

**ARBITRATION AWARD**

BETWEEN:

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

AND:

GOVERNMENT OF NEWFOUNDLAND AND LABRADOR,  
DEPARTMENT OF TRANSPORTATION AND WORKS,  
Represented by Public Service Secretariat  
(hereinafter called the "Employer")

GRIEVOR: Glen Reid

COUNSEL: For the Union

Vina Gould

For the Employer

David Martin

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on November 17, 18 and 19, 2009, April 7, June 24 and 28, and September 13, 2010. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance. However, the Employer raised an objection with respect to the jurisdiction of the Arbitrator to interpret and apply legislation. The parties agreed that a ruling on the jurisdictional issue could be included in the Award on the merits of the case.
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 - Grievance form dated April 5, 2007

Consent 2 - Grievance form dated September 27, 2007

Consent 3 - Memorandum dated July 15, 2005 from Gary Beaton, Policy Analyst to Dana Hynes, Manager, Labour Relations, Department of Transportation and Works

Consent 4 - Maintenance and Operational Services Collective Agreement between Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board and the C.A. Pippy Park Commission and The Newfoundland and Labrador Association of Public and Private Employees, signed May 4, 2004, expires March 31, 2008

GR - 1 Notes of Glen Reid

GR - 2 Targeted Functional Assessment of Glen Reid dated February 23, 2007

GR - 3 Letter dated March 8, 2007 from Maureen Burry to Glen Reid enclosing forms required for application for medical disability

GR - 4 Letter dated April 3, 2007 from Maureen Burry to Lester Porter with attached assessment for medical retirement form

GR - 5 Letter dated September 11, 2007 from Maureen Burry to Glen Reid

- GR - 6 Termination Form
- GR - 7 Letter dated October 11, 2007 from Murray Bryant to Glen Reid
- GR - 8 Letter dated September 13, 2007 from Janet Dawe, Case Manager, Workplace Health, Safety and Compensation Commission to Glen Reid
- GR - 9 Letter dated November 1, 2007 from Janet Dawe to Glen Reid
- GR - 10 Department of Works, Services and Transportation Employee Attendance Record 2007/2008 for Glen Reid
- EW - 1 Memorandum dated February 7, 2000 from Gordon Murphy, Director of Human Resources and Financial Operations - Reference - Extended Earnings Loss ("EEL") and Leave Benefits
- BS - 1 Department of Works, Services and Transportation Employee Attendance Record 2006/2007 for Glen Reid
- CR - 1 Policy No. EL-01, Workplace Health, Safety and Compensation Commission
- MB - 1 Notes of Maureen Burry
- MB - 2 Letter dated September 10, 2007 from Gerard Ryan, Pensions Benefits Specialist to Maureen Burry
- MB - 3 Calculation of pension entitlement for Glen Reid
- MB - 4 Letter dated September 19, 2007 from Maureen Burry to Lester Porter
- MV - 5 Email dated October 10, 2007 from Nadine Devereaux to Maureen Burry
- JD - 1 WHSCC Case Worksheet Information, re Glen Reid
- JD - 2 Email dated October 3, 2007 from Gary Kendall to Nadine Devereaux
- DH - 1 Department of Works, Services and Transportation Employee Attendance Record 2005/2006 for Glen Reid
- DH - 2 Glen Reid - Record of Government Service, Department of Works, Services and Transportation, Avalon Region

- DH - 3            Public Service Payroll - Payroll Adjustment for Glen Reid., adjustment date June 30, 2005
- ND - 1            Email dated September 7, 2007 from Nadine Devereaux to Maureen McCarthy

### **Nature of the Grievance**

The Grievor, Glen Reid, had a workplace injury and was assessed by the Workplace, Health, Safety and Compensation Commission (“WHSCC”) as being totally disabled from work. He was awarded Extended Earnings Loss (“EEL”) benefits by WHSCC. He was also awarded a Provincial pension based on medical disability. The Union grieves that the Grievor was denied the full use of his accrued sick leave benefits and accrued annual leave benefits prior to commencing receipt of the disability pension and EEL benefits.

### **Collective Agreement**

The relevant Articles of the Collective Agreement are as follows:

#### Article 2        Definitions

##### 2.01    For the purpose of this Agreement:

...

- (f)        “employee” or “employees” where used is a collective term except as otherwise provided herein including all persons employed as Maintenance and Operational Services (MOS) employees in the classifications contained in the bargaining unit:

...

- (h)        “grievance” means a dispute arising out of the interpretation, application, administration or alleged violation of the terms of this Agreement.

...

- (l)        “management” means the Deputy Minister or the person or persons authorized to act on his behalf.

...

- \* (t)       “service” means any period of employment, excluding overtime, either before or after the date of signing of this Agreement in respect of which an employee is in receipt of salary or wages from the Employer and includes periods of special leave without pay not exceeding twenty (20) working days in the aggregate in any year.

- (u) “termination” means the permanent cessation of service of an employee because of the abolition of an employee’s position, dismissal for just cause, or because of the employee’s resignation.

...

Article 5 Employee Rights

5.01 ...

- (b) The Employer agrees that there will be no discrimination with respect to any employee in the matter of hiring, wage rates, training, upgrading, promotion, transfer, layoff, recall, discipline, classification, discharge, assignment of work or otherwise by reason of age, race, creed, colour, national origin, sex, marital status, political or religious affiliation, physical handicap or by reason of his membership in the Union.

...

Article 9 Arbitration

- 9.01 Where a difference arises between the parties to or persons bound by this Agreement or on whose behalf it has been entered into and where that difference arises out of the interpretation, application, administration or alleged violation of this Agreement and including any questions as to whether a matter is arbitrable, either of the parties may, within fourteen (14) calendar days after exhausting the grievance procedure, as outlined in Article 8, notify the other party in writing of its desire to submit the difference or allegation to arbitration, and the notice shall contain the name of the person appointed to be an arbitrator by the party giving notice.

...

Article 15 Annual Leave

...

- 15.02 For the purpose of this Article, an employee who is paid full salary or wages in respect of not less than one-half (1/2) of the days in the first or last calendar month of his service shall, in each case, be deemed to have had a month of service.
- 15.03 Annual leave shall not be taken except with the prior approval of the permanent head. However, subject to the operational requirements of the public service, the permanent head shall make every reasonable effort to grant the employee his annual leave at a time requested by the employee.
- 15.04 Vacation periods, once approved by the permanent head, will be changed only in the event of an extreme emergency or by mutual agreement between the employee and permanent head.

15.05 In respect of leave which may be carried forwarded to subsequent years, the following shall apply:

...

(b) An employee may carry forward to another year any proportion of annual leave not taken by him in previous years until, by so doing, he has accumulated a maximum of:

(i) twenty (20) days annual leave, if he is eligible for fifteen (15) or twenty (20) days in any year;

(ii) twenty-five (25) days annual leave, if he is eligible for twenty-five days in any year.

Each of the above accumulations is in addition to his current annual leave and annual leave accruing to him pursuant to sub-clause (a) hereof.

However, consideration will be given to allowing employees to carry forward more than the aforementioned maximum where such employees were prevented from taking annual leave as a result of being on extended sick leave or Workers' Compensation Commission benefits.

15.06 Subject to Clause 15.07, an employee who has entered upon annual leave may not change the status of his absence to any other type of leave except bereavement leave until he has used up all his current annual leave (exclusive of leave carried forward from previous years).

15.07 (a) An employee who qualified for any sick leave under Article 16 while on vacation may change the status of his leave to sick leave effective the date of notification to the Employer, provided that the employee submits a medical certificate(s) signed by a qualified medical practitioner and acceptable to the permanent head.

...

15.08 Subject to 15.02, in an incomplete year before resignation or retirement, an employee may receive a proportionate part of his annual leave for that year.

15.09 Sick leave awarded immediately prior to disability retirement, and periods of special leave without pay in excess of twenty (20) days in the aggregate in any year shall not be reckoned for annual leave purposes, and the employee's period of service shall be noted accordingly.

...

### 15.11 Annual Leave Pay

An employee who is authorized by his permanent head to proceed on annual leave and who requests annual leave pay, in writing, not less than six (6) weeks prior to the pay day immediately preceding the commencement of his annual leave period, shall receive his pay cheque(s) which normally would be issued during such period of annual leave on the last pay day immediately preceding the commencement of his annual leave period, provided that such annual leave is of two (2) weeks or longer duration.

...

15.13 (a) Subject to Clause 15.05, employees who are laid off may leave current, accumulated and accrued annual leave with the Employer to be taken at a later date.

(b) Seasonal and temporary employees, upon employment shall be given an option with respect to annual leave as follows:

(i) Subject to Clause 15.05, to carry over any unused annual leave which he may have to his credit at the end of his employment period;

(ii) To receive payment for annual leave on a regular basis throughout his employment period; or

(iii) To receive payment for annual leave at the end of the employee's employment term.

