

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

GOVERNMENT OF NEWFOUNDLAND AND LABRADOR,
DEPARTMENT OF GOVERNMENT SERVICES
(hereinafter called the "Employer")

GRIEVOR: Charmaine Snelgrove

COUNSEL: For the Union

Hubert Sutton

For the Employer

Bernadette A. Cole Gendron

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on February 2, 2010. 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 was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter for ninety (90) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The following exhibits were entered at the hearing:

Consent 1 - Emails exchanged between the Grievor, Charmaine Snelgrove and Carol Ann A. Edgecombe, December 9 and 11, 2008

Consent 2 - Agreed Statement of Facts signed by the Union and the Employer

Consent 3 - General Service Collective Agreement between Her Majesty the Queen in Right of Newfoundland et al. and Newfoundland and Labrador Association of Public and Private Employees, date of signing February 25, 2009, expires March 31, 2012

Consent 4 - Grievance Form dated April 7, 2009

CS - 1 Letter dated April 11, 2008 from Glenn George, Human Resources Consultant to Charmaine Snelgrove

Nature of the Grievance

The Union grieves that the Employer is not entitled to recover an overpayment of salary from the Grievor. An overpayment occurred when the Grievor was promoted to a new position and was paid at an incorrect step level on the pay scale.

Collective Agreement

The parties do not dispute the Arbitrator's jurisdiction to apply the Collective Agreement that was in effect at all relevant times, following the Grievor's promotion to a new position in April, 2008. The parties agree that the relevant Collective Agreement language at all times was the same as the

current Agreement. The parties referred to Article 31.03 of the current Collective Agreement, which states as follows:

Article 31 Salaries
 ...
 31.03 (a) Promotion to Higher Pay Range

The rate of pay of an employee promoted shall be established at the nearest point on the new pay range which exceeds his/her existing rate by at least 5%, but shall not exceed the maximum of the new pay range. Where however, the rate of pay prior to promotion is above the maximum of the new pay range, his/her present rate shall be retained.

Evidence

The evidence was presented by Agreed Statement of Facts, and by the testimony of the Grievor, Charmaine Snelgrove. The Agreed Statement of Facts stated as follows:

1. The Grievor is an employee of the Government of Newfoundland and Labrador, and is currently working in the position of Design Approval Technician II, with Government Services Centre, Gander, NL, and is a member of the Newfoundland and Labrador Association of Public and Private Employees. This position is categorized in the pay range of GS-38.
2. Prior to this position, the Grievor held the position of Drafting Tech II, which is categorized in the pay range of GS-27. The Grievor was at Step 2 of the pay scale for this position, earning a salary of \$34,634.00.
3. On or about April 16, 2008, the Grievor began work in her current position, having been awarded this position through competition. Commencing April 16, 2008, the Grievor was paid at the level of GS-38, step 2, a salary of \$50,159.20.
4. On or about December 9, 2008, the Grievor contacted payroll and indicated that she believed a mistake had been made on her step increase. This related to a step increase that the Grievor had received as a result of her passing her yearly anniversary date for step progression. The Grievor had been moved to step 3 and indicated that she believed she should be moving to step 2. (See attached e-mail correspondence dated December 9, 2008, marked Consent Exhibit # 1).

5. Following the e-mail, it was determined that an error had been made in April, 2008 when the Grievor assumed the Design Approval Technician II position. At that time the Grievor was put on step 2, but should have been put on step 1, by virtue of A. 31.03, Promotion to a Higher Pay Range. The salary for step 1 would have been \$47,411.
6. The overpayment amount was calculated to be \$1,796.00, resulting from an overpayment between April 16 and December 3, being the difference between step 1 and step 2, and a further overpayment from December 4 to December 9, being the difference between step 2 and step 3 resulting from her yearly step increase. (See attached e-mail correspondence dated December 11, 2008, marked Consent Exhibit #1).
7. The Grievor advised the employer to deduct the overpayment from her pay at the rate of \$105.70 per pay period, which was the same amount that she was overpaid per pay period. (See attached e-mail correspondence dated December 11, 2008, marked Consent Exhibit #1).
8. All monies have now been recovered from the Grievor. The Grievor is seeking repayment of these monies.

