

Memorandum of Understanding
Wage re-Opener

**FINDINGS AND AWARD
IN A DISPUTE**

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

(hereinafter called the "Union")

AND: **MAXIMUM HOME SUPPORT SERVICE INC.**

(hereinafter called the "Employer")

GRIEVOR: **GROUP GRIEVANCE**
FOR THE UNION: **GERARD WARD & FRED OATES**
FOR THE EMPLOYER: **GREGORY ANTHONY, LL.B.**
BEFORE: **W. JOHN CLARKE, C.Arb. C.Med.**

PRELIMINARY MATTERS

The hearing of this matter took place at Corner Brook on April 9, 2008 at which time the parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to the jurisdiction of the arbitrator to hear the grievance.
3. The employer questioned whether the grievance procedure had been properly followed in connection with the timeliness of the filing of the grievance. This issue was subsequently resolved during the course of the hearing.
4. The arbitrator would remain seized of the matter for a period of 60 days following publication of the Award in the event the parties could not agree on the interpretation of the award or in the event there is a question of compensation arising from the award.



5. Witnesses were permitted to remain throughout the hearing.
6. The time limits for the filing of the award were waived.
7. There were no persons who were not parties to the proceedings who were entitled to notice of the hearing.

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

- C#1 A letter from Cox and Palmer to the arbitrator dated April 8, 2008
- C#2 Collective Agreement between the parties expiring March 2008.
- C#3 Grievance form dated October 26, 2006 together with covering letter.
- C#4 E-mail correspondence from Brian J. Hoskins to the union dated October 31, 2007.
- C #5 Letter from the employer to the union dated December 7, 2007
- C#6 Letter from the employer to the union dated January 7, 2008

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

For the Union:

Terry Buckle who entered the following exhibits:

- TB#1 Series of letters from various Deputy Ministers, Assistant Deputy Ministers and Acting Deputy Ministers of the Department of Health and Community Services to the employer during 2006 and 2007.
- TB#2 Series of letters from Regional Manager of Client Payments, Revenue & Collections of Western Health to the employer during 2007.

Gerard Ward

For the Employer:

Brian Hoskins



THE FACTS

The employer is in the home support business providing services to individuals who are not able to provide these services to themselves. These individuals include elderly and disabled persons.

The individuals remain in their homes and are provided support rather than have them institutionalized. Personal care, such as personal bathing and grooming, in addition to day to day household chores, are performed by between 150 and 160 employees of the employer. What services they perform for these people is dictated by Western Health Corporation after an assessment by a Public Health Nurse or a Social Worker.

There are three vendors of such services within the Western district including the employer. The clients determine which of the home support services providers in the area they will hire. The rate to be paid to the vendor/employer for the services it provides to the public is determined by the Provincial Government through the Department of Health and Community Services. Any increase in the rate paid for home support services comes from the government to the CEO of Western Health and is copied to Terry Buckle, the Regional Manager of Client Payments, Revenue and Collections. All revenues of the employer are supplied in this manner. Any money that is to be paid by the user of the services is determined by the government and the amount is collected by the government and offset against the total cost. The funds for this employer are provided by the provincial government through the medium of the Western Health Corporation.

The rates of pay for the employees of the individual vendors are negotiated through the collective bargaining process for each unionized individual vendor/employer. Mr. Buckle takes directions from documents sent to him from his Vice President of Finance as to how much is to be paid for



various home support work services.

Once Mr. Buckle is informed of a rate increase to the agencies, the agencies are informed of that increase. Mr. Buckle testified as to having received a number of letters with respect to increases in rates. Mr. Buckle noted that sometimes rates are approved in a provincial budget and are retroactive to a certain date. Mr. Buckle pointed out that no direction is given to the individual vendors with respect to an increase in the salaries for the workers. That is not the role of his department.

There is only one classification of employee, home support worker, in the collective agreement of this employer and only one wage rate is paid. What each individual home care worker does on a day-to-day basis is dependent upon what the client has requested and been granted by the social worker and/or public health nurse. The individual clients are assigned a certain number of hours per week of care by the Western Health Care Corporation. At the end of each billing period, the employer sends its invoice to Western Health Care based upon the number of hours worked by the home care workers.

