

Seniority
Date of Hire
Credibility

BETWEEN: COMMUNICATIONS, ENERGY & PAPER
WORKER'S UNION, Local 60N

(hereinafter called the "Union")

AND: HIBERNIA PLATFORM EMPLOYERS'
ORGANIZATION

(hereinafter called the "Organization")

GRIEVOR: DAVID WALSH

FOR THE ORGANIZATION: Harold Smith, QC

FOR THE UNION: John Harris, QC

ARBITRATOR: David G.L. Buffett, QC

ARBITRATION AWARD

The Grievance

This case concerns a grievance by a Grievor who claims that he has been misplaced by his employer on the seniority list.

The Seniority List states that the Grievor and three other individuals were hired effective, and commenced working on the same day, March 24, 1997. The Grievor claims that he was hired and commenced working before the other three individuals.

The Grievance form is dated December 11, 2006. It describes his grievance as follows:

“With reference to Article 27 of the Collective Agreement. On December 7/06 the Employee became aware that his position on the seniority list posted was incorrectly”. (sic)

The settlement desired is stated in this way:

“The Employee requires that he be properly positioned on the seniority list.”

The hearing was commenced on October 21, 2008 at St. John’s, Newfoundland and Labrador.

At that time the parties agreed that:

- i) I, as Arbitrator, am properly constituted as a tribunal to hear this matter, and have authority to hear the matter.
- ii) I, as Arbitrator, will take notes, and in the event of a dispute as to the evidence or what transpired at the hearing, my notes would prevail.
- iii) There were no issues as to arbitrability and no other preliminary objections.
- iv) All matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, had all been either properly observed or waived.
- v) There are no issues of quantum to be considered, whether in this hearing or separately.
- vi) I will remain seized in the matter for a period of sixty (60) days after the publication of the award, to deal with any matters of interpretation should they arise.
- vii) Witnesses were to be excluded until their testimony had been heard.
- viii) Time limits for publication of the award are waived.

As to whether there are any third parties affected by the outcome of the hearing, the parties stated that there were three other persons listed on the seniority list as having commenced working on the same day as the Grievor. Neither of these persons has been notified of the grievance, and neither take the position that they were hired earlier than stated, or any earlier than the Grievor.

Both parties wished to proceed with the hearing and maintained that these workers did not appear to take issue as to what was being claimed by the Grievor, and were not in a position to add anything to the hearing, one way or the other.

They were fine with their positions on the seniority list, and it was just the Grievor that took issue with his placement on the seniority list.

On this basis I decided to proceed with the hearing.

The following exhibits were received as consent exhibits:

- Consent 1 The first collective agreement between the union and the organization.
- Consent 2 The grievance form.
- Consent 3 The response of the Employer to the grievance at step 1.
- Consent 4 A letter to the Union from Nicole Parsons, Human Resources Co-ordinator for the Employer dated January 23, 2007.
- Consent 5 A regular rotation seniority list for Noble Drilling (Canada) Ltd. as of May 1, 2006.
- Consent 6 A calendar for the month of March 1997.
- Consent 7 A fitness certification for employees of Noble Drilling in respect of the Grievor.
- Consent 8 A London Life Insurance Company Registered Retirement Saving Plan Form dated the 25th of March 1997.
- Consent 8A The same form but as a more clear photocopy.

- Consent 9 A March 31, 1997 letter to John Kavanagh from Kevin Roche of Noble Drilling offering employment, and a signed acceptance by Mr. Kavanagh dated April 7, 1997.
- Consent 10 A letter from Kevin Roche to Ken Pendergast (whom the parties agreed had the surname Prendergast) offering employment with Noble Drilling, and an acceptance form signed by Mr. Prendergast on April 7, 1997.
- Consent 11 A letter from Kevin Roche of Noble Drilling to Edward Waterman dated March 31, 1997 offering employment and a signed acceptance form by Mr. Waterman dated April 7, 1997.
- Consent 12 A letter from Kevin Roche of Noble Drilling dated March 31, 1997 to the Grievor offering employment and a signed acceptance form signed and dated by the Grievor on April 7, 1997.
- Consent 13 (Admitted only as to the fact that it exists, not as to its content.) A Group Retirement Services letter directed by D. Andrews for K. Squisaato directed to the Grievor dated February 13, 2007 referencing an inquiry to the call center on February 12, 2007.
- Consent 14 A Registered Retirement Savings Plan Statement for the period January 1, 1998 to June 30, 1998 from London Life.

During the course of witness testimony the following additional exhibits were received:

DW#1 a Personnel Test Form in respect of the Grievor dated January 9, 1997.

DW#2 a pre-employment test form for roustabout/lead roustabout in the name of the Grievor dated January 9, 1997.

DW#3 a Group Insurance Application Form of W.F. Morneau & Associates in respect of the Grievor.