Charmaine Snelgrove testified that she has been employed by the Provincial Government since December 4, 2006. She was appointed to the position of Design Approval Technician II effective April 16, 2008. Her letter of appointment, dated April 11, 2008, stated that her salary was in accordance with the GS-38 pay scale. She was told by her Director, Roger LeDrew, that she would be placed on Step 1 of the pay scale. The yearly rate posted on the job competition started at \$47,411.00, and she expected to be paid a salary at that rate. In her former position as Drafting Tech II, she was paid an annual salary of \$34,634.00 at GS-27, Step 2. When she was promoted to the new position, her placement at GS-38, Step 1 was the appropriate step and level on the pay scale in accordance with Article 31.03 of the Collective Agreement.

Ms. Snelgrove testified that she did not realize she was being paid at the yearly rate for GS-38, at Step 2 of \$50,159.20. Her pay stub showed her gross biweekly pay and not her yearly pay. She did not calculate her yearly pay from the pay stub. In December, 2008, she received an annual step increase which moved her to Step 3. At that time, following a discussion with a co-worker about an error in the amount the co-worker was paid, the Grievor realized that she had been paid at Step 2 and not Step 1 from April to December. She immediately contacted the Employer and the error was corrected. She was entitled to an increase from Step 1 to Step 2 in December, 2008. After

December 9, 2008, she continued to be paid at Step 2. She was asked to repay the overpayment in amounts of \$100.00 per pay period. She requested that the overpayment be repaid by deductions of \$105.70 per pay period, which was equivalent to the amount per pay period that she had been paid in error. She had been expecting a pay increase in December, 2008, but instead she received a net pay reduction. She said it was upsetting at the time to be told about the overpayment.

Ms. Snelgrove testified that she made purchases based on her new salary. In May, 2008, she purchased a new Toyota Tundra truck, valued at about \$46,000.00. She entered into a four year lease with payments of \$425.00 per month. She traded in another vehicle that had lower lease payments. The lease was registered in the names of both the Grievor and her common law partner. She and her partner have another vehicle that is also registered in both names. The Grievor testified that she and her partner purchased a house on September 19, 2008, at a cost of \$151,000.00. They arranged a 25 year mortgage in the principle amount of about \$115,000.00. The mortgage payments are about \$700.00 per month. She also bought a piece of land for future development at a cost of \$25,000.00. Prior to purchasing the house, the Grievor had been living at home with her parents and saving money for a down payment. She said she was reluctant to buy a house until she had a permanent job. The Design Approval Technician II position was her first permanent job. She said she made the purchases of the vehicle and the house based on her new salary. If she had known that she would be paid \$3,000.00 per year less, then she may have purchased a lower priced house or a house needing fewer repairs, or she may have delayed the purchase. Her common law partner is also employed and earns a salary similar in amount to hers. She still owns the house and vehicle and the payments did not fall into arrears when she was repaying the salary overpayment.

The Grievor testified that she discussed the matter with her Union shop steward. The grievance was filed on April 7, 2009 after the shop steward became aware of an arbitration award on a similar issue. A new Collective Agreement was signed in February, 2009. She received retroactive pay to April 1, 2008 calculated at the correct step level.

