

- Vacation Entitlement
- Management Rights
- Grievance procedure

**FINDINGS AND AWARD
IN A DISPUTE**

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

(hereinafter called the "Union")

AND: **PURITY FACTORIES LIMITED**
(hereinafter called the "Employer")

GRIEVOR: **BRIDGETT BERESFORD**
FOR THE UNION: **AMANDA GALWAY**
FOR THE EMPLOYER: **JOHN PEDDLE**
BEFORE: **W. JOHN CLARKE, C. Arb., C. Med., Sole Arbitrator**

PRELIMINARY

The hearing of this matter took place in St. John's on June 29, 2009 at which time the parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections 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 for a period of 90 days following publication of the Award 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. Witnesses were permitted to stay throughout the hearing.
6. The time limits for filing the Award were waived.
7. There was no person potentially affected by the outcome of these proceedings



who has not been notified of same.

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

- C#1 Collective Agreement between the parties expiring June 26, 2010.
- C#2 Grievance dated October 2, 2008.
- C#3 Letter from Amanda Galway of the union to Doug Spurrell of the employer dated October 2, 2008.
- C#4 Letter from Doug Spurrell to Amanda Galway dated December 8, 2008.

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

For the Union:

Bridgett Beresford, the grievor:

For the Employer:

Warrick Pinsent who entered the following:

WP#1 Notes of a meeting dated March 29, 2007.

THE GRIEVANCE

On October 2, 2008 the union filed a grievance which was stated as follows:

“ violation of Article 16.05 and all other pertinent articles of the Purity Factories private agreement.”

The union requested: "Full redress. Full retroactivity"

The employer denied the grievance in a letter to the union dated December 8, 2008. The letter reads in part as follows:

"This will acknowledge receipt of the above grievance claiming a violation of Article 16:05 and all other pertinent articles of the Purity Factories private agreement. The grievance requests 'full redress, full retroactivity'.

There is no 'private agreement' between Purity Factories and any employee regarding vacations, we follow the Collective Agreement between NAPE and Purity Factories for all employees.



Before this grievance was filed you had several conversations with Mr. Warrick Pinksen and Mr. John Peddle over the interpretation of clause 16:05 of the Collective Agreement. The interpretation provided by both Mr. Pinksen and Mr. Peddle was the same, in that Bridge Beresford was not entitled to any payment for vacation as she had not worked in 2008.

During the meeting on November 5, 2008, you made no reference to NAPE's interpretation of the Collective Agreement that would justify the Employer changing its position. Your request was more for a gratuitous payment to Ms. Beresford because of her circumstances. During the November 5th meeting the Employer pointed to discussions that had taken place with the Local Union representatives on March 29, 2007 whereby the local representatives were demanding that an employee who was off, similar to Ms. Beresford, not be placed on the vacation schedule and not entitled to vacation until the year in which they return to work.

It is the Employer's position that Bridget Beresford has been paid for all vacation that she has earned and entitled to based on the Collective Agreement and the interpretation of the Collective Agreement by both parties over the years. The Employer denies Bridget Beresford's grievance dated October 2, 2008 and we would ask that NAPE reconsider its position and agree with the interpretation of the Collective Agreement that the parties have followed for years and drop the grievance..."

THE COLLECTIVE AGREEMENT

The relevant provisions of the collective agreement read as follows:

"ARTICLE 7 GRIEVANCE & ARBITRATION PROCEDURE

7.01 Definition of Grievance

A grievance is defined as a dispute arising out of the interpretation, application or alleged violation of this Collective Agreement. There shall be no lockout by the Employer or any strike, slow down, stoppage of work or interference of the Employer's business by the Union or its members, but such grievances shall be settled by the procedure outlined in this Article.

7.02 Grievance Procedure

An earnest effort shall be made to settle grievances fairly and promptly in the following manner:

Step 1

The aggrieved employee shall within five (5) working days of the occurrence of the alleged grievance, submit his/her grievance to a Shop Steward.

