7-8-1992

Memorial University of Newfoundland Faculty Association v Memorial University of Newfoundland

Innis Christie

Rick McGaw

Gerard McDonald

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

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

HEARING DATES: January 27, 28 and 29, 1992

AT: St. John's, Newfoundland.

FOR THE UNION: John Harris, Counsel
Mark Graesser, President, MUNFA
William Schrank, Vice-President, MUNFA

FOR THE EMPLOYER: Augustus G. Lilly, Counsel
J.E. Strawbridge, Director of Faculty Relations
C.S. Rennie, Special Advisor on Labour Relations (retired)

DATE OF AWARD: July 8, 1992

Union grievance alleging breach of the Collective Agreement between the parties for the period April 1, 1988 - March 31, 1991 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 who have not been paid in accordance with the Collective Agreement.

At the outset of the hearings prior to the preliminary award in this matter counsel for the parties agree that this arbitration board is properly constituted and properly seized of this matter, and should remain seized to deal with any matters arising from its application. Counsel agreed to waive any post-hearing time limits.

AWARD

The issues before this Board of Arbitration were set out in our Preliminary Award dated April 13, 1991, at pp.1 and 2, as follows:

> 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 filled 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 favour 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.

By agreement of the parties, that Preliminary Award dealt only with one part of the third of those issues. As the Board went on to say on p.2 of that Award:

> 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 its apparent meaning. They agreed that if we conclude that the Collective Agreement, on its face, favours the position taken by the Employer we should dismiss the grievance, and that will end the matter. They also agreed that if we find, on the other hand, that the Collective Agreement, on its face, favours 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, negotiation 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.

After full consideration of the terms of the Collective Agreement the majority of this Board of Arbitration stated, at p.15,

> ... there is no reason apparent or on the face of the Collective Agreement for limiting a 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. [emphasis added]

Mr. McDonald dissented, concluding, at p.4 of his dissent,

> 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.

The majority's "Conclusion and Order", at p.21, was:

> In our view the Collective Agreement does not provide on its face that the salaries of the academic members employed as of February 19, 1989, whose initial placement on the scale made their salaries anomalous 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.

The Board reconvened for three days of hearings in January 1992. Virtually all of the evidence related to the history of the negotiation and ratification of this first Collective Agreement between the parties. Counsel for the Employer called as witnesses Mr. Charles Rennie, former Special Advisor to the President on Labour Relations, who was chief negotiator for the Employer, Dr. John Strawbridge, who during the negotiations was Associate Dean of Science and a member of the Employer's bargaining team, Mr. Harold Squires, a certified general accountant, who was and is Director of Budgets, Audits and Institutional Analysis for the Employer, and Dr. Michael Stavely who was and is Dean of Arts and a member of the Employer's bargaining team. Counsel for the Union called only one witness, Dr. Greg Kealey, Professor of History, who was chief negotiator for the Union.

According to the evidence, negotiations commenced in the Spring of 1988 and the Union's first salary proposal was submitted on April 15. It called for the full experience of academic staff members, both at Memorial University of Newfoundland and elsewhere, to be taken in to account. This was unchanged in subsequent proposals, up to January 1989, when the Union applied for a provincial government conciliator. This application triggered a strike deadline of February 10, 1989.

Through Mr. Rennie, several salary proposal documents were put in evidence. In the course of cross-examination, at the request of counsel for the Union and over the objection of counsel for the Employer, Mr. Rennie was directed to produce the minutes of four crucial bargaining sessions to which he had referred. These were the bargaining sessions that had led to the signing of the Memorandum of Settlement at the eleventh hour. The accuracy of these purportedly verbatim minutes of "Conciliation Talks" at 7:15 a.m. on February 9 and at 4:16 a.m., 5:45 a.m. and 6:37 a.m. on the 10th was not disputed, except by Dean Stavely, one of the Employer's witnesses. His concerns were rather specific and not addressed to the issues that concern us here. For the purpose of dealing with the issues that do concern us, this Board of Arbitration accepts the minutes put in evidence by Mr. Rennie as accurately reflecting what was said at those meetings.

According to Mr. Rennie, early proposals had envisaged the creation of a Salary Parity Committee to deal with anomalies in the pay scale which might well become apparent after the signing of the Collective Agreement. However, a February 2 MUN proposal reflected an expanded role for this proposed committee. It called for the establishment of a committee "to establish mechanisms to correct pay inequities for that group of Academic Staff Members whose initial placement on the scale is anomalous relative to their length of academic of equivalent service." In that proposal the Employer was "to set aside one (1) percent of its 1988--1989 annual payroll for Academic staff Members for salary parity purposes as identified by the Committee." Significantly, the cost of that proposal otherwise totalled 28.9%.

On February 7 the University produced two salary proposals the details of which are irrelevant here except that they made no such provision for recognizing non-MUN experience and showed a total increase of 29.9% over the cost of MUNFA salaries in fiscal 1987. According to Mr. Rennie's testimony it was by then well understood by the MUNFA bargaining team that the University, under edict of the provincial government, had to settle for a cost of less than 30%, although both he and the Union negotiators were unwilling to sign anything to the effect that that would be the cost of the package.

