4-13-1991

# Re Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Assn

Innis Christie

IN THE MATTER OF AN ARBITRATION

BETWEEN:

MEMORIAL UNIVERSITY OF NEWFOUNDLAND FACULTY ASSOCIATION
(The Union)

AND:

MEMORIAL UNIVERSITY OF NEWFOUNDLAND (The Employer)

RE: Grievance No. A-90-01, Y-Value, Pay
(Preliminary Award)

BEFORE: Rick McGaw, Union Nominee
Gerard McDonald, Employer Nominee
Innis Christie,

At: St. John's, Newfoundland

Hearing Date: December 13, 1990

For the Union:
John Harris - Counsel
J. H. Evans - President
W. E. Schrank - Past President
N. Graesser - Executive Member
B. Schrank - Academic Freedom & Grievance Committee

For the Employer:
Agustus Lilly - Counsel
C. S. Rennie - Special Advisor on Labour Relations
R. Walsh - Assistant to the Special Advisor on Labour Relations
J. Strawbridge - Special Negotiator
- Faculty, Division of Labour Relations

Date of Decision: April 13, 1991

Union grievance alleging breach of the Collective Agreement between the parties in that the Employer is in violation of Article 16 and other relevant articles in not paying Academic Staff Members at their Y-value (salary scale placement) as revised by the Salary Parity Committee. The Union requests compensation for all members of the Union who have not been paid in accordance with the Collective Agreement. At the outset of the hearings in this matter counsel for the parties agreed that this arbitration board is properly constituted and properly seized of this matter, and should remain seized after the issue of any award to deal with any matters arising from its application. Counsel agreed to waive any post-hearing time limits.

**AWARD**

The first Collective Agreement between these parties was signed on March 16, 1989, retroactively effective to April 1, 1988, for a three year term concluding March 31, 1991. Article 16 of the Collective Agreement provides for a salary scale upon which each Academic Staff Member is to be placed as of April 1, 1988. It also provides for salary parity adjustments to be made by a Salary Parity Committee and for a "salary parity fund". The issue before this Board of Arbitration is whether salary adjustments made by the Salary Parity Committee in accordance with the mechanisms set out in the Collective Agreement are limited by the amount of the fund only for the period of retroactivity, as the Union contends, or for the three year life of the Collective Agreement, as the Employer

contends. This is a matter of interpretation of the Collective Agreement.

At the outset of the hearing counsel for the Employer took the positions; (a) that the grievance was not filed within the time limits under the Collective Agreement, (b) that the Union is estopped from taking the position that it asserts here, (c) that if the words of the Collective Agreement do not favor the Employer's position they are patently, or at least latently, ambiguous and that evidence of negotiating history to be called by the Employer will sustain its position, and (d) that, in any event, the nature of the grievance and the way that it has been put forward and dealt with entitles the Union only to a declaration not to compensation for its members.

Counsel for the Union took issue with each of these positions.

After the positions of the parties had been clearly stated and following a brief adjournment, counsel agreed that, without evidence, the Board should proceed to hear argument on the meaning of the relevant provisions of the Collective Agreement, and then make a preliminary award on the apparent meaning. They agreed that if we conclude that the Collective Agreement, on its face, favors the position taken by the Employer we should dismiss the grievance, and that will end the matter. They also agreed that if we find, ont he other hand, that the Collective Agreement, on its face, favors the position taken by the Union, or if we find the Collective Agreement to be ambiguous in any relevant respect we should

reconvene to hear evidence and argument on the issues of timeliness, estoppel, negotiating history and the appropriate remedies. The history of negotiations would, of course, be relevant only if the Collective Agreement is either patently or latently ambiguous.

## The Collective Agreement

Article 16.1 of the Collective Agreement, which provides for the salaries of members of the bargaining unit, is a complex provision. It commences:

> 16.1.1 There shall be a salary scale system for assigning salaries to all Academic Staff Members. For 1988-89, each step in the scale shall have the value $1,200. The scales applicable during the period of this Agreement are shown in Appendix H of this Agreement. The University agrees to pay Academic Staff Members salaries not less than those specified in Appendix H.
>
> 16.1.2 **Definition of Scale**
>
> 16.1.2.1 The step at which an Academic Staff Member is placed on scale in April 1, 1988, shall be determined by the formula:
>
> Faculty Members
>
> Step (Y) = Number of Years at Memorial
> + Degree Factor
> + Rank Factor
>
> Degree Factor: Ph.D. or equivalent = 2
> Master's degree or equivalent = 1
>
> Rank Factor: Associate Professor = 1
> Professor = 2 . . .

