SENIORITY -
JOB POSTING

FINDINGS AND DECISION IN A DISPUTE

BETWEEN: **NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES**

(hereinafter referred to as "the Employer")

AND: **UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1252**

(hereinafter referred to as "the Union")

RE: **GRIEVANCE OF HUBERT SUTTON**

(hereinafter called "the Grievor")

Appearances: For the Union: Fraser March

For the Employer: Randell Earle, Q.C.

Witnesses: For the Union: Gerard Ward
Hubert Sutton
Leo Puddister
Chris Henley
Linda Chafe
Ettie Bursey

For the Employer: Elaine Price
Carol A. Furlong
Sheila Greene, Q.C.

Arbitrator/Mediator: Dennis Browne, Q.C.

The Arbitration hearing continued at the Comfort Inn in St. John's, NL, on August 17, 2009, and concluded on August 18, 2009[*]. At the commencement of the hearing, the parties had agreed as follows:

1. That the sole Arbitrator was acceptable to the parties and had jurisdiction to deal with the dispute.

2. That the Arbitrator would take written notes and in the event of conflict, these notes would prevail.

3. That the grievance procedure had been properly followed.[*]

4. That the Arbitrator would remain seized of the matter for a period of sixty (60) days following the date of the Award in the event that any interpretation of the Award or its effect was necessary.

5. That witnesses would be excluded from the hearing.

6. That all parties likely to be affected by the outcome of the arbitration had received adequate notice.

7. That Collective Agreement and statutory time limits for making the Award would be waived.

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[*] This hearing commenced on February 28, 2007, at which time the Employer raised a preliminary objection. A decision in reference to that objection was issued on February 12, 2008, after that hearing concluded on January 10, 2008.

THE EXHIBITS

The following exhibits were entered by consent:

C1 Collective Agreement (July 1, 2001 – June 30, 2004)

C2 Grievance Form – June 1, 2006

C3 Job posting – May 23, 2006

C4 Seniority roster – February 2007

C5 Correspondence – Chafe/Blundon – September 11, 2007

Other Exhibits:

SG1 Grievance – May 3, 2006

HS1 E-mail – Furlong/Staff – January 14, 2007

HS2 E-mail – Furlong/Staff – May 29, 2006

HS3 Physician Description – Senior Negotiator – May 23, 2006

CH1 NAPE Local Report Forms

CH2 Correspondence - Carter/Henley – July 31, 1997

CH3 Correspondence – Deir/Henley – November 3, 1997

CH4 Correspondence – Deir/ Henley – September 8, 1998

CH5 Correspondence – Deir/Henley – February 18, 1999

CH6 Correspondence – Hanlon/Henley – December 11, 2000

CH7 M.O.U. – NAPE/UFCW 1252 – February 7, 2001

CH8 Collective Agreement – UFCW (Local 1252) and NAPE (July 1, 1997 – June 30, 2001)

CH9 Correspondence – Executive Committee/Members – July 5, 1999

CH10 Negotiations Protocol – September 27, 1999

CH11 Correspondence – Henley/Puddister – June 3, 2004

CH12 Correspondence – Henley/Healey – September 11, 2006

CH13 Correspondence – Henley/Healey – February 5, 2007

CH14 Correspondence – Healey/Henley – January 29, 2007

CH15 NAPE Local Report Form – May 17, 2001

CH16 NAPE Local Report Form – July 24, 2002

EB1 Correspondence – Furlong/Bursey – July 17, 2001

EB2 Correspondence – Bursey/Hanlon – December 3, 2001

EB3 Correspondence – Hanlon/Bursey – March 11, 2002

EB4 Correspondence – Furlong/Bursey – July 10, 2002

EB5 Correspondence – Hanlon/Bursey – August 5, 2002

EP1 Weekly Attendance Records

NATURE OF THE GRIEVANCE

In a grievance dated June 1, 2006, the Union alleged a violation of Article 11 and other related articles of the Collective Agreement. The Union maintained that the Employer failed to make known all of the requirements for the posted position of Senior Negotiator which closed May 23, 2006. Specifically, the Union alleged that the Employer had relaxed the requirement that the successful applicant was required to work from the head office in St. John's. It is the Union's position that the relaxation of that requirement was not made known in the job posting. The Union is seeking full redress.

