanged for years. I've worked with it for years.

Asked what she could recall in respect of this issue from 1984 onward, Ms. Nichols said:

I remember nurses who failed and who get the Interim Licence and wrote again in November. But they worked with an Interim Licence, and when they got on the nurses' pay scale, that's when the step progression started. There was no retroactive benefit due them...

Reminded that Ms. Humphries had said her understanding was that a nurse who had worked on an Interim Licence for two years until she got the registration exam would start at Step 3... Ms. Nichols said:

She would start at Step 1 and we never had an example of anyone starting at higher than Step 1. How could they get to step 3 with unregistered service. I never did that.

When it was pointed out to Ms. Nichols that the Collective Agreement says (at Schedule A, p. 59) that step progression is after twelve months of service, Ms. Nichols pointed out that the clause actually says:

"Employees shall advance one step on their respective salary scales on the date when twelve (12) months of service is accumulated." (Ms. Nichols emphasis) An unregistered nurse is not on a salary scale, so such a nurse is not on NS 28 and does not go from NS 28 to go up the steps until they get their licence.

**ON CROSS EXAMINATION** Ms. Nichols confirmed both that Article 26.01 requires that "All employees... shall receive salaries as specified in Schedule "A", and that Schedule A(a) also requires that employees shall advance one step on their respective salary scales on the date when twelve month of service has accumulated. Ms. Nichols also agreed that references to "service" (at Articles 2.01(s) and 2.01(m)) simply are in terms of receipt of salary or wages without specifying that "service" must be as registered nurses.

Ms. Nichols also acknowledged that Ms. Sooley was hired on April 24, 2006 and by April 24, 2007, twelve months later, she already had a full licence.

**ON REDIRECT EXAMINATION** Ms. Nichols testified that Article 26.01 includes the phrase "subject to Article 26.02". In Ms. Nichol's view Article 26.02 must be understood to imply that the salary scales are those in Schedule A.

**THE SECOND EMPLOYER WITNESS** was Ms. Kelly Martin, Payroll Manager, who was hired to the position by the Healthcare Corporation in September 2000 and transferred to Eastern Health in 2006. Prior to 2000 she worked with a chartered accounting firm. She is responsible for the payroll system for all of Eastern Health, and is familiar with steps and salary scales.

Ms. Martin testified that:

When new nurses, recent grads, are first set up on the system, they're set up with a number, 'NS0-1000'. The number is just a code to define them within the system, and covers unregistered nurses in the Collective Agreement. The Nurse 1 is at the NS 28, which is one of the scales in the Collective Agreement. 'NS 0-1000' is not in the Collective Agreement. There is no scale defined for unregistered nurses. The 'NS 0-1000' merely says, 'unregistered nurses'.

Ms. Martin described the payroll procedures for administering step progression and said:

A payroll clerk is assigned to step progression. She is able to identify those who have reached the one year - 1950 hours. The report she prepares is posted bi-

weekly. It looks at the contributing hours, the total since the last step progression. The clerk then checks with the NLNU schedule to see all those who have reached the 1950 hours, and moves them to the next step. That is recorded in the master file. Where the new graduates are concerned, one of the things the payroll clerk does when looking at new graduates is read the file and see when the new grad is changed to Nurse 1, and her hours as unregistered nurse are backed out of her contributory hours and she sends HR a note to have that done. She backs out the non-registered hours, and then she will change the NS 1-1000 designation to NS 28. As part of that they delete the unregistered period from the contributing hours and make a note on the file. That's part of the process. The system is set up to do it.

Ms. Martin said that the employee's step is not actually recorded on the pay cheque, but their hourly rate is stated, and it is possible to determine the step from the salary level.

Asked whether she knows why the hours as unregistered nurses are backed out of the step progression calculation, Ms. Martin said: "No, that is a Collective Agreement issue, and a question to go to HR." Asked who directed this procedure to take place, Ms. Martin answered: That came from HR I think. It might have been Ed Wade... It was not a decision I made myself.

**ON CROSS EXAMINATION** Ms. Martin confirmed she has no interpretative role with respect to the Collective Agreement.

It kind of depends on the part. A lot of it clearly says what to pay, but if something needs an interpretation we go to HR, unless there is an established policy.

### **ARGUMENT**

**FOR THE UNION,** Ms. Trahey introduced two cases from the arbitral jurisprudence as aids in understanding the appropriate date for calculating step progression: *CUPE Local 1418 v. New Brunswick (Department of Justice) (Bourke Grievance)* B.D. Bruce Adjudicator, June 2005; *Prince Rupert Grain Ltd. V Grain Workers' Union, Local 333 Relief Postings Policy Grievance*, B. Foley, Arbitrator December 7, 2006. In the Union's view, it is the full "service" that must be counted, as set out in the Collective Agreement, starting from the date of employment. The Collective Agreement requires step progression to occur once 1950 hours are accumulated.