There is a similar provision for librarians, and considerable elaboration in sub-articles 16.1.2.3-13 on how the scale is to be applied, including the granting of step increases and the improvement in the value of all steps (or not) on April 1, 1989 and April 1, 1990.

Appendix H consists of a table with the "Y-factor", or steps, on its left margin and the ranks, from lecturer through assistant and associate professor to professor, along the top. Reading across on one axis and down on the other identifies the salary for any given Y-factor and rank. Article 16.1.2.14 provides:

> 16.1.2.14 Notwithstanding the provisions of 16.1.1-16.1.2.13, each Academic Staff Member shall receive a salary not less than the scale salary indicated by his/her Y-value at any time.

It is to be noted that, as set out in Article 16.1.2.1 above, a Union member's Y-factor takes account only of "number of years at Memorial" and not of equivalent experience elsewhere. Such experience is picked up in Article 16.1.3, which is entitled "Salary Parity Adjustments". It provides, in part:

> **16.1.3 Salary Parity Adjustments**
>
> 16.1.3.1 The Parties agree to establish a Salary Parity Committee within four weeks of the signing of the Collective Agreement to correct salary inequities for those Academic Staff Members employed as of February 10, 1989, whose initial placement on the scale makes their salary anomalous relative to their length of academic or equivalent service or other relevant factors.

**16.1.3.2** The Committee shall be composed of five (5) members; two (2) members to be appointed by the University and two (2) members to be appointed by the Memorial University of Newfoundland Faculty Association. The members of the Committee so appointed shall select the fifth person who shall act as Chairperson of the Committee.

**16.1.3.3** The Committee shall hear appeals from Academic Staff Members who wish to challenge their initial placement on the scale. Among those factors to be considered by the Committee are: . . .

This provision then goes on to set out the equivalences to be accorded for university teaching or library experience, or other relevant experience, at other institutions.

Article 16.1.3 then goes on to provide for "a salary parity fund" and its allocation by the Salary Parity Committee.

**16.1.3.4** The University agrees to reserve a salary parity fund of $404,543 for adjustment of salaries of Academic Staff Members retroactive to April 1, 1988, as determined by the Salary Parity Committee

**16.1.3.5** Academic Staff Members who wish to seek an adjustment in their initial placement in respect of any of the factors stated in 16.1.3.3 shall apply to the Salary Parity Committee not later than May 30, 1989 or within 20 days of receiving a copy of the Collective Agreement, whichever is later, but in no case later than October 1, 1989.

**16.1.3.6** The Committee shall assess all applications for adjustment in scale placement and award such adjustments

> on an equitable basis irrespective of the amount of money in the fund. The Committee shall report these adjustments to the University and the Association by October 30, 1989. The money in the salary parity fund shall be distributed to adjust salaries of Academic Staff Members on the basis of step increases as determined by the Committee, retroactive to April 1, 1988. If there are not sufficient funds to make full payment to pay all of the awards, each Academic Staff Member receiving a salary adjustment shall receive the same proportion of the amount owed to him/her, in accordance with the overall deficiency in the fund, but on the understanding that the actual payment must be made in full steps.

As we said at the outset of this award, in broad terms the issue here is whether the salary parity fund of $404,543 and its division on a pro-rated basis in accordance with article 16.1.3.6 is a matter only for the period of retroactivity, from April 1, 1988 to March 16, 1989, which pretty much coincided with the first year of the Collective Agreement. Or do these arrangements apply in each of the three years of the Collective Agreement? The Union, of course, argues for the former interpretation, and the Employer for the latter.

If the Employer's interpretation is correct the effect is to cap the cost to the University of adjustments for teaching and library experience other than at Memorial at $404,543 for each of the three years of the Collective Agreement. That is the way the University has applied the Collective Agreement. In other words,

it has treated Article 16.1.3.4 as constituting an agreement on its part to "reserve a salary parity fund of $404,543" for each of the three years of the Collective Agreement or, stated differently, as obliging it to carry forward into years two and three that element of the cost of the settlement for the first year.