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Step 2

If the Steward considers the grievance to be justified, the employee concerned, together with the Shop Steward, may within five (5) working days following receipt of the grievance, submit the grievance, in writing, to the employee's Supervisor. The Supervisor shall reply within three (3) working days.

Step 3

Failing a satisfactory answer at Step 2, the Steward may within a further five (5) working days submit the grievance to the Employer which shall include a written statement outlining the particulars of the grievance and redress sought. The Employer, for the purpose of settling the grievance, shall form a Committee consisting of four (4) persons comprising an equal number of the Employer and Union representatives. The Union shall appoint two (2) representatives to the Committee. One of the Employer representatives shall Chair the meeting. If the matter is not mutually resolved by the Committee, then the Employer shall give its final position to the grievor within ten (10) calendar days of the Committee meeting.

...

7.08 **Policy Grievance**

Where a dispute arises involving a question of general application or interpretation of this Agreement, the Union or the Employer may initiate a grievance at Step 3.

...

10.10 **Loss of Seniority**

The seniority of an employee shall be considered broken and all his/her rights forfeited when he/she:

...

- (e) an employee who is off on illness or disability in excess of twenty-four (24) months shall not be entitled to any benefits of this agreement except for seniority for layoff and recall purposes only. After sixty (60) months of being off on illness or disability, the employee shall lose his/her seniority. An employee who returns to work after the twenty-fourth (24th) month and before the sixtieth (60th) month will receive the benefits of the agreement on a pro rated basis for the year in which he/she returns to work from illness or disability; or,

...

16.05 **Length of Vacation**

- a) All employees who have completed one (1) year employment with the Employer shall receive two (2) weeks' vacation with pay in accordance with the Labour Standards Act.



- b) All employees who have completed five (5) years employment with the Employer shall be entitled to three (3) weeks' vacation with pay.
- c) All employees who have completed eleven (11) years employment with the Employer shall be entitled to four (4) weeks vacation with pay.
- d) All employees who have completed twenty-two (22) years employment with the Employer shall be entitled to five (5) weeks' vacation with pay.
- e) In view of the seasonal nature of the Employer's business, the third, fourth and fifth weeks of vacation shall be taken separately from the first two (2) weeks and shall be subject to the operational requirements of the Employer. The selection of the third, fourth and fifth weeks of vacation shall be done by seniority in the department.
- f) Notwithstanding anything in the Clause, employees hired after August 25, 1989 who do not work a full year shall be entitled to vacation as outlined in Clause 16.05 (a), (b), (c) and (d) on a pro rated basis, based on their hours of work the previous year.
- g) Should an employee be laid off during his/her scheduled vacation, he/she shall have the option of remaining on vacation or taking the day off and rescheduling the remainder of his/her vacation. In the event an employee is scheduled for layoff, he/she shall have the option of taking the day off or using any vacation entitlement due to him/her."

THE FACTS

The grievor began working with the employer on July 19, 1982. She was a full-time general helper and occasionally was laid off when work was slow. The grievor explained that every year around April, Mr. Pinksen inquired of the employees as to what vacation time they wanted. The system worked in order of seniority and everyone put down the first two weeks they wanted and the balance would be determined later. It was her understanding that her vacation year started in January and if an employee wanted to vacation in February they would ask Mr. Pinksen and, if the employer was not too busy,

he would allow them to take it then. The plant is usually closed for the last week of July and the first week of August during which time everybody takes vacation.

In 2007 the grievor worked in January and February but could not recall for how long. She as well could not recall if Mr. Pinksen had asked her about vacation. On March 5th, 2007 she was involved in an accident outside the workplace. She was paid her 15 weeks sick time and then was in receipt of Employment Insurance benefits. In July 2007 she was paid for two weeks vacation. She was not scheduled for any vacation time in 2007. She was paid the remaining three weeks' vacation before the end of 2007. She received no vacation time or pay in 2008. She did not expect to receive a call and she did not receive the five weeks pay before the end of that year.