A month of service is defined in a way that does not exclude unregistered nurses. So too, the word employee is defined without any such limitation. In connection with step progression, there is no reference in the Collective Agreement to a nurse's registration with the ARNNL. The distinction between a Practicing Licence and an Interim Licence should not be considered with respect to step progression. The Employer's doing so is a breach of the Collective Agreement.

Ms. Trahey then reviewed Articles 26.01 and 26.02, and argued that the language is straight forward dealing entirely with "employees" and "months of service", both of which are defined at 2.01(f) and 2.01(m). There is no doubt, in the Employer's view, that the Grievor was, in fact, in the bargaining unit, eligible for, and in receipt of, full salary. There is no doubt that she should advance after twelve months of service based upon the date of employment and without consideration of the character of the licence under which she worked. To introduce this condition is to introduce an extraneous consideration.

Article 26.02 refers to unregistered nurses, and it applies only to unregistered nurses; it does not apply anyone who is now registered. It has no bearing on a nurse who is registered. By April 2007, Ms Sooley was a registered nurse. It does obtain to an unregistered nurse while that nurse is unregistered. Such a nurse does not advance on the step while unregistered. But once the nurse is registered, 26.02 no longer applies, since that nurse is no longer unregistered. The Employer has shown that under current bylaws, it would not be possible to remain unregistered for a year. But this was not always the case on Ms. Humphries's testimony. She testified that it was possible to remain unregistered for up to two years. The NNLU argues that, if we were dealing with unregistered nurses after twelve months of service, 26.02(a) would apply and would prevent that unregistered nurse from advancing on the stages of the scale. But that is not the case in the instant grievance, so 26.02(a) is not applicable to the instant matter. In the instant matter, we are not dealing with unregistered nurses. Both grievances were filed on behalf of nurses who are registered with practising licences with the association.

It is also informative to look at Article 2.01(y) which defines an unregistered nurse. On the Employer's interpretation a third party, the ARNNL as Registering agency, would have the capacity, effectively, to change the intent of the Collective Agreement. Ms. Trahey encouraged the Arbitrator to look at the Collective Agreement as a whole.

Ms. Trahey reviewed comments dealing with experience credits from Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at p 4-38. There is no question the Grievor's dates and experience date from her first paid day worked.

It should also be noted that, if the Employer's position is upheld, it would raise questions about those nurses who work outside the province and later work with Eastern Health. Are they

to be credited with time worked in Newfoundland as a graduate unregistered nurse or not? This could not have been intended by the Parties. An anomaly cannot be allowed to stand.

Ms Trahey also noted that normal word meaning is to be observed. Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at p 4-41 encourage arbitrators to give effect to words of the Collective Agreement where ordinary normal sense is possible and there is no ambiguity. At page 4-45 Brown and Beatty point out that headings are significant. Article 26.02 uses the title "unregistered nurse", and the heading shows that this relates to unregistered nurses only. There is no application to someone who is a registered nurse.

In assessing the Employer's evidence the Union submits that Ms. Martin's evidence deals with the Employer's practice, but adds nothing to the interpretation of the Collective Agreement.

Further, Ms. Nichols's evidence regarding a nurse who remains unregistered nurse for two years is not a problem for the Union. What the Union does object to is the view that this applies to nurses once they are registered.

In the Union's view, the date of registration is not the determinative date. The Union seeks such a declaration. The appropriate date is the employment date, regardless of ARNNL registration requirements.

**FOR THE EMPLOYER**, Ms. Cole Gendron argued that the dispute relates entirely to a matter of interpretation. She acknowledged that Schedule A(a) and its use of "months of service" tends (in light of Article 2.01(m)) to support the Union's position. However, when read as a whole with its more precise specific provisions (particularly at Article 26.02(a)), the Collective Agreement modifies the more general provisions and sustains the Employer's position. The Employer agrees that employees are entitled to step progression at twelve month intervals, and that most of those periods involve all time worked. However, this Collective Agreement contains Article 26.02, and also the stipulation in 26.01 and 26.02. These specific provisions override the general ones.

It is important to look at the Union's evidence of changes in ARNNL procedure. In the '80s nurses could work unregistered for up to two years, whereas now the Interim Licence is void after one. The Union's evidence subverts their position. If the change in ARNNL practice is as Union testimony suggests, then the Collective Agreement language has no meaning anymore.