We note in passing that the actual amount allocated by the Salary Parity Committee for the first year of the Collective Agreement was $440,743 because of the operation of Appendix J. Counsel agreed that Appendix J does not affect the principle of the issue before us so we will say no more about it.

The Report of the Salary Parity Committee

The Salary Parity Committee provided for in Article 16.1.3.1 was established, did its work and made its report to the University and the Association in December of 1989, not "by October 30, 1989" as called for in Article 16.1.3.6. Its recommendations were implemented in February of 1990. There was no suggestion from either party that anything turns on the timing of its report or the implementation of the report. Three hundred and twenty-one members of the bargaining unit are dealt with in the Committee's report. It is a complex document the heart of which is a table that sets out, for each of the three hundred and twenty-one faculty members, the relevant numbers, ending with "the applicant's revised salary effective April 1, 1988". It is useful to set out

here much of the textual part of the Salary Parity Committee's report of December, 1989, which was put in evidence by agreement:

**PART I, INTRODUCTION**

> The Salary Parity Committee was established under Article 16.1.3 of the Collective Agreement between the University and the Memorial University of Newfoundland Faculty Association. The Committee was also required to consider applications from Academic Staff Members who submitted a claim under Appendix J of the Collective Agreement. . . .
>
> The rules governing the Committee's decisions are given in Part II of this report, and the calculation of the revised Y value and corresponding salary adjustment, are given in Part III. The Committee's decisions for each applicant are summarized in Table 1.

**PART II, RULES APPLIED UNDER CLAUSE 16.1.3.3.**

> (a) Under Clause 16.1.3.3. of the Collective Agreement, all applications were reviewed for:
>
> (i) "Previous experience in the rank of Lecturer or equivalent or above in a University or equivalent institution . . ." or "Previous experience in the rank of Librarian I or equivalent or above . . ." (Clause 16.1.3.3.(a), (b).
>
> (ii) "Other relevant experience . . ." classified in accordance with Clause 16.1.3.3.(c), "which was relevant to the appointment, or which is relevant to the performance of the Academic Staff Member in his/her present position . . .".
>
> Total relevant experience under Clause 16.1.3.3.(c) of the Collective Agreement was then prorated as set out in Section III of this report.

In all calculations involving partial credit for service or funds, the rounding rule of one-half or greater rounded to one was applied. . . .

## PART III, CALCULATION OF Y VALUE AND SALARY ADJUSTMENT

Y values were calculated from the years of experience assessed under the previous section (Part II) as follows:

III(a) Years credited under II(a)(i) and II(b) inclusive, i.e. ". . . in the rank of Lecturer or equivalent or above". Each year of service = 1 Y.

III(b) Years credited under II(c), i.e. ". . . in the rank of Librarian I or above". Each year of service = 1 Y.

III(c) Years credited under II(d), other relevant experience:
Years 1 through 5; each year = 1 Y.
Years 6 through 15; each year = 0.5 Y.
Years 16 and above; each year = 0.0 Y.

The results of these calculations, as applied to individual applicants, are summarized in Table 1.

### Table 1

Column A: Next to the applicant's name and Faculty or Department, the number of Y assigned under III(a) or III(b).

Column B: The total years of experience credited under Clause 16.1.3.3(c) of the Collective Agreement (Section 11 (d) above).

Column C: The number of Y calculated under III (c).

Column D: The total increment in Y value, as assessed by the Salary Parity Committee. . . .

Column E: The Y value assigned to the applicant prior to any adjustment by the Salary Parity Committee.

Column F: The sum of Column D and Column E, i.e. the revised Y value effective April 1, 1988.

Column G: The salary step at which the applicant was paid effective April 1, 1988. [The Committee was here allowing for personal market adjustments and other historical anomalies.]

Column H: The appropriate salary step for the revised Y value from Column F.

Column J: The difference between Column H and Column G. This difference will be equal to or [because of personal market adjustments and other historical anomalies] less than the Y increment in Column D.

