

ARBITRATION AWARD

BETWEEN:

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

AND:

COLLEGE OF THE NORTH ATLANTIC
(hereinafter called the “College” or the “Employer”)

GRIEVOR: Lori Barron

COUNSEL: For the Union

Bert Blundon

For the Employer

Don Saturley

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on January 21 and 22, 2009. 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 in the event there is a question of interpretation or compensation arising from the Award, with any question to be referred to the Arbitrator within sixty (60) days following publication of the Award.
5. Any applicable time limits for the filing of the Award were waived.

The following exhibits were entered at the hearing:

- Consent 1 - College of the North Atlantic Faculty Agreement between Her Majesty the Queen in Right of Newfoundland represented herein by Treasury Board, The Board of Governors of the College of the North Atlantic, as provided in the *Colleges Act* and Newfoundland and Labrador Association of Public and Private Employees, signed June 29, 2006, expires August 31, 2008
- Consent 2 - Grievance Form dated September 26, 2007
- Consent 3 - Letter dated October 5, 2005 from Trudy O'Neill, Manager of Human Resources, College of the North Atlantic to Lori Power
- Consent 4 - Request for Classification Review Instructional Staff for Lori Power, dated October 26, 2005
- Consent 5 - Letter dated December 2, 2005 from Trudy O'Neill to Lori Power
- Consent 6 - Letter dated February 9, 2006 from Trudy O'Neill to Lori Power
- Consent 7 - Letter dated February 21, 2006 from Trudy O'Neill to Lori Power
- Consent 8 - Letter dated March 9, 2006 from Trudy O'Neill to Lori Power
- Consent 9 - Letter dated May 30, 2006 from Trudy O'Neill to Lori Power

- Consent 10 - Letter dated June 6, 2006 from Trudy O'Neill to Lori Power
- Consent 11 - Letter dated September 26, 2006 from Trudy O'Neill to Lori Barron
- Consent 12 - Letter dated October 12, 2006 from Trudy O'Neill to Lori Power
- Consent 13 - Letter dated October 30, 2006 from Trudy O'Neill to Lori Barron
- Consent 14 - Letter dated February 21, 2007 from Trudy O'Neill to Lori Barron
- Consent 15 - Letter dated May 23, 2007 from Trudy O'Neill to Lori Barron
- Consent 16 - Letter dated July 27, 2007 from Trudy O'Neill to Lori Barron
- Consent 17 - Email dated September 19, 2007 from Lori Barron to Trudy O'Neill and reply
- Consent 18 - Email dated September 21, 2007 from Trudy O'Neill to Lori Barron
- Consent 19 - Letter dated January 14, 2005 from Lori Power submitting application for the position of Communications Instructor, with attached resume
- Consent 20 - Letter dated February 15, 2005 from Trudy Dwyer to Lori Power
- Consent 21 - Letter dated March 8, 2005 from Trudy Dwyer to Lori Power
- LB - 1 Printout of View Paycheque inquiry
- LB - 2 Printout of Paycheque of Lori Barron - pay end date - October 4, 2005
- LB - 3 Statement of term charges for 2005-06 Winter, Masters Program, MUN
- LB - 4 Statement of term charges 2007-2008 Fall and 2006-2007 Spring, Masters Program, MUN
- LB - 5 Motor vehicle lease dated June 14, 2007, lessee Todd Barron
- LB - 6 Bank of Montreal Promissory Note dated July 26, 2006, William T. Barron
- LB - 7 Invoice from Leon's Furniture to Todd Barron dated May 2, 2006
- LB - 8 Quotation from Hayward Interiors to Todd Barron and Lori Power dated May 3, 2006
- LB - 9 Invoice from Crown Cabinets to Todd and Lori Barron dated September 6, 2006

- LB - 10 Bank of Montreal Mortgage Loan Confirmation dated May 26, 2006 to William T. Barron
- LB - 11 Letter dated September 28, 2007 from Trudy O'Neill to Lori Barron
- LB - 12 Letter dated October 10, 2007 from Colleen M.E. Morrison, Employee Relations Officer for the Union to Trudy O'Neill with attached letter dated September 28, 2007
- TO - 1 Appointment letter form signed by Trudy Dwyer, February 15, 2005
- TO - 2 Transcript - Memorial University of Newfoundland, Lori Power

Nature of the Grievance

The Grievor is an Instructor at the College of the North Atlantic. Following completion of a Bachelor of Education degree, she applied for a review of her classification. She was reclassified by the Employer at a higher pay level. About two years later the Employer informed the Grievor that there had been an error in her step level, her salary would be reduced to the correct lower step level and she would have to pay back to the Employer the amount of an overpayment. The Union grieves that the Employer is not permitted to reduce the Grievor's pay level, and there was no overpayment. In the alternative, the Union submits that the Employer is not entitled to collect the amount of any overpayment because the Grievor changed her position in reliance upon the salary paid by the Employer. The Employer requests an Order by the Arbitrator that the Grievor's pay level is correct and that the Grievor pay back the overpayment.

Collective Agreement

The relevant articles of the Collective Agreement are as follows:

Article 1 Purpose of Agreement

1.01 The purpose of this Agreement is:

- (a) to maintain and improve harmonious relations between the Union, Employer and employees;
- (b) to set forth certain terms and conditions of employment relating to remuneration, hours of work, safety, employee benefits and general working conditions affecting employees covered by this Agreement.

- (c) to set conditions conducive to the development and delivery of public, post-secondary education.

Article 2 Definitions

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2.01 (d) “Classification” means in the case of Technical and Vocational Instructors, the class and level to which an employee is assigned under the Technical and Vocational instructors’ Classification Plan and in the case of a Instructional Assistant, the level to which an employee is assigned under the Instructional Assistants’ Scales; and in the case of Academic Instructors the grade to which an employee is assigned under the Teacher (Certification) Regulations.

...

(n) “Increment” means the increase in salary from one step to the next higher step in the salary scale.

...

(cc) “Reclassification” means any change in the current classification of an employee.

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(gg) “Technical and Vocational Instructor” means an employee classified under the Technical and Vocational Instructors’ Classification Plan and paid on the basis of the Technical and Vocational instructors’ salary scale.

(hh) “Temporary Employee” means a person who is employed for a specific period or for the purpose of performing certain specified work and whose employment may be terminated at the end of such period or on completion of such work.

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Article 4 Management Rights

4.01 All functions, rights, powers and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Union as being retained by the Employer. These rights include but are not limited to the following:

- (a) to maintain efficiency and to make, alter, and enforce rules and regulations to be observed by employees;
- (b) to direct, hire, promote, demote, transfer, suspend, discipline or dismiss employees;

- (c) to evaluate jobs, classify positions, establish qualification requirements of employees and specify the employee's duties and
- (d) to manage and operate the College of the North Atlantic as provided in the *College Act*, 1996 respects and without restricting the generality of the foregoing, to determine the number and location of establishments, the services to be rendered, the methods, the work procedures, the kinds and locations of instruments and equipment to be used; to select, control and direct the use of all materials required in the operation of the College; to schedule the work and service to be provided and performed; to make, alter and enforce regulations governing the use of materials, equipment and services as may be deemed necessary by the Employer.

