

**Wages  
Retroactivity of benefits**

**FINDINGS AND AWARD  
IN A DISPUTE**

**BETWEEN:**

**UNITED BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA, LOCAL 579**

(hereinafter called the "Union")

**AND:**

**CHESTER DAWE  
4338533 CANADA INC.**

(hereinafter called the "Employer")

<b>GRIEVOR:</b>	<b>GROUP</b>
<b>FOR THE UNION:</b>	<b>ROBERT DORNAN</b>
<b>FOR THE EMPLOYER:</b>	<b>GORDON KENNEDY &amp; BRIAN HUMPHREYS</b>
<b>BEFORE:</b>	<b>W. JOHN CLARKE, C.Arb. C.Med. Sole Arbitrator</b>

**PRELIMINARY MATTERS**

This hearing of this matter took place at Paradise on April 27<sup>th</sup>, 2009 at which time the parties agreed as follows:

1. The Arbitrator was acceptable.
2. There was one preliminary objection by the Employer going to jurisdiction to hear the grievance.
3. The grievance procedure had been properly followed or requirements had been waived.
4. The Arbitrator would remain seized of the matter in the event the parties could not agree on the interpretation of the award or in the event there was a question of compensation arising from the award.
5. The witnesses were permitted to remain throughout the hearing.
6. The time limits for filing of the award were waived.
7. There was no person potentially affected by the outcome of the proceeding who should have received notice of the hearing.



The following exhibits were entered by consent and identified as follows:

- C#1 Collective Agreement effective February 1, 2001–January 31, 2004 between A.E. Hickman Company Limited and The Transport & Allied Workers Union Local 855.
- C#2 Collective Agreement effective February 1, 2005–December 31, 2007 between Chester Dawe Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 579.
- C#3 Collective Agreement effective January 1, 2008–December 31, 2011 between Chester Dawe 4338533 CANADA Inc. and United Brotherhood of Carpenters and Joiners of America, Local 579.
- C#4 Notice of grievance dated December 18, 2008.

The following persons testified under oath and entered exhibits identified as follows:

For the Union

Darrell Melvin who entered the following exhibits:

- DM#1 Email dated October 20, 2008 at 2:46 pm from Darrell Melvin to Gordon Kennedy of the employer.
- DM#2 Email dated October 20, 2008 at 4:36 pm from Gordon Kennedy to Darrell Melvin.
- DM#3 Memo to former outside workers from Darrell Melvin.

For the Employer

Brian Humphreys  
Gordon Kennedy

**THE EVIDENCE**

The employer in this matter is the successor employer to Chester Dawe Ltd. which had purchased the business of a company called A.E. Hickman Company Ltd. on O’Leary Avenue in the St. John’s area. A.E. Hickman Company Ltd. had been a party to a collective agreement with The Transport and Allied Workers Union, Local 855. Because a different union represented the other employees of Chester Dawe Ltd., a vote was held to determine which of the two unions would



represent the employees. That vote was won by the Carpenters Union, the union described in this arbitration. That union then assumed the collective bargaining responsibilities for the employees at that location.

Darrell Melvin is a business representative with the union, a position which he has held since May 2001. He is familiar with the labour relations issues at the subject employer and has been for approximately 6 to 7 years. He was involved with the negotiations of the current agreement as chief negotiator. He was a participant in the negotiations for the predecessor collective agreement and sat in on the negotiations for the collective agreement with A. E. Hickman Company Ltd.

During the course of negotiations for the present collective agreement a wage increase was negotiated. This wage increase was said to be retroactive to January 1, 2008 and was to include overtime hours worked since January 1, 2008. Although the collective agreement was effective January 1, 2008 it was not executed until November 4, 2008. Some employees had left the employ of the employer during that interim period.

The grievance is on behalf of employees who were no longer employed with the employer when the newly negotiated agreement was signed but who had worked with the employer during 2008. The union is seeking to have these former employees paid the increases negotiated in the collective agreement for all hours worked during that interim period including overtime since January 2008 to the date of their departure from the company. No evidence was presented as to how the employees left the employ of the employer. It is uncertain whether they were dismissed or whether they quit of their own volition.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a series of loops and a long horizontal stroke at the bottom.