The subject collective agreement is the first one between this employer and the union. Several changes in staff salaries had occurred since the signing of the collective agreement. Brian Hoskins, the manager of the employer noted that there is a heavy payroll burden to go on top of the regular hourly pay and how difficult it is to get the number of employees needed to perform the services required. He explained that in the collective bargaining process with the union the employer does not get a very sympathetic hearing from that organization. Mr. Hoskins stated

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that during the negotiations he had agreed to rate increases not knowing at the time what sources these raises would come from. The raises amounted to \$0.50 per hour commencing April 1, 2005; \$0.25 per hour effective April 1, 2006 and \$0.25 per hour effective April 1, 2007. He had no knowledge of whether he would receive sufficient increases from the government to cover these wage increases.

The union, on the other hand, had hoped to get greater raises than that during the course of the negotiations and a compromise was reached whereby a memorandum of understanding ("MOU") was executed by the parties and added to the collective agreement. The MOU stipulated that if, during the term of the collective agreement, the government provided additional monetary benefits to Home Support Workers, the parties agreed to meet to discuss these changes and to make necessary adjustments to the Agreement. Mr. Hoskin said that he had no input into the drafting of that MOU and he really did not know what it meant.

His understanding was that if the employer received a letter from the government telling them to increase home support workers wages, they would do so. The employer received various notices from the government increasing the rate to be charged to the government but they never received a direction from the government to increase the wages of home support workers, and they never increased the wages. The form of advice which Mr. Hoskin said was received from the government was one which merely notified of an increase for a home support agency over the previous effective rate. This represented to him an additional amount that he was entitled to charge to the Western Health Care Corporation. The employer felt no need to discuss this matter with the union as this money was, in his view, outside of the collective agreement.

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Gerard Ward, employee relations officer with the union, negotiated the collective agreement on behalf of the employees. He realized that the parties were not dealing with a lot of money. The agreement was a bare-bones attempt at a first collective agreement. He realized that there had to be an increase in salary in order for the employees to be able to justify participating in a union. One of the other service providers in the area, the Victorian Order of Nurses ("VON"), had gone on strike for wage increases of \$0.50 in the first year, and \$0.25 in each of the second and third years. That is the identical amount which had been negotiated for this collective agreement. It was Mr. Ward's understanding that that was the amount that the employer could pay at the time. It was not, in his view, an amount that would be paid in the event that the employer found some new source of revenue or received an increase from the government. This was not in his view a raise that was granted in anticipation of an increase in the employer's revenue. The rates they negotiated were above the rates paid to non-unionized workers. The MOU was added to the collective agreement in order that the parties could discuss whatever increments came along. In effect it was a wage re-opener clause.

In October of 2007 the union became aware of certain things and took the position that the employer was not living up to the commitments which had been given in the memorandum of understanding. Increments had been received and the union had not been contacted. This was in violation of the union's understanding of the MOU. The union membership now became disgruntled with the situation and the union wanted the opportunity to renegotiate the wage package based upon increases which, according to its information, had been received by the employer. This became especially troubling when it was determined that the VON had gotten

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increases during the same period of time.

Mr. Ward stated that on several occasions he had tried to get a meeting with the employer and there were several delays experienced. No meaningful negotiations were ever held with respect to a wage increase pursuant to the memorandum of understanding.

THE GRIEVANCE

On October 26, 2007, the union filed a grievance against the employer claiming that:

“Violation of the Collective Agreement. Specifically in the M.O.U. on page 27 & all other related articles.”

The relief the Grievor requested was:

“Full Redress.”

THE COLLECTIVE AGREEMENT

On page 27 of the collective agreement a Memorandum of Understanding reads as follows:

“Additional Monetary Benefits

If, during the term of this Agreement, the Newfoundland government provides additional monetary benefits to Home Support Workers, the parties agree to meet to discuss these changes and to make any necessary adjustments to this Agreement.”

THE POSITIONS OF THE PARTIES

In its argument, the Union highlighted that the memorandum of understanding was placed in the collective agreement because there was a feeling that increases may be coming for home care workers as they were being paid such a low wage at the time. The union wanted to ensure that if there was generally additional compensation in the sector, then this group of employees would not miss out on it. The union accepted Mr. Hoskins’ position that he did not know the



significance of the memorandum but it was signed by him. The union also recognized that there is never enough money to go around but workers must nevertheless be paid.