DW#4 an Enrollment Form for Sunlife Financial.

DW#5 a Hibernia Management and Development Co. Ltd. Frontier Club Membership.

DW#6 a Noble Drilling Thrift Plan enrollment form.

DW#7 an Accidental Death and Dismemberment Form Policy No. 135177.

JM#1 a Personnel Status and Adjustment Notice (PSAN) Form.

JM#2 handwritten payroll note of Jennifer Mercer.

JM#3 a payroll register for March 15, 1997 respecting Noble Drilling.

JM#4 a payroll register for March 31, 1997 respecting Noble Drilling.

JM#5 a payroll register for April 15, 1997 respecting Noble Drilling.

JM#6 handwritten notes of Jennifer Mercer for the payroll period ending April 15, 1997.

JM#7 a Great West Life Assurance Company SHNS Enrollment Form.

JM#8 a Revenue Canada TD1 Form respecting the Grievor.

JM#9 a Notice to Employees of a Policy regarding Drug, Narcotics, Alcohol and Firearms.

JM#10 a Resume in respect of the Grievor.

JM#11 a Personnel File Checklist Form of Noble Drilling Canada Limited respecting the Grievor.

The Evidence

The Union called one witness the Grievor himself, and the Organization called one witness, Jennifer Mercer, the accounts payroll advisor with the Grievor's Employer, Noble Drilling (Canada) Ltd. (the "Employer").

The Grievor

The Grievor gave evidence that he became employed by the Employer in 1997 in the position of pipe deck coordinator.

He gave a history of having worked in the offshore oil industry since 1979.

In the past he had worked with Kevin Roche, who in 1997 was employed in management with the Employer. He said that Mr. Roche had told him that “when he set up shop” in the Newfoundland Offshore Industry, there was a job for him. In December 1996 when he set out looking for work he said he called Mr. Roche. He called in January 1997, but Mr. Roche said that though things “were coming along” they were not ready yet.

In March he had a call from Brown & Root as to an opportunity for employment. He testified that at that point things started to happy quickly, and he informed Mr. Roche that he had an interview with Janet Chafe concerning the Brown and Root job. He called Ms. Chafe who informed him that there was a bit of a problem, as according to her records Noble Drilling had the Grievor slotted in for work with Noble and that they did not want to cross over so as to take another offshore employer’s personnel.

At that point the Grievor called Mr. Roche who suggested that the Grievor give Lou Puddister a call. Mr. Puddister was then the Human Resources Co-ordinator at the Employer.

According to the Grievor when he called Mr. Puddister, Puddister's reaction was "who are you", and was to say that he could not be hired as a pipe deck co-ordinator, because those jobs had been spoken for. Upon hearing this, the Grievor called Roche again, and Roche indicated that he would speak with Puddister.

Subsequently the Grievor's phone rang and Mr. Puddister was on the line and told him to come on down.

The Grievor went to the Employer's offices and met with Mr. Puddister and was introduced to Harvey Stone who was the senior tool pusher for Noble Drilling.

The Grievor said that they chatted about past offshore work, including being on the Uglund, and that Lou then said to Harvey, "What are we going to do?" Harvey responded "What did Kevin say?" Puddister said "Kevin said hire him." The next thing that happened, according to the Grievor, was that Harvey was saying congratulations, good to see you on board, and that he shook the Grievor's hand.

The Grievor said that on the same day that he, Stone and Puddister had the conversation which resulted in him being hired, he went off with Puddister who said that they would get him set up for a medical.

He said he had the medical and came back and started in work.

C7 is a fitness certificate signed by Dr. David G. Hart on March 4, 1997.

The Grievor said that he could not say what day it was that he started work, but he knows that it was "ahead of" John Kavanagh, Ken Prendergast and Ed Waterman, the three other persons stated on the seniority list to have been hired on the same day as the Grievor.

The Grievor said that in the period of time before Kavanagh, Prendergast and Waterman came on the scene, that he would be at the Employer's offices accessing the literature having to do with the cranes that they would be using on the rigs.

In addition to doing this, he would be referred calls from the secretary when persons called in interested in the pipe deck co-ordinator positions.

He testified that there were no other pipe deck co-ordinators there when he was hired on.

He could recall speaking on the telephone with Waterman and with Prendergast when he was at the Employer's offices and they were not in the office.

He also recalls speaking to Kavanagh's brother, Adrian, at the Noble offices. Adrian at the time was working for Haliburton. Adrian informed him that John Kavanagh would be coming in. He says he remembers John Kavanagh coming in after he was already there. He thinks it was the following week. He states that Kavanagh was the first one hired after him. His recollection is based on seeing Kavanagh filling out paperwork and saying to Kavanagh "Welcome Aboard."