The Employer denies any violation of the Collective Agreement in the circumstances alleged.

THE EVIDENCE

The Grievor has worked in various locations for this Employer since 1973, for the most part as an Employee Relations Officer and for a period as the Senior Negotiator. For personal reasons, the Grievor moved from the Employer's St. John's office, where he was Senior Negotiator, to the Grand Falls-Windsor ("GFW") office in 1991. But the position of Senior Negotiator had been determined by the Employer to be a St. John's head office position. Therefore, the Employer informed the Grievor at that time that he could no longer be Senior Negotiator as he could not hold that position after moving to the GFW office.

After the Grievor's move to Grand Falls-Windsor, another Employee Relations Officer, Clarence Rice, successfully applied for the position of Senior Negotiator, a permanent position. Mr. Rice wanted to work out of the Employer's Corner Brook office as a Senior Negotiator. The Grievor objected as he had been told by the Employer that the Senior Negotiator position required the worksite to be the head office in St. John's. Clarence Rice never moved to St. John's. Instead, Mr. Rice has been on leave for a considerable period of time and, consequently, his permanent Senior Negotiator position was reposted and occupied as a temporary position by others from time to time in the St. John's office.

When the Senior Negotiator temporary position was posted with a closing date of May 23, 2006, the Grievor did not apply because he had no intention of relocating to St. John's to assume the position in the Employer's head office in St. John's. The successful applicant was Elaine Price, an Employee Relations Officer who worked in the GFW office. The Grievor testified that Ms. Price had no intention of moving to St. John's and planned to work out of the GFW office. If the Senior Negotiator position was to be located out of the GFW office the Grievor would have applied prior to the May 23, 2006, closing date. Therefore he grieved.

The Grievor testified that Elaine Price never moved from Grand Falls-Windsor to St. John's while she held the Senior Negotiator position. Elaine Price finished in the position around December 2006. The position has been vacant since. The Grievor testified that he would

strongly suggest that Ms. Price spent more time working in the GFW office while she held the position of Senior Negotiator. Based on the Grievor's experience, if a person moves from one NAPE office to another there is a certain number of days given in which to make the move. All of that would be written in a contract. The Grievor stated that although Article 11.02 does not mention location as a requirement, past practice has been that location was included in postings.

Elaine Price was working as an Employee Relations Officer in the GFW office, applied for the position of Senior Negotiator (Temporary) and was awarded the position on or about May 27, 2006. Ms. Price accepted the position knowing that she would be required physically to relocate from Grand Falls-Windsor to St. John's. She had asked the Employer if it was possible for her to work between St. John's and Grand Falls-Windsor, and was informed that she would be required to relocate to St. John's. The discussion of splitting the location between St. John's and Grand Falls-Windsor was held with the Employer prior to her accepting the position.

Ms. Price kept a weekly attendance record. Her records indicated that while she was Senior Negotiator there were 152 working days. Of those days, Ms. Price worked 39 days in the GFW office and 85.5 days in the St. John's head office. For 27.5 days she was either on paid leave or annual leave.

Prior to accepting the Senior Negotiator position, Ms. Price had ongoing commitments in her Employee Relations Officer job in Grand Falls-Windsor, including arbitrations and negotiations. Also, two new Employee Relations Officers were hired in June 2006 and were assigned to the GFW office on a rotational basis. Ms. Price was responsible for monitoring these two employees as Senior Negotiator. When in Grand Falls-Windsor, Ms. Price stayed at her home located in that town. Ms. Price struggled personally to decide whether she would leave Grand Falls-Windsor and move to St. John's after she became the Senior Negotiator. Prior to the 2006 Christmas break, Ms. Price informed the Employer that her decision was to

return to her former Employee Relations Officer position in Grand Falls-Windsor, and to relinquish the Senior Negotiator position.

Ms. Price maintained an office in St. John's and had administrative support while she was Senior Negotiator. As Senior Negotiator her work included WHSCC and the marine collective agreements. She honoured previous commitments she had in Grand Falls-Windsor as an Employee Relations Officer after becoming Senior Negotiator in May 2006.

Ms. Price testified that technically, under the Collective Agreement, she had two months to be confirmed in the Senior Negotiator position, but the Employer gave her flexibility. She had made the request for flexibility before the two months elapsed under Article 11:04, sometime between May 27 and August 27, 2006. The Employer gave her that accommodation and there was no adverse effect on anyone. No one had taken her place in the GFW office as the Employee Relations Officer after she became the Senior Negotiator.