Column K: The full cost to bring the applicant's salary to the appropriate step, e.g. $1,200 x Column J. Column K, summed over all of the applicants, required $1,532,400 to fully fund all of the increments. As there was only $440,743 available ($404,543 from Clause 16.1.3.4 of the Collective Agreement plus $36,200 not expended under Appendix J), it was not possible to fully fund all of the adjustments awarded by the Salary Parity Committee. The actual funding of the adjustments was made in accordance with Clause 16.1.3.6 of the Collective Agreement, as follows:

(i) A scale adjustment factor equal to 3.34 was determined by trial and error after an initial estimate from the ratio of the fully funded cost ($1,532,400) to the funds available ($440,743).

(ii) The fully funded cost for each applicant (Column K) was divided by the scale adjustment factor, and this figure is recorded in Column L.

(iii) The value in Column L was then divided by $1,200 to obtain the fractional unrounded salary step increment listed in Column M.

(iv) The value in Column M was then rounded to the nearest whole number of salary steps as given in Column N.

(v) In accordance with the requirement that the actual payment "must be made in full steps", the rounded salary steps increment in Column N was multiplied by $1,200 to give the actual salary increment for each applicant (Column P).

(vi) The applicant's original salary as of April 1, 1988, is listed in Column Q; and to this was added the increment in Column P to obtain the applicant's revised salary effective April 1, 1988 (Column R).

(vii) This procedure resulted in eight applicants reaching or exceeding the cap on their respective salary scales for their rank effective April 1, 1988. In these cases, only those funds required to reach the capped salary level were awarded (Columns N and P).

(viii) The foregoing procedure used a total of $436,800 leaving $3,943 unallocated. The Committee then awarded $1,200 to each of three applicants, who were not at their capped salary level, and who had, in absolute

> terms, the largest discrepancy between their fully funded cost (Column K) and their salary increment under Column P. The remaining $343, being less than one salary step increment, was not awarded.

Neither party took any issue before us with the work of the Salary Parity Committee as it related to the first year of the Collective Agreement. It is to be noted, however, that the Salary Parity Committee treated the salary parity fund, established under Article 16.1.3.4 and divided up as provided for by Article 16.1.3-.6, as determining the increment to the applicants' salaries for the year April 1, 1988, to March 31, 1989, not as an increment to the applicants' salaries for the period of retroactivity, which, strictly speaking, ran from April 1, 1988, to March 16, 1989, the date when the Collective Agreement was signed. To have made the latter assumption would necessarily have involved the Committee in some uncertainty about the applicants' pay for the last two weeks of March of 1989 and therefore in some uncertainty about the applicants' total salary for 1989. We will return below to the matter of how these final two weeks of March of 1989 must be taken to have been intended to be treated by the parties under the Collective Agreement.

Interpretation

On its face, the Collective Agreement before us provides in Article 16.1.3.1 for a Salary Parity Committee to correct salary inequities for those whose initial placement on the scale under Article 16.1.2.1 made their salaries anomalous relative to the length of their academic or equivalent service, or other relevant factors. The Committee is charged by Article 16.1.3.3 with hearing appeals from Academic Staff Members "who wish to challenge their initial placement on the scale" and the Collective Agreement sets out the factors to be considered. Article 16.1.3.6 directs the Committee to assess all applications for adjustments in scale placement "and award such adjustments on an equitable basis irrespective of the amount of money in the fund", referring to the "salary parity fund of $404,543" set up in accordance with Article 16.1.3.4. Once that is done, each academic staff member will have an established "Y-factor" or "Y-value". The governing provision is then Article 16.1.2.14, which has already been set out above, but which is repeated here for convenience:

> 16.1.2.14 Notwithstanding the provisions of 16.1.1-16.1.2.13, each Academic Staff Member shall receive a salary not less than the scale salary indicated by his/her Y-value at any time.