The union pointed out that the arbitrator is not being asked to rule on the quantum of damages or an apportionment of the increase among workers. What is being requested is an interpretation of the intent of the memorandum of understanding. It must be borne in mind, says the union, that prior to the employer being the subject of a certification order, the Western Regional Health Authority directed the various vendors as to the rate to be paid to the home care workers.

Subsequent to the certification of the union as bargaining agent, the authority no longer dictates the wages to be paid to workers as it would be an interference with the collective bargaining process. The intent of the Memorandum of Understanding was that the employer would simply notify the union when an increase was received. The parties would then sit down and negotiate the effect of that increase on the wage rate in the collective agreement. The union does not expect to receive the full increase that is awarded to the various vendors by the Health Authority, it only requests the right to sit down with the employer and negotiate a reasonable portion of those increases for the workers. The union pointed out as well that the employer granted to the employees a \$0.50 per hour increase in October 2007 when the provincial government increased the minimum wage to be paid to all workers in the province. The employer does not have the right to unilaterally pay workers such an increase without the consent of the union.

Upon execution of the collective agreement the unionized employees were making an average of \$0.50 per hour more than their non-unionized counterparts. As a result of increases passed on to workers by other, non-unionized employers, the gap has narrowed such that the non-unionized

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sector now makes the equivalent of that paid in the unionized sector.

The union recognizes, as alleged by the employer, that unions are fierce in their negotiations and they have to be in order to get the best deal that they can for the employees. Similarly, employers are often hard in negotiations between these two groups. This causes a fair collective agreement to be negotiated. The collective agreement is negotiated within the financial parameters which exist at the time and is not based upon forecasted increments in revenue that the employer may be expecting.

The arbitrator must examine the intention of the parties and determine what the words they used in the agreement mean. The union's understanding of the memorandum of understanding was that if increments came from the government, the union would have a chance to sit down again, re-open the wage package and negotiate a new rate. Otherwise, the memorandum of understanding would have no meaning whatsoever. The union argued that it is the duty of the arbitrator to find that which best harmonizes the document as a whole and which best reflects the likely intention of the parties. The parties obviously meant for the memorandum of understanding to have some meaning or it would not be there.

The employer, on the other hand, argues that an arbitrator is not permitted to amend the collective agreement made by the parties. The parties are seen to have intended what they meant by what they said. The arbitrator is obliged to give the words used their ordinary and sensible meaning. The wording in the memorandum of understanding was drafted by the union without any input from the employer. It is the language of the Union and the contra - proferentem rule



should apply. The union drafted the language and they are stuck with it. The employer pointed out that the wording is different than if it had said if any increase whatsoever is provided then the parties would sit down to negotiate. The type of increase mentioned in the clause is quite specific. There is no evidence to substantiate that the government gave additional money to home support workers; only that the government gave additional money to the employer. There was no specification as to what use the funds were intended. The letters from Western Health merely said that there is an increase in the amount that the vendor can charge to Western Health. There is no evidence to confirm any directive by the government to give an additional payment to home support workers.

The employer argued that in the normal course collective agreements are negotiated to cover multi-year periods. Any employer would have to increase its revenues or reduce its costs in order to cover those raises. Here, the employer crossed its fingers and hoped that the increases would come. There is no evidence to suggest that the government specified that the increases given were meant to go to employees.

The employer agreed that, technically speaking, it had no right to pass on the \$0.50 increase in the minimum wage to its employees. The employer pointed out that this is its first collective agreement and it is not familiar with the collective bargaining process and what it means to be a party to a collective agreement.

The employer pointed out as well that any interpretation of this collective agreement should make business sense. The employer is financially constrained and has to rely on government to

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recoup any increases that it pays to its workers.

CONSIDERATIONS

It is perhaps trite to say that the function of an arbitrator in interpreting a collective agreement is to determine what the parties intentions were as indicated by the wording they have chosen. As stated in United Nurses of Alberta, Local 121-R v. Calgary Regional Authority(Perkins Grievance), (2000) 93 L.A.C. (4th) 427 (Mearns, Currie and Smith, Chair), paragraph 18:

“The task before the panel is to determine the intention of the parties with respect to Article 20 of the Collective Agreement by examining the words used in their ordinary meaning having regard to their context and with due regard to the whole of the Collective Agreement. In carrying out our task we are not permitted to amend the agreement that the parties have made, as ‘the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions’ (Brown and Beatty, Canadian Labour Arbitration (3rd) at 4-33).”