Ms. Price testified as to her own grievance dated May 3, 2006 (SG1). That grievance was based on a violation of Articles 43.04 and 14.01. Ms. Price had alleged sexual harassment and requested her Employer to take immediate action to ensure the harassment ceased. In the summer of 2006, Ms. Price met with the investigator pursuant to the sexual harassment complaint, but it was late January 2007 before the investigator's report was completed.

Carol Furlong, the Union President, testified that she was familiar with the job posting for Senior Negotiator (Temporary). While Ms. Furlong was President of the Union there was only one other Senior Negotiator with whom she had worked and that was Mr. Chris Henley. When Mr. Henley advised her that he wanted to return to an Employee Relations Officer position and resign as Senior Negotiator there was no dispute. Therefore, the Employee Relations Officer position he assumed was not posted.

In the job posting, the position of Senior Negotiator was described as temporary because employee Clarence Rice retained the permanent position while on extended leave. Carol

Furlong believed that Elaine Price's grievance of May 3, 2006, had not even been reviewed at the time of the Senior Negotiator posting as the practice with such a grievance was to conduct an investigation first. That posting had a closing date of May 23, 2006.

In this case, the only application for the job posting was that of Elaine Price. There is nothing Ms. Furlong could recall re discussions with Elaine Price prior to her applying for the position. When the President met with Ms. Price and interviewed her, Ms. Price said that she wanted to work on Mondays and Fridays out of the Employer's GFW office and on Tuesdays, Wednesdays and Thursdays out of St. John's. The President informed her that arrangement could not be accommodated and the job had to be worked from the St. John's office. Ultimately, Ms. Price accepted the job of Senior Negotiator.

The Employer's position regarding the St. John's location never changed. The Employer was aware that in June, July and August, Ms. Price worked a fair amount of time in the GFW office. The Employer had no issue with that because Ms. Price was expected to conclude the work she had undertaken in the GFW office as an Employee Relations Officer. Further, there were two new Employee Relations Officers hired around that time who were sent to the GFW office where they worked for a period. Having these two new Employee Relations Officers alleviated the workload there at the time and, as Senior Negotiator, Ms. Price could oversee their work.

After Elaine Price accepted the Senior Negotiator position, there were discussions as Ms. Price had reservations after taking the job. The President was prepared to give Ms. Price some time to decide. Ms. Furlong could not say for certain when she was informed that Ms. Price would be leaving the Senior Negotiator position, but it would have been around the end of 2006. Ms. Furlong had no issue regarding Ms. Price's return to her Employee Relations Officer job in GFW because previously Chris Henley had been re-assigned from the Senior Negotiator position back to his Employee Relations Officer job. Elaine Price had the same benefit as did Mr. Henley. Both went back to their old jobs. Elaine Price was unsure if she was prepared to move and she was having difficulty making up her mind. No letter was sent to Elaine Price

confirming her appointment after two months in the job. Ms. Furlong never spoke to Sheila Greene, the Shop Steward, about extending the trial period, only about an accommodation in reference to the harassment issue. Ms. Furlong did not view the flexibility provided Elaine Price while she was deciding as an extension of the trial period.

Gerard Ward testified that the Senior Negotiator position was always worked out of the St. John's office. There was a general opinion that every Employee Relations Officer was qualified to do that job. When Leo Puddister was Senior Negotiator he also served as a correctional officer in St. John's but generally the Senior Negotiator did not work outside St. John's. The witness did not hear of the harassment complaint until after this grievance was filed. The Collective Agreement required that the most senior person with the minimum qualifications was entitled to the job pursuant to the job posting.

Leo Puddister testified as to the work of the Senior Negotiator and the history as to how the position evolved. The Senior Negotiator position was always appointed to the St. John's office and it was anticipated that incumbents would work out of the St. John's office. Senior Negotiators for the Union generally came from the rank of senior Employee Relations Officers. Those who worked in the position were some of the Union's most experienced people and included Jim Ryan, the Grievor, Phyllis Loder, and Chris Henley.