The Grievor says that he got paid at the end of March, and recalled that it was not two weeks pay. He said that he did not make anything of this, and thought that this was the way he got paid. He figured that the pay was for the days he worked before March 15th, and that there would always be two weeks pay held back. He never asked questions and just assumed it was correct.

He next got paid he supposed around April 15th and he supposed that that would be for the period from March 15th to March 31st. He states that his experience with other companies in the past was that they would hold back two weeks pay.

He said by March 31st he had worked all of two weeks, plus some days prior to March 15th.

He was unable to give the exact date that he started work, but said "All I know is that I was there answering phones when other people got hired."

He said that he can remember "showing the boys where the filing cabinets were and where other things were."

He stated that he didn't pay attention to the start date or what his stated start date was, because it was of no consequence to him at the time as the Employer was not then unionized. It was only after the Employer became unionized so that seniority became important and the seniority list was posted that he noticed that his start date was stated to be the same as Mr. Kavanagh, Mr. Prendergast and Mr. Waterman.

He stated that he then set out to obtain documentation that would prove what his start date was.

He contacted the insurance company responsible for handling the retirement plans. According to Consent 13 he made an inquiry call on February 12, 2007. Consent 13 is a letter from Group Retirement Services to the Grievor indicating that they have his employment date as March 8, 1997, and that their records show he joined the plan on March 8, 1997.

He concluded his examination in chief by saying "I knows in my heart and soul I was in the office before the other guys."

During the course of his cross-examination he stated that any dates shown on the documentation suggesting March 24th as being his effective start date were not filled in by him, and he did not pay any attention to that at the time as seniority was not then an issue. He stated he just would not have paid any attention to it.

He stated that had he been terminated or resigned he would have gone looking for the two weeks, which he thought the Employer was holding back.

He really doesn't know the date he was hired. He said "Either I was hired on the 24th and they were later, or they were hired on the 24th and I was earlier, I know I was hired earlier." He also said that if he were in a union situation back then he would have questioned the start date of March 24th. He stated "I know I was there before the boys, at least 10 days before."

He said that they did not all get hired on the same day. How they all ended upon on the same day on the seniority list he does not know.

He recalls Adrian Kavanagh coming into the office when he was already there, and saying that his brother John Kavanagh was going to be coming in. He said that after the others were hired the four of them were at the Baine Johnston Centre for 3-4 weeks on or off. Some days they would go to Kenmount Road for “rigging and slinging”. He said there was a pipe yard in St. Anne’s Industrial Park and they would go there as well.

He said the first time the March 24th date had significance for him was when this seniority list was posted on the board.

Jennifer Mercer

The one organization witness was Jennifer Mercer, who is now the Accounts-Payroll Advisor. While in 1997, she had a different title, she was then responsible for payroll, benefits, accounts receivable and accounts payable with the Employer.

Not surprisingly, Ms. Mercer had very little memory of the hiring of the Grievor, and her knowledge came only from the documentation which had been prepared back in 1997.

She did recall in 1997 that they were “crewing up” for the offshore. She said there were about 10 people in the office at that time. She remembered Karen Smith, Andrew Strong, Linda Smith, Lou Puddister, Kevin Roche, Horace Ewanchuk, Deanne Badcock and Stephen Norman. Harvey

Stone and Tony Chaytor were both hired for the offshore. They were in the office for some periods back then and were back and forth to the Bull Arm site, but did not have a permanent office in the Employer's offices. She was able to describe the set up of the offices in 1997.

She testified at the hearing as to the documents she would need to support the hiring of an employee. These were a TD1 Tax Form, a Group Insurance Form, a form for the Thrift Plan, and an RRSP Form if they decided to go into the Thrift Plan, a DCP Form concerning the defined contribution pension plan, and a banking information form which would be needed for direct deposit into the employee's account. At some time prior to the person going on payroll, she would need a PSAN Form from personnel. TM#1 is such a form for the Grievor. The document is received from Human Resources and in the case of the Grievor it is signed by Mr. Puddister, Human Resources Supervisor, and Mr. Roche, Area Manager/Operations Manager. This form told her that he was coming on the payroll effective March 24, 1997 as a pipe deck coordinator. The fact that there is a tick mark opposite hire and that there is no payroll number on the form tells her that he is a new hire.

She stated that when she receives PSAN Forms in batches, she puts them in numerical order in terms of arranging the payroll number. An earlier payroll number does not tell you that the individual is necessarily hired before the person with the next payroll number.

She was questioned as to the effective date on DW#7 of 03-24-97 and whether there is a difference between that and the date of full time employment. She said the date of hire is the effective date, as there is no waiting period.

She referred to the various other documentation that had been completed as regards to the Grievor, and explained the general practice as to how these would be filled out and signed.

DW#4 was signed in January 2005. It was necessary because the Employer changed insurance carriers. Even on that form, the date of hire was stated to have been 1997/03/24. The said information that she would put on the document, including the date of hire, would have been on it when the Grievor signed it.