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Article 6 Arbitration

6.01 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 question as to whether a matter is arbitrable, either of the parties may, within the time limit specified in Clause 5.02 (step 5), 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.

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6.12 An Arbitration Board may not alter, modify or amend any provision(s) of this Agreement but shall have the power to set aside a decision of the Employer and to modify a disciplinary measure imposed by the Employer.

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Article 12 Salary

- *12.01 (a) The annual salaries specified in Schedule 1 shall be paid in bi-weekly instalments.
- (b) The regular hourly rate shall be calculated by dividing the yearly rate specified in the schedules by 1560 for instructors and as specified in the schedules by 1820 for Instructional Assistants and Guidance Councilors;
- (c) The regular daily rate shall be calculated by dividing the yearly rate specified in the schedules by 260;

- (d) When an employee's pay is to be reduced and the period of reduction is for less than one week, the employee's payment shall be reduced by an amount calculated by dividing his/her annual salary by 1560 or 1820, as appropriate, for each attendance hour lost during the period.

Article 13 Increments and Upgradings

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- 13.02 (a) Subject to Clause 13.01 increments will be awarded annually on September 1st of each year in accordance with an employee's completed years of service until he/she reaches the top of the salary scale unless withheld by the Employer for unsatisfactory service and in such case(s) there will be recourse to Grievance and Arbitration Procedure(s) referred to in Article 5 and Article 6. The computation of years of service for incremental purposes shall be made once yearly immediately prior to September 1st.
- (b) In computing the years of service for incremental purposes the following shall apply:
- (i) Six (6) hours of service shall be counted as a day of service for instructors.
- Seven (7) hours of service shall be counted as a day of service for Instructional Assistants and Guidance Counsellors.
- (ii) The total years of service shall be determined by dividing the total days of service by two hundred and sixty (260).
- (iii) The maximum number of days of service which may be credited for any twelve (12) month period is two hundred and sixty (260).
- (iv) When the total years of accrued service has been computed any half year or more shall be counted as a year, but a fraction of less than one half shall not be counted.
- (c) An employee who qualifies for a higher classification or level during the academic year will be placed in the higher classification or level effective the first day of the month in the month in which the qualification was obtained, except if the qualification is in a period during which the Employer has not scheduled the employee to work,

in which case it will be awarded on the first day of the month in which the employee is scheduled to work after receipt of the qualification.

Employee(s) are responsible to inform the Employer of their having obtained such higher qualification(s) within 90 days of having obtained it. If an employee fails to inform the Employer within this time limit, he/she will receive the higher classification or level effective the first day of the month in which the Instructor notifies the Employer.

- *(d) Subject to Clause 13.02 (e), on reclassification of an employee to a higher classification, his/her rate of pay shall be established at the same step on the new range except in a case where the same step would not give him/her an increase in salary of at least five percent (5%), in which case he/she shall be placed at a step which does exceed his/her existing rate by at least five percent (5%) subject to the maximum of the new scale.
- (e) Clause 13.02 (d) will only be applicable provided the employee has completed a minimum of one (1) year of related post-secondary courses or equivalent since his/her last upgrading to a level within a class. Where the employee has not completed the required full year, he/she shall be established at a step in the new classification without loss of pay.

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Article 37 Accreditation Procedure

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37.02 The accreditation procedure will provide for the rendering for the final decision on the acceptability of specific courses and types of experience of an employee for the purpose of qualifying for a higher classification or a higher level within a classification.

Article 38 Classification Plan

38.01 An employee shall be notified in writing of any change in his/her classification.

*38.02 (a) No employee shall be paid at a rate which is below the minimum rate of the classification to which he/she is assigned.

- (b) Notwithstanding Article 13, an employee who has less than the minimum required years of employment experience for entry into a class shall not receive an increment until such time as that employee's years of employment in the bargaining unit equals the deficiency in years of employment experience.
- (c) The Employer may appoint a person up scale who has several years of progressive related experience in addition to the minimum required to enter the class as follows:
 - i) Classes one and two - up to Step 4
 - ii) Classes three, four and five - up to Step 7
 - iii) Class six - up to Step 8

Article 39 Classification Appeals Board

39.01 The Instructors' Classification Appeals Board shall carry out its function in accordance with the Instructors' Classification Appeal Board Procedure as set out in Schedule "5".

39.02 When an employee feels that his/her position has been unfairly or incorrectly classified, the employee may submit a request for review or appeal in accordance with the procedures outlined in Schedule "5".

39.03 Classification decisions arising out of an employee's request for review or appeal made under Clause 39.02, shall be retroactive to the date the request was first received by the Employer or, in case of new employees, to the date of appointment.

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Article 45 Duration of Agreement

*45.01 This Agreement shall come into effect on the date of signing and shall remain in full force and effect until August 31, 2008.

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SCHEDULE "1"

SALARY IMPLEMENTATION FORMULA

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Technical and Vocational Instructors Salary Scale
September 1, 2007
Schedule 1A-4

...

		STEP 1	STEP 2	...	STEP 9	STEP 10
<u>CLASS 5</u>	Level A	38,108	40,010	...	56,298	59,115
Level B =						
A+	1,592	39,700	41,602	...	57,890	60,707
Level C =						
B+	2,171	41,871	43,773	...	60,061	62,878
Level D =						
C+	2,171	44,042	45,944	...	62,232	65,049
Level E = B, C, or D+	2,171	46,213	48,115	...	64,403	67,220
...						

SCHEDULE "4"

TECHNICAL AND VOCATIONAL INSTRUCTORS' CLASSIFICATION PLAN

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Instructor, Class 5, Level A

A four year degree (non-teaching) in Arts, Commerce, Science or equivalent plus a minimum of 3 years of related experience.

Instructor, Class 5, Level B

Qualifications for Class 5, Level A, plus completion of a program of vocational teacher training, or the equivalent, as approved by the Minister of Education.

Instructor, Class 5, Level C

Qualifications for Class 5, Level A or B, plus completion of one additional year of approved related post-secondary courses, or the equivalent.

Instruction, Class 5, Level D

Qualifications for Class 5, Level C, plus completion of one additional year of approved related post-secondary courses or the equivalent.

Instructor, Class 5, Level E

Qualifications for Class 5, Level B, C, or D, plus the Bachelor of Vocational Education Degree or Bachelor of Post-Secondary Education.

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SCHEDULE "5"

INSTRUCTORS' CLASSIFICATION APPEAL BOARD

CLASSIFICATION REVIEW AND APPEAL PROCEDURES

I. DEFINITIONS

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2. "Appeal" means a request by an employee to the Board for a change in his/her the classification or a request by an employee who is an academic instructor and alleges he/she has grounds to be classified under the Technical and Vocational instructors' Classification Plan or vice versa.