The evidence put forward during the preliminary objection as it relates to this matter was also considered. The evidence of Sheila Greene is relevant. Ms. Greene was the Shop Steward at the time and assisted Elaine Price with her harassment grievance. There were various discussions with the Union President Carol Furlong on this issue. There was no accommodation for Elaine Price, save for some discussion of removing her from the GFW office. However, there was no amendment to the Collective Agreement and the issue was limited to that discussion.

Sheila Greene testified that all job postings stated a location for the job. The witness was aware that while Elaine Price was Senior Negotiator, there were times that she was not in the

St. John's office but she did not know her daily whereabouts. She did have conversations with her while Elaine Price was in the GFW office.

POSITION OF THE PARTIES

The Union

In this instance, the job posting was for the temporary position of Senior Negotiator in the St. John's office. As a result of the posting, there was only one applicant and a member of the bargaining unit received the promotion. However, the Grievor, who was senior to the successful applicant, would have and could have applied if the information on the posting had been complete. Following the promotion, the Employer made retroactive changes to the nature of the job.

In this hearing the Employer has made various submissions in an attempt to explain. The Employer stated, by way of preliminary objection, that there was no Collective Agreement in place at the time. However, that preliminary objection was unsuccessful. The Employer then stated that there was a harassment factor pertaining to another grievance which resulted in the successful applicant receiving an extension to the trial period. However, the evidence of the Shop Steward and the Union President is not consistent on this issue.

Furthermore, if there was a harassment issue, the successful applicant could have transferred into other positions in St. John's at the time. There was no report presented into evidence in reference to that matter. It took the Employer seven months to say that harassment was the reason that the successful applicant was allowed an extension of the trial period in violation of Article 11.04 of the Collective Agreement. Furthermore, there was no indication whatsoever that the Employer went to the Union citing harassment problems. All this seems to be justification and a rationalization after the fact, because the Collective Agreement was breached.

There is no indication that the job posting was in any way different from previous postings. There was no information whatsoever in the job posting regarding extended trial periods or any leniency in applying the Collective Agreement.

The Collective Agreement provides the rules. It is prescribed in the jurisprudence that job postings are made in good faith. Yet, the Employer violated the Collective Agreement. Because of what transpired, every member of the bargaining unit was denied something, including the person who filed the grievance.

The language in Article 11 was clear. Everyone knew the rules pertaining to the posting. The person with the minimum qualifications has to be given the job and there is a trial period. If the Grievor had applied, he certainly would have been awarded the job, because he had both the qualifications and the seniority.

If there were extenuating circumstances, as the Employer alleges, certainly the Employer could have gone to the Union and asked that the trial period be extended. This was not done. This is a Collective Agreement and therefore individual employees cannot cut their own deal.

Did the job as posted equate with the job as awarded? It is the Union's position that it did not. Others would have the right to apply for the job if what transpired after the incumbent was awarded the position had been made known in the posting. The Grievor was denied his rights under the Collective Agreement.

In short, the Employer posted the position and changed the rules after the appointment was made. The Employer acted in bad faith. The Employer cannot manipulate a job posting. The Union is requesting that the grievance be allowed and that the parties be given thirty (30) days to deal with issues pertaining to a remedy.

The Employer

When this grievance was filed, the Grievor had reached the conclusion that the successful candidate for the job posting of Senior Negotiator was working out of the GFW office. The grievance was filed on June 1, 2008, and the successful candidate had only been awarded the job on May 27, 2008. Elaine Price's schedule indicates that she had returned to the Grand Falls' office on June 1 and it was after that the grievance was filed. Based on that occurrence, the Grievor created a prism of preconception from which he based all subsequent facts.

The fact is that the job posting stated the location for the job was to be in the head office in St. John's. Ms. Price applied for the job in writing and was the only person to do so. Based on her written application, she was awarded the job. The essence of the grievance is that the job as posted was not the job awarded. It is agreed that the Employer cannot post a job and omit an important piece of information and then after the fact change the requirements. That would be a breach of the Employer's obligations. However, the Employer did no such thing here.

When Ms. Price was awarded the position the Employer informed Ms. Price that she had to operate out of the St. John's Head Office. However, the Employer also told her that previous work at her prior location should be completed. That is perfectly within the Employer's prerogative. The Employer has a right to assign specific duties to any employee. It was reasonable for the Employer to direct Ms. Price to finish her ongoing work.