She testified that when she was made aware that the Grievor disputed the March 24th hire date, she was asked to go through her records as to documents he completed prior to employment, and her payroll registers. Her payroll documentation told her that his hire date was March 24, 1997. She said she had no independent recollection as to what his hire date was. She maintained handwritten notes in addition to the payroll records. JM#2 was her handwritten notes for the payroll for the period ending 03/31/97. She said that the Grievor is not in her handwritten notes for any payroll period ending prior to March 31, 1997, indicating to her that he got first paid at that time. He got paid for six days at that time and Kavanagh and Waterman got paid for six days then as well.

Payroll records and notes support that the Grievor, Waterman, Kavanagh and Prendergast were hired at the same time. The Grievor was not on the payroll register for the period ending March 15th. JM#3 was the payroll register for the period ending March 15th.

JM#4 was the payroll register for the period ending March 31st. This is the first payroll register that the Grievor appears on.

JM#5, the payroll register for April 15th, shows him receiving a full bi-monthly pay, the same as Waterman and Kavanagh. It shows Prendergast receiving his same bi-monthly pay plus an adjustment for six days prior to March 31, 1997. She said that the reason for Prendergast not having received this six days pay at the same time as the other three would likely have been that he did not have all of his paperwork completed and in to her as early as the other three, and that she therefore could not put him on the payroll system in time for the March 31st pay. On her handwritten notes for the period ending April 15, 1997 she noted Prendergast's start date as 03/24/97. This was JM#6.

She said that the Employer has never paid in arrears in the sense of holding back two weeks pay.

She also testified that the office hours were from 8:30 a.m. to 5:00 p.m. in 1997.

In cross examination she stated that not everyone gets on the payroll when they start. It depends on when she gets all of the documentation and paperwork. This was the case with Prendergast.

She recognized some of Karen Smith's handwriting on the TD1 Form JM#8. The total credits and code entries were Ms. Smith's.

Ms. Smith also witnessed Mr. Walsh's signature on the drug/alcohol policy document JM#9.

JM#11 has Karen Smith's signature on it, and Ms Mercer agreed on cross examination that the 7 in 03/24/97 had a stroke through it so that it read 03/24/97 with a slash across the 7.

On cross examination she admitted that she could not say independently of the documents when the Grievor showed up for work. The start date for the Grievor and the other three pipe deck coordinators was given to her by Human Resources. She said "I am just telling you what the payroll records tell us, and I assume they showed up for work on the 24th, because if they didn't show up for work on that day they would have deducted from their pay any day or days that they missed, if Human Resources said to deduct such amounts."

The TD1 does not indicate the date that the Grievor started work according to Ms. Mercer. This document is given to persons in advance. The PSAN form is the form that authorizes her to put a person on the payroll and indicates the start date.

She said the Drug and Alcohol Policy form would have been signed on the 4th of March, so as to allow the Grievor to go and have his medical examination done.

In her evidence she indicated the office was closed on weekends.

What the documents tell us.

Consent #6 the calendar shows us March 4th was a Tuesday, the 5th a Wednesday, the 6th a Thursday, and the 7th a Friday. Monday was the 10th of March. March 24th was a Monday.

Consent #7, the Fitness Certificate was signed by Dr. Hart on March 4, 1997. Mr. Walsh signed consents to the release of fitness information on that date as well.

Consent #8 shows the effective date for RRSP purposes to be either 02, 03, 97 or 08, 03, 97. It is hard to read. The Grievor felt that it was 08, 03, 97. That form was dated on March 25th, signed by the Grievor and witnessed by Ms. Mercer. Mercer certified on the document that the Grievor was eligible for membership in the plan. The date on the document of her certification was April 4, 1997.

Consent #9 revealed that the letter offering employment to Mr. Kavanagh was dated March 31, 1997, and it appears it was accepted by him on April 7, 1997.

Consents #10, #11 and #12 reveal that letters offering employment to Messrs. Prendergast and Waterman and the Grievor were also dated March 31, 1997, and accepted by each of them on April 7, 1997. Each letter is worded identically and offers the position of pipe deck co-ordinator commencing March 24, 1997.

Consent #13 shows the Group Retirement Services Offices of Great West Life, London Life and Canada Life saying in 2007 that they have the Grievor's date of employment as March 8, 1997.

Consent #13 also shows London Life as having the Grievor's date of plan membership as March 8, 1997.

The date of plan membership is revealed on a RRSP Statement from London Life for the period January 1, 1998 to June 30, 1998. The date is said to be March 8, 1997.

DW#1 shows that Mr. Walsh did a personnel test on January 9, 1997. No employer name appears on it.

DW#2 shows he did a pre-employment test for roustabout/lead roustabout January 9, 1997. It does not bear an employer name.