Warrick Pinksen, who is the production manager and has been with the employer since June 1976 testified that, to the best of his knowledge, no one had ever been paid vacation in a year in which they did not work. He explained his understanding of the vacation system as being if an employee begins employment, for example, in July 2008, they are not entitled to any vacation until July 2009. They have to pass the anniversary date of their employment before they are entitled to vacation. In the instant case the grievor started in July 1982 and therefore would not be able to take any vacation before July 1983. He explained further that after January in the third year after commencement of employment, employees can select when in that calendar year they wish to take their first two weeks vacation. This has been the practice every year for 40 years.

If an employee is off work in one calendar year going into another calendar year and returns for example in March of that second year, there is no vacation until after March. Mr. Pinksen acknowledged that this situation is not spelled out in the collective agreement but has been the practice. All holidays are paid out at year end and none are carried forward to the next year.

Minutes of a meeting attended by the local union President and management in March 2007 were entered as evidence and read as follows:

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“A short meeting was held on Thursday, March 29, 2007, to discuss whether or not someone who was off of work due to illness could call in and request Annual Leave. It was agreed upon by all parties that this could not be done. It was mutually decided upon that those who were off of work (long term) would have to choose from the available holiday, once they returned to work. As well, a person can not choose holidays in a year where they have not worked.”

This meeting was held in response to a situation where the protocol, as explained by Mr. Pinksen, was not followed and someone received vacation who was not entitled to it. This was the result of an error made by management. The meeting resulted from disapproval by members of the union for what had happened when a person who had not been working in the year was mistakenly permitted to take vacation.

THE UNION'S POSITION

The union summarized the grievor's situation as having been hired in a permanent full-time position in 1982. She worked until March 2007 when she was injured outside work. She received a 15 weeks weekly indemnity and after that was on unpaid sick leave. In 2007 she worked only a couple of months and was paid five weeks vacation. She received no vacation time or pay in 2008.

The union argued that article 16.05 (f) provides the basis for prorating the benefits due to the grievor in 2007. It argues that it was a result of this formula that the grievor was paid for her vacation in 2007. The same logic should apply to 2008 and she should receive some benefit. Until she has been absent for 24 months, she is entitled to the full benefits of the collective agreement including vacation. Her injury was in March 2007 and her benefits should expire two years later i.e. in March 2009. After two years she loses all seniority unless she returns before the 60th month.

However, one must read article 16.05 (f) which states that a person who does not work a full year shall be entitled to vacation as set forth in that article but it is based on their hours of work in the previous year. Therefore, the grievor is entitled to prorated vacation pay for 2008 based upon the hours worked by her in 2007 (ie. two months). If the



collective agreement is meant to deprive an employee of their benefits, then it must do so expressly.

With respect to the issue of past practice, union stated that four conditions must be present in order to rely on such a practice:

1. there must be a clause in which the words are unclear;
2. one party must engage in conduct which attributes a meaning;
3. the other party must acquiesce in the conduct-expressly;
4. the acquiescence must be by an official who is charged with the duty of doing so.

In this case there is no strong history of conduct to make out these conditions. With respect to the incidents cited by the employer there is no evidence that those employees ever requested pay for vacation. One cannot say that the union agreed to it as it may not have even known.

The union asked that the grievance be allowed and that the grievor be paid the prorated vacation pay for 2008.

THE EMPLOYER'S POSITION

The employer argued that the history of the grievor is clear in that she went off work in March 2007 on weekly indemnity and was then covered by a separate insurance policy which was not that of the employer. The accident happened away from work.