Ms. Price's own records indicate that as Senior Negotiator she spent more than twice as much time in St. John's than in Grand Falls. The exhibit EPI, the weekly attendance record, shows the pattern and provides a history of Elaine Price's work in the Senior Negotiator position. The weekly attendance records certainly do not support the Union's contention that Elaine Price was working out of the Grand Falls' office. Elaine Price's evidence was that her work obligations were in St. John's. This is supported by the daily attendance record (EP1). The core part of the job was in St. John's. There was other work outside of St. John's which

formed some of the duties as Senior Negotiator. Ms. Price had testified that she would have liked to split the job between St. John's and Grand Falls. Ms. Price was told that was not possible and could not be done.

There is no disputing the Grievor's qualifications. If he had applied for the position as posted, he would have gotten the job. But the Grievor, by his own admission, had no interest in working in the St. John's Head Office. The job was located in St. John's and that was the fact. The issue ends there.

Furthermore, this is not a grievance about trial periods. The grievance was filed on June 1. Therefore, this is not about Article 11.04 as such. Elaine Price performed satisfactorily in her position. She was the only candidate who applied for the position. Factually, the Employer gave Ms. Price an extension of time to make up her mind to see what she would do. Ms. Price was given until the end of the year to make her decision. Further, Elaine Price had filed a harassment complaint, which was a serious matter, and these were extenuating circumstances. The accommodation from the Employer to Ms. Price was in the extension of time to allow her to decide if she would relocate to St. John's or to return to Grand Falls to her former position.

On June 1, 2006, this grievance was filed. It was based on speculation. Nothing then was known as to how matters would proceed. The job in the posting was St. John's based and remained St. John's based. Article 47.01 protects the terms of the Collective Agreement. There has been no violation of the Collective Agreement. The grievance should be denied.

CONSIDERATIONS AND REASONS FOR THE DECISION

This grievance dated June 1, 2006, alleged that the Employer relaxed a job posting location requirement which stipulated that the successful applicant was to work in the St. John's head office. The grievance stated further that the Employer failed to make known all of the requirements in the job posting so that the most senior employees in regional offices could apply. The job posting for Senior Negotiator closed May 23, 2006, and stated:

SENIOR NEGOTIATOR (Temporary)
(Open to male and female applicants
LOCATION: Head Office, St. John's

Duties:

1. Supervises daily work and schedules of Employee Relations Officers and Administrative Assistants II – Regional offices.
2. Supervises the operation of Regional Offices.
3. Advises the President on allocation of staff in negotiations. Assists in development of strategies for negotiations.
4. Conducts regular ERO meetings and assists in the development and maintenance of a staff training and development program.
5. Maintains a general supervision of membership services, inquiries/appeals to the Union.
6. Shall be responsible for the efficient prosecution of grievances to arbitration.
7. Recommends approval of overtime where warranted.
8. Assumes responsibility for such other duties as assigned from time to time by the President.
9. Successful applicant will currently assume a regular ERO caseload, in addition to the above duties.

Qualifications:

University graduation in labour relations or related fields or the equivalent in experience and training.

Extensive knowledge of labour legislation, labour relations with the demonstrated ability to interpret legislation and government regulations and apply same to the workplace.

Practical workplace knowledge in the application of Collective Agreements.

A strong belief in Union principles and the rights of working people in the workplace.

The ability to supervise Union staff on a continuing basis.

Remuneration:

As per the Collective Agreement.

Reporting:

The Senior Negotiator reports to the President.

Closing: May 23, 2006

The relevant articles of the Collective Agreement included:

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

11.03 <u>Role of Seniority in Promotions and Transfers</u>

Both parties recognize:

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

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

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

Although the Grievor did not apply for the position as posted, the Grievor was senior to the applicant appointed to the position. In fact, the Grievor is the second most senior employee within the organization, as is evident from the February 2007 Seniority Roster. At 6:0000, Brown and Beatty make reference to the importance of seniority as follows:

> Seniority systems are an integral part of virtually every collective agreement. They define eligibility for a wide variety of monetary and fringe benefits provided for in collective agreements, and they determine an employee’s entitlement to particular jobs

in the context of promotions, transfers and layoffs. With all of the terms and conditions of employment to which they are linked, seniority provisions are designed to reward employees for longevity of service. The theory underlying such systems is to provide those employees possessing the longest record of service in the context of a layoff with the greatest job security and, in the context of a promotion, with the greatest potential for advancement. The extent to which a particular seniority provision secures such benefits will depend in large measure on the scope or definition of an employee's seniority, the manner in which the agreement provides for its application, and the extent to which it is qualified by such other considerations as skill and ability. Notwithstanding enormous variation in all of these matters in collective agreements, all arbitrators start from the premise that:

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

Collective agreements usually reflect the importance of seniority in any job competition. Brown and Beatty at 6:3000:

> Although every collective agreement is distinctive in some respects, typically seniority rights are qualified by requirements of skill and ability in one of two ways:
>
> > Two alternative themes are generally found in seniority articles. **Under one, seniority is qualified in greater or lesser degree by a requirement of ability or competence to do the required work. In such a case, a senior man who is equal to the job is entitled to it, although there may be a junior applicant who can do it better.** The other theme involves a contest between competing applicants, and seniority governs only when their competence or ability is relatively equal. (Emphasis added)

Here, the parties agree that Article 11.03 is what is commonly referred to as a sufficient ability clause – the first theme referenced above.

In this instance there was but one applicant and the Employer chose that applicant to fill the job posting. The scope of an arbitrator's ability to review a management decision is limited. Brown and Beatty at 6:3100 state:

> Notwithstanding the many variations in the type and language of seniority clauses that may be included in collective agreements, there has been relatively little dispute among arbitrators as to the general scope of their review of managerial decisions that are made according to any of the standard promotion and layoff regimes. In the first place, there is a consensus that regardless of the language of the agreement, the standard of arbitral review of managerial decisions that involve an assessment of the abilities of employees is less demanding than that used in discipline cases. As a general rule, arbitrators have been reluctant to interfere with managerial decisions of this kind unless there is evidence of arbitrariness, discrimination, bias and/or bad faith, or an indication that the employer's judgment was unreasonable in some basic and significant respect. In the usual case, and particularly when the job is a skilled and technical one, the issue is not viewed as whether the grievor in fact possesses the requisite skill and ability but, rather, whether the employer's decision as to those matters was reasonable in the circumstances. From the earliest awards it has been said that the primary function of an arbitrator's review is to ensure that:
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> > … the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling.
>
> In most cases, arbitrators have not restricted their inquiries to analyses of the *bona fides* of the employer's motives. In addition, as the extract confirms, arbitrators have always examined the merits of such decisions at the time they were made against a standard of reasonableness. As summarized by one arbitrator, an employer's decision will be tested for its honesty, its completeness and its correctness under a test of reason. For others, a test of reasonableness centres on an assessment of whether management has deviated from the path of rationality or relevancy. Another formulation asks whether the decision was based on evidence that is so minimal that no employer, acting reasonably, could have arrived at that decision.

In quoting a decision from the Ontario Divisional Court, the authors state at 6:3100:

> The board as a creature of the collective agreement must then see to it that the provisions of the collective agreement have been complied with; its role cannot be more or less than this. The honesty and lack of *malafides* in making the decision are factors

> to be taken into account. So, too, is the question of whether or not the employer has acted unreasonably. Indeed, in determining the "reasonableness" of the employer's decision, the board may go a long way to determine the issue submitted to it. However, once the collective agreement makes provisions as to the method of selection of employees for promotions, then the board must see to it that those provisions have been complied with and in so doing, it cannot restrict itself to determining whether the employer acted honestly and reasonably. If the board is not to make such a decision, then the parties in the collective agreement should ensure that management's right in this regard is unfettered.

Finally, Brown and Beatty state at 6:3100:

> Although reasonableness and correctness are the standards against which an employer's evaluation of an employee's ability and qualifications are usually tested, in some cases it is claimed that a decision was arbitrary, discriminatory, biased and/or made in bad faith. Employees have prevailed when they were able to show that the employer did not apply its standards consistently, displayed favouritism or failed to even consider them for the job. Decisions that are not in conformity with human rights legislation will be found to be discriminatory as well.