## THE POSITIONS OF THE PARTIES

The union argues that there was no negotiation which relinquished the rights of those employees to be paid for retroactive pay which was linked to hours worked. There simply was no discussion of this issue at the time. Given that the offer was retroactive and the membership voted on it, the offer should be retroactive for all employees employed at the time whether or not they are still employed. There was no indication from the employer that the former employees would not receive that raise.

For the employer to be permitted to retain the amount of the retroactive pay to the detriment of the employees who worked for it is an unjust enrichment of the employer and the principles of equity cannot permit it. Essentially, the employees said we will work for the current wage rate knowing that an increase is being negotiated. When the amount of the increase is determined we will receive our proportion of that increase.

The employer, on the other hand, argues that the union never negotiated to say that the retroactive raise was payable to the former employees. Throughout the history of the relationship between the employer and its unions there has never been an instance whereby former employees were paid a retroactive raise. The matter was never grieved. There has thus been established a past practice whereby such former employees do not receive retroactive benefits after the employment relationship has ended.

The employer further argued that this proceeding is in the nature of a personal grievance. When employees quit or the employment relationship is otherwise severed, they relinquish their rights

A handwritten signature in black ink, appearing to be initials or a stylized name, located in the bottom right corner of the page.

and are not in a position to file a grievance. This is not the type of matter for which a union policy grievance can be pursued but instead is a group grievance on behalf of similarly affected former employees.

The employer asked that the grievance be denied.

### **FINDINGS AND CONSIDERATIONS**

The facts in this situation revolve around a fairly narrow issue; whether employees who were not employed with the employer at the date of execution of a collective agreement are entitled to the benefits of that collective agreement which was being negotiated and took effect while they were active employees. The facts related to those individuals who are no longer employed are scanty. In fact, no specific individuals were identified as being affected by this situation.

The employer has alleged that the grievance is not arbitrable because it is a personal grievance and, it argues, personal grievances are not permitted to be arbitrated under the terms of this collective agreement. The argument was not fully developed by the employer but it seems to be grounded in the wording of article 3. 01 (b) which reads as follows:

"The grievance procedure may be utilized by the Company or by the union in processing a grievance which is not a personal grievance and which alleges a violation of this Agreement. Such a grievance may be introduced at Step 2 of the grievance procedure."

No other provision in the collective agreement was pointed out by the parties as either using or defining the term "personal grievance". The undersigned can find no definition of it in the agreement. In Canadian Labour Arbitration, Brown and Beatty (3d)(Canada Law Book) section 2:3120 the learned authors describe four types of grievances, namely: the individual employee grievances where the subject matter of the grievance is personal to the employee, group grievances where a number of employees with individual grievances join together in filing their grievances, union or policy grievances where the subject matter of the grievance is of general interest and where individual employees may or may not be affected at the time that the



grievance is filed and a hybrid type which is a combination of the policy and individual grievance. It would seem from this classification that the type of grievance with which we are concerned here is either an individual, or personal, grievance or a group grievance, being a grouping of several personal grievances. In other words, it is the very type of grievance which the employer alleges cannot be pursued under this collective agreement.

The grievances must be seen in the context of article 3, the relevant portion of which reads as follows:

". . . In this Article, a grievance shall consist of a dispute concerning interpretation, application of alleged violation of any Clause of this Agreement. If any question arises as to whether a particular dispute is, or is not a grievance within the meaning of these provisions, the question may be taken up through the grievance procedure and determined, if necessary, by arbitration. Both parties agree to make every effort to settle such grievance promptly through the following steps:

- STEP 1: The Employee shall discuss his/her grievance with his/her immediate supervisor within five (5) days of the mailer (sic.) giving rise to the grievance. The Employee may be accompanied by a Shop Steward if he/she so desires. The immediate supervisor shall reply to the grievance within a further two (2) days.
- STEP 2: Failing settlement at Step 1, within a further two (2) days the grievance shall be submitted, in writing, to Management and within a further five (5) days, a meeting shall be held between Management and Union representatives in an effort to reach a settlement. Should the meeting not result in settlement, Management will reply to the grievance within a further two (2) days.
- (a) During any of the above steps of grievance procedure, the Shop Steward or appropriate Management representative may request the presence of the Union business agent or duly appointed officials of the Union.
  - (b) The grievance procedure may be utilized by the Company or by the union in processing a grievance which is not a personal grievance and which alleges a violation of this Agreement. Such a grievance may be introduced at Step 2 of the grievance procedure.
  - (c) Any and all time limits fixed by this Article may be extended by mutual Agreement between the Company and the Union.
  - (d) Failing settlement of the grievance at Step 2, either party may submit the matter in dispute to arbitration which submission must be made within five (5) days of the receipt of the reply at Step 2. All grievances referred to



arbitration shall be heard by a single arbitrator. The hearing shall take place at any time mutually agreed upon between the Company and the Union. The arbitrator shall make such decisions as may finally dispose of the question in issue and the decision shall be final and binding on all parties.

- (e) The arbitrator shall not have any power to alter or change any of the provisions of this Agreement or to substitute any new provisions for any existing provisions or to give any decision inconsistent with the terms of the provisions hereof. The fees and expenses of the arbitrator shall be borne equally by the Company and Union.”

This article sets out the procedure whereby grievances may be pursued by the union. In the normal course of events, where an employee has a grievance the process would begin at Step 1. This establishes the general rule for the processing of all types of grievances as enumerated by Messrs. Brown and Beatty. The normal type of grievance which would be presented to management is the garden-variety personal grievance and it would begin its processing within this organization at Step 1. Subsection (b) essentially makes an exception to the normal processing of grievances for all types of grievances other than personal grievances. These other types can begin at Step 2 rather than at Step 1 where the personal grievances would begin. Subsection (b), in effect, allows the company or the union to bypass Step 1 in the processing of all grievances other than personal grievances. It therefore, in my view, cannot be seen as a prohibition against the filing and processing of personal grievances by employees alleging a breach of the collective agreement by the employer but rather is an enabling section allowing both union and management to begin other than personal grievances at Step 2 of the grievance procedure.

The employer argues as well that there is a past practice between these parties whereby a pattern has been established that there has never been payment of retroactive pay to people who were employed at the effective date of the agreement but not employed at the date of execution. Evidence of a past practice requires that there be an ambiguity in the wording of the agreement which would allow an arbitrator to look to the past practice of the parties to determine what the true meaning of the ambiguous clause was. No ambiguity has been pointed out to the undersigned in this case, nor has there been any evidence adduced upon which one would conclude that such a practice has occurred in the past. It is not enough to simply say that it has happened. If that fact is not conceded by the other side, which it is not here, it is incumbent upon the employer to produce



credible evidence upon which such facts can be found.

The collective agreement is said to be effective January 1, 2008 to December 31, 2011. Schedule "A" of the collective agreement sets forth the wage rate for the term of the collective agreement. A letter of understanding numbered #4 reads as follows:

"The Company agrees that the increase for 2008 shall be retroactive to January 1, 2008. The payment of retroactive wages shall include overtime hours worked since January 1, 2008. All retroactive pay will be calculated and paid within two (2) weeks of the date that this agreement is ratified."

As noted above, the question for resolution is whether employees who were employed at the effective date of the collective agreement but no longer employed at the date of execution of the collective agreement are entitled to avail of this schedule in the collective agreement. The issue is not a unique one and has been dealt with by several cases in the past. The decision of arbitrator Easton, as he then was, in NAPE and Bonavista-Trinity-Placentia Integrated School Board (Dodge Grievance) 22 L. A. C. (3d) 430 (Easton) reviews many of the arbitral and labour board authorities in this area.