The words "at any time" in Article 16.1.2.14 must surely be given some significance. Their apparent meaning is that once the Salary Parity Committee has adjusted an academic staff member's Y-value his or her salary is then governed by the relevant scale

salary. In this respect applicants to the Salary Parity Committee under Article 16.3.3 would then be no different than academic staff members appointed after April 1, 1989, whose prior experience is assessed by the Salary Parity Committee under Article 16.1.4. It provides;

> 16.1.4 Academic Staff Members appointed after April 1, 1989, shall enter into the salary scale at no less than the appropriate rank and Y-value in accordance with the formula in 16.1.2.1, except that the number of years at Memorial shall be replaced by the number of years of prior university experience as specified in 16.1.3.3 (a) and/or (b), as appropriate. The Y-value shall be adjusted to reflect other relevant experience following an assessment of these factors by the Salary Parity Committee in accordance with 16.1.3.3(c).

As Counsel for the Union submitted, this provision is surely a "major clue" to the intended effect of Article 16.1.3 as a whole. It is somewhat strange to give Article 16.1.3 a meaning other than the one it appears to have on first reading, when the result is to create an inequity between the salaries paid after April 1, 1989 to those employed as of February 10, 1989 and those appointed after April 1, 1989.

Article 16.1.3.4 states that the University agrees to reserve a salary parity fund for the adjustment of salaries "retroactive to April 1, 1988, as determined by the Salary Parity Committee". The fact that the parties agreed on a specific amount of money for that purpose and the special provisions in Article 16.1.3.6 for

the proportionate allocation of that money clearly limit the entitlement of academic staff members who apply under Article 16.1.3.3 insofar as the retroactive adjustment of their salaries is concerned. But there is no reason apparent or on the face of the Collective Agreement for limiting an academic staff member's salary to anything less "than the scale salary indicated by his/her Y-value at any time", to use the words of Article 16.1.2.14, beyond the period of retroactivity. Were it not for the creation of that specific fund and the last two sentences of Article 16.1.3.6 there would be no reason not to pay all salaries retroactively in full, as provided by Article 1.12.3:

> 1.12.3 Salary increases and sabbatical leave provided by this Agreement shall be applied or granted retroactively as though this Agreement came into effect on April 1, 1988.

This apparent meaning of the Collective Agreement is buttressed by reading Article 16.1.3 in context. If the intention of the parties had been that the Salary Parity Fund was to come into play in each of the years of the Collective Agreement, not merely for the period of retroactivity, they could easily have called for the establishment of a fund for each fiscal year, or each year of the Collective Agreement, as they did in Article 12.1.2 in relation to travel funds. Moreover, had the intention of the parties been that the fund was to continue to be a governing factor in the second and third years of the Collective Agreement they might have been expected to address its quantum for the second and third

years, in terms of the percentage increases used in Article 16.1. 2.9 and 11 for determining the rate at which the steps on the scale would increase.

Counsel for the Employer submitted that there is nothing in the Collective Agreement to distinguish between the period of retroactivity and the subsequent two years which makes the Salary Parity Fund applicable only to the former and not to the latter. We are unable to accept this submission because Article 16.1.3.4 says on its face that the University agrees to reserve a Salary Parity Fund "for adjustment of salaries of Academic Staff Members retroactive to April 1, 1988 . . .". It says nothing whatever about any such fund for the subsequent two years.

Counsel for the Employer also submitted that Article 16.1.3 is "a complete code" with respect to salary parity adjustments and the way they will be funded. He said that to accept the Union's submission would be to render parts of that provision "redundant". It is to be noted in this context that Article 16.1.4 also deals with salary parity, and may, on the face of it, involve retroactive adjustments where a new faculty member has relevant experience that requires assessment by the Salary Parity Committee. Thus Article 16.1.3 does not, in fact, cover all salary adjustment matters. Nor need it be the case that every part of Article 16.1.3 continues in play through the whole life of the Collective Agreement. There is nothing illogical about the notion that the provisions dealing with the Salary Parity Fund will be spent once

the matter of retroactive pay for applicants employed as of February 10, 1989 is disposed of.

Counsel for the Employer stressed that in the last sentence of Article 16.1.3.6 the reference is to "each Academic Staff Member receiving a salary adjustment". He emphasized that the reference is to "a salary adjustment" and that each Academic Staff Member shall receive "a proportion of the amount owed to him/her". The reference here to "salary adjustment" may, indeed, lend some credence to the suggestion that what the whole clause is about is salary adjustments rather than "scale placement", but the other provisions of the Collective Agreement override this slim support for the Employer's argument. Indeed, Counsel for the Union stressed the words, "the amount owed to him/her". This, he submitted, suggests that during the period of retroactivity the academic staff member in question is getting less than he or she is entitled to, due to the limited fund available; the implication being that after the period of retroactivity he or she will be paid his or her full entitlement.