Union Submission

The Union submitted that soon after the Grievor received an increase in pay in her new job, she purchased a new vehicle and a new house. Her purchases were based on her net income as shown on her pay stubs. She discovered the overpayment and brought it to the attention of the Employer immediately. The Employer was entitled to correct the step level. The Grievor had been expecting

a pay increase in December, 2008. As a result of the error, she was expected to repay the overpayment, and also lose the increase that she had been expecting, for a total loss of almost \$3,000.00. The Grievor had made a material change in her financial circumstances. She had relied on a pay cheque that showed a gross pay of \$105.50 more than it should have been. The Union submitted that the arbitration award in *Newfoundland and Labrador Association of Public and Private Employees and College of the North Atlantic* (2009) 184 L.A.C. (4th) 25 (Oakley) (the "*Barron*" case) applied in this case. The Grievor had made financial decisions based on her income in the same way as the grievor had in the *Barron* case. The Grievor should not have had to repay the Employer. The Union requested that the grievance be upheld.

Employer Submission

The Employer submitted that it is entitled to recover an overpayment where there is a clerical error, as there was in this case. The onus is on the Union to prove any exception to the general principle that an overpayment is to be repaid. The Union is required to prove that the Grievor materially changed her circumstances in reliance on the amount paid to her in error. For example, the Grievor may prove that she made an expense, in reliance on the overpayment, that she would not have otherwise made. The Employer referred to case authorities and submitted that it was not sufficient to show that the Grievor had spent money. In some case authorities the grievance was denied because the evidence was found to be too vague and inconclusive as to whether a grievor had made purchases because of an overpayment. The Employer distinguished the *Barron* case, as a case where the grievor had received several letters from her employer confirming an incorrect salary. The error made by the employer in the *Barron* case amounted to about \$18,000.00 per year. The overpayment continued for a much longer time than in the present case. In this case the difference between the amount paid and the correct amount was \$2,748.00 per year or about \$75.00 net per pay period. The reason for the Grievor's purchase of a truck and house was that she received a promotion to a permanent job with an increase of about \$13,000.00 per year over the salary she was paid in her previous job. The Grievor did not materially change her circumstances in reliance upon receiving a yearly salary of about \$50,000.00. The evidence was vague with respect to the amount of repairs needed to her house or any other expenses. The Grievor knew that she was placed in the new position at Step 1 and she understood that her salary would be \$47,411.00. She did not expect to be paid at Step 2 or expect to be paid a salary in excess of \$50,000.00. The Grievor had repaid the overpayments and continued to make her house and car payments. The Employer requested that the grievance be denied.

Considerations

The Employer paid an overpayment of salary to the Grievor from April 16, 2008 to December 9, 2008 in the amount of \$1,796.00. The Grievor repaid the amount of the overpayment. The parties dispute whether or not the Employer was entitled to recover the overpayment.

The error occurred when the Grievor was promoted to the permanent position of Design Approval Technician II in April, 2008. The correct pay level was GS-38, Step 1 at an annual salary of \$47,411.00. By mistake, the Grievor was paid at GS-38, Step 2, at an annual salary of \$50,159.20. The Grievor's letter of appointment stated she would be paid at the GS-38 pay scale, but did not state a step level. She was informed by her supervisor that she would be paid at Step 1, which was the correct step in accordance with Article 31.03 of the Collective Agreement. Placement at Step 1 of the GS-38 pay scale would mean an increase in annual salary to the Grievor of about \$13,000.00 compared to her previous position. The Grievor was not aware of the mistake at first. Her pay stub showed her gross biweekly pay, not her annual salary. The Grievor did not calculate her annual salary, or realize there was an overpayment until December, 2008.

With respect to an employer recovering an overpayment, Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, at paragraph 8:1410, states as follows:

At common law, if the mistake that caused an overpayment, such as a clerical or mathematical error, can be characterized as a mistake of fact (rather than a mistake of law), the employer can recover whatever money had been paid unless there has been some detrimental reliance by the employees, there are limitations in the collective agreement or the employer has been guilty of unreasonable delay in seeking to enforce its rights.