Without over-simplifying unduly, it can be said that when the parties met at 7:15 on February 9, 1990 there were three issues outstanding; how to package the "less than 30%" money available (which included a serious concern for the recognition of merit on the part of some members of the management team, Dr. Stavely, the Dean of Arts, in particular), how to deal with non-MUN experience, and the "Webber affair", a censure matter with which a side table was dealing.

Mr. Rennie testified that to "fully fund non-MUN experience", which is what the grievance before us seeks for the final two years (i.e. the non-retroactive period of the Collective Agreement), was estimated to be going to cost $1.5 million per year, when the 1% available under the February 2 proposal only amounted to something just over $400,000. In those circumstances, he said, it was certainly never his intention, or that of the Employer, in agreeing to Articles 16.1.2.14 and 16.1.3 to agree to fully fund non-MUN experience after the period of retroactivity, as the majority of this Board has held is the effect of the Collective Agreement on its face. Nor, Mr. Rennie testified, was that the apparent intent of the Union's negotiators, specifically the chief negotiator, Dr. Kealey.

It must be recalled that, as was explained in detail in our Preliminary Award, 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.

Article 16.1.2 is headed "Definition of Scale" and provides in Sub-article 16.1.2.1;

> 16.1.2.1 The step at which an Academic Staff Member is placed on scale on April 1, 1988, shall be determined by the formula:
>
> Step (Y) = Number of Years at Memorial
> + Degree Factor
> + Rank Factor...

It is to be noted that the reference here is to "Number of Years at Memorial", but Article 16.1.3-1 provides for the mechanism of the Salary Parity Committee "to correct salary inequities", and then Article 16.1.3.4 provides for the reservation of a fund of $404,543 "for adjustment of salaries of Academic Staff Members retroactive to April 1, 1988..." The question in the Preliminary Award was whether, on the language of the Collective

Agreement alone, it was clear that this fund, or dollar-amount cap, applied only to the period of retroactivity. The Union said that was as far as it went. The Employer said it was intended to be carried forward into subsequent years. Neither party suggested to us that there was intended to be only $404,543 spread over all three years of the Agreement, but, apparently, there had been some misunderstanding on that score right up to the final stages of the negotiations.

The minutes of the "Conciliation Talks" which commenced at 7:15 on the morning of February 9 are significant in that they corroborate Mr. Rennie's testimony that the Union negotiators, like the Employers', were proceeding on the basis that the total cost of salary increases, including any anomalies fund, was to be no more than 29.9%. Even more significantly, the minutes directly corroborate Mr. Rennie's testimony as to the apparent understanding and intentions of the negotiators on both sides of the table with respect to the clauses of the Collective Agreement here in issue.

By the time the "Conciliation Talks" covered by the next set of minutes in evidence commenced, at 4:16 a.m. on the 10th, there seems to have been no doubt on the part of any of the negotiators about what the total cost of the package was to be. The negotiating teams had broken into two groups. Harold Squires, the Employer's Director of Budgets, assisted by John Dicks, a computer expert seconded to his office by Newfoundland and Labrador Computer Services, was working at the University, with Drs. Schrank and Neuman of the Union, to cost various scenarios and Mr. Rennie and his assistant, Ms. Walsh (who took the notes of these talks), and Dr. Strawbridge, were finalizing the Agreement in the offices of the Department of Labour with the conciliation officer and Drs. Kealey and Evans of the Union. The first recorded statement in this meeting is GK (Greg Kealey) saying;

> You probably have this costing sheet. It is in Harold's hands. Top line and bottom line increase is 28.8. There is an anomaly fund of another $400 which brings it to 29.9 and some other decimal points to under the $432, 200...

Shortly thereafter the parties moved to a discussion of the Union's proposal on Article 16.1.3, with which we are directly concerned here. As Mr. Rennie put it, the Employer's team was being "walked through" the proposal, a copy of which is in evidence. The proposal showed, for the first time apparently in a Union proposal, "Y" defined as it is in the Collective Agreement by reference to "No. of years <u>at</u> <u>Memorial</u>" [emphasis added]. "CSR" is Mr. Rennie and "JS" is Dr. Strawbridge:

> GK: ...They [the Salary Parity Committee] are calculating 'Y' irrespective of the money. The committee reports to the University by not later that October 1989. (Dr. Kealey Clause 16.1.3.6). They will have to come up with some kind of prorating.
>
> CSR: If they are entitled to five steps and you only have enough money to pay two, he only gets two.

GK: My guess is certain people will only get one. It is not much of a solution, but it is one.

JS: Will the assumption of 'Y' carry forward?

GK: They will know, you will know and we will know. Their 'Y' is this, but there is not enough money to bring them up to this.

JS: Okay.

GK: (Dr. Kealey read aloud article 16.1.4). Trying to say how people hired during the