3. "Board" means the Instructors' Classification Appeal Board constituted to function in accordance with these procedures.

4. "Class" refers to one of the six classes 1 to 6 contained in the Vocational and Technical Instructors' Classification Plan.

5. "Classification" is defined in paragraph 2.01 (f) of this Collective Agreement.

...

10. "Level" refers to one of the various pay levels within a class, designated by one of the alphabetic letters A, B, C, D, or E, or one of the levels 1, 2, or 3 of the Instructional Assistants' Classification Plan.

...

II. CONSTITUTIONAL OF APPEAL BOARD

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12. The decision of the Board on an appeal shall be final and binding on both the appellant and the Employer. The majority opinion of the Board shall prevail and there shall be no minority report.

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III. PROCEDURES

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3. A request for review shall be submitted to the Employer, in writing, stating:

- (a) the employee's full name;
- (b) name of the employing Employer and place of work;
- (c) the class and/or level in respect of which the review is requested;
- (d) details of the reasons why the employee considers that his/her present

class and/or level is incorrect and the justification for the class and/or level which the employee considers to be correct.

4. The Employer shall consider each such request within thirty (30) days of its receipt and within a further thirty (30) days shall notify the employee in writing of its decision thereon.
5. If an employee is dissatisfied with the decision of the Employer, he/she may, if she/she so desires, appeal the decision to the Instructors' Classification Appeal Board.
6. All such appeals shall be submitted to the Board in writing (in duplicate) within a period of not more than fourteen (14) days after receipt by the employee of notification of the Employer's decision as above mentioned.
7. The Board shall consider and rule on only those appeals received from an individual employee provided that such employee shall first have submitted a request to the Employer for a review of his/her classification, in accordance with paragraph 3 of this Section, and shall have been notified in writing of the Employer's decision on his/her request.

Evidence

The witness called by the Union was the Grievor, Lori Barron (formerly Lori Power), Instructor at the College of the North Atlantic. The witness called by the Employer was Trudy O'Neill (formerly Trudy Dwyer), Manager of Human Resources for the St. John's region of the College.

The Grievor, Lori Barron, applied by letter dated January 14, 2005 for the position of Communications Instructor at the College of the North Atlantic, Prince Phillip Drive Campus, St. John's. At that time she had completed a Bachelor of Arts Degree with a major in English and a minor in Sociology and an Information Technology certificate. She was working towards the completion of a Bachelor of Education Degree in Post Secondary Education. Her application for employment was accepted and she was subsequently offered appointment to various temporary positions commencing January 21, 2005. Each temporary appointment was confirmed by a letter from the College signed by Trudy O'Neill, Manager of Human Resources. The letters were signed by the Grievor to accept the appointment on the stated terms and conditions. The letters were usually issued after the term of the appointment had commenced. The first letter of appointment was dated February 15, 2005 and stated, in part, as follows:

I am pleased to confirm your temporary appointment to the position of Instructor-Communications at Prince Phillip Drive Campus of College of the North Atlantic.

Your appointment will be for the period January 21 and 24, 2005. Your salary will be on the Technical and Vocational Instructors' Salary Scale, Class 5, Level B, Step 1 at \$23.98 per hour. The benefits and conditions associated with this appointment are as determined by your immediate supervisor and as outlined in the College of the North Atlantic Faculty Collective Agreement. This also includes the requirement for you to service a probationary period in accordance with Article 24.

...

To indicate your acceptance of this offer please sign below and return this entire contract to the Human Resources Department by March 1, 2005.

As stated in the letter, the Grievor was hired at Class 5, Level B, Step 1 on the Technical and Vocational Instructors' Salary Scale. Trudy O'Neill testified that she reviewed the Grievor's education and experience as stated on her resume. Ms. O'Neill determined that the Grievor qualified for Class 5, Level B. The Grievor had completed a Bachelor of Arts Degree and Vocational Certificate, which met the minimum requirements for Class 5, which were a 4 year degree (nonteaching) in Arts, Commerce, Science or equivalent. She had approximately 2 ½ years teaching experience which met the minimum experience requirement for Class 5, which was 3 years related experience. Having the minimum 3 years experience meant that she would be placed on Step 1 of the salary scale. Ms. O'Neill testified that Article 38.02 (c) of the Collective Agreement allows the College to hire up scale at a higher step when an instructor has more than the minimum required experience to enter the class. She said the practice of the College when hiring up scale is to grant one step for every year of teaching experience. The Grievor did not have any teaching experience in addition to the minimum requirement, and was therefore hired at Step 1. Ms. O'Neill also testified that an instructor will progress upward one step on the salary scale after one year of full time employment. One year of experience for Instructors is equivalent to 260 working days.

The Grievor's second letter of appointment was dated March 8, 2005, and was for the period February 24, 2005 to April 27, 2005. The letter referred to the same salary scale, Class 5, Level B, Step 1, and stated the annual salary was \$37,421. In a subsequent letter of appointment dated October 5, 2005, the College confirmed the Grievor in various temporary appointments covering the period August 29 to December 16, 2005, at the Technical and Vocational Instructors' Salary Scale, Class 5, Level B, Step 1 at \$23.99 per hour.

The Grievor testified that when she was hired she was told by Trudy O'Neill to apply for a reclassification when she finished her Bachelor of Education Degree in Post Secondary Education. The Grievor completed the course work required for the degree on August 10, 2005, and was awarded the Degree by Memorial University of Newfoundland at convocation on October 26, 2005. On the same date, she brought her degree certificate and transcript to the Human Resources office. She did not recall if she met with Ms. O'Neill that day or spoke to someone at the front desk. The Grievor testified that she completed part of a form headed "Request for Classification Review Instructional Staff", entered as exhibit C-4. The Grievor testified that she wrote her name in the blank for "Name", and she wrote "Instructor" in the blank for "Faculty". In the blank next to "Reason for Request" she wrote "completed Bachelor of Education (Post Secondary), August 10-05". She signed the form. Above her signature, there were blanks to fill in for "Present Classification" and "Requested Classification". The completed form was filled in to show Present Classification at Class 5, Level B, Step 9, and the Requested Classification at Class 5, Level A+B+E, Step 9. The Grievor testified that she did not fill in any of the blanks for Present Classification or Requested Classification, and she did not recall if those blanks were filled in before she signed the form. At the bottom of the form there is a box that is headed "To be Completed by Staff Classification Committee". In the box, blanks were filled in stating the decision of the committee was Class 5, Level A+B+E, Step 9, effective date August 1, 2005. The space for signature in the box on the form was signed by Trudy O'Neill and dated October 28, 2005.