Ms. Humphries's evidence is that a nurse who had worked as an unregistered nurse would then start at Step 3 once registered, not at Step 1. But there are two problems with that. Under Schedule A an unregistered nurse is not on the salary scale at all. There is only one pay rate: that is \$950 below the Nurse 1 position. It is not a step. You cannot move up the steps if you are not on a step. That cannot have been what the Collective Agreement intended. To go to step 3 would mean being treated as though the nurse had progressed through steps 1 and 2. The Union agrees they do not go up a step while unregistered, so they cannot get retroactive credit for that period.

The Union's references to "experience" are simply not relevant, and the cases on which the Union relies are not pertinent in view of the specific agreed provisions in the Collective Agreement. Schedule B (p.66) covers experience issues. Nurses who come from other provinces do not get full credit, and are at a disadvantage when compared with our own graduates.

The Arbitrator is bound by the rules of interpretation and, in this instance, this means reading the entire Collective Agreement which contains Articles 26.01 and 26.02. read as a whole, the Collective Agreement supports the Employer's position.

The Employer invited the Arbitrator to consider *Communication, energy, and Paperworkers Union, Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)* which sets out (at p. 16) the tests that apply in matters such as this. In the Employer's view, the Employer's interpretation is more in keeping with the intention of the Parties who framed the Collective Agreement.

It is important that the Arbitrator not imply a term to the Collective Agreement. Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 4:2120 also point out that special or specific provisions outweigh general provisions and clear expressions are required to confer a financial benefit. Article 26.01 is modified by 26.02. The phrase "advance up the salary scale" in 26.02 is particularly pertinent, as unregistered nurses are not on a salary scale and therefore can not "advance up the salary scale".

The Union is seeking a retroactive credit for step progression. They cannot use arbitration to seek changes that they did not win at bargaining. The Union says that the issue applies only to nurses so long as they are unregistered. The Employer would agree. The same principle applies to Schedule A. It does not apply until the nurses are registered. Registration is the trigger agreed

to in Article 26.02 and stipulated in Article 26.01 (which subjects itself to Article 26.02). These are benefits taken away from nurses while unregistered by a clear agreement of the Parties. The Union interprets the situation as though the unregistered nurses were proceeding through the steps; but the Collective Agreement says that they not so entitled. To start out on Step 1 and allow them to go to Step 3 some nine months later based on three or four months credit not due them (since they are unregistered) is still step progression for which they are not eligible. This is a financial benefit, and cannot be accorded without strong language. The trigger step for getting on the step progression is registration. If the Union were to be successful in this matter the next question would be retroactive pay but that is not claimed and it is not addressed in the Collective Agreement. It would need to be stated very clearly.

**IN REBUTTAL ARGUMENT FOR THE UNION**, Counsel pointed out that it should be noted that the Union has not submitted that were a nurse to remain unregistered for up to two years, as might have been the case in previous years, that nurse would then start on Step 3 once the registration came through. That is not the Union's position.

### **CONSIDERATIONS**

**At issue between the Parties** is the starting point of a newly Registered Nurse's first "twelve (12) months of service" for step progression under Schedule A of the Collective Agreement.

**Onus:** As both Parties pointed out, onus is not pertinent in the instant matter. Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 3:2400, "Onus or Burden of Proof", reads in part:

...It has been pointed out that the question of onus of proof arises only where a conflict respecting facts as found has occurred; the onus of proof has no bearing in situations involving questions of law, which includes the interpretation of a term in a collective agreement. Rather, in resolving such issues arbitrators must determine the true meaning intended by the parties to the agreement, using generally accepted canons of construction...

In the instant matter, therefore, the question of onus does not arise, as I am required to provide "the interpretation of a term in a collective agreement" and must "determine the true meaning intended by the parties to the agreement, using generally accepted canons of construction."

**The Union argues** that according to the clear and normal wording of the relevant provisions of the Collective Agreement (Schedule A and pertinent definitions in Article 2.01), the "twelve months service" is calculated from the Nurse's date of hire. The Union complains the Employer's

established practice of calculating from the date it is notified of the Nurse's registration with the ARNNL is a violation of the Collective Agreement. It seeks an order that the Employer not use the date of a nurse's registration as the anniversary date in calculating step progression.

**The Employer argues** that the Collective Agreement, read as a whole, contains Articles 26.01 and 26.02 specifying how Unregistered Nurses shall receive salaries under Schedule A. Thus its interpretation is what the Parties agreed, and what the Collective Agreement requires. On the Employer's submission, the more general language of Schedule A and related definitions is constrained by the more specific language of Articles 26.01 and 26.02. As rules of interpretation require that the specific override the general, its interpretation must, therefore, prevail.