DW#3 is a Group Insurance Application Form showing date of hire as 24/03/97 and effective date as 24/03/97. It appears to have been signed by the Grievor on March 25, 1997.

DW#4 is a Sun Life Financial Enrollment Form. It shows the date of hire as 1997/03/24, and an effective date of coverage as 2005/01/25. Mr. Walsh appears to have signed it January 28, 2005. Ms. Mercer explained that this had to be signed because the employer switched insurance carriers.

DW#5 is a workplace club membership enrollment form authorizing deduction from pay commencing April 1997 and is signed by the Grievor and purports to be dated March 24, 1997.

DW#6, the Thrift Plan Enrollment Form, is signed by the Grievor and dated March 25, 1997. The bottom portion of the form is signed by Ms. Mercer and has the employment date as March 24, 1997, and the plan entry date as May 1, 1997.

DW#7 is an accidental death and dismemberment insurance form. It is signed by the Grievor and dated March 25, 1997. The effective date on that form is noted to be March 24, 1997.

JM#1 is the personnel status and adjustment notice form, the PSAN. It is in respect of the Grievor and is signed by both Mr. Puddister and Mr. Roche purportedly on March 7, 1997. The date employed by Noble is stated to be March 24, 1997. The Grievor's salary is stated to be effective March 24, 1997. The effective date of adjustment is stated to be March 24, 1997.

JM#2, the notes of Jennifer Mercer for the 03/31/97 payroll, show Kavanagh, the Grievor, and Waterman all getting six days pay at that time.

JM#3 is the payroll register for March 15, 1997. Neither the Grievor's name nor that of the other three individuals in question is on that register.

JM#4 is the payroll register for March 31, 1997. The names of the Grievor and Waterman and Kavanagh appear on it. The name of the other person involved, Prendergast, does not. It shows all three of the Grievor, Waterman and Kavanagh receiving the same pay.

JM#5 contains Prendergast's name as well. It is the payroll register for April 15, 1997. Prendergast is shown as receiving the same pay as the others plus an adjustment to or additional amount to his pay equivalent to what the others received at the end of March.

JM#6, Ms. Mercer's notes for the April 15, 1997 payroll, shows Mr. Prendergast getting an additional 6 days pay on April 15, 1997.

A Great West Life SHNS Enrollment Form, JM#7, purportedly signed on April 12, 1999 by the Grievor has 03/24/97 stated as the date of employment.

JM#8, a Revenue Canada TD1 Form containing the Grievor's signature purports to be dated March 4, 1997.

JM#9 the drug and alcohol policy form is signed by the Grievor and dated March 4, 1997.

JM#11, a personnel file checklist form, states the date of hire to be March 24, 1997. The following are checked off on that form as having been obtained or attended to: benefits summary, letter of offer/acceptance, ESQ policy acknowledged, drug screening authorized, role description/acknowledged, competency indication, aptitude test, competency assessment log, medical certificate, drug/alcohol policy, hearing test, lab results, banking information, PSAN form, TD1, Benefits Form. The form is not dated.

The Union Argument

The Union suggested that the case turned on an analysis of the credibility of the Grievor. He signed the documents. Dates did not mean a lot to him. None of it made any difference to him until the fall of 2006 when the seniority list was posted.

Not until he saw the seniority list did the March 24th date mean anything to him, and it meant something to him then only in relation to the start dates of the other three people that he knew started after him.

He started looking for paper in 2006 in relation to the sequence of events in 1997. The purpose of his quest was to show that he was hired and commenced working earlier than the others.

We know from the PSAN Form that the approval of hiring likely happened March 7, 1997. This is consistent with the evidence of the Grievor and other documents. The Union submitted that the Grievor was a credible witness and that he did start work shortly after the medical on either the 6th, 7th or 10th. His assumption was that the six days that he got paid for were the six days prior to the 15th of March, and he said that if he got laid off that he would have gone looking for the two weeks pay he thought was being held back. Based on his previous experience in the off shore, he thought two weeks was being held back, and the hearing was the first he learned of the fact that he got paid from the 24th to the 30th.

It submitted that all of the paperwork was not consistent. C8 or C8A was partly completed by Mercer, partly by the Grievor and partly filled out by someone else. Though Mercer did not

think it was Karen Smith, the Union submitted the 7 with a stroke through it supports that it was Smith as the only other 7 with a stroke through it is one that we know was made by Ms. Smith. Ms. Smith was consistently around the office at that time. Somebody else completed the documents and the Grievor did not pay a whole lot of attention to them. The documents do not tell a consistent story. One example of this is the March 31st letter offering employment when he would have started a week earlier, had he started, as the Organization suggests, on March 24th.

He undertook work for the Employer and he thinks that a week or two afterwards the others came on.

He stated that he started right away. While he acknowledges that he did not get on the payroll, he thought he had been hired on to keep him from going to Brown and Root.