Trudy O'Neill testified that upon completion of the Bachelor of Education Degree, the Grievor was qualified for Class 5, Level A+B+E on the Technical and Vocational Instructors' Salary Scale. However, the form incorrectly stated that the Grievor's Present Classification was Class 5, Level B, Step 9, when, in fact, the Grievor's step level was Step 1. Ms. O'Neill testified that she did not fill in the blanks on the form for "Present Classification" and she did not know who completed that part of the form. The blanks in the box at the bottom of the form were likely completed by a clerk formerly employed in the Human Resources Office who was no longer employed by the College. Ms. O'Neill said that she filled in the blank on the form for "Requested Classification". Ms. O'Neill testified that she determined that the pay increase would be at least 5%. If the increase had been less than 5%, then the Grievor would have been entitled to move up one step by operation of Article 13.02 (d). Ms. O'Neill signed the form approving the reclassification without knowledge of the error on the form. Ms. O'Neill testified that the only way the Grievor could move up one step was by completing 260 working days, or if the reclassification of her Grade and Level resulted in a pay increase of less than 5%. Ms. O'Neill said that if the form had been filled out correctly, then the

result of the reclassification would have been Class 5, Level A+B+E, Step 1, at an annual salary of \$39,468. At Step 9 the annual salary for Class 5, Level A+B+E was \$56,614.

The College advised the Grievor of her reclassification by letter dated December 2, 2005, signed by Trudy O'Neill. The letter stated, in part, as follows:

Please be advised that your request for reclassification has been approved.

Effective August 1, 2005, your classification has been changed to Class 5, Levels A+B+E, Step 9 at \$56,614 per annum.

The Grievor testified that she had no reason to distrust the letter dated December 2, 2005 informing her of the reclassification. She did not think the increase in annual salary was extravagant. She was told she would receive a substantial increase when she completed her Bachelor of Education Degree. When she was hired she was told that the remuneration was very good at the College. She had not previously worked in a unionized position, and she had not seen a copy of the Collective Agreement. She had not discussed the salary with her coworkers. She was concerned about performing her job and not the amount of her salary. She said the Employer offered her a salary and she either accepted it or not. She signed the letters of appointment and returned them to the Employer and did not keep a copy. Therefore, she did not compare the letter of December 2, 2005 with any previous letter of appointment. She had not paid any attention to the details in the letters of appointment with respect to her class, level and step. She said that the terms "class, level and step" did not mean anything to her, and she just looked at the dollar amount of her salary.

The College confirmed the Grievor's subsequent temporary appointments to the position of Instructor by letters of appointment stating that her salary would be on the Technical and Vocational Instructors' Salary Scale at Class 5, Level A+B+E, Step 9. The College issued letters to that effect dated February 9, February 21, March 9, May 30 and June 6, 2006. The letters were all signed by Trudy O'Neill and by the Grievor. By letter dated October 12, 2006, from Ms. O'Neill of the College to the Grievor, the Grievor was advised that her classification was changed from Class 5, Level A+B+E, Step 9 to Class 5, Level A+B+E, Step 10. The Grievor testified that when she moved up from Step 9 to Step 10 she was told that a review was done annually and the higher step level came into effect on September 1. The College issued letters of appointment to the Grievor at the Step 10 pay level dated September 26, and October 30, 2006, and February 21, May 23, and July

27, 2007. The letters were all signed by Trudy O'Neill and the Grievor with the exception of the February 21, 2007 letter, where the space for the Grievor's signature was blank. The Grievor did not know why that letter was not signed.

Trudy O'Neill testified that in September, 2007, a clerk in the Human Resources Office was doing an annual review, and questioned how the Grievor moved from Step 1 to Step 10 between January, 2005 and September, 2007. Ms. O'Neill testified that the Grievor's correct step in September, 2007 was Step 2, based on her service with the College. Ms. O'Neill informed Gary Pinto, Director of Human Resources for the College about the situation. Ms. O'Neill was informed that a decision was made by Mr. Pinto and John Hutchings, Director of Finance for the College, to correct the Grievor's step level and to recover the amount of the overpayment. The decision was based on due diligence and the responsibility of the College under the *Financial Administration Act*, RSNL, 1990 c. F-8. Ms. O'Neill testified that the College is accountable to the Department of Education of the Provincial Government for its budget and its expenditures. She said the decision to correct the step level was not a classification review, because a classification review applied only to the class and level components of the salary scale and not to the step level. Ms. O'Neill was asked why the form used for an application for classification review referred to the step level. She said no one had objected to the form and the step level was needed to calculate the adjustment to salary and to take the proper payroll action.

Ms. O'Neill asked the Grievor to meet with her on September 14, 2007. Ms. O'Neill informed the Grievor that there was a significant problem with her salary level and that her salary would be reduced by about \$400 to \$500 per biweekly pay cheque. At that time Ms. O'Neill did not know the exact amount of the correction or the amount of any overpayment.

The Grievor sent an email to Ms. O'Neill on September 19, 2007 requesting details of the problem with her salary. Ms. O'Neill replied the same day stating that "your pay has been corrected to Class 5, Level A+B+E, Step 2 at \$43,773" and stating that a detailed summary and calculation of the overpayment would follow. Ms. O'Neill testified that the Grievor's salary level was corrected as stated in her email to the Grievor dated September 19, 2007. On September 21, 2007, Ms. O'Neill wrote to the Grievor and offered to meet with her to discuss the matter. The approximate amount of the overpayment, as calculated by the College, is \$20,000.

After September, 2007, the Grievor's letters of appointment were based on Step 2 of the salary scale. The College sent a letter of appointment to the Grievor dated September 28, 2007 appointing her for the period of August 30 to December 31, 2007 on the salary scale at Class 5, Level A+B+E, Step 2 at \$43,773 per annum. The letter was signed by the Grievor and returned to the College. However, the letter was enclosed with a letter from Colleen M. E. Morrison, Employee Relations Officer for the Union, headed "Without Prejudice" and stating that the signing of the letter was not an admission that the Grievor is currently being paid at the correct rate. Prior to signing the letter, the Grievor and Ms. Morrison signed a grievance form dated September 26, 2007 requesting that the Grievor remain at Class 5, Level A+B+E, Step 10 under the Technical and Vocational Instructors' Salary Scale.

The Grievor testified with respect to her financial circumstances. After she was reclassified and received the increase in salary in the fall of 2005, she arranged her financial affairs on that basis. At the time she did not have any significant savings or debt. She was paying rent and living in an apartment. She knew that she could be laid off from temporary positions, but she had seen that other instructors were made permanent who had been temporary for 20 years. She started a Master Degree program and had tuition expenses. She testified that she married William Todd Barron on August 10, 2006. She and Mr. Barron had purchased a new house in May, 2006 and purchased furniture and appliances for the house. Her name was on the ownership of the house although the mortgage documentation was in Mr. Barron's name. The mortgage payment was \$665 biweekly. She and her husband arranged the lease of a new truck in June, 2007. The truck payments were \$630 per month. Her husband had child care expenses related to a prior marriage. She testified that she had significant expenses planned for personal reasons that she explained in her testimony. After she was told in September, 2007 that her salary would be reduced, she tried to continue with the same financial arrangements until the issue was resolved. She and her husband attempted to maintain the same monthly expenses. A loan at the bank was renegotiated. She had planned her financial arrangements based upon the increase in salary she received in the fall of 2005.