**The Collective Agreement** is fashioned by the Parties as an integrated document, to be read as a whole. As a matter of established practice, Arbitrators read collective agreements as integrated wholes and interpret them accordingly. I will follow this established practice in the following considerations and decision.

**The arbitral jurisprudence** provided was helpful, and I am grateful for it. I note in particular *Prince Rupert Grain Ltd. V Grain Workers' Union, Local 333 Relief Postings Policy Grievance*, B. Foley, Arbitrator December 7, 2006 which quotes (at paras 59 & 60) Arbitrator Richard Bird's articulation of principles for Collective Agreement interpretation in *Pacific Press and GCIU Local 25C* (1995) and the summary statement of related principles in *Communication, energy, and Paper-workers Union, Local 777 v. Imperial Oil Strathcona Refinery (Policy Grievance)* paras. 44-47. Para 47 reads:

Once an interpretation is settled upon, it should be tested by asking these questions:

- is the interpretation plausible – is it reasonable?
- is the interpretation effective – does it answer the question within the bounds of the collective agreement?
- Is the interpretation acceptable in the sense that it is within the bounds of acceptability for the parties and legal values of fairness and reasonableness?

**Several key questions** determine this matter, in my view:

- A. Does the term "Employees", as it appears in Schedule A(a), itself exclude Employees who are Unregistered Nurses?
- B. Does the term "months of service", as it appears in Schedule A(a), itself exclude those "months of service" provided by Unregistered Nurses?

- C. Does the phrase "shall advance ... on their respective salary scales" as it appears in Schedule A(a) not apply to those who are "Unregistered Nurses" since they are not "*on*" (emphasis added) – and therefore not able to "*advance on* – their ... scales" (emphasis added) until registered?
- D. Does the phrase "subject to Article 26.02" as it appears in Article 26.01 limit the way in which "Unregistered Nurses" shall "receive salaries as Per Schedule A" as specified in Article 26.02(a)?
- E. Does Article 26.02 (headed "Unregistered Nurses") apply, directly or residually, to Nurses once they are Registered?
- F. Is there "nothing specific pertaining to work as registered nurses governing step progression" as Ms. Humphries claimed in her testimony?

I shall deal with each question separately.

**A.** Does the term "Employees", as it appears in Schedule A(a), itself exclude Employees who are Unregistered Nurses?

The Union argues that the plain, unambiguous meaning of Schedule A(a) determines the issue in dispute. That provision reads: "Employees shall advance one step on their respective salary scales on the date when twelve (12) months of service is accumulated." Nurses who, like Ms. Sooley, served for some period as Unregistered Nurses are clearly "Employees" as the term is defined at Article 2.01(f). Schedule A (a) uses "Employees". It does not use "Registered Nurses".

I am persuaded that the term "Employees", as it appears in Schedule A(a), does not itself exclude Employees who are Unregistered Nurses.

**B.** Does the term "months of service", as it appears in Schedule A(a), itself exclude those "months of service" provided by Unregistered Nurses?

The Union also pointed out that the Agreement defines both "month of service" (2.01(m)) and "service" (29.01(s)) by invoking "receipt" of "salary or wages" as criterion in ways that do not exclude Unregistered Nurses. In the Union's view, Schedule A (a) must be interpreted to cover those in Ms. Sooley's situation.

I am persuaded that the term "months of service", as it appears in Schedule A(a), does not itself exclude those "months of service" provided by Unregistered Nurses.

**C.** Does the phrase "shall advance ... on their respective salary scales" as it appears in Schedule A(a) not apply to those who are "Unregistered Nurses" since they are not "*on*" (emphasis added) – and therefore not able to "*advance on* (emphasis added) – their ... scales" until registered?

The Employer argued it is not logical to hold that anyone could "*advance on*" (emphasis added) anything when that person is not "on" it already. Being "on" something is a precondition to advancement on it, in the Employer's view. The Employer pointed out that Schedule A agrees that "step progression" involves advancement "on" something quite specific, *viz.* "their respective salary scales". The Employer also argues that this logic is explicitly confirmed by Article 26.02 which provides that "unregistered nurses shall receive a salary of nine hundred and fifty dollars (\$950.00) below the minimum salary of a Nurse I and such nurses shall not advance up the salary scale nor hold a position above a Nurse I level."

I recognise the logic of the Employer's position. I note, further, that this logic is consistent with the fact that Schedule A expressly provides (at p. 61) that an "UNREG. NURSE" receive a fixed salary, and that there is no further "step" or opportunity for advancement set out that would accommodate Unregistered Nurses making such an advance.