His testimony that he was studying manuals in the office right away rings true. This is clear from the way both he and Mercer described the cabinets as containing manuals. He was in the office studying the manuals and talking to people prior to them coming to work.

Roche wanted the Grievor. The Grievor wanted to be there. He showed up for work. He thought he was getting paid.

Ms. Mercer did not discredit him. The paperwork is fine as far as it goes, but it does not contradict him.

That time was a busy time in the office. There was a lot of paperwork being done and a lot of paper being generated. Mistakes might very well have been made. Ms. Mercer said she did not see anyone milling around the office and that that would not have been tolerated. The Grievor was not milling around, he was actually studying the manuals.

It is not a question of non est factum by virtue of the fact that he signed forms containing March 27, 1997 as the hire date. It is a question of when he started working.

One does not have to be paid to be considered employed. The Union referred to Morley R. Gorsky et al., *Evidence and Procedure in Canadian Labour Arbitration* Vol. 2, (Toronto: Thomson Carswell, 1994), 2008 Release 2 at WP-209, where “employed” is defined as “performing the duties of an office or employment, occupied or engaged” and where “engaged” is said to mean “employed -- hired”.

The Union submitted the documents show the date given by the Employer to the insurance company on which the insurance company was to base the RRSP was 08/03/97. Why would this be the case if he was not starting until March 24th?

It's argument was that the Grievor was a forthright, truthful and credible witness whose testimony was not challenged by either Ms. Mercer or the documents. It submitted that the only way I could find against the Grievor was to conclude that I did not believe him.

In support of its argument it also cited Donald J.M. Brown & David M. Beatty, Canadian Labour Arbitration 4th edition (Aurora, Ont., Release 7 June 2008) pages 3-96 to 3-98.1 and Morton, Mitchnick & Brian Etherington, Leading Cases on Labour Arbitration Vol. 1, (Toronto: Lancaster House, 2002) where the authors comment at pages 5-14 and 5-15 on how credibility is to be approached.

Organization Argument

The Organization took the position that though the Grievor believes he was working prior to the other three persons, that is not the end of the matter. The reality is that he is coming forward 11 years later, and cannot say the day he started work, or whether it was the 24th of March or some earlier date, but only that he knows he started before the other three individuals hired as pipe deck coordinators. He has come forward without any evidence to corroborate what he is saying.

While it may be his recollection, one has to ask oneself would he benefit from that recollection. He has a vested interest in the outcome and has a vested interest in having the memory he says he has.

The only things he relies on to say he commenced work first was that he saw Kavanagh sign papers after he was already there, and he talked to people on the phone.

The period in question is from March 4th to March 24th. If he was in the office he was not then working. He had no authority to hire people, so if he was on the phone it was just chatting.

The very persons who hired him filled out a form, the PSAN, saying his start date was the 24th of March. The key element in his recollection seems to be that he saw Kavanagh sign documents after the Grievor was there, but it may well be the case that he saw Kavanagh signing a document after he, Kavanagh, too was already there.

There was no contract between the Grievor and the Employer. The Employer contemplated his work starting on the 24th. It is clear that there was no consensus ad idem with respect to his working prior to the 24th.

Most of what the Grievor said about working before Kavanagh, Waterman and Prendergast has to be discounted. He had no idea what they were doing or not doing.

A lot of documents were signed post employment. Therefore, to say simply because Kavanagh was signing a form on a particular day that he was not employed is not appropriate.

The Organization argued that the Grievor did not do anything that he had to record and put to paper before March 24th. He was hired as a pipe deck co-ordinator. To say that because he read manuals and chatted on the phone he was carrying out his duties is wrong. Employed means performing the duties of his office and employment, and he certainly was not doing that.

If Kavanagh or one of the others came in and said I was working too, but I wasn't in the office, I was on Kenmount Road or somewhere else with no paper or corroborating evidence to back that up, we probably would be in the same situation that we are now with the Grievor.

The Organization submitted that the Grievor has the onus of proof and must show on the balance of probabilities that his seniority date is incorrect. It suggested that the proof he has offered is insufficient.

Whether he believed he was being paid is irrelevant if he was working he had to be paid at least to the extent required by the *Labour Standards Act*.

Whether hired or not, he is hired for collective agreement purposes when he takes up work.

He may have been in and out of the office, but if so, he was there on his own initiative and not because the Employer required it.

The Organization submitted that this Grievor's memory is more bits and pieces and he has assembled the bits and pieces to fit his belief that he was the first of the pipe deck coordinators to be hired and working. This flies in the face of the documentation.

Even if he was there it was only looking at manuals and it was not working.

Some of the documents are given to hirees in advance of their start date so the fact that they are dated in advance of the 24th is of no consequence.

He likely was told on the 7th he was hired, but it is clear that he was hired effective the 24th.