Counsel for the Employer put some emphasis on the fact that the retroactive period, to which in the Union's submission the "Salary Parity Fund" is solely applicable, is the fifty weeks from April 1, 1988 to March 16, 1989, the date of signing of the Collective Agreement. Indeed, there would appear to be some difficulty with the notion that the Fund is to be divided under Article 16.1.3.6 for a fifty week period, rather than the one year

that the Salary Parity Committee appears to have in fact worked with. The latter may well be what the parties intended, given that, probably, no new pay period started after mid-March. What matters here, however, is that this wrinkle does not assist us to conclude that the Employer's interpretation of the effect of Article 16.1.3.4 is the correct one. If the dividing up of the salary parity fund is treated as a one-time thing, as the Union says it should be, it appears to make little practical difference whether the fund is ascribed to a fifty week period of retroactivity or to a full one year period. If, on the other hand, as the Employer submits, and apparently as the Employer has done, the $404,543 amount is not only "reserved for the period of retroactivity" but brought forward in the budget for the second and third years of the Collective Agreement to provide for parity, a real difficulty presents itself. With respect to the treatment of the last two weeks of March, 1989. If the initial fund is for the retroactive period, how much is to be made available for the fifty-four week period from the date of signing to the end of the second year of the Collective Agreement?

Counsel for the Employer stressed the fact that if salary parity were to be "fully funded" for the last two years of the Collective Agreement it would cost far more than $404,543 per year. That, of course, is made quite clear by the calculations of the Salary Parity Committee. An obligation which will cost the Employer over two million dollars, must, counsel submitted, be

clear in the Collective Agreement. In our opinion, it is; starting with the provision in Article 16.1.2.14 that an academic staff member shall receive a salary not less than the scale salary indicated by his or her Y-value at any time. That, applies, according to Article 16.1.2.14, "notwithstanding the provisions of 16.1.1 - 16.1.2.13. Counsel for the Employer made something of the fact that it is not said to apply notwithstanding the provisions of Article 16.1.3; but how could it when there is no doubt that Article 16.1.3.4 and the last two sentences of Article 16.1.3.6 provide for a different arrangement during the period of retroactivity? That is not to say, of course, that the general thrust in Article 16.1.2.14 does not carry where there is no specific provision to the contrary in Article 16.1.3. Indeed it is this provision which makes the adjustments in scale placement carried out by the Committee under Articles 116.1.3.3. and 6 connect back to Article 16.1.1, which imposes upon the Employer the obligation to pay in accordance with the table in Appendix H.

Counsel for the Employer referred to the decision of Wells, J. in the unreported case of Memorial University of Newfoundland v. Memorial University of Newfoundland Faculty Association (June 19, 1990, St. J. No. 922, in the Supreme Court of Newfoundland Trial Division). That was an application by the Employer to have the award of an arbitration board chaired by arbitrator Soberman set aside. The award involved a faculty member who had obtained his doctorate after April 1, 1988, the date upon which, according

to Article 16.1.2.1 "an academic staff member is placed on scale". The arbitration board decided that his Y-factor, and therefore his salary as determined by reference to the Table in Appendix H, should have been increased when he received the degree, but Mr. Justice Wells disagreed. He said on p. 9:

> On a reading of Article 16 in its entirety, I cannot find wording showing an intention on the part of the parties, to provide for vertical movement on the scale to allow for an alteration in the degree factor <u>during the life of the agreement</u>.
>
> I note also that there is no specific wording which allows for an alteration in the rank factor during the life of the agreement, however, it would be an absurd interpretation to find that a person could be promoted, let us say from the rank of associate professor to that of professor, but not be paid as a professor.

Counsel for the Employer submitted that similarly here there was no wording to show that parity should be "fully funded" after the period of retroactivity. To the contrary, Article 16.1.2.14 does exactly, and explicitly, that. While it does not provide for changes in the Y-value on the basis that a degree has been obtained, it does provide that a salary shall not be less than the scale salary indicated by the Academic Staff Member's Y-value "at any time".