I accept that the phrase "shall advance ... on their respective salary scales" as it appears in Schedule A(a) does not apply to those who are "Unregistered Nurses".

**D.** Does the phrase "subject to Article 26.02" as it appears in Article 26.01 limit the way in which "Unregistered Nurses" shall "receive salaries as Per Schedule A" as specified in Article 26.02(a)?

I accept that the phrase "subject to Article 26.02" as it appears in Article 26.01 does limit the way in which "Unregistered Nurses" (26.02(a)) shall "receive salaries as Per Schedule A" (26.01) as specified in Article 26.02(a). I note that the limitation is explicitly set out again, in somewhat different language, in Schedule A (at p. 65) under the heading "UNREG. NURSE".

However each party claims that the other is trying to apply its respective interpretation retroactively. The Employer claims the Union is trying to secure a retroactive, unbargained benefit in claiming months of service as an Unregistered Nurse should be calculated as part of accumulated service for step progression when the newly Registered Nurse reports registration to Management and is placed on Step 1, instead of being backed out of recorded hours by the payroll clerk, as Ms. Martin testified.

The Union claims the Employer seeks retroactively to deny a benefit which Registered Nurses have achieved through bargaining when it refuses to recognise those "months of service" completed before registration as part of the 12 required for step progression under Schedule A(a).

But, with respect, I find that the Collective Agreement makes it clear there is no "retroactive" benefit to either secure or to deny.

As set out (in "C") above, Schedule A (at p. 61) does not contemplate Unregistered Nurses making an "advance" during the period they are unregistered. I also note that Articles 26.01 and 26.02 confirm this same limitation on Unregistered Nurses' access to step progression. The Collective Agreement makes it clear that there are no progression-related rights accumulated by Unregistered Nurses during their employment prior to registration. In view of the existing explicit language and logic of the Collective Agreement as it stands, there would need to be very much stronger, and much more precise language for an Arbitrator to sustain the Union's view that the phrase "months of service" as used in Schedule A (a) should be held to include those months worked as an Unregistered Nurse.

I note that the Union expressed some concern at the possibility that, on the Employer's interpretation, the licensing practices of an outside third party (the ARNNL) might affect control over provisions of the Collective Agreement. I note however, that the Agreement does explicitly recognise the ARNNL registration at Article 2.01(y), and, as bearing on salary, in Article 26.02.

**E. Does Article 26.02 (headed "Unregistered Nurses") apply, directly or residually, to Nurses once they are Registered?**

The Union argued that Article 26.02 has no bearing on the situation of those nurses who, like Ms. Sooley, served for some period after hiring as Unregistered Nurses but then became, and continue as, Registered Nurses. Since the instant Policy and Individual grievances concern those who are Registered Nurses but whose Step Progression is improperly calculated, Article 26.02 has no relevance here, in the Union's view.

The Union does not object to the Employer applying Articles 26.01 and 26.02 to those Nurses who are "Unregistered Nurses", but does complain of a Collective Agreement violation when these provisions are applied to Registered Nurses who have a right, as "employees" under Schedule A (a) as it appears in the Collective Agreement to include "months of service" worked while unregistered in calculation of an accumulated period for step progression.

With respect, I am not persuaded by the Union's argument. The Collective Agreement as it stands, and read as a whole, provides that Registered Nurses have no Collective Agreement-

based step progression interest in the "months of service" worked while they were Unregistered Nurses since no such interest is contemplated in that Agreement as accorded them while they are unregistered. More precisely, such an interest is explicitly denied at Article 26.02(a).

Further, Articles 26.01 and 26.02 (as confirmed by Schedule A p. 61) are specific provisions and, as such under the rules of interpretation, override more general provisions such as Schedule A (a) read in the light of the definition clauses 2.01(m) and 201(s).

I find that Article 26.02 (headed "Unregistered Nurses") does, when read as part of the whole Collective Agreement, have the above noted relevance for Nurses even after they come to be Registered.

**F.** Is there "nothing specific pertaining to work as registered nurses governing step progression" as Ms. Humphries claimed in her testimony?

In light of the foregoing analysis, I must respectfully disagree with Ms. Humphries' view. The Collective Agreement does have the effect of denying Registered Nurses access, for step progression purposes, to periods of service worked while the Nurses were Unregistered.

### **DECISION**

In light of the forgoing considerations, I find that

### **THE GRIEVANCE IS DENIED.**

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Ph.D.  
Arbitrator

April 30, 2009