In that case the grievor, Ms. Dodge, had resigned and was entitled to severance pay. The severance paid to which she was entitled, if calculated under the old agreement, was considerably more than the severance pay which she received having been calculated under the new agreement. The factual situation is similar to the one at hand in that Ms. Dodge was an employee at the time of the effective date of the new collective agreement but had resigned prior to the date of signing of the new collective agreement. The agreement was said to have had, as here, retroactive effect. The unfortunate thing for Ms. Dodge in that case was that the calculation in the old agreement would have yielded her a larger settlement than the one contained in the newly negotiated agreement. Essentially then, the union there was taking the argument of management in this case while management there was taking the argument of the union in this case. Arbitrator Easton reviewed several cases in the area and in particular, Re: Penticton and District Retirement Service and Hospital Employees Union, 16 L. A. C. (2d) 97 (Weiller), as reviewed by the British Columbia Labour Relations Board. Arbitrator Easton notes the reference made by arbitrator Weiller to Re: Service Employees Union Local 204 and Toronto Hospital For the Treatment of Tuberculosis, 22



L.A.C. 119 (Brown) and Re: Board of Trustees of Northland School Division No. 61 and Alberta Teachers Association, 10 L.A.C. (2d) 337 (Lucas) at paragraphs 26 and 27 of his Dodge award as follows:

"The standard retroactivity clause defines the period of time during which the new terms and conditions of employment are intended to be effective. However, it does not determine precisely who is to be entitled to the retrospective operation of these new monetary benefits. Instead, those eligible can include only those who remain as employees within the bargaining unit up to the date the new agreement was concluded. Why? Because at the time the Union settled the new contract, these were the only individuals whom the Union was entitled to represent and bind by new contract terms.

That is the argument. Does it stand up under close examination? I note at the outset that this special gloss on the standard duration clause is not justified by reference to the presumed intentions of the parties, or the practical exigencies of collective bargaining or contract administration. Rather, it is perceived as the necessary implication of such legal concepts as employee, unit, privity of contract and so on.

One immediate difficulty with this legal logic is that it leaves a crucial ambiguity in its conclusion. Precisely what is the cut-off date for determining eligibility to retroactive payment of the new wage rates? Is it the date on which the negotiators settled a final memorandum of agreement? Is it the date that the settlement was ratified by the parties or on which notice of ratification was given? Or is it the date the new agreement was formally executed? The choice an arbitrator makes among these alternative dates may be critical in judging the eligibility of a person who has just terminated his employment. That potential pitfall is avoided if the arbitrator adopts as the eligibility date the day expressly chosen by the parties in their duration clause as the over-all effective date of their contract.

Further, at page 27, arbitrator Easton quotes from page 106 of the Penticton case, supra, as follows:

"There is no particular magic in the date the new agreement was settled. A Union and an Employer clearly agreed to increase wages paid for work done before the agreement was signed, but after the effective date of the new contract. If they can agree to pay these wage rates to individuals who terminated their employment in the interim, there is no need to erect a strong legal presumption against finding that this is what they did negotiate. Sensing that fact a number of reported decisions have taken literally the language of the duration clauses. They hold that the date selected by the parties as the point at which the new contract benefits are to be effective is also the date for determining who is entitled to the benefits."

In effect then, the thrust of these cases is that the parties are free to negotiate whatever date they choose for their contract to become effective. In the Letter of Understanding numbered # 4, the parties have agreed that:

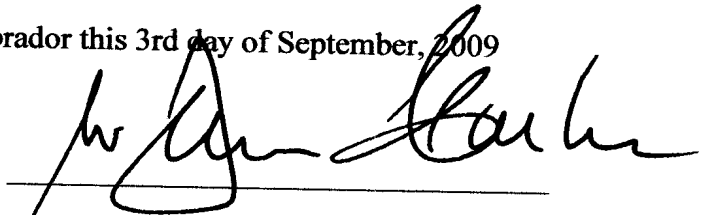
A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line and a diagonal stroke.

“ . . . the increase for 2008 shall be retroactive to January 1, 2008. The payment of retroactive wages shall include overtime hours worked since January 1, 2008. All retroactive pay will be calculated and paid within two (2) weeks of the date that this agreement is ratified.”

The parties to the collective agreement have selected the date to be January 1, 2008. All employees employed as of that date are entitled to the negotiated benefits or, in the case of Ms. Dodge, be deprived of benefits that had existed under the previous agreement that are no longer available under the newly negotiated agreement.

As a result of the foregoing the Grievance is allowed. As noted above, I remain seized of the matter should matters of calculation arise.

**DATED** at St. John's, Newfoundland and Labrador this 3rd day of September, 2009



---

W. JOHN CLARKE – SOLE ARBITRATOR