**CONCLUSION AND ORDER:**

In our view the Collective Agreement does not provide on its face that the salaries of academic members employed as of February 10, 1989, whose initial placement on the scale made their salaries anamolous relative to their length of academic or equivalent service or other relevant factors, and who applied to the Salary Parity Committee and were awarded adjustments in scale placement, are limited in the salaries they receive by the terms of Article 16.1.3.4 or by the last two sentences of Article 16.1.3.6. On its face, the Collective Agreement makes those limiting provisions applicable only to the period of retroactivity, from April 1, 1988 to March 16, 1989. Accordingly, we will reconvene the hearing in this matter to allow the Employer to call evidence and make argument with respect to whether the grievance is untimely, whether there is any latent ambiguity in the Collective Agreement on this issue, and if so how it is to be resolved, whether the Union is estopped from asserting this claim on behalf of its members and, finally, as to the appropriate remedies if the grievance succeeds.

Innis Christie, Chair

IN THE MATTER OF AN ARBITRATION

Between

Memorial University of Newfoundland

And

Memorial University of Newfoundland Faculty Association
(Grievance A-90-01, Y-Values)

# Dissent of Gerard V. McDonald

The matter which was brought before this Board concerned an interpretation of the current collective agreement between Memorial University of Newfoundland and the Memorial University of Newfoundland Faculty Association regarding the salary scale placement of faculty by the Salary Parity Committee in accordance with the relevant provisions of the collective agreement. The parties agreed at a preliminary hearing of the Board in this matter that the Board would hear argument, and make a ruling, on the question of whether the matter in dispute between the parties could be disposed of on the basis of an interpretation of the collective agreement on its face. It was agreed that if the collective agreement, on its face, could be interpreted in favour of the employer's position, then the matter would be settled, but that if it could not be, the Board would then be reconvened to hear further evidence and argument.

I have reviewed the majority's preliminary ruling in this regard, and for the reasons which I have set out below, I am unable to agree with certain aspects of it.

To begin with, I believe that the notion that the salary parity fund provided for under the Agreement was, in effect, a "retroactivity" fund is an erroneous one and one which is not supported by the complete context of clause 16.1.3.4. I can make a distinction in my own mind between a fund which would have been set aside for the purpose of absorbing the absolute, financial cost (over the retroactivity period) of all adjustments made by the Salary Parity Committee on the one hand, and a salary parity fund which could have been intended to absorb the annual dollar equivalent of adjustments to initial scale placement, as of April 1, 1988.

In my opinion, it is possible that what the parties had intended under clause 16.1.3.4 of the Agreement was not a ceiling on retroactive costs, but rather a ceiling on the costs associated with adjustments to the initial placement on scale of Academic faculty and the re-calculation of their Y-values. While clause 16.1.3.4 states that adjustments to initial placement would be retroactive to April 1, 1988, I do not feel that this should be allowed to automatically characterize the salary parity fund as a pool of money to absorb the retroactive costs associated with these adjustments. I think that the use of the term "retroactive to April 1, 1988" in 16.1.3.4 was intended to have the effect that phrases such as "as of April 1, 1988" or "with effect from April 1, 1988" might more clearly have expressed.

I will acknowledge that the use of the term "fund" to describe the monies that were being made available appears to fit more snugly with the interpretation that has been ascribed to the fund by the union, that is, a defined pool money to finance a one-time period of retroactivity. This does not mean that, though, that another meaning cannot be given to 16.1.3.4, that is, a fund which was intended to place a limit on the annual dollar equivalent of the initial scale adjustments approved by the Salary Parity Committee. In accepting this latter approach, one might characterize the parties' use of the term "fund" as not entirely appropriate, but no so inappropriate as to make another interpretation of the clause impossible. We might bear in mind, as well, that when this wording was agreed upon, no one could accurately predict whether the fund would be over or under utilized. The matter before us would not have become an issue had the fund been sufficient enough to meet all parity requirements -- perhaps the parties did not pay enough attention to the words they ultimately used to express their intent.