Prior arbitration awards have discussed the requirements to be met to show detrimental reliance on an incorrect salary payment. In *Re Ottawa Board of Education and Federation of Women Teachers Associations* (1986) 25 L.A.C. (3d) 146 (P.C. Picher), an overpayment was made to a teacher based on a clerical error. The arbitrator found that the teacher would not have incurred certain moving and household expenses had she been aware of her correct salary entitlement. However, the arbitrator also found that it was likely that the grievor's purchase of a new house, and the career change made by the grievor's husband, would have occurred in any event. As a result, part of the overpayment

was ordered to be repaid. In *School District No. 39 (Vancouver) and IUOE, Local 963 (Harrison)* (2000) 92 L.A.C. (4th) 182 (Dorsey), the evidence was too vague and inconclusive to find that the grievor made purchases because of an overpayment in net pay. These cases demonstrate that it is not sufficient to show that expenses were made. It is necessary to demonstrate that the expenses would not have been incurred except for detrimental reliance on the incorrect salary payment.

The Union submits that there was detrimental reliance by the Grievor that she would continue to be paid the amount shown on her pay stubs and that she purchased a house and other items relying on the incorrect amount. The Union relies on *Newfoundland and Labrador Association of Public and Private Employees and College of the North Atlantic* (2009) 184 L.A.C. (4th) 25 (Oakley) (the “*Barron*” case) where the arbitrator found that the grievor had changed her financial circumstances based upon her salary and her letters of appointment showing an incorrect salary amount.

The facts of the *Barron* case may be distinguished from the present case. In the *Barron* case, the grievor received several letters of appointment from her employer stating the annual salary amount and step level that the grievor was paid. The grievor in the *Barron* case was expecting to be paid the annual salary as stated in her letters of appointment. However, the employer had mistakenly calculated the salary payable to the grievor. There was a substantial difference of about \$18,000.00 per year between the amount the grievor received and the amount she would have received had the employer not made the mistake. She based her expenses in reliance on the amount that was stated in the letters. The facts in the *Barron* case were that the employee changed her financial circumstances in reliance on the incorrect amount. The expenses included wedding expenses, purchasing a house and arranging for mortgage payments, leasing a vehicle, incurring household moving expenses, tuition expenses and additional personal expenses.

Ms. Snelgrove received a significant increase in her annual salary when she was promoted from her former position to the new permanent position. When calculated at the correct pay level of GS-38, Step 1, the increase was about \$13,000.00 per year. She was not informed at any time by the Employer that she was appointed to the new position at the level of Step 2. There was no misunderstanding as to the correct annual salary, unlike the situation in the *Barron* case, where the employer sent several letters to the grievor stating an incorrect annual salary amount, and the grievor believed she was entitled to the amount stated in the letters. Although Ms. Snelgrove leased a new vehicle, and purchased a house, these financial arrangements were made following her appointment to the new permanent position, with a substantial salary increase over her former position. It is not

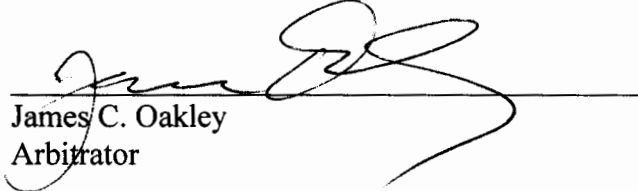
established that the Grievor would not have made these purchases, if the Employer had paid the correct bi-weekly salary amount. It is more likely that the Grievor arranged her financial circumstances in reliance on her promotion to a permanent position at the GS-38, Step 1 level, with a substantial salary increase, and not in reliance on the incorrect bi-weekly pay. The evidence does not establish that the Grievor relied to her detriment on the incorrect biweekly pay.

The Union has not established that the Grievor made a material change in her financial circumstances in reliance upon the overpayment. It would not be inequitable to require the Grievor to repay the amount paid to her by mistake. The Employer was entitled to recover the overpayment.

Decision

The grievance is denied.

DATED this 26st day of April, 2010.


James C. Oakley
Arbitrator