London Life Insurance Company can't say a start date, but only the effective date of his RRSP.

The Organization submitted that it can't be the 8th that was his start date, as that is a Saturday, and the office is not open on Saturdays.

In the case of every single document which indicates or contains a start date, it is stated to be March 24th.

If he was in the office he was not engaged in work even if he could be said to be preparing for it. In the absence of pay, assigned duties and work space, it is hard to find that he was doing other than preparing himself for the job he was excited about doing.

The Organization argued that if I did find he was in the office and he believed he was at work, by signing the contract in the manner that he did, he effectively altered his start date to the 24th. In saying this it noted that the start date and conditions of employment in the contract of employment contained within the March 31st letter are significantly different than what was in place at the office with him just reading manuals.

The Organization is not in a position to do anything other than confirm records of employment after 11 years. The Grievor has not met the onus of proof. After 11 years the records of employment have to be viewed as paramount. Though he is stating what he believes, it is just not supported by the facts.

He has been hired a number of times in the offshore. Therefore, one has to seriously question how after 11 years his memory of this one hiring could be so acute.

All we have had put before us is his belief, and that is not sufficient to discharge the onus on the Grievor.

The Organization also argued the doctrine of non est factum. By signing documents stating that his start date is the 24th, he cannot now take a contrary position.

Considerations and Reasons for Decision

The relevant portion of the Collective Agreement is Article 27.3. It reads:

“The seniority date for employees hired by Bonavista Food Services Limited, Crosbie Salamis Limited, Hibernia Management & Development Company Ltd. and Noble Drilling (Canada) Ltd., prior to May 1, 2006, shall be the employee’s date of hire with the employer in a regular rotation position.”

The parties are agreed and stipulated that for Collective Agreement purposes a person's date of hire, is the date the person commenced working after being hired. Thus as far as the operative Collective Agreement provision, Article 27.3, is concerned, the date of hire means the date of

commencing work after hiring. One has to be both hired and to have commenced working to be considered hired.

The question before me is whether the Grievor has proved on the balance of probabilities he was both hired and had commenced working before Kavanagh, Waterman and Prendergast. It seems the decision to hire him was made on or before March 7, 1997 because of the PSAN form. It was signed on that date by both the Human Resources Supervisor and the Area Manager. What is at issue is when he commenced working?

Answering this question entails an analysis of the character of what the Grievor is saying and the character of or just what can be drawn from the documentation that has been put in evidence.

I am inclined to the view that the Grievor is not being dishonest, but is instead valiantly trying to recall what happened 11 years ago. He is stating what he fervently believes to be the case. In fact both parties said as much during the hearing.

In trying to properly characterize the force of what he is saying, one has to be mindful that he is recalling events that happened 11 years ago.

Ms. Mercer, not surprisingly, has no recollection of the hiring, and can't speak independently of the documentation.

The Grievor cannot state a precise date that he commenced working. This too, is not surprising. In fact, he cannot even say if it is the case that he commenced work before the 24th and the others commenced on the 24th, or if he commenced on the 24th and the others commenced afterwards. Some of his statements like “I knows in my heart and soul I was there before those guys” in one sense sounds like he is trying to convince himself this was the case.

I have trouble accepting that he would not notice in the March 31, 1997 letter which contained the offer of employment and a place for him to sign by way of acceptance, that his employment commencement date is stated to be March 24, 1997. It seems to me unlikely that this document, which is designed to set forth the terms and conditions of employment, and which he was required to sign by way of acceptance, is not something that he would read.

Arbitrator Roberts in *McMaster University and S.E.I.U. Local 523* (1972), 24 L.A.C. 265 referred to the principles set out in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C. C.A.). The key passage from Arbitrator Roberts’ Award reads as follows:

“If the Trial Judge’s finding of credibility depends solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic, that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and *cf.* *Raymond v. Bosanquet* (1919) 50 D.L.R. 560 at p. 566 (S.C.C.). The witness by his manner may create a very unfavourable impression of his truthfulness upon the Trial Judge, and yet the surroundings and circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of

the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie, and of long and successful experience in combining skillful exaggeration with partial suppression of the truth. Again, a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a Trial Judge to say "I believe him, because I judge him to be telling the truth", is to come to a conclusion and consideration of only half the problem. In truth, it may easily be self direction of a dangerous kind.

The Trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case, and if his view is to command confidence, also state his reasons for the conclusion. The law does not clothe the Trial Judge with a divine insight into the hearts and minds of the witnesses. The Court of Appeal must be satisfied that the Trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all of the elements by which it can be tested in the particular case."

Arbitrator D.M. Browne in *Royal Oak Mines* (1995) 51 LAC (4th) 365 commented that the real test of the truth of the story of a witness must be its harmony with the preponderance of the probabilities which a practical and informed person may readily recognize.