Union Submission

The Union submitted that the Request for Classification Review Form and the letter from the Employer dated December 2, 2005 confirmed that the Grievor was reclassified. The reclassification was done under a prior Collective Agreement. The current Collective Agreement came into effect on the date of signing, according to Article 45.01. The date of signing was June 29, 2006. The Arbitrator did not have jurisdiction to apply a prior Collective Agreement. The Arbitrator's

jurisdiction to grant remedial relief is confined to the term of the current Collective Agreement under which the Arbitrator is appointed (*Manitoba v. Manitoba Government and General Employees Union* (2007) 158 L.A.C. (4th) 225 (Graham)). Under the current classification system there is finality once the classification decision is made, according to Article 37.02. The step level is part of the classification. To change the step level requires a classification review. A classification review can only be initiated by an employee and cannot be initiated by the Employer. The Grievor did not request a classification review in 2007. To allow the Employer to reclassify the Grievor would be prejudicial to the Grievor because the time limit has expired for her to appeal the classification review decision made in 2005. There was no evidence to support a finding that a mistake was made. The prior Collective Agreement was not before the Arbitrator. The Employer does not have authority to undo something done under the prior Collective Agreement. In the alternative, if there was an overpayment, the Employer is not entitled to recover the overpayment. The Employer cannot unilaterally deduct the amount of an overpayment, according to the *Labour Standards Act*, RSNL 1990, c. L-2, s. 36 (*Vancouver Hospital and Health Sciences Centre v. British Columbia Nurses Union* (2005) B.C.C.A. 343). In order to make a claim for unjust enrichment, the College was required to prove (1) an enrichment of the Grievor; (2) the corresponding deprivation of the College; and (3) absence of any juristic reason for the enrichment. The Employer has not proven these requirements. The College did not incur any loss, because the money originated from the Department of Education of the Government of Newfoundland and Labrador. Section 31(2) of the *Financial Administration Act*, RSNL 1990, c. F-8 does not delegate authority to the College to collect overpayments on behalf of the comptroller general, and does not change the authority of the Arbitrator to address the issue of unjust enrichment. An absence of juristic reason means no obligation, contractual, statutory or otherwise, to make the payment. In this case, there was a juristic reason because the Grievor was reclassified under the Collective Agreement and the salary payments were based on the reclassification. The Grievor had a legitimate expectation she would receive the salary amounts paid based on the letters of appointment. The Grievor changed her financial circumstances in reliance upon the amount paid following the reclassification. A change in position is a defence to a claim for unjust enrichment. The Grievor incurred a significant amount of debt in a mortgage for the purchase of a house and the lease of a truck. The Grievor did not know and had no reason to have reasonably known that she was being overpaid. The Employer knew or ought to have known about the mistake. It would be inequitable in the circumstances to require the Grievor to repay the overpayment. The Union also referred to *Pride of Alberta Meat Producers Co. and UFCW, Local 280P* (1996) 55 L.A.C. (4th) 385 (Sims), *Goodwin v. Benefit Plan Administrators (Atlantic) Ltd.* (2000) 195 Nfld. and P.E.I.R. 159 (P.E.I.S.C.T.D.), *Cabot Institute (Treasury Board)*

and Newfoundland Association of Public Employees (Kerri Thorne), July 30, 1995 (Panjabi) (the “*Cabot Institute*” case), and other authorities. The Union requested that the Grievor be reinstated to the classification and pay level that was in effect prior to September, 2007 and that the Employer pay restitution to the Grievor for loss of income after September, 2007.

Employer Submission

The Employer submitted that in January, 2005 the Grievor was classified at Class 5, Level B. She was hired at Step 1 on the pay scale. In October, 2005, following a classification review, the Grievor’s classification was changed to Class 5, Level A+B+E. Her application for classification review mistakenly showed that her present step level was Step 9 and not Step 1. The new pay level was mistakenly set at Step 9. The mistake was discovered in September, 2007 and the step level was decreased at that time from Step 10 to Step 2. There was an overpayment of about \$20,000.00. The step level is not part of an employee’s classification. The Employer referred to the definitions in Article 2.01. The definition of classification means class and level, and the definition of increment, means an increase in salary from one step to the next higher step. The Employer also referred to the calculation of step increases set out in Article 13, the reference to step levels in Article 38, and Schedules 1 and 4. In September, 2007, the Employer correctly determined the Grievor’s step level by applying the Collective Agreement. There was an overpayment proven and it was required to be repaid. The mistake was a violation of Article 13.02 (d) of the current Collective Agreement. There was a mistake of fact based on incorrect information on the Classification Review form. The Arbitrator had authority to consider the events that occurred prior to the coming into force of the current Collective Agreement. Classification was a vested right that survives the term of the Collective Agreement. As soon as the Employer became aware of the mistake, it took action to correct the mistake and notify the Grievor. The Employer was not estopped from correcting the mistake. The Employer relied on the right to recover the overpayment in Section 31 (2) of the *Financial Administration Act*, and relied on Sections 16 (j) and 20 (1) of the *Colleges Act* 1996, S.N. 1996, c. 22.1. The Employer submitted that the Grievor’s lifestyle did not change significantly after the mistake was discovered and her salary was reduced. Therefore the Grievor could not claim she would not have incurred the same expenses if she had known that her salary would be at the lower step level. The Employer referred to case authorities including *Re British Columbia and BCGEU* (1991) 23 C.L.A.S. 597 (Glass), *Ellement and Treasury Board (Public Works and Government Services Canada)* [1997] C.P.S.S.R.B. No. 56 (Cloutier), *Aspen View Regional, Local 19 v. General*

Teamsters, Local 362 [2000] A.G.A.A. No. 28 (Tettensor), and *Capital Health Authority v. United Nurses of Alberta, Local 85* (2002) 108 L.A.C. (4th) 97 (Sims). The Employer submitted that the *Cabot Institute* case, relied upon by the Union, was based on language of a different collective agreement, concerned a reclassification to a lower class level and not a pay error, and was distinguishable on its facts. The Employer requested an order that the Grievor's pay level be confirmed and that the Grievor be ordered to repay the amount of the overpayment.

Considerations

The Grievor, Lori Barron, applied for a position as Instructor at the College of the North Atlantic. Her temporary appointment in January, 2005 to a position at the Prince Phillip Drive Campus of the College was confirmed by letter dated February 15, 2005. The letter stated that her salary was on the Technical and Vocational Instructors' Salary Scale at Class 5, Level B, Step 1. At the time she was hired, her qualifications were evaluated by Trudy O'Neill, Manager of Human Resources. She was placed at Class 5, Level B on the basis of completion of a non-teaching Bachelor of Arts Degree and the equivalent of three year's teaching experience. She met the minimum experience requirement and was hired at Step 1. The College has discretion to hire upscale at a higher step level, pursuant to Article 38.02 of the Collective Agreement, where an Instructor has more than the minimum level of experience. Upscale hiring did not apply in the Grievor's case. The Grievor received several temporary appointments to the position of Instructor from January, 2005 up to the present date. For each temporary appointment, the College issued a letter to the Grievor. The Grievor signed each letter, except for one letter she overlooked, and returned the letters to the College.