The burden of proof rests with the Union. Brown and Beatty in Canadian Labour Arbitration, at 3:2400, state:

> The obligation of having the onus or burden of proof means the party bearing it will not succeed when, on the basis of the evidence adduced and argument presented, the result has not been pointed to one way or the other in the mind of the arbitrator. That is, for the party with the onus of proof to succeed, the scales must tip in its favour. However, where there are two conflicting versions of what occurred, the arbitrator must first resolve which one is correct before applying the foregoing principle. …
>
> In the allocation of the burden of proof, the general principle is that "the onus of proof in all cases rests primarily on him who asserts a claim to establish and prove it and not on the other side to disprove the claim". And in grievance arbitrations, it is generally accepted that the Grievor has the ultimate burden to make out a breach of the collective agreement except in cases of discharge where the initial burden to prove a *prima facie* case is met by proving the collective agreement, the fact of employment, and the dismissal.

In this case, there was no dispute that the job as posted complied with the requirements of Article 11:02 of the Collective Agreement. There was no stipulation in Article 11:02 for the

location to be included in the job posting. However, based on the evidence, this has been a consistent practice and I am satisfied that a statement of the location for the job was the prevailing precedent in a job posting.

It is the Grievor's contention that the Employer, without notifying the bargaining unit, relaxed the requirement that the position of Senior Negotiator be located in and worked out of the St. John's head office. If the job was to be worked out of the Employer's GFW offices, then the Grievor would have applied for the position. Certainly, if the Employer had relaxed the job location requirement, that would be a relevant factor for employees in considering an application for the position. But was that the case?

Historically, the Senior Negotiator position has always been located in the Employer's St. John's head office. Further, it would seem highly improbably in this instance that, given all of the circumstances, the Employer would change the location of the job to the GFW office, when appointing the successful applicant to the position. The Employer would have known that the Grievor, a senior Employee Relations Officer, had relinquished the position of Senior Negotiator, as directed by the Employer, after he moved from the St. John's head office to the GFW office in 1991. Further, the Grievor had objected when Clarence Rice, having succeeded the Grievor to the position of Senior Negotiator, wanted to work in that position from the Employer's Corner Brook office and not move to the Employer's St. John's head office. The Grievor is a seasoned Trade Unionist who has negotiated and administered numerous Collective Agreements throughout his tenure with this Employer. Any bad faith move to manipulate a job posting after the fact, and in particular on the sensitive issue of the job location for the Senior Negotiator, would not escape the Grievor's attention. In short, it was known among Employee Relations Officers, the Grievor included, that the job of Senior Negotiator was a St. John's head office based position.

The successful applicant, after acquiring the Senior Negotiator position on May 27, 2006, and until she relinquished the position at the end of 2006, maintained her residence in Grand Falls-

Windsor. The evidence is, nevertheless, that the successful applicant, while she held the position, worked more time in the St. John's head office than she did in the GFW offices. In the GFW offices she continued with the conduct of existing files accumulated while she was an Employee Relations Officer before her appointment to the Senior Negotiator position. The difficulty arises in this instance because the successful applicant, after accepting the Senior Negotiator position as posted, sought an arrangement whereby she could work some days in the GFW office and other days in the St. John's head office.

The Union President's evidence was that the successful applicant was informed by the Employer prior to accepting the Senior Negotiator position that she would be required to move to St. John's to work in the head office. There is no evidence that the Employer told the successful applicant anything other than that the job of Senior Negotiator required that she move to the head office in St. John's and work from there. The Employer's position on the St. John's head office location was consistent. While, the successful applicant may very well have hoped that the Employer would accept an arrangement whereby she would be able to work some days out of the St. John's head office and other days in Grand Falls-Windsor as Senior Negotiator, that was not the Employer's position. Both at the time of the job posting and after the successful applicant was appointed to the position of Senior Negotiator, the Employer's position was that the job of Senior Negotiator was to be located in and worked out of the Employer's head office in St. John's.

In conclusion, the Employer may not have been prudent in allowing the successful applicant latitude, in addition to her rights under the Collective Agreement, in making her decision to relocate. Based on the evidence, the Employer did not relax the requirement that the position of Senior Negotiator was to be located in and worked out of the Employer's St. John's head office before or following the successful applicant's appointment to the position of Senior Negotiator. I can find no breach of the Collective Agreement as alleged in the grievance dated June 1, 2006. Consequently, the grievance is denied.

DECISION

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

DATED at St. John's, in the Province of Newfoundland and Labrador, this 30th day of October, 2009.

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Dennis M. Browne, Q.C.
Arbitrator / Mediator