In the appropriate case where the testimony of a witness clashes with what one would infer from the documentation presented, just as in a clash between two witnesses, I believe it is responsible to subject the testimony of the one witness to the same test.

In my view, this is the case of a witness, the Grievor, testifying what he sincerely believes to be true, and the real issue is whether he is honestly mistaken.

In my assessment the story of the Grievor fails the test of being in harmony with preponderance of the probabilities which a practical and an informed person would readily recognize as reasonable in that place and in those conditions.

In my view it is unlikely that the Human Resources Supervisor and the General Manager would have specified a March 24th start date on the PSAN if they were of the mindset that or understood that he would be starting earlier.

Therefore, it can be concluded, that they were likely of the mindset on March 7, 1997, when the PSAN was signed that he would start work on March 24, 1997.

If they had that mindset on the 7th of March, because I see nothing in the evidence, whether viva voce or documentary, which indicates or suggests that the mindset changed, I am forced to conclude that it didn't. If it didn't change, it makes it more likely than not that the worker did not commence working earlier than March 24th.

The risk of losing the Grievor to Brown and Root has been mentioned as to why they would arrange to hire him as soon as possible. The risk existed before March 4th. It was not something that arose after March 7th. It is likely that on March 7th, or at the very least between March 4th and 7th, the PSAN form was completed with March 24th shown as a start date. Consequently I have trouble accepting that the fear of losing the Grievor to

Brown and Root caused the Employer to, between March 7th and 24th, change its mind as to the start date.

I believe it unlikely had the worker started work earlier than March 24th that all those employment records which show a start date would show a start date of March 24, 1997.

It is unlikely that the Employer would have had a need for a pipe deck coordinator before March 24th, or else its records, in particular the PSAN, would have shown an earlier start date for the Grievor. He had passed his medical prior to that. He had been approved for employment by the Employer prior to March 24th. He could have commenced earlier. The other three pipe deck coordinators did not start until March 24th as far as is known. Consequently, there does not appear to have been any need to have had such a person's employment start any time prior to March 24th. The lack of need for such a person to start before March 24th, makes it more likely than not that the Grievor would not have started work until then.

A March 8th employment date shown on Consent #13, the letter from Group Retirement Services, appears to likely have been based on Consent #8, the Registered Retirement Savings Plan document from London Life where the effective date was stated to be March 8th. March 8th was a Saturday. I believe it unlikely that a Saturday when the office was closed, was a time when one would start or commence work. It is much more likely that one would start on a Monday. March 24th was a Monday.

As for the Grievor seeing Mr. Kavanagh signing documents, we know that he signed one document on April 7, 1997. We know that the Grievor signed some documents before and some after his start date of March 24th. Mr. Kavanagh could have easily been doing the same.

Just because he has a recollection of seeing Kavanagh signing a document and saying “welcome aboard” to Kavanagh, this does not make it more likely than not that Kavanagh’s start date was any later than the Grievor’s.

It would be unusual, in my view, had the worker been working prior to March 24th, or if he even had the perception that he was working prior to March 24th, for him not to have noticed the March 24th commencement date stated in the letter offering employment. If he had such a perception, I believe it more likely than not that he would have noticed the start date and complained that it was in error. While he may not have been concerned about seniority at that time, he would have been concerned about making sure that he was going to get paid at some point, whether at the end of March or later, for the time worked before March 24th.

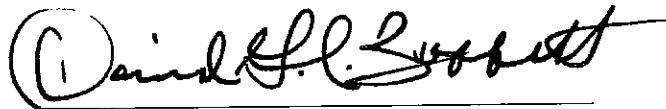
We know that Mr. Prendergast worked before he was actually entered into the payroll system. His case was caught by Ms. Mercer and corrective action was taken. This makes it more likely than not that had the Grievor worked before being entered in the system, before March 24th, his situation would have been caught and corrective action taken by Ms. Mercer.

Taking into account the fact that he is a witness trying to recall events that happened 11 years ago, something that is not easy to do, which causes me to be skeptical, not about his honesty, but about whether his recollection is accurate and taking into account that what he asserts to be the case is not in harmony with the preponderance of probabilities, I find that it has not been proven by the Grievor on the balance of probabilities that the Grievor commenced work any earlier than March 24, 1997 or that the other three pipe deck coordinators commenced work subsequent to him.

I am not able to find on evidence of the quality that was presented that his attendance at the office before March 24th was other than in connection with the hiring process as opposed to working. Therefore, it is unnecessary for me to deal with the question of whether there was a contract of employment in effect before March 24th simply because he was working, or with the question of non est factum.

For the reasons stated the grievance is denied.

DATED at St. John's, Newfoundland and Labrador this ^{27th} day of November, 2008.



DAVID G.L. BUFFETT, QC
Sole Arbitrator