The Grievor received the Degree of Bachelor of Education in Post Secondary Education on October 26, 2005. At that time she applied for review of her classification. The Grievor partially completed a request form and signed the form. The form incorrectly stated that her present classification was Class 5, Level B, Step 9 and that the requested classification was Class 5, Level A+B+E, Step 9. The form should have stated that her present step level was Step 1. The Grievor testified that she did not complete the part of the form stating present and requested classification, and she did not recall if that part of the form was completed before she signed it. There is no evidence upon which the Arbitrator may make a finding with respect to who completed the part of the form that incorrectly states the Grievor's step level. The Grievor was entitled to be reclassified at Class 5, Level A+B+E.

There is no dispute with respect to the Grievor's class and level. When the College approved the reclassification, it incorrectly set the step level at Step 9. The Grievor had been paid at Step 1 and not Step 9 up to October, 2005. The Employer informed the Grievor by letter dated December 2, 2005 that she was reclassified to Class 5, Level A+B+E, Step 9 at an annual salary of \$56,614. The annual salary for the equivalent class and level at Step 1 was \$39,468, a difference of \$17,146.

The Grievor testified that when she was hired, she was told that she would be entitled to a reclassification when she completed her Bachelor of Education Degree. At the time of the reclassification, she had not read the Collective Agreement, had not kept copies of her letters of appointment, and had not paid any attention to the details of her classification in her letters of appointment, other than the salary amount. The Grievor said that the reference to "class, level and step" in the letters of appointment, and on the request for classification review form did not mean anything to her. The evidence does not support a finding that the Grievor knew there was any error in the step level at the time of the reclassification or when she continued to receive salary at the higher step level. The Grievor was notified of an increase in her step level from Step 9 to Step 10, effective September 1, 2006. The Grievor received approximately 10 letters of appointment from February, 2006 to July, 2007. The letters stated that her step level was Step 9, and then, following September 1, 2006, the letters stated that her step level was Step 10.

Upon review of the Grievor's payroll records by the Human Resources Office in September, 2007, it was determined by the College that the Grievor's correct pay level was at Step 2 and not Step 10. The Grievor's pay level was changed in a subsequent letter of appointment to the Grievor. The Grievor's signed the subsequent letter of appointment on a without prejudice basis. She has not agreed that there was any error in the step level and has not agreed that the Employer was entitled to change the step level. The Employer claims refund of an overpayment of about \$20,000 for the period from August, 2005 to August, 2007 when the Grievor was paid at the higher step level.

The Collective Agreement under which the grievance was filed was signed on June 29, 2006. The Collective Agreement came into effect on that date, by operation of Article 45.01 of the Collective Agreement. There were no prior collective agreements entered as exhibits at the arbitration hearing.

The issues before the Arbitrator are: (1) Was the Employer entitled to change the Grievor's step level from Step 10 to Step 2 in September, 2007? (2) Was there an overpayment made to the Grievor from August, 2005 to August, 2007? and (3) If there was an overpayment, is the Employer entitled to collect the amount of the overpayment from the Grievor?

Was the Employer entitled to change the Grievor's step level from Step 10 to Step 2? There are references to step level in the Collective Agreement. Article 2.01 (n) defines "increment" to mean "the increase in salary from one step to the next higher step on the salary scale". Article 38, headed "Classification Plan" refers to the step level upon entry into a class. Article 38.02 (c) states that the Employer may appoint a person up scale who has several years experience in addition to the minimum requirement to enter the class. In this case, the Employer determined that the Grievor had the minimum required to enter the class and therefore she entered the class at Step 1. Article 13.02 states that increments are awarded annually on September 1st of each year in accordance with the employee's completed years of service. The computation of years of service for incremental purposes shall be made once yearly prior to September 1st. A year of service is equivalent to 260 days, and any half year or more is counted as a year for computing years of service, under Article 13.02 (b) (iv). Therefore, pursuant to Article 13.02, an employee is entitled to move up one step level, for each completed year of service, on September 1st of each year, starting from the step level at which the employee entered the class. In this case, the Grievor entered the class at Step 1 in January, 2005. She is entitled to move up one step level, on September 1st each year, for each completed year of service, as defined in the Collective Agreement. The Employer calculated that, as of September 1, 2007, the Grievor was entitled to be paid at Step 2. The Employer determined the step level in September, 2007 based on the terms of the current Collective Agreement. Having considered how the Employer applied the Collective Agreement to the facts of the Grievor's situation, the Arbitrator finds that the Employer did not violate the Collective Agreement when it determined the Grievor's step level in September, 2007.

An employer's entitlement to correct an error in monetary benefit is stated in *Brown & Beatty, Canadian Labour Arbitration*, 4th edition at paragraph 8:1410 as follows:

An employer's obligation to pay any monetary benefit must be founded in an express provision in the agreement. It therefore follows that an employer who mistakenly pays its employees more than they are entitled to would not be obliged to perpetuate its error indefinitely. In such circumstances, there is a general agreement that so long

as it gives proper notice, an employer may rectify the mistake and revert to paying its employees pursuant to the precise terms of the agreement.

The Union submits that the Employer's action to change the Grievor's step level from Step 10 to Step 2, amounted to a reclassification, and there is no provision in the Collective Agreement permitting reclassification in the absence of a request by the employee. The Employer submits that correcting the step level is not a reclassification. The Arbitrator has considered the definition of "classification" in Article 2.01 (d). The definition states that classification means "the class and level to which an employee is assigned under the Technical and Vocational Instructors' Classification Plan". In the case of the Grievor, her class was Class 5 and her level was Level A+B+E. The definition of "classification" does not include the step level. Also, Article 39 of the Collective Agreement refers to a request by an employee for a review or appeal of a classification. The classification review and appeal procedures in Schedule 5 state that the process of review and/or appeal shall be available to any employee who considers that his/her class and/or level has been improperly classified. Therefore, a classification review or appeal is not the process to follow to correct an error in the step level. The Employer's action to correct the error in the step level was not a reclassification.

The Employer was entitled to change the step level in September, 2007 to the correct step level as determined under the Collective Agreement in effect at that time, which is the Collective Agreement under which the Arbitrator has jurisdiction. The Employer's action to notify the Grievor of the change in step level, and to adjust the salary level, does not violate the Collective Agreement.