The choice provided in accordance with clause 15.13 (b) must be made immediately upon employment. It shall be the Employer's responsibility to acquire the employee's choice in writing upon re-hire.

...

### Article 16 Sick Leave

\*16.01 (a) The number of days of sick leave with full pay which may be awarded to an employee, other than a part-time employee, at any time shall not exceed the figure obtained by multiplying his total months of service by two (2) and subtracting therefrom the number of working days of sick leave previously awarded to him, provided that the maximum number of working days of sick leave with full pay which may be awarded to an employee during any period of two hundred and forty (240) months of service shall not exceed four hundred and eighty (480) days in the aggregate.

- (b) Notwithstanding Clause 16.01 (a), the number of days of sick leave with full pay which may be awarded to an employee hired after May 4, 2004, other than a part-time employee, at any time shall not exceed the figure obtained by multiplying his total months of service by one (1) and subtracting therefrom the number of working days of sick leave previously awarded to him, provided that the maximum number of working days of sick leave with full pay which may be awarded to an employee during any period of two hundred and forty (240) months of service shall not exceed two hundred and forty (240) days in the aggregate.
- 16.02 . . .
- (b) Employees on special leave without pay shall continue to accumulate seniority except where they would have been otherwise laid off.
- 16.03 For the purposes of Clause 16.01, an employee who receives full salary or wages in respect of not less than one-half ( $\frac{1}{2}$ ) of the working days in the first or last calendar month of his service, computed in full or half days shall, in each case, be deemed to have had a month of service.
- 16.04 (a) Subject to Clause 16.05, when an employee has reached the maximum of the sick leave which may be awarded him in accordance with this Article, he shall at his option, if he is still unfit to return to duty, proceed on annual leave (including current, accumulated and accrued leave) if he is eligible to receive such leave, or if not, on special leave without pay.
- (b) Employees on special leave without pay shall continue to accumulate seniority except where they would have been otherwise laid off.
- 16.05 Where, in the opinion of the permanent head, it is unlikely that an employee will be able to return to duty after the expiration of his accumulated sick leave, he may be required by the permanent head to undergo a medical examination. If it appears from such examination that, in the opinion of a Medical Doctor in th Department of Health, it is unlikely that the employee will be able to return to duty, the employee may be retired effective when his accumulated sick leave has expired or at retirement age, and paid such pension award as he may be eligible to receive, and the employee shall be given notice in accordance with Article 22.
- 16.06 (a) The permanent head may require an employee to submit a medical certificate during any period that an employee is on sick leave. In any event, sick leave in excess of three (3) consecutive working days at any time or six (6) working days in the aggregate in any year shall not

be awarded to an employee unless he has submitted in respect thereof a medical certificate prior to or immediately upon his return to work, which is satisfactory to the permanent head of the Department concerned.

- (b) Medical certificates, as stipulated in Article 16.06 (a), shall be signed by a doctor, an attending doctor's secretary, a laboratory and x-ray technician, or by attending nurse in areas where no physician is available.

16.07 Sick leave awarded immediately prior to disability retirement and periods of special leave without pay in excess of twenty (20) working days in the aggregate in any year shall not be reckoned for sick leave purposes, and the employees' record of service shall be noted accordingly.

...

16.09 Sick leave shall not be granted to an employee who is on maternity leave or any other type of leave without pay.

...

Article 22 Termination

22.01 Subject to Clause 22.09, upon termination of service for any cause other than dismissal:

- (a) An employee shall receive the pay for all current annual leave not taken by him prior to the date of termination of his service plus pay for his accumulated and accrued annual leave up to a maximum of twenty (20) days, or if entitled under sub-clause 15.05(b)(ii), to a maximum of twenty-five (25) days, not taken by him prior to the date of termination of his service; or
- (b) The employee shall receive four percent (4%) of the salary (excluding overtime) earned by him on completion of each twelve (12) months of employment or on the termination of his employment, whichever is the shorter period. This provision shall apply only in cases where the calculations of annual leave entitlement under Article 15 and paragraph (a) above yields less than four per cent (4%) of the salary (excluding overtime) earned by the employee in the period.

22.02 The Employer will endeavour to make all monies owing to the employee available to the employee on the termination date of his employment.

22.03 Except in the case of dismissal for cause, thirty (30) calendar days' notice, in writing, shall be given to permanent employees who are to be laid off or

whose services are to be terminated. If such notice is not given, a sum equal to one month's salary will be paid to such employees in lieu of notice. In the event of layoffs, employees shall be laid off in accordance with Article 28 - Seniority.

...

22.06 Annual leave shall not be used as any part of the period of the stipulated notices referred to in this Article unless mutually agreed between the parties hereto.

22.07 The period of notice may be reduced or eliminated by mutual agreement.

22.08 When an employee is to be pensioned for health reasons, he shall be given notice in accordance with this Article.

...

Article 26 Injury on Duty

\*26.01 (a) Subject to 26.02, an employee who is unable to perform his/her duties because of a personal injury received in the performance of his/her duties shall report the matter to his supervisor and the employee shall be placed on Injury on Duty Leave with pay as per Clause 26.01(b) pending settlement of the insurable claim. While on Injury on Duty Leave, employees shall receive the benefits of the collective agreement, subject to necessary adjustments.

(b) For the purposes of this Article, Injury on Duty Leave pay is the amount that would be determined by the Workplace Health, Safety and Compensation Commission in accordance with the *Workplace Health, Safety and Compensation Act*.

...

\*26.03 Where the Workplace Health, Safety and Compensation Commission informs the permanent head that it considers the employee is unable to perform his duties because of an injury on duty, the employee shall continue on Injury on Duty Leave subject to regular reports from the Workplace Health, Safety and Compensation Commission, until such time as the Workplace Health, Safety and Compensation Commission considers the employee is able to return to work or that he is prevented from returning to work because of a permanent disability. Failure of the employee to provide the Workplace Health, Safety and Compensation Commission with medical reports when requested may result in the employee being placed on Special Leave Without Pay.

26.04 Injury on Duty Leave pay will cease when employees return to full-time work with the clearance of a medical practitioner or a disability award is made.

\*26.05 In the event that an employee becomes:

- (a) permanently disabled; or
- (b) incurs a recurring disability

as a result of an injury received in the line of duty, the case shall be submitted to the permanent head for determination of the benefits which may be due to the employee. In any case, the benefits shall not be less than those due had the employee been covered under the *Workplace Health, Safety and Compensation Act*.

...

26.09 (a) An employee confirmed as being unable to perform the regular duties of his classification as a result of injury on duty will be employed in other work he can do provided a suitable vacancy is available and provided that the employee is qualified and able to perform the duties required. Where a suitable vacancy is available, the rate for the new position shall apply.

- (b) Where the Employer determines that a suitable vacancy is not available, the incapacitated employee retains the right to bump a less senior employee in another classification. Where an incapacitated employee advised the Employer of his intention to bump, he will be deemed to have been given notice of layoff, effective from the date he was confirmed as being unable to perform the regular duties of his classification. Accordingly, the right to displace a less senior employee in another classification shall be exercised as per the provisions of Clause 28.04(c).

...

Memorandum of Understanding  
Application of Master Agreement Language

Items contained in the Master Agreement signed on 1994 07 25 which are relevant to the Maintenance and Operational Services bargaining unit have been reflected in the text of this collective agreement where it is appropriate to do so.

...

# 28 Pension Credit and Group Insurance

Pension credit and group insurance coverage to continue on the basis of the pre-injury salary including contract allowance, salary adjustments from step progression or pay increases during the period of temporary absence, subject to payment of appropriate premiums based on the pre-injury salary rate or adjusted rate because of step progression or pay increases, provided this

proposal reflects the current practice and does not violate the *Workers' Compensation Act*.

...

Memorandum of Understanding - 2004  
Agreement on Pensions

The Parties agree to the following:

1. Introduction of a formal indexing program for those pensioners and survivors who have reached age 65, as follows:

60% of the annual change in the national CPI as published by Statistics Canada (Catalogue 62-001), in the calendar year immediately preceding the anniversary date, to a maximum annual increase of 1.2%;

- a) For those pensioners and survivors who have attained age 65 from October 1, 2002; and
- b) For those pensioners and survivors who are not age 65, from the next anniversary date after the date they reach age 65.

Cost: 2% of salary to be shared equally by both parties.

Anniversary Date: October 1, 2002 and every October 1 thereafter.