The union and the employer each have their interpretation of what the words used in the MOU mean. The employer is reading the wording literally and is insisting that the Newfoundland government did not provide, in the relevant time, any additional monetary benefits which were clearly and specifically earmarked as being for Home Support Workers. It therefore is under no obligation to meet with the union to discuss these changes or to make any necessary changes to the collective agreement. The union, on the other hand, is arguing that the spirit of the wording is that if any additional funding is directed to organizations such as the employer, then there is an obligation to meet and discuss these changes and make any necessary adjustments to the agreement, specifically, to the wage rate. It matters not, on the union’s interpretation, if the additional money is specifically identified as being for the workers.

As a casual observation, the words in the MOU are themselves not without doubt. It is not clear whether the term “Home Support Workers” used in the MOU applies to the specific workers mentioned in the collective agreement or to Home Support Workers generally. The evidence indicates that, while government at one point did dictate the rates paid to these workers when they were not unionized, it would not do so after a bargaining agent had been certified. This



would be seen as interference in the collective bargaining process. Is it likely then that the union would have used wording in the MOU which was impossible of occurring? In fact, if the government did dictate to Western Health the rate which must be paid to Home Support Workers, it is likely that both the union and the employer would be upset with government for interfering in the collective bargaining process. It seems then highly unlikely, in my estimation, that either of the parties at the time of execution of the collective agreement would have had in mind the scenario in which government would specifically dictate the amount of remuneration that the particular employees of this employer would receive or dictate to this employer that a certain amount must be given to its workers by way of a wage increase. In my view, it cannot seriously be contended that either the union or the employer was expecting such a scenario as the triggering point for the meeting contemplated in the MOU. What then was contemplated?

From the evidence it seems that the government periodically increased the rates to be paid to the employers in the home care industry, ie. it increased the amount that the agencies were permitted to submit to Western health which would, in turn be compensated by the provincial government. As an example, in a letter dated October 1, 2007, Terry Buckle, on behalf of Western Health, wrote to the employer as follows:

“Please be advised that Government has approved a rate increase for Home Support Agencies effective April 1, 2007. The hourly rate has increased from \$12.34 to \$12.38 retroactive to April 1, 2007.

Upon implementation of the increase, please forward to our office an invoice for retroactive payment from April 1, 2007 to the date of the implementation.

Please ensure that the invoice indicates the clients name and the hours (broken out by Respite, Homemaking and Personal Care).

Should you have any questions or require any additional information, please feel free to contact me....”

It should be noted that in the third paragraph a request is made that the invoice, among other things, should break out the hours spent doing Respite work, Homemaking and Personal Care services. These are the very services which the bargaining unit employees perform. There is only one category of employee covered in the agreement who perform as a group all services which



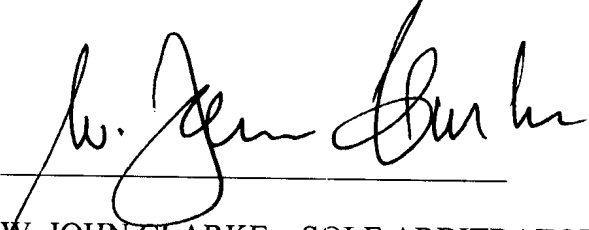
are included in the letter. This, it would seem to me, is the more likely type of increase which the parties to the MOU would have had in their minds when they signed it. It would make no sense to have expected government to dictate the hourly wages to be paid by a particular employer. The government is, however, dictating the amount of money it is prepared to pay for these services. How this amount is split between the service agencies and their employees is a matter for negotiation between the employers and their respective bargaining agents. This is the very process which was intended to be addressed in the MOU.

While the wording of the Memorandum of Understanding does fall short of perfect clarity, it can bear this interpretation and it is one which makes sense in the circumstances having regard to the context in which it was written. It is as well an interpretation which does not require the arbitrator to re-write or amend the agreement.

Having said all that, it should be noted that the effect of this finding is merely that the parties are to meet to discuss the changes and to make any necessary changes. The agreement does not empower an arbitrator to impose a wage rate or an increase on the parties.

It follows that the grievance is allowed and the employer is hereby ordered to meet with the union to discuss the changes and to make any necessary adjustments.

DATED at St. John's, Newfoundland and Labrador this 9th day of May, 2008



W. JOHN CLARKE – SOLE ARBITRATOR