The employer argues that article 16.05 is based upon the provincial Labour Standards legislation which says that an individual must have a year of employment in order to avail of vacation. July 19 is the grievor's anniversary date of employment. That is the trigger date for awarding vacation benefits. Five years after that trigger date she moves up a notch on the vacation ladder and is then entitled to three weeks vacation. In a year in which the grievor works there is no issue. Article 16.01 dictates that the vacation period shall be from May 1 to December 31. The grievor can select her vacation in January of that year. The employer permits the employees to select their date in January

notwithstanding what the anniversary date of their hiring is. Vacations are to be selected by all employees by April 15 in each year but are taken only after May 1. If followed strictly, no employees would get vacation prior to that date. However, the employer has on occasion, permitted it to happen.

The selection of vacation is done in order of seniority. As long as an employee has started work in any calendar year they are permitted to take vacation for that year. If it is not possible for the employee to take vacation in that year, the balance is paid out to them by December 31. There is no carry over to the next year. If an employee has not worked in the calendar year they are not entitled to take vacation in that year. This has been accepted by the employees and the union. Minutes were produced of a union management meeting wherein the president of the local union was in attendance and confirmed this principle.

Article 16.05(f) of the collective agreement is not applicable to this situation. It applies only to employees who were hired after August 25, 1989, a group into which the grievor does not fall. This clause is meant to prevent employees who work only part of a year from getting a full vacation. The issue in this case is purely one of whether or not the grievor is entitled to vacation and not its calculation.

Article 10.10 is designed to cover situations where a grievor returns to work after being off for a period of time and to limit the benefits to which such a person is entitled.

The employer argues that the union has filed this grievance under article 7.03. The only way a grievance such as this can be processed under this collective agreement is pursuant to article 7.08, the policy grievance provision. Grievances filed under this section are not entitled to individual redress and the only thing an arbitrator can offer is an interpretation of the sections.

The employer requested that the grievance be denied.

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FINDINGS AND CONSIDERATIONS

This grievance is filed by the union on behalf of the grievor. Article 7 of the collective agreement defines a grievance as a dispute arising out of the interpretation, application or alleged violation of the collective agreement. It then sets forth the various steps in the grievance procedure, one of which is that the aggrieved employee shall, within five working days of the occurrence of an alleged grievance, submit his or her grievance to a shop steward. The steward shall then, if they think the grievance is justified, submit it in writing to the employee's supervisor. This step has not occurred in this situation. The matter was filed with the employer by the union on behalf of the grievor. No proof was tendered that the shop steward had any involvement with the process. The employer alleged that there was no such involvement. The only way permissible under the collective agreement for a grievance in such circumstances to be heard at arbitration then, is for it to begin at article 7.08 which specifies that when there is a dispute arising involving a question of general application or interpretation of the agreement the union or the employer may initiate a grievance at step three. This, in my view, is what happened. The employer argues that because this therefore is a policy grievance, it follows that damages cannot be awarded.

In Canadian Labor Arbitration (3d.), Brown and Beatty, (Canada Law Book Inc.) at section 2:3124 the issue of policy grievances is discussed. The learned authors state:

"A policy grievance is usually considered to be one that does not depend upon the behaviour of an individual employee or one that does not affect the individual specifically.... Thus, where the relief sought was peculiarly individual, such as a claim for monetary redress, reinstatement, relief from improper recall or lay-off, arbitrators either held such grievances to be inarbitrable as policy grievances, or alternatively limited the relief to a declaration only. However, this approach is no longer applied with the same vigour and it has been substantially eroded. Now, only where the collective agreement specifically prescribes the range of union policy grievances is it likely that such a limitation will be found to exist."
(Citations omitted)

As no specific prescription of the range of union policy grievances has been brought to my attention, it is my view that the restriction argued for by the employer cannot be




sustained and I therefore find that a monetary award may be made should one be found to be warranted in the circumstances.