Was there an overpayment made by the Employer to the Grievor? The Employer claims there was an overpayment on the basis that an error was made in the step level at the time of the reclassification in October, 2005. The Employer submits that the Grievor was incorrectly paid at Step 9 and not Step 1 commencing from the implementation of the reclassification effective August, 2005. The Union submits that the Arbitrator does not have authority to grant relief or make any determination under the prior collective agreement, for the reason that the Arbitrator's authority is limited to the Collective Agreement under which the Arbitrator is appointed. The Union's submission in this regard applies to the entire period from August, 2005 to August, 2007, for which the Employer claims repayment of the overpayment. However, the Union's submission in this regard would not apply to an overpayment after the date the current Collective Agreement came into effect, on June 29, 2006. Under the current Collective Agreement, the Arbitrator would have authority to

determine whether payments were correct after June 29, 2006, which is during the term of the current Collective Agreement. The Union's submission in this regard may be considered for the period prior to June 29, 2006. The Union also submits that even if the Arbitrator has authority to make a determination under the terms of the prior collective agreement, there is no evidence as to what those terms are, and therefore no basis upon which to make a determination. For example, the Union submits that there was no evidence with respect to the collective agreement provisions setting out how the initial step level was determined, or how increments to step levels were awarded. The evidence does not support a finding that the current terms are the same as the terms in the prior collective agreement. The Union's submission regarding the prior collective agreement may be considered with respect to the Employer's claim for overpayment between August, 2005 and June 29, 2006, prior to the effective date of the current Collective Agreement.

Article 6.01 of the Collective Agreement states that the parties may make a submission to arbitration where a "difference arises . . . out of the interpretation, application, administration or alleged violation of *this agreement*" (emphasis added). The reference to "this agreement" means the current Collective Agreement. Collective agreement and statutory provisions similar to Article 6.01 have been considered in arbitral authorities. The authority of an arbitrator to interpret and apply a collective agreement in effect prior to the agreement under which the arbitrator is appointed was discussed in *Manitoba v. Manitoba Government and General Employees Union* (2007) 158 L.A.C. (4th) 225 (Graham) (the "*Manitoba*" case). In that case, the arbitrator stated as follows:

10 The Union relies on *Re Goodyear Canada Inc. and United Rubber Workers Local 232* (1980) 28 L.A.C. (2d) 196 and various judicial and arbitral authorities decided thereafter, including a relatively recent decision (May 2005) of Arbitrator Hamilton involving these same parties, namely the MGEU and the Province (Re: the grievance of Debra Fredborg), [2005] M.G.A.D. No. 13. Based on those authorities, the Union's primary position is that an arbitrator should generally only grant remedial relief which is confined to the term or extended term of the collective agreement pursuant to which that arbitrator is appointed. In this case, the Union says that any application of the *Goodyear* principle would mean that no order ought to be granted requiring the Grievor to repay any of the overpayments which occurred prior to March 22, 2003, the date on which the current Collective Agreement came into force.

...

20 The basic rule remains unchanged, namely that an arbitration board can only exercise jurisdiction under the collective agreement through which it was appointed, and has no jurisdiction to remedy breaches arising from matters rooted in prior

collective agreements. However, in *Huntsville District Nursing Home and Ontario Nurses' Association* (2001) 106 L.A.C. (4th) 312, Arbitrator Lynk spoke of two exceptions to the basic rule, which were:

- (i) Cases in which the parties have agreed that an arbitrator has the jurisdiction to grant the remedy;
- (ii) Cases involving accrued or vested employment rights.

21 The second exception had been established by the Supreme Court of Canada in *Dayco (Canada) Ltd. and C.A.W.* [1993] 2 S.C.R. 230, involving pension benefits accumulated under previous agreements. Arbitrator Lynk identified three preconditions which must be satisfied in order to fall within the second exception to the *Goodyear* rule, namely:

- (i) The vested right being claimed must have vested under the prior collective agreement;
- (ii) The board must be satisfied that the grievance had been filed under the agreement pursuant to which the claim “can be said to have crystallized”;
- (iii) The grievance must satisfy any applicable procedural or timeliness provisions.

The Arbitrator finds that this is not a case where there are vested rights that may be enforced under the current Collective Agreement, and the parties have not agreed that the Arbitrator has jurisdiction. Therefore, the exceptions to the general rule discussed in the *Manitoba* case do not apply. Based on Article 6.01 and arbitral authority, there is no jurisdiction to interpret and apply the prior collective agreement to determine whether or not there was an overpayment made during the term of the prior collective agreement. Further, even assuming jurisdiction, there is insufficient evidence of the terms of the prior collective agreement upon which to base a decision. Therefore, the Arbitrator’s jurisdiction is limited to determining whether or not there was an overpayment during the term of the current Collective Agreement, which came into effect on June 29, 2006.

Following the effective date of the Collective Agreement, the application of the provisions with respect to step increments may be considered. The Grievor’s correct step level was Step 1, and then Step 2 effective September 1, 2006, upon completion of one year’s service. The Grievor was

incorrectly paid at Step 9, and then Step 10. Therefore there was an overpayment to the Grievor during the term of the current Collective Agreement.

Is the Employer entitled to collect the amount of the overpayment? The Arbitrator will first consider various statutes that were the subject of submissions by the parties, and will then consider principles of restitution.

The Union refers to case authorities applying labour standards legislation. In Mitchnick and Etherington, *Leading Cases on Labour Arbitration* at page 7-125, the authors state as follows:

The employment standards legislation of most jurisdictions prohibits the employer from making a deduction from wages by way of set-off or otherwise unless the employee consents or the deduction has been authorized by statute. The decision in *Capital Health Authority and U.N.A., Local 85* (2002), 108 L.A.C. (4th) 97 (Sims) confirms that it is improper for an employer of its own accord to recover overpayments by deduction from wages owing, and that in the absence of consent by the employee, the appropriate procedure is to file a grievance under the collective agreement requesting an order authorizing the deduction.

In the *Capital Health* case, referred to in the above quotation, the arbitrator sets out guidelines for processing claims for overpayment. One guideline is that determination of an overpayment, and the right to set off the overpayment from future salary payments, may be made by an arbitrator in the context of a grievance by the union disputing the overpayment. It is also noted that labour standards legislation varies from one jurisdiction to another, and that the *Capital Health* case applied legislation that differs from the legislation in this Province. The legislation in this Province is set out in the *Labour Standards Act*, R.S.N.L. 1990, c. L-2, which states in Section 36 (3) as follows:

...

36. (3) An employer shall not withhold or make a deduction from an employee's wages except:
- (a) deduction required by an *Act* of the province or of Canada;
 - (b) amounts ordered to be deducted or withheld by an order of a court;
 - (c) an overpayment of wages;
 - (d) deductions related to a group benefit plan that the employee participates in;
 - (e) savings plan deductions requested by the employee;

- (f) overpayment of or unused portion of required travel advances; or
- (g) deductions permitted under subsection (2).

Section 36(3)(c) of the *Labour Standards Act* in this jurisdiction permits a deduction for an overpayment of wages. The legislation does not prohibit any order by the Arbitrator that the Employer is entitled to recover an overpayment.