There are a couple of issues that trouble me in terms of treating the salary parity fund as a "retroactivity" fund, and one which should then have logically applied to the period April 1, 1988 to March 16, 1989. First of all, I am cognizant of the fact that the Salary Parity Committee itself calculated adjustments using a full 12 month period, which is consistent with the notion that what they were supposed to be doing was to determine adjustments to initial placement on scale (which, by necessity, must be expressed in terms of annual dollars), and not to calculate adjustments in such a way as to exhaust the monies available for retroactive payments.

Secondly, I note that all Academic staff who were employed as of February 10, 1889 were eligible to apply to the Salary Parity Committee for adjustments. Presumably, this means that, among those 321 faculty who were reviewed, there were some faculty who became employed by MUN sometime between April 1, 1988 and February 10, 1989. Hence, while the total adjustments approved by the Committee

totalled some $440,400, it seems possible that this total amount was not in fact expended, due to the fact that some of the faculty would not have been on the university's payroll until some time after April 1, 1988. If this so, can one really view the salary parity fund as a true "retroactivity" fund?

If one is prepared in the first instance to accept this alternative interpretation of clause 16.1.3.4, then we must of course examine the implications of this argument for other sides of the issue as well.

For example, there is clause 16.1.2.14, which does indicate that "... each academic staff member shall receive a salary not less than the scale salary indicated by his/her Y-value at any time". I understand what this clause says, but I do not believe that it should be considered in isolation, and in fairness, nor did the majority in their considerations. My thinking on the application of this clause to this case, however, is that it is substantially qualified by Article 16.1.3 which follows later, to the extent that 16.1.3 clearly contemplates that a faculty member may indeed be paid at less than his/her Y-value, subject to the availability of monies to compensate him/her for teaching experience at other universities, etc. (i.e., the salary parity fund).

Another issue is the apparent inequity which would result from the University's interpretation of the Agreement, that is, salary differences between staff hired before February 10, 1989 and those comparably qualified staff hired after April 1, 1989. My view is that, while this may appear to be inequitable, it may be what the parties in fact intended and agreed to. For all we know, MUNFA may have been counting on the adequacy of the salary parity fund to cover all salary parity adjustments required as of April 1, 1988, in which case the "equity" issue would have been an academic one in their minds or not on their minds at all.

I give some credence to the employer's argument, too, that if the Association's interpretation is accepted, then 16.1.4 would really have been unnecessary. But seeing that it is there, I am prepared to assume that the parties saw some reason for deliberately distinguishing between academic faculty who were already on staff and those who would be hired by the University after April 1, 1989. In other words, inasmuch as the parties specifically stated that new faculty would be entitled to a full recalculation of their Y-values, the implicit assumption could be that academic faculty already on staff would be excluded from the same entitlement, either because it was assumed and/or hoped that the salary parity fund would fully address parity with those faculty, or for some other reason of which we are unaware.

I believe that, when the collective agreement is read in context and the sequence of the relevant clauses is taken into account, Article 16.1.3 can be said to completely qualify clause 16.1.2.14. To me, Article 16.1.3 appears to highlight an exception to the general rule of 16.1.2.14, that is, that there would be those faculty whose initial placement on the April 1, 1988 scale could be something less than that indicated by taking into account teaching experience at other universities, etc., and that those anomalies would be only be rectified with effect from April 1, 1988 to the extent that the salary parity fund provided enough money to do so.

In summary, I believe that the salary parity fund was never intended to provide a pool of money to finance the cost of retroactivity. Rather, I feel that the fund was intended as a ceiling on the annual dollar equivalent of salary scale adjustments as of April 1, 1988. At most, I would be prepared to concede that, on its face, the collective agreement may not be so clear in its intent as to render any other interpretation implausible.

I agree with the majority that the collective agreement does not, on its face, clearly and unequivocally support the employer's position. My difference with the majority relates to their finding that the collective agreement is not unclear or ambiguous -- I feel that it is, inasmuch as I feel that the Agreement is also open to the interpretation which the employer has advanced. The majority in their ruling do contemplate the possibility that the collective agreement may contain within it a "latent" ambiguity, but my observation is that an ambiguity, if there is one, is already apparent.

Respectfully submitted,

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Employer Nominee

April 5, 1991.