2. Increase special payments by \$20 million per year (from \$40 million to \$60 million) payable in quarterly instalments commencing January 1, 2003, until Government's share of the unfunded liability established at December 31, 2000 is extinguished. (Total quarterly instalments after this increase will be \$15 million per quarter).
3. A committee of the parties will be established to identify and resolve any matters required to implement joint trusteeship by April 1, 2008.  
  
All reasonable costs of the Committee relating to professional, legal and support services shall be paid from the Pension Fund.
4. All unions representing Public Service Pension Plan members must indicate, in writing, acceptance of this proposal.
5. For the duration of the Collective Agreement the Employer agrees to maintain the Public Service Pension Plan as an independent pension plan.

**Legislation**

The relevant provisions of the *Public Service Pensions Act 1991*, S.N.L. 1991 c. 12 are as follows:

## Retirement

16. (1) An employee shall be retired under the pension plan
- (a) where he or she makes an election under section 19 or terminates employment upon reaching normal retirement age, or, where he or she continues working past normal retirement age, at the earlier of termination of employment or reaching the age at which a pension benefit is required to begin under the Income Tax Act (Canada); or
  - (b) where, after the employee has used up all sick leave entitlement, he or she is unable to perform efficiently the duties of his or her position or the duties of an alternative position owing to incapacity that is medically certified to the satisfaction of the minister as likely to be permanent, from a date to be determined by the minister.
- (2) Notwithstanding paragraph (1)(b), the minister reserves the right to require an employee to participate in a rehabilitation program which has been recommended by medical advisors, or to take other action which is reasonable in the circumstances, to rehabilitate the employee to the extent possible so as to enable the employee to reasonably perform the duties of his or her position or alternative position.
- (3) Where the employee elects not to participate, or through his or her own negligence does not respond properly to an approved rehabilitation program, or knowingly performs an act which aggravates the medical condition to cause permanent disability, or refuses an offer of an alternative position, that employee shall be ineligible for a pension under paragraph (1)(b).
- (4) Where an employee who retired under paragraph (1)(b) becomes fit for work and receives an offer of re-employment to his or her former position or an alternative position within 12 months of his or her retirement and refuses the offer, without reasonable cause, the pension paid to that employee may be cancelled by the minister.

(4.1) Notwithstanding subsection 16(1), where, during the period an employee is on sick leave,

- (a) the employee's employment is terminated by reason of redundancy;
- (b) the employee has not used up all his or her sick leave benefits; and
- (c) the employee meets the requirements of this section,

the employee shall be retired under the pension plan from the date the employee's employment is terminated.

(5) For the purpose of this section, an alternative position includes a position for which, in the opinion of the minister, the employee is reasonably suited by virtue of his or her training, experience and education and which has been offered in writing to the employee.

#### Minimum service

17. (1) An employee shall not receive a pension under the pension plan until the employee has been credited with not less than 5 years of pensionable service.
- (2) An employee shall not receive a pension under the pension plan while he or she is an employee.
- (3) For the purposes of this section a pension does not include a survivor benefit.

The relevant provisions of the *Workplace, Health, Safety and Compensation Act*, R.S.N.L. 1990 c. W-1, are as follows:

#### No amount in excess of compensation

- 81.1 (1) After January 1, 1993, an employer and a worker shall not in an agreement provide that the employer shall pay an amount in excess of the amount that the worker, as a result of an injury, is receiving as compensation either under this Act or as if the worker were a worker within the scope of this Act.
- (2) Where an employer and a worker enter into an agreement in contravention of subsection (1), that agreement is of no effect.

- (3) [Rep. by 2009 c7 s6]
- (4) For the purpose of this section, the word "agreement" means a collective agreement or other contract of employment.

The relevant provisions of the *Human Rights Code*, R.S.N.L. 1990 c. H-14, are as follows:

Discrimination in employment

- 9. (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of
  - (a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or
  - (b) that person's age, if that person has reached the age of 19 years,

but this subsection does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

**Evidence**

The witnesses called by the Union were Glen Reid, Vina Gould, Bert Blundon, Edward Wade, Brenda Sainsbury, Carolyn Rice, Maureen Burry, Janet Dawe, Debbie Howell, Shirley Sharpe, Gary Kendall, Nadine Devereaux, Maureen McCarthy, Gordon Murphy and John Hicks. The Employer did not call any witnesses.

Glen Reid was employed as a Labourer II with the Department of Transportation and Works, Avalon Region commencing July 27, 1993. He injured his shoulder at the workplace shovelling asphalt. He received treatment for his injury, but did not work after February 13, 2004. His claim for benefits was accepted by the Workplace Health, Safety and Compensation Commission (“WHSCC”). He

was placed on Injury on Duty Leave under Article 26 of the Collective Agreement. He was paid Temporary Earnings Loss (“TEL”) benefits, calculated at 80% of net earnings.

An independent functional assessment of Glen Reid, dated February 23, 2007, concluded that he did not have sufficient functional tolerance to be gainfully employed. The WHSCC accepted the assessment report. As a result, on March 7, 2007, the WHSCC approved the Grievor for full Extended Earnings Loss (“EEL”) benefits. On that date Janet Dawe, the Grievor’s WHSCC Case Manager, communicated the decision by telephone to the Grievor and to the Department of Transportation and Works.

Workers’ Compensation claims for employees of the Government of Newfoundland and Labrador are administered by the WHSCC. The Government pays the amount of the workers’ compensation payments, plus an administrative fee of 12.5% to WHSCC for claims administration. TEL benefits, in the amount calculated by WHSCC, are paid directly by Government to the employee. Pursuant to Article 26 of the Collective Agreement, the Department of Transportation and Works placed the Grievor on Injury on Duty Leave and paid him the amount of TEL benefits calculated by WHSCC. Once an employee is approved for EEL benefits, the WHSCC pays the EEL benefits to the worker, and recovers the amount from Government. Workers’ Compensation payments are included in the salary budget for the applicable division in the Department.

On March 8, 2007, Maureen Burry, Payroll Clerk in the Department of Finance, sent a letter to the Grievor enclosing the forms he needed to apply for a medical disability pension. The Grievor testified that he completed the required forms. Ms. Burry sent the completed forms to the Pensions Division of the Department of Finance on April 3, 2007.

The Grievor, and Union representative Vina Gould, met with Employer representatives, including Gary Kendall, Shirley Sharpe and Brenda Sainsbury, on March 22, 2007. Vina Gould testified that the employer representatives informed the Grievor at the meeting that he could not use his accumulated sick leave, because once he was placed on EEL benefits, his employment would be terminated on the grounds of medical disability. The Grievor was informed that the decision was based on a memorandum dated July 15, 2005 from Gary Beaton, Policy Analyst, to Dana Hynes, Manager, Labour Relations, Department of Transportation and Works (the “2005 memo”). Ms. Gould testified that the Union was not aware of the 2005 memo prior to this meeting. The 2005 memo stated as follows:

The following is provided further to recent discussions with yourself and other staff within your Department, concerning an employee who was on Injury-on-Duty Leave and determined by the Workplace Health, Safety and Compensation Commission (WHSCC) to be permanently disabled and awarded Extended Earnings Loss (EEL) benefits.

The awarding of EEL benefits by WHSCC meant that the employee was determined to be disabled from performing the duties of his current classification, and that all options were explored for alternate employment within the Department, but given the employee's limitations these efforts were unsuccessful. In this case the Department, upon the awarding of EEL benefits, placed the employee on Sick Leave to exhaust existing "banked leave". As discussed, there are no provisions for entitlement to non-injury related benefits within the Collective Agreement which is also supported by an arbitration ruling (Elizabeth Howe). In addition, the payment of non-injury related benefits in this case would breach the *WHSCC Act*.

Benefit entitlements for employees who are on Injury on Duty Leave are derived from the Injury on Duty provisions of the Collective Agreement (article 26), WHSCC legislation, and related arbitral rulings.

#### Collective Agreement

The Injury-on-Duty provisions of the MOS agreement are quite specific for cases like this and without quoting these provisions section by section, the agreement provides a process whereby an employee continues on Injury-on-Duty Leave until WHSCC considers the employee is prevented from returning to work because of a permanent disability (i.e., awarding of EEL benefits by WHSCC). Injury-on-Duty Leave ceases when this disability award is made by WHSCC.

The agreement further states that an employee who is unable to perform the duties of the current classification, will be employed in other work, provided a suitable vacancy is available and the employee is qualified and able. Where a vacancy is not available, the employee can bump a less senior employee provided the employee is capable and able. I assume this process would have been exhausted through WHSCC's Labour Market Assessment process including discussions with the employee and employer prior to the subsequent awarding of EEL benefits by WHSCC.

#### Arbitral Rulings

In the Elizabeth Howe ruling, an arbitrator upheld a decision by your Department to terminate Injury-on-Duty Leave for an employee who was

awarded EEL benefits by WHSCC. In a supplementary award relating to the same case, the arbitrator further ruled that employees in receipt of workers' compensation benefits who are permanently disabled within the meaning of article 26 (M.O.S.) and whose Injury-on-Duty Leave is terminated, do not have status as employees within the meaning of the Collective Agreement.

#### WHSCC Legislation

Aside from the provisions of the Collective Agreement, non-injury related benefits paid to an employee would be in addition to the benefits received as compensation under the *WHSCC Act*. These non-injury related benefits are assessed by WHSCC as additional income. As a result, employers providing these additional benefits are in breach of section 81.1 of the *WHSCC Act* which prohibits the payment of benefits in excess of that contemplated by legislation. These non-injury related benefits include sick leave.

In the case you had described, Injury-on-Duty leave should have ceased and the employee either receive EEL directly from WHSCC or apply for medical retirement through the PSPP. The agreement provides for no entitlement to non-injury related benefits as the payment of these non-injury related benefits are in breach of section 81.1 of the *WHSCC Act*. The *Act* prohibits the payment of benefits in excess of the compensation provided under the *WHSCC Act*.

These provisions should be applied in all cases.

The 2005 memo referred to an arbitration ruling in the Elizabeth Howe case. In the Elizabeth Howe case there were four arbitration awards, an award dated December 15, 1994 and three supplementary awards dated November 8, 1995, April 10, 1996, and July 18, 1997. The 2005 memo referred to a ruling in the third supplementary award, in *Newfoundland Association of Public Employees and Her Majesty the Queen in Right of Newfoundland (Department of Works, Services and Transportation) (Supplementary Award # 3)*, July 18, 1997 (Oakley) (the "Howe award").

The Union filed the first grievance, dated April 5, 2007, claiming that the denial of sick leave was a violation of the Collective Agreement.

Vina Gould testified that the Employer's decision to deny the Grievor use of accumulated sick leave represented a change from the prior practice. Based on her experience with prior cases, once WHSCC determined the worker was eligible for full EEL benefits, the worker would then go on sick leave, followed by annual leave, until the accumulated sick leave and annual leave credits were

exhausted. The effective date to commence receipt of EEL benefits would follow. Once an employee commenced receipt of EEL benefits, then the employee was no longer eligible for Injury on Duty Leave and employment would be terminated.

Bert Blundon, Secretary Treasurer of the Union, and chief negotiator of the MOS Collective Agreement, testified that, according to his understanding of the Collective Agreement, an employee in the Grievor's situation would use accumulated sick leave and annual leave and then go on special leave without pay. Mr. Blundon understood that sick leave was required to be exhausted before an employee was eligible for pension under the *Public Service Pensions Act*. To his knowledge, Glen Reid was the first injured worker not allowed to use accumulated sick leave prior to receiving a disability pension. He said the effect of the 2005 memo was to discriminate against employees injured at the workplace and in receipt of Workers' Compensation benefits, compared to employees who were disabled as a result of sickness or injury outside the workplace, because the latter group of employees could access sick leave benefits.

Edward Wade, former employee with the Department of Transportation and Works, testified that, prior to 2005, the practice was that the WHSCC Case Manager would call the Department to say that EEL benefits were approved and ask what leave entitlement was to be paid out. The worker would then go on sick leave until it was exhausted, and annual leave would be paid out in a lump sum. Mr. Wade said that the termination of employment date, and the effective date of EEL benefits, was not set until the worker's entitlement to sick leave and annual leave was exhausted.

Shirley Sharpe testified that she was the Manager of Integrated Disability at the Department of Transportation and Works from 1999 to 2006. Prior to the 2005 memo, the practice was that the WHSCC would ask the Department about an injured worker's accumulated sick leave and annual leave. The injured worker would be placed back on the payroll, and draw down accumulated sick leave and annual leave prior to commencing EEL benefits. Ms. Sharpe said there was one other case after the 2005 memo, and prior to the Grievor's case, where an employee was denied the use of accumulated sick leave. In that case, the employee did not dispute the decision to deny sick leave.

Gordon Murphy testified that he held the position of Director of Human Resources in the Department of Works, Services and Transportation at the time he retired in August, 2003. He was the chief negotiator for the Employer during four rounds of collective bargaining for the MOS Collective Agreement. He testified that the practice in the Department prior to his retirement was

that, when it was determined an injured worker was unable to return to work, the worker would be placed on sick leave until accumulated sick leave was exhausted, paid annual leave in a lump sum payment, and then terminated from employment and placed on disability pension. He said the Collective Agreement mirrored the practice that was in effect for several years. He did not recall anyone being refused the benefit of accumulated sick leave when applying for a medical disability pension. Mr. Murphy referred to the *Howe* award, which he said established the right of the Employer to terminate an employee placed on EEL benefits by the WHSCC, following exhaustion of any accumulated sick leave and annual leave. He said that the *Howe* award did not prevent an employee from using accumulated sick leave benefits. Mr. Murphy said that the 2005 memo set out a practice that differed from the practice he followed when he administered the Collective Agreement. The practice followed by Mr. Murphy was set out in a memorandum from him dated February 7, 2000, which stated as follows:

All Regional Administrators/Salary and Benefits Manager

Reference: Extended Earnings Loss (EEL) and Leave Benefits

Some of you may have read the arbitration award (actually, there were a number of awards) concerning Elizabeth Howe, a former employee of this Department who had been placed on Extended Earnings Loss (EEL) by the Workplace Health and Safety Compensation Commission due to her permanent disability resulting from a workplace injury. Central to this case was our right to terminate the employee from our records in this circumstance, following the exhaustion of any accumulated leaves resulting from employment.

During the past couple of months there have been a number of different interpretations on how the payout of these benefits would occur. For your future guidance, persons who have been determined as eligible to be placed on EEL by the WHSCC will be placed on payroll (or remain on payroll) until their sick leave has been exhausted. Any annual leave to their credit will be paid in lump sum on the final cheque of their sick leave entitlement.

Letters of termination to any such relevant employees will be issued from this office. Consequently, it is very important you advise me immediately when an employee's sick leave is exhausted in these circumstances.

Janet Dawe, WHSCC Case Manager, testified about her knowledge of the practice followed by the Department of Transportation and Works, prior to 2005, in cases where the WHSCC decided the

injured worker was eligible for EEL benefits. She said the worker would draw on sick leave benefits, be paid annual leave in a lump sum and then receive a disability pension, if eligible. She said that if the Employer allowed an employee to use sick leave or annual leave, it would not violate the legislation or policies of WHSCC. During the payout of sick leave or annual leave, Workers' Compensation benefits would be suspended. The effective date of EEL benefits was set by WHSCC in consultation with the Employer. EEL benefits would be scheduled to come into effect after other benefits, such as sick leave, were exhausted. Ms. Dawe testified that she was aware of one other case, prior to Glen Reid's case, where the Employer did not pay out accumulated sick leave prior to the employee receiving EEL benefits.

Ms. Dawe referred to WHSCC Policy No. EL-01, Earnings Loss:Benefit Calculation, which provided for the suspension of benefits during any period of post injury earnings. The policy stated, in part, as follows:

#### Part III - Employment Benefits Considered as Post-Injury Earnings

To the extent that an injured worker receives employment-related earnings during a period of compensable disability, there is no loss of earnings [subject to Sections 74 (1) and 81 (1) of the *Act*].

Where that happens the Commission will suspend the appropriate amount of compensation otherwise payable for the period.

A. Regardless of when accumulated, the following (most common) benefits paid to a worker by an employer - including lump sum payouts of such benefits anytime during or at the end of the employment relationship - are considered post-injury earnings. The onus is on employers to notify the Commission if this occurs.

1. Annual leave benefits;
2. Sick Leave benefits;
3. Statutory Holiday Pay;
4. Family Leave;
5. Compassionate Leave;
6. "Banked" overtime earnings [see Part II, 2 also];

7. Vacation pay which is taxable during the period [see Part II, 3 also];
8. Special bonuses [e.g. profit sharing, performance pay, Christmas or year-end bonuses] which are taxable during the period [see Part II, 4 also];
9. Pay in lieu of notice or redundancy pay from an employer.

Carolyn Rice, Manager of Client Services at WHSCC, testified that an injured worker is not prevented from receiving a post injury benefit from an employer, so long as WHSCC is notified and compensation benefits are suspended for that period. An injured worker could not be paid sick leave in addition to Workers' Compensation benefits, as that would amount to topping up benefits, contrary to the *WHSC Act*.

The Grievor was terminated from employment on August 28, 2007. He did not receive a letter from the Employer giving him notice of termination of employment. He was placed on EEL benefits by WHSCC effective August 29, 2007. At that time, he had total accumulated sick leave credits of 946 hours, comprising 866 hours as of March 31, 2007 plus 80 hours accumulated from April 1 to August 28, 2007. The Employer did not allow the Grievor to use his sick leave credits. At that time, his sick leave credits would have allowed him to go on sick leave for about 5 months. His time on sick leave would then have been added to his service for the purpose of pension calculation. As a result, his pension amount would have been based on approximately 11 years, 10 months service, and not 11 years, 5 months service. As of August 28, 2007, his accumulated annual leave entitlement was 61.37 days (490.98 hours). His annual leave was paid out in a lump sum, equivalent to the period from August 29 to November 22, 2007. The annual leave payout was not included in the calculation of service for the disability pension.

The Grievor's EEL benefits were suspended for the period August 29 to November 22, 2007, the period covered by the annual leave payout. The Grievor received letters from WHSCC explaining his benefits. By letter dated September 13, 2007, Janet Dawe, WHSCC Case Manager, advised the Grievor as follows:

With respect to entitlement to EEL benefits, you are entitled to 80% of the net weekly compensation earnings. Your weekly EEL entitlement is \$375.86 effective August 29, 2007. These benefits will be paid to you directly once notification has been received from your employer, Department of Transportation and Works. These

benefits will be paid to you on a bi-weekly basis and will stop at age 65, or when your earnings capacity is equal to or greater than your pre-injury earnings. A calculation sheet is enclosed which explains how your EEL pre-entitlement was calculated.

By letter dated November 1, 2007, Janet Dawe advised the Grievor as follows:

This letter is in follow-up to my letter dated September 13, 2007 in which you were advised you were entitled to EEL benefits effective August 29, 2007. Since that time, your employer has submitted documentation confirming you were paid 61.37 days annual leave benefits and you became entitled to Provincial Pension benefits effective August 29, 2007.

In accordance with Policy EL-01, "Earnings Loss: Benefit Calculation", your Extended Earnings Loss (EEL) benefits were discontinued for the period of August 29, 2007 to November 22, 2007 since you were paid 61.37 days annual leave from your employer.

...

Please be advised you will be entitled to receive EEL benefits effective November 23, 2007 which will be paid directly to you by Workplace Health, Safety & Compensation Commission (WHSCC). These benefits will be paid on a bi-weekly basis and will stop at age 65 or when your earnings capacity is equal to or greater than your pre-injury earnings.

Your EEL rate has been adjusted based on information submitted by your employer dated October 11, 2007 which confirms you are entitled to Provincial Pension benefits of \$6,475.15 per year effective August 29, 2007. Therefore, 75% of your net Employer Sponsored Pension Plan (ESPP) benefits will be deducted from your EEL benefits. As a result, your weekly EEL entitlement is \$282.49. Enclosed with your correspondence is a calculation sheet which explains how your EEL entitlement was calculated.

Janet Dawe testified that the Employer informed her that it would stop paying TEL benefits on August 28, 2007 and that August 29, 2007 would be the effective date of EEL benefits. She did not know prior to August 29, 2007 whether or not the disability pension had been approved.

In 2005, when he was in receipt of TEL benefits, the Grievor was granted bereavement leave for 3 days. On those 3 days, he received his regular wages and his TEL benefits were suspended. His regular wages were a greater amount than his TEL benefits.

Nadine Devereaux testified that she was the Manager of Integrated Disability and Management in the Department of Transportation and Works, commencing in June, 2007. She was previously employed at WHSCC from 1995 to 2007. The Department of Transportation and Works was one of the major employers within her area of responsibility at WHSCC. Her experience when she worked at WHSCC was that the Department paid out accumulated sick leave and the EEL effective date was set after the sick leave payout. She testified that the WHSCC has no influence over the Employer's decision to pay sick leave. When she commenced employment with the Department, she was informed that the 2005 memo set out the procedure to follow. Ms. Devereaux testified that she sought clarity on the issue of Glen Reid's EEL effective date. She requested a letter from the Pensions Division of the Department of Finance to address any requirement that an employee had to exhaust sick leave entitlement to be eligible for a disability pension. On September 7, 2007, she met with Gary Kendall and Maureen McCarthy, Director of Pensions Administration, Department of Finance, to discuss the Glen Reid case. Ms. McCarthy told her that August 29, 2007 was a good date for the disability pension to come into effect. The Pension Division confirmed approval of the disability pension by letter dated September 12, 2007. Ms. Devereaux and Ms. Dawe of WHSCC, determined that the effective date of EEL benefits would be August 29, 2007, the same date as the effective date of the disability pension. Ms. Devereaux received an email dated October 10, 2007 from Ms. McCarthy about the termination date and entitlement to sick leave, which stated, in part, as follows: "As I understand the WHSCC rules, an employee who is unable to work and is approved for EEL under that act, is terminated from his employment and thus has no entitlement to access sick leave."

Maureen McCarthy, Director of Pensions Administration, testified that eligibility for medical disability pension requires 5 years of pensionable service and a medical evaluation. She testified that for medical retirement, an employee is required to use accumulated sick leave prior to receiving a pension according to Section 16 (1)(b) of the *Public Service Pensions Act*. The rationale for having an employee use accumulated sick leave is to mitigate part of the cost of the disability pension. Most employees who apply for a medical disability pension are on sick leave or leave without pay. A person cannot apply for a pension after termination of employment. The effective date of the pension is given to the Pensions Division by the Department. If the Grievor had been allowed to use his sick leave, it would have increased his service and increased the value of the pension. Whether annual leave is paid as a lump sum or paid out weekly does not impact the pension. Ms. McCarthy said her October 10, 2007 email message to Ms. Devereaux stated her understanding of what she was

told by the Department. The Pensions Division accepted that Glen Reid was eligible for a disability pension.

Vina Gould testified that the Union filed the second grievance on September 27, 2007, after the Grievor was denied use of accumulated sick leave, and was paid annual leave in a lump sum. Ms. Gould said that, had the Grievor been allowed to go on annual leave, he would have accumulated further annual leave and sick leave credits and pensionable service.

### **Union Submission**

The Union submitted that the first grievance was filed after Glen Reid was told on March 22, 2007 that he would not have access to sick leave. The denial of sick leave was a violation of Articles 15, 16, 22 and 26 of the Collective Agreement and was contrary to the *Public Service Pensions Act*. The Union filed the second grievance after the Employer failed to pay sick leave and paid out annual leave in a lump sum. The payout of annual leave in a lump sum violated Articles 11, 15, 16, 22 and 26, and violated the *Public Service Pensions Act*. The Union also claimed that the denial of sick leave and annual leave amounted to discrimination in violation of Article 5 of the Collective Agreement and Section 9 of the *Human Rights Code*, R.S.N.L. 1990, c. H-14. With respect to the Employer's preliminary objection, the Union submitted that the Arbitrator has jurisdiction to rule on the pension plan issue. The dispute concerning the *Public Service Pensions Act* was a difference between the parties and within the Arbitrator's jurisdiction under Section 86 of the *Labour Relations Act*, R.S.N.L. 1990, c. L-1 and Section 39(1) of the *Public Service Collective Bargaining Act*, R.S.N.L. 1990, c. P-42. An arbitrator is required to interpret a collective agreement so that it does not conflict with statutes (*Re Stelco Wire Products Co. and United Steelworkers, Local 3561* (1986) 25 L.A.C. (3d) 427 (Brent) ("*Stelco*") and *McLeod v. Egan* [1975] 1 S.C.R. 517). An arbitrator may use statutes as an aid to the interpretation of the collective agreement. When Article 16.05 of the Collective Agreement was read together with Section 16 of the *Public Service Pensions Act*, the result was that the Grievor was entitled to be placed on sick leave prior to receiving a disability pension and being terminated from employment. The effect of Article 16.05, and the Memorandum of Understanding in relation to the pension plan, is to require the Employer to maintain the pension plan as part of the Collective Agreement. The Arbitrator has authority to apply the *Human Rights Code*. The essential character of the dispute arises from the Collective Agreement, and meets the requirements of *Weber v. Ontario Hydro* [1995] 2 S.C.J. No. 59. The Union also submitted that the pension plan issue was similar to the issue in *Bisailon v. Concordia University* [2006] S.C.J. No.

19 where a dispute relating to a pension plan was found to be within the jurisdiction of an arbitrator, because it concerned the conditions of employment and there was an express or implied connection to the collective agreement.

The Union submitted that the Employer had incorrectly relied upon the *Howe* award to deny sick leave. The *Howe* award did not address what benefits were payable to an employee immediately prior to medical disability. The practice of the Department after the *Howe* award, and prior to the 2005 memo, was that employees were terminated from employment after sick leave was exhausted and employees were paid annual leave in a lump sum. There have been no changes to any of the relevant Articles of the Collective Agreement since the *Howe* award. Once the Employer knew in March, 2007 that the Grievor would be placed on EEL benefits, then the Employer should have placed the Grievor on sick leave, followed by annual leave, until those leave entitlements were exhausted. When the Grievor was in receipt of sick leave and annual leave, the WHSCC could suspend his Temporary Employment Loss (“TEL”) benefits, in order to comply with Section 81.1 of the *WHSC Act*, and to avoid any top up of benefits. Pursuant to the *WHSC Act*, an employer can permit an employee to exhaust sick leave benefits before receiving EEL benefits from WHSCC (*Mandavia v. Central West Health Care Institutions Board* [2005] N.J. No. 69). The Collective Agreement did not limit the Grievor’s right to access sick leave or annual leave. The amount of sick leave was calculated under Article 16.01. Under Article 16.04 (a), an employee who had reached the maximum of sick leave had the option to proceed on annual leave. Article 16.05 provided for an employee to be retired and receive a pension, once it was determined that the employee was unable to return to duty. The pension would be effective when the accumulated sick leave had expired. Article 16.07 contemplated that an employee would receive sick leave immediately prior to disability retirement, because it stated that sick leave in those circumstances is not reckoned for the purpose of calculating further sick leave. Article 15.09 stated that sick leave prior to disability did not cause any further accrual of annual leave. Under Article 26.04, Injury on Duty Leave ceases when an employee is awarded EEL benefits. Under Article 26.05 (a), an employee who has a permanent disability has his case submitted to the permanent head to determine the benefits that are due, and the employee applies for medical disability. Under Article 22.01 the Employer was required to make monies owing to the employee available on the termination date. The Employer could not arbitrarily terminate the Grievor’s employment and deny him the benefit of sick leave and annual leave. An employer cannot exercise a management right to destroy an interest vested in an employee under the collective agreement (*Newfoundland Telephone Co. and Communications and Electrical Workers of Canada, Loc. 410* (1988) 3 L.A.C. (4<sup>th</sup>) 349 (Alcock)). The Union referred

to the award in *Hoyles Escasoni Complex and NAPE (Stevens)*, June 22, 1992 (Alcock), where the arbitrator held, based on collective agreement language that was similar to the current language, that an employee approved for EEL benefits could not be laid off for redundancy and denied the right to unused sick leave. Under Section 16 of the *Public Service Pensions Act*, an employee is required to use unexpired sick leave in order to be eligible for a pension. There is an exception in Section 16 (4.1) in the case of an employee who is made redundant, however, this exception does not apply to the Grievor. The Grievor was entitled to go on annual leave under Article 15.01 and was not required to be paid a lump sum. The lump sum payment had the effect of denying the accrual of further benefits of sick leave, annual leave and pensionable service. The claim to go on annual leave was supported by Article 15.09, which stated that sick leave immediately prior to disability retirement is not reckoned for annual leave purposes. Under Article 16.04 (a) an employee can proceed on annual leave when eligible. Article 22.01 did not apply in this situation because the Grievor was retiring under a medical disability. There was no operational reason to deny annual leave. Under Article 15.03 there should be every reasonable effort made to grant annual leave at the time it was requested. Under Article 15.05 (b) an employee on Workers' Compensation benefits may be allowed to carry more than the maximum amount of annual leave forward to another year. The Employer discriminated against the Grievor on the grounds of a disability caused by a workplace injury. The Grievor was treated differently than employees who were sick or disabled by a cause other than a workplace injury. The denial of annual leave and sick leave amounted to discrimination contrary to Article 5.01 of the Collective Agreement and Section 9 of the *Human Rights Code (British Columbia (P.S.E.R.C.) v. B.C.G.S.E.U. (Meiorin)* [1999] S.C.J. No. 46 and *Clarendon Foundation (Cheshire Homes) Inc. v. OPSEU, Local 593* (1996) 58 L.A.C. (4<sup>th</sup>) 270). To comply with its duty of accommodation, the Employer must show that it was impossible to accommodate the Grievor without undue hardship. There would be no undue hardship on the Employer to allow the Grievor to go on sick leave and annual leave, because all the money paid to the Grievor came out of the salary budget. The Union requested that the Grievor be allowed to take annual leave and sick leave effective from August 29, 2007, the date the Grievor's employment was terminated.

### **Employer Submission**

The Employer submitted that the Arbitrator did not have jurisdiction to make a ruling on the *Public Service Pensions Act*. The Employer referred to the categories of collective agreement language in relation to pension plans, as discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, paragraph 4:1400. The Memorandum of Understanding in the Collective Agreement was in the

category that committed the Employer to make contributions into the pension plan. The pension plan was not incorporated into the Collective Agreement. To incorporate the pension plan by reference, the parties would need to clearly state such an intention. A person with a claim under the pension plan has recourse under the *Public Service Pensions Act* (the “Act”) to apply to the Minister of Finance, and then to appeal to the Court. The Employer referred to *Dawn Foods Canada and U.F.C.W. Loc. 342 P-2* (2002) 108 L.A.C. (4<sup>th</sup>) 51 (Hood) where the determination of what to do with an excess surplus under a pension plan was to be determined by the terms of the plan itself, and not under the collective agreement. In that case, the collective agreement just obligated the employer to make contributions to the plan, and the essential character of the dispute did not arise from the collective agreement. The Employer distinguished the case authorities referred to by the Union on the basis of different collective agreement language. There was no violation of the *Public Service Pensions Act*, because the Grievor was awarded a pension. In the alternative, if the Arbitrator had jurisdiction to interpret and apply the legislation, Section 16 of the *Public Service Pensions Act* was not violated, because the Grievor was not eligible to receive sick leave. When an employee continued on Injury on Duty Leave until terminated from employment, there was no obligation to pay sick leave. There was no connection between the pension plan and the Collective Agreement. The Employer requested that the preliminary objection as to jurisdiction be allowed.

The Employer submitted that when the Grievor was approved for EEL benefits in March, 2007, he could have been placed on EEL benefits, awarded a disability pension and terminated from employment at that time. However, because he continued on Injury on Duty Leave until his employment was terminated in August, 2007, he had the benefit of an additional 5 months of pensionable service. If the Grievor had been placed on EEL benefits and terminated from employment before he was awarded a disability pension, then he would not have been eligible for a disability pension. According to the *Howe* award, when an employee was placed on EEL benefits, the employee no longer had employee status, was terminated from employment, and was no longer eligible to receive any benefits under the Collective Agreement. Sick leave and Injury on Duty leave were two mutually exclusive types of leave under the Collective Agreement. The parties contemplated employees converting from certain types of leave to others in Article 15.07, but there was no provision to allow an employee to convert from Injury on Duty Leave to sick leave. Under Article 26.04, an employee continues on Injury on Duty Leave until the employee returns to work or a disability award is made. A person on sick leave may apply for a disability pension and exhaust sick leave before termination of employment. There is no similar language in Article 26 for an injured worker on Injury on Duty Leave. The policies of the WHSCC were not applicable. The

testimony of WHSCC witnesses was not relevant. Article 16.01 was not applicable. The Employer complied with Article 22.01 (a), and paid for the Grievor's accumulated annual leave. To allow the Grievor to go on annual leave would violate Article 26. The Employer distinguished the Union's authorities on the basis of different facts or different collective agreement language. There was no discrimination on the facts of the case. Once the Grievor's employment was terminated, then he was no longer eligible for sick leave or annual leave. The Employer requested that both grievances be denied.

### **Considerations**

Glen Reid had a workplace injury in 2003 when employed by the Department of Transportation and Works. He was approved for Temporary Earnings Loss ("TEL") benefits by WHSCC and placed on Injury on Duty Leave by the Employer under Article 26 of the Collective Agreement. He was paid TEL benefits by the Employer in the amount calculated by the WHSCC, at 80% of net wages. WHSCC decided in March, 2007, that Mr. Reid did not have the functional capacity to be gainfully employed. He was therefore eligible for Extended Earnings Loss ("EEL") benefits. WHSCC informed the Grievor and the Employer about the decision in March, 2007. There was no effective date set for EEL benefits to start at that time. The Employer later set August 28, 2007 as the date when the Grievor's Injury on Duty Leave and employment would be terminated. Following consultation with the Employer, WHSCC set the effective date of commencement of EEL benefits to be August 29, 2007. On the date of his termination of employment, the Grievor had sick leave and annual leave credits that he had accumulated and not used. Upon being terminated from employment he was not allowed to use his accumulated sick leave, which amounted to about 5 months wages. He was not allowed to go on annual leave. The Employer paid out his annual leave credits in a lump sum. His EEL benefits were temporarily suspended by WHSCC for the period covered by the annual leave lump sum payout, from August 29 to November 22, 2007. The Grievor applied for a Government disability pension and received notice in September, 2007 that his disability pension was approved effective August 29, 2007.

The issues before the Arbitrator are: (1) does the Arbitrator have jurisdiction to interpret and apply statutes? (2) was the Grievor entitled to use his accumulated sick leave before his employment was terminated? and (3) was the Grievor entitled to go on annual leave to use his accumulated annual leave, and not be required to accept a lump sum payout of annual leave?

The Employer objected to the jurisdiction of the Arbitrator to interpret and apply the *Public Service Pensions Act 1991*, S.N.L. 1991, c.12 or to apply the pension plan. During the arbitration hearing reference was made to other legislation, including the *Workplace Health, Safety and Compensation Act*, R.S.N.L. 1990, c. W-1 (“*WHSC Act*”) and the *Human Rights Code*, R.S.N.L. 1990, c. H-14. When addressing the issue of jurisdiction, the Arbitrator will consider all applicable legislation.

The authority of an arbitrator to interpret and apply a statute is discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, at paragraph 2:2100 as follows:

However, it is now established that arbitrators not only have the authority but also a responsibility to interpret and apply any applicable legislation. In the words of the Supreme Court of Canada:

That is not to say that an arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion, he must construe, but at the risk of having his construction set aside by a Court as being wrong.

This view was reiterated and reinforced by the court in *Weber v. Ontario Hydro*, where it indicated that an exclusive jurisdiction model of grievance arbitration is to be preferred, and that any dispute which in its “essential character” arises from the interpretation, application, administration or violation of the collective agreement should be determined by arbitration, including disputes that involve legislation or the *Charter*.

The authors of the Brown & Beatty text also refer to the use of legislation as an aid to the interpretation of the collective agreement, in paragraph 2:2110, as follows:

It is generally accepted that an arbitrator may properly consider the meaning of a statute as an aid to interpretation of a collective agreement. For example, where the collective agreement is vague and unclear, the arbitrator may resort to the statute to assist in selecting the proper construction to be given to it. As well, if there are two possible meanings to the agreement, one which conflicts with a statute and one which does not, then an arbitrator may presume, as do the courts, that the parties intended to act in a manner that was not contrary to law.

I find that I have jurisdiction to interpret and apply statutes, subject to the guidelines set out in the arbitral and judicial authorities. The Arbitrator has authority to interpret the Collective Agreement in a manner that is consistent with the applicable statutes, including the *Public Service Pensions Act* and the *WHSC Act*. The Arbitrator also has authority to interpret and apply legislation such as the *Human Rights Code*, where the essential character of the dispute arises from the Collective Agreement, as discussed by the Supreme Court of Canada in *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929 (“*Weber*”), *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U. Local 324* [2003] 2 S.C.R. 157 (“*Parry Sound*”) and *Bisaillon v. Concordia University* [2006] S.C.J. No. 19 (“*Bisaillon*”).

With respect to the specific areas of jurisdiction in dispute in this case, the Arbitrator has authority to interpret the Collective Agreement so that it is consistent with the *Public Service Pensions Act*. In particular, the Union referred to Section 16 (1) of the *Act*, which states, in part, that “an employee shall be retired under the pension plan . . . (b) where, after the employee has used up all sick leave entitlement, he or she is unable to perform efficiently the duties of his or her position or the duties of an alternative position owing to incapacity”. At issue is whether the Grievor has sick leave entitlement under the Collective Agreement, and if he does, whether terminating the Grievor’s employment before he uses his accumulated sick leave is inconsistent with the *Public Service Pensions Act*. The Arbitrator has jurisdiction to address this issue when interpreting the Collective Agreement.

The Arbitrator will also consider the issue of authority to interpret the Collective Agreement so that it is consistent with Section 81.1 of the *WHSC Act*. Section 81.1 states that no amount shall be paid to a worker in excess of compensation paid under the *Act*. Reference was made to the *WHSC Act* in the Employer’s 2005 memo, as one of the reasons for the Employer’s decision that sick leave was not payable to a worker whose Injury on Duty Leave has been terminated. The Union submits that the Employer was incorrect in its interpretation of the *WHSC Act* as stated in the 2005 memo. According to the Union, payment of sick leave does not violate Section 81.1 because the WHSCC will suspend the payment of TEL or EEL benefits for the duration of the sick leave. The Arbitrator has jurisdiction to consider this issue when interpreting the Collective Agreement.

The Union also submitted that treating the Grievor differently, as an injured worker, in comparison to other disabled workers, was discrimination on the grounds of physical disability contrary to the *Human Rights Code*. The essential character of the dispute arises from the Collective Agreement,

for the reason that the Employer has interpreted the right to sick leave and annual leave in the Collective Agreement as operating in a different way for injured workers on Injury on Duty Leave compared to other disabled workers. Therefore, the Arbitrator has jurisdiction to interpret and apply the *Human Rights Code*, and to determine whether the *Code* was violated in this case, having regard to the *Weber, Parry Sound* and *Bisaillon* cases.

The Employer also submitted that the Public Service Pension Plan is not incorporated as an ancillary document in the Collective Agreement. The Collective Agreement makes reference to the pension plan in an attached Memorandum of Understanding. On the facts of this case, it is unnecessary to decide whether or not the pension plan is incorporated in the Collective Agreement. There was no dispute about the eligibility of the Grievor to be awarded a disability pension. There was no allegation of a breach of the terms of the pension plan.

The Employer followed the practice described in the 2005 memo. The Employer denied the Grievor's request to go on sick leave, and required the payout of annual leave in a lump sum. The 2005 memo states that the Employer's practice changed following the ruling in the *Howe* award. It is useful to review the findings in the *Howe* award. In the *Howe* award the arbitrator found that the Employer may terminate the employment of an employee who is permanently disabled in a case where the employee has exhausted accumulated annual leave and sick leave entitlements. The *Howe* award states, in part, as follows:

Elizabeth Howe was placed on injury on duty leave from the date of her injury until she commenced receiving EEL benefits on June 3, 1992. She continued to receive full pay until her accumulated sick leave and annual leave expired on October 14, 1992 and at that time she was removed from the Government payroll. Ms. Howe applied for a Newfoundland Government Public Service Pension on the grounds of medical disability, however, her application was denied because she did not possess the requisite five years of service to qualify for a pension. On October 14, 1992, her employment and her status as an employee were terminated. [page 5]

...

The Arbitrator decided that a decision by the Commission to award EEL benefits was equivalent to a decision that an employee was "prevented from returning to work because of a permanent disability" within the meaning of Article 26.03. It was found that the Employer did not violate Article 26 by terminating injury on duty leave at such time as an employee is awarded Extended Earnings Loss benefits by the Commission. [page 6]

...

The Union has maintained that the Grievor may not be terminated unless the reason for termination falls within the definition of “termination” in the Collective Agreement. The Employer states that it may terminate an employee at such time as there is a finding of permanent disability. A finding of permanent disability arises when an employee is unable to return to work (Article 26.03). Under those circumstances, the employee may be terminated because of the disability. [page 12]

...

Based on the wording of the Collective Agreement I find that a person does not have employee status following a decision that the employee is permanently disabled under Article 26. An employee who is placed on injury on duty leave has status as an employee. However, Article 26 means that injury on duty leave will terminate once the employee is prevented from returning to work because of a permanent disability. [page 13]

The Supreme Court of Newfoundland, Trial Division upheld the *Howe* award on judicial review in *Newfoundland Association of Public Employees v. Her Majesty the Queen in Right of Newfoundland* (1997) St.J. No. 2132, December 8, 1997.

The *Howe* award did not have to address the issue of an employee’s entitlement to sick leave or annual leave prior to the termination of Injury on Duty Leave or the termination of employment. On the facts of that case, Elizabeth Howe had exhausted her accumulated sick leave and annual leave prior to the termination of her employment. Upon the termination of her Injury on Duty leave, she had no further sick leave or annual leave entitlement. Under those circumstances she no longer had status as an employee, and the Employer could terminate her employment.

The parties referred to various Articles of the Collective Agreement with respect to the entitlement of the Grievor to sick leave and annual leave. When interpreting the Collective Agreement, I will consider the principles of interpretation applied by arbitrators. These principles are discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, and include that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

With respect to the issue of sick leave entitlement, I will consider the provisions of Articles 15, 16, 22 and 26. The Grievor accumulated sick leave pursuant to Article 16.01. He continued to accumulate sick leave up to the date of termination of employment on August 28, 2007. Article 16.05 states that where an employee is unlikely to be able to return to duty after the expiration of accumulated sick leave, he may be retired when sick leave has expired, paid a pension award, if eligible, and given notice of termination in accordance with Article 22. It would be consistent with Article 16.05 to allow the Grievor to use his accumulated sick leave before his employment is terminated and he receives his pension award. Article 16.07 supports the entitlement to sick leave. It states that sick leave awarded immediately prior to disability retirement shall not be reckoned for the purpose of calculating sick leave. In other words, when an employee goes on sick leave prior to disability retirement there is no further accumulation of sick leave. Similarly, under Article 15.09, when an employee goes on sick leave immediately prior to disability retirement, there is no further accumulation of annual leave. Article 16.09 states that sick leave shall not be granted to an employee who is on maternity leave or any other type of leave without pay. While Article 16.09 prohibits the conversion of leave from maternity leave or leave without pay to sick leave, there is no similar prohibition against conversion from Injury on Duty Leave to sick leave. Eligibility for sick leave is addressed in Article 16.06. An employee may be required by the permanent head to submit a medical certificate. Article 16.06 contemplates that where a medical certificate is satisfactory, and the employee has sick leave credits available, then sick leave will be awarded. When Article 16 is read in its entirety, it supports the Grievor's claim to use accumulated sick leave.

Article 26 is headed "Injury on Duty". Under Article 26.01 (a), an employee who is unable to perform duties because of a workplace injury shall be placed on Injury on Duty Leave and paid the amount determined by WHSCC. Under Article 26.03, the employee continues on Injury on Duty Leave for the period that WHSCC informs the Employer that it considers the employee unable to perform his duties. Article 26.03 states that Injury on Duty Leave continues until WHSCC considers that the employee is able to return to work or that the employee is prevented from returning to work because of a permanent disability. "Permanent disability" was interpreted in the *Howe* award to include a decision by WHSCC to award EEL benefits. Under Article 26.04, Injury on Duty Leave pay will cease when a disability award is made. The reference in Article 26.04 to the making of a disability award, when read together with Article 26.03, means the placement of the employee on EEL benefits. When the employee is placed on EEL benefits, Injury on Duty Leave ceases. Article 26.05 addresses the event of an employee becoming permanently disabled, which means the employee is eligible for EEL benefits. Article 26.05 states that the case shall be submitted to the

permanent head of the department for determination of the benefits which may be due to the employee. The benefits shall not be less than those due had the employee been covered under the *WHSC Act*. Article 26.05 supports the entitlement to sick leave. Having regard to the whole of the Collective Agreement, the Employer may not terminate employment where the effect would be to deny the use of accumulated sick leave.

In this case, the Grievor had accumulated sick leave to which he was entitled under Article 16. To terminate the Grievor's employment and deny the use of accumulated sick leave would be a violation of Articles 16 and 26, in particular, Articles 16.01, 16.05, 16.06, 16.07 and 26.05. This interpretation of the Collective Agreement is consistent with section 16(1)(b) of the *Public Service Pensions Act*. The section states that an employee shall be retired under the pension plan where the employee has used up all sick leave entitlement and is medically certified to have a permanent incapacity. The legislation contemplates that sick leave entitlement will be used before employment is terminated. The rationale for using sick leave is to mitigate the costs of the pension plan. The *Public Service Pensions Act* sets out an exception in section 16 (4.1) where an employee's employment is terminated by reason of redundancy. The exception was added by amendment of the legislation in 1995 (S.N. 1995 c. 23). Where the exception applies, an employee may be retired even though the employee has not used up all sick leave entitlement. There is no exception in the legislation that applies to the Grievor's situation. The Grievor had sick leave entitlement within the meaning of the *Public Service Pensions Act* based on Articles 16 and 26.

The Employer refers to its authority to terminate the employment of an employee upon an award of EEL benefits and the termination of Injury on Duty Leave. As stated, the termination of the Grievor's employment, upon the expiry of Injury on Duty Leave, is subject to the right to use accumulated sick leave entitlement. The Employer relies on the *Howe* award as authority to terminate employment upon expiry of Injury on Duty Leave, because such a person does not have employee status. However, the decision in *Howe* was made in a case where the employee had exhausted her sick leave and annual leave entitlement. Therefore, the *Howe* award did not decide that an employee with accumulated sick leave does not have employee status upon the expiry of Injury on Duty Leave. To deny employee status in those circumstances would violate an employee right under the Collective Agreement.

The finding that the Grievor had the right to use accumulated sick leave is supported by the award in *Hoyles Escasoni Complex v. N.A.P.E. (Stevens)*, unreported, June 22, 1992 (Alcock). In that case,

an injured worker was found to have a permanent disability and was accepted for EEL benefits by WHSCC. The collective agreement language that applied in that case had provisions similar to Article 16 of the present Collective Agreement. The employee was found to be eligible for a disability pension and was placed on sick leave. While she was drawing down her accumulated sick leave, her position was made redundant. She was laid off and her sick leave was terminated. The arbitrator found that the Grievor had a right under the collective agreement to use her accumulated sick leave and the employer had improperly laid her off. The arbitrator also referred to the requirement in the *Public Service Pensions Act* that an employee use sick leave before receiving a disability pension.

The Grievor was paid out his total accumulated annual leave in a lump sum payment. The Union submits that the Grievor was improperly denied the opportunity to go on annual leave, and thereby accrue further annual leave and sick leave credits and pensionable service. The Employer submits that it was appropriate to deny the Grievor the opportunity to go on annual leave, upon the award of EEL benefits, for the same reasons submitted in support of the denial of sick leave. The Arbitrator notes that there are differences between the annual leave and sick leave provisions in the Collective Agreement. Article 22.01 provides for the payout of accumulated annual leave upon termination of employment. There is no similar provision authorizing the payout of accumulated sick leave. Having reviewed the Collective Agreement as a whole, in particular, Articles 15, 16, 22 and 26, the Employer is not required to allow an employee to go on annual leave, and is permitted to pay out annual leave as a lump sum. It is also noted that there is no requirement in the *Public Service Pensions Act* that an employee use annual leave before receiving a disability pension, as there is with respect to sick leave. The payout of annual leave in a lump sum amount to the Grievor did not violate the Collective Agreement or the legislation.

The Union also submits that the Employer discriminated against the Grievor on the grounds of disability contrary to Article 5.01 and the *Human Rights Code*. The Union claims that the Grievor, as an injured worker, was treated differently than other disabled employees. It is unnecessary to consider this issue with respect to entitlement to sick leave, as that part of the grievances will be allowed for the reasons stated. However, the allegation of discrimination may be considered with respect to the annual leave payout, as the Arbitrator has not otherwise found any violation of the Collective Agreement with respect to that part of the grievance. As an injured worker, the Grievor was eligible for benefits under the *WHSC Act* which are not available to an employee who is sick or disabled for reasons other than a workplace injury. Prior arbitration awards have found that different

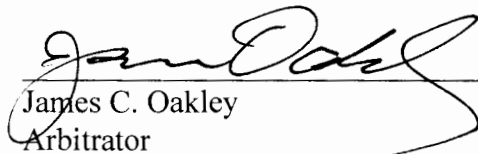
treatment of disabled employees whose cause of disability is a workplace injury, compared to employees whose cause of disability is not a workplace injury, does not violate human rights legislation. The existence of different types of insurance plans designed to cover different purposes does not amount to discrimination contrary to human rights legislation (*Messier-Dowty Inc. and I.A.M.A.W., Local 905 (Pinkston)* (1999) 80 L.A.C. (4<sup>th</sup>) 87 (Knopf) and *Toronto Real Estate Board v. C.E.P.U., Local 87 (M7 Ontario Newspaper Guild)* (1998) 76 L.A.C. (4<sup>th</sup>) 90 (Albertyn)). I accept the arbitral authority in this regard and find there was no violation of Article 5.01 or the *Human Rights Code*, by the Employer's requirement that the Grievor be paid a lump sum annual leave payout.

In summary, the claim for sick leave will be allowed and the claim to go on annual leave will be denied. The Employer's right to terminate employment was subject to the Grievor's right under the Collective Agreement to use his accumulated sick leave. On the facts of the case, the Grievor was entitled to be placed on sick leave on August 28, 2007, and to use his accumulated sick leave, prior to termination of employment. Placement on sick leave would not violate the *WHSC Act* for the reason that the payment of Workers' Compensation benefits could be suspended during the period of sick leave entitlement. The payout of annual leave in a lump sum did not violate the Collective Agreement or any applicable legislation.

### **Decision**

The grievances are allowed, in part. The Employer was required by the Collective Agreement to allow the Grievor to use his accumulated sick leave prior to terminating his employment. The Employer did not violate the Collective Agreement, or any applicable legislation, when it paid the Grievor's accumulated annual leave in a lump sum payment. The Grievor shall be paid compensation in an amount to be determined.

**DATED** this 22<sup>nd</sup> day of February, 2011.

  
James C. Oakley  
Arbitrator