The Employer submits that the recovery of the overpayment is authorized by the *Financial Administration Act*, R.S.N.L. 1990, c. F-8, which states in Section 31 (2) as follows:

- (2) The comptroller general may recover an overpayment made out of the Consolidated Revenue Fund for salary, wages, pay, gratuities, allowances or pensions out of a sum of money that may be due or payable by the province to the person to whom the overpayment was made.

On the facts as presented, it is not demonstrated that the salary payment was made out of the Consolidated Revenue Fund, or that the claim for overpayment is being made by the comptroller general. Therefore, the *Financial Administration Act* does not assist the Employer in this case. The Employer also referred to sections of the *Colleges Act 1996*, S.N. 1996, c. 22.1, however, those sections empower the College to employ staff, and collect fees, and do not assist the Employer with its claim for overpayment.

The Employer's claim for repayment of the overpayment is appropriately considered on the basis of principles of restitution and unjust enrichment. The principles were considered in *U.A., Local 170 and O.P.E.I.U., Local 15* (2004) 134 L.A.C. (4th) 64 (Burke) (the "*U.A. Local 170*" case) where the arbitrator stated as follows:

On the other hand, the employer bases its claim on unjust enrichment. In doing so, however, it invokes equitable principles and ultimately the question of what is equitable to do in this situation. . . .

The employer has cited [*Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, 59 D.L.R. (4th) 161] for the proposition that the concept of equity has replaced mistake of law and fact. It maintains as a result I must consider the concepts of enrichment; deprivation and *absence* of a juristic reason. It cites the definition of juristic reason

set out in *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995), 24 O.R. (3d) 717 (Div. Ct.), as:

. . . a “juristic reason” simply means some underlying justification, grounded in a legal or equitable base, for the circumstances that have arisen, notwithstanding that the benefit/detriment equilibrium has since become unbalanced. (at p. 773)

The union says if there is “enrichment”, there is a juristic reason for it. As the employer has a contractual obligation to pay the money, it cannot claim it has been deprived of the money. There is, accordingly, a “juristic reason”, i.e. the collective agreement provision requiring payment, for the money to be paid.

The *U.A. Local 170* case referred to the meaning of a juristic reason for a payment as discussed in *Canada (Attorney General) v. Confederation Life Insurance Co.* (1995) 24 O.R. (3d) 717. In that case, the Court also stated as follows:

That the concept of “juristic reasons” is a broad one, involving many factors, and that it is the element in the unjust enrichment exercise which involves an examination of the “unjustness” of the situation, is apparent from the following statement of Madam Justice McLachlin in *Peter v. Beblow*, [1993] 1 S.C.R. 980, at p. 990 S.C.R., p. 645 D.L.R.:

It is in connection with the third element - absence of juristic reason for the enrichment - that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are “unjust”.

What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court.

. . .

In every case, the fundamental concern is the legitimate expectation of the parties.

The Arbitrator has considered a prior case between *Cabot Institute and Newfoundland Association of Public Employees (Kerri Thorne)* July 30, 1995 (Panjabi). In that case, an employee was hired at a higher classification level and arranged his financial affairs based upon that level. The Employer

reduced the classification level and sought to recover an overpayment. The Arbitrator found that the employer was precluded from recovery of an overpayment of \$4,217.06, on the basis of material change of circumstances and estoppel. Although the test of “absence of jurisdic reason” applied in the *U.A. Local 170* case was not applied, the related issues of legitimate expectation and detrimental reliance were considered. The discussion of those issues is relevant to this case. The arbitrator stated as follows:

Unfortunately, it is impossible in an arbitral context to weigh and compute ‘detrimental reliance’ in terms of dollars and cents. Barring grossly unreasonable reliance, it would be almost impossible to quantify and calculate what must surely be considered a perception, a sense of comfort, a dependence based on hope that certain circumstance would prevail. In the instant case, having read a job posting and received a letter of appointment with the CI-30 classification, the Grievor would have expected with a degree of confidence to be paid at the quoted rate. This expectation is the foundation of detrimental reliance and the finding is that regardless of the amount, in the instant case, Mr. Kerri Thorne depended on the fact that his salary would be at the CI-30 level and had no particular reason to doubt both the job advertisement and his letter of appointment.

Arbitral authorities have found that where there is a material change of position, a repayment of an overpayment is not required. In *Ottawa Board of Education and F.W.T.A.O.* (1986) 25 L.A.C. (3d) 146 (P.C. Picher), the grievor received an incorrect salary for more than one school year. She undertook a number of special projects and financial commitments, including a loan to cover moving expenses, rewiring and new doors for her home, and entered a contract to purchase Canada Savings Bonds. The majority of the arbitration board found that the grievor materially altered her position and she did not have to repay the money expended. In *York University and C.U.P.E., Local 3903 (Malik)* (2004) 125 L.A.C. (4th) 109 (Devlin), the grievor received an incorrect payment as the result of a clerical error. He purchased a vehicle which he would not have purchased, and he was not required to repay the amount of the expenditure.

In the present case, having regard to the principles of restitution discussed in the arbitral authorities, the payments were an enrichment of the Grievor and a deprivation of the College. There was a juristic reason for the enrichment. The juristic reason is established by the approval of the reclassification request, the letters of appointment from the College to the Grievor, and by the letters from the College to the Grievor confirming the reclassification and the increase in step level. The Grievor has established a change in position based upon the letters of appointment. She changed her

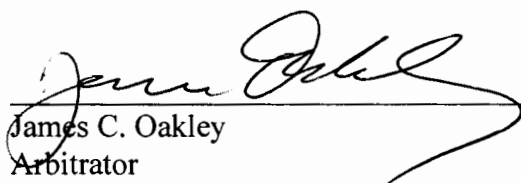
financial circumstances. She married and incurred related expenses. She and her husband purchased a house and arranged for mortgage payments. She and her husband arranged to lease a vehicle. She incurred household furnishing expenses. She had tuition payments for a Masters Degree program. She incurred additional personal expenses. In these circumstances, there was a legitimate expectation that the payments would continue, and the Grievor materially altered her financial circumstances. It would be unjust to require the Grievor to repay the amount of the overpayment.

In summary, the Employer was entitled to change the Grievor's step level in September, 2007 from Step 10 to Step 2, and to correct the Grievor's salary level. The Employer's determination of the Grievor's salary at that time did not violate the Collective Agreement. The Arbitrator does not have jurisdiction to determine whether or not there was an overpayment under a prior collective agreement. There was an overpayment to the Grievor during the term of the current Collective Agreement. There was a juristic reason for the overpayment, the Grievor materially altered her financial circumstances, and it would be unjust to require the Grievor to repay the amount of the overpayment.

Decision

The grievance is allowed in part. The Employer was entitled to change the Grievor's step level in September, 2007, and to correct the Grievor's salary level. The Employer's claim for repayment of any overpayment is denied.

DATED this 26th day of March, 2009.


James C. Oakley
Arbitrator