Article 16.05 deals with the method of calculation of the length of vacation to which an employee is entitled. It also sets forth guidelines as to when individuals become entitled to certain periods of vacation. Employees work their way through the various stages from an entitlement of two weeks' vacation after having completed one year of employment to five weeks of vacation upon completion of 22 years of employment. Clause (e) of that article deals with when in the calendar year a vacation may be taken. Clause (f) stipulates that employees hired after August 25, 1989 who do not work a full year shall be entitled to the vacation weeks as previously specified in that article on a prorated basis based upon their hours of work the previous year. The grievor does not fall into this group. She began her employment in 1982 and therefore does not qualify for the proration dealt with in that clause.

It was suggested that the grievor's situation is covered under article 10.10(e). This clause however, is of no benefit to the grievor. On the plain wording of the clause it says that an employee who is off on illness or disability in excess of 24 months shall not be entitled to any benefits of this agreement except for seniority for layoff and recall purposes only. Firstly, the grievor, at the time of the grievance, had not been off for a period of 24 months. She left in March 2007 and the grievance was filed in October 2008, some 6 to 7 months short of 24 months. Even if she had been off for in excess of 24 months the only benefit which this clause would provide to her is access to seniority for layoff and recall purposes only.

How then does this collective agreement deal with benefits such as vacation for employees who do not work in a calendar year, were not hired after August 25, 1989 and are off on illness or disability for less than 24 months? The simple answer is that this collective agreement does not deal specifically with that situation. A close examination of article 16.05 reveals that there is no specific provision there dealing with the amount of time an employee must be at work in order to qualify for vacation in any one year. It

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deals only with the calculation of the quantum of vacation time, who has first choice as to dates and at what times during the year it can be taken. It deals specifically with employees hired after August 25, 1989 in the position of the grievor and what happens in the event of a layoff during vacation. The evidence reveals, and this is not denied by the union, that the employer does not grant holidays, or pay in lieu thereof, to persons who have not worked in the calendar year in which the vacations are sought. The union however, disputes the employer's right to do this.

Article 6 of the collective agreement entitled "Management Rights" reads in part as follows:

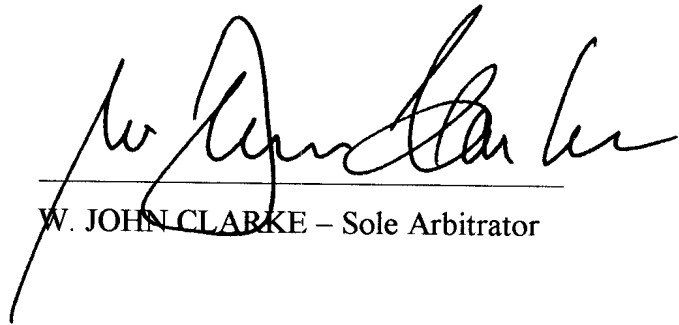
"It is expressly understood, agreed and declared that, subject to the terms and conditions of this Agreement, nothing herein shall be interpreted as limiting the Employer in any way in the exercise of the regular and customary functions of management, including the introduction of technical improvements and changes in the methods of operation, and the right to engage, layoff, promote, transfer and for just and reasonable cause to reprimand, suspend or discharge..."

The collective agreement provides management with the right to exercise the regular and customary functions of management in areas not covered by the collective agreement. The grievor's situation where vacation time is prorated for employees hired August 25, 1989 or earlier is not covered in the agreement. It would seem the employer has exercised that management function related to that group in this case. However, management has not acted alone in this exercise. It has involved the employees in the process as evidenced by the minutes of the meeting held with the President of the local union. In that meeting the two parties agreed that someone who was off work because of illness could not call in and request annual leave and a person could not choose holidays in a year they had not worked. That system has been in effect as long as Mr. Pinksen could remember during his employment and has been acquiesced in by the union who in fact, has objected when a contrary course of action was mistakenly used by the employer.

As a result the grievance is denied.

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DATED at St. John's, Newfoundland and Labrador this th 12 day of November, 2009.



W. JOHN CLARKE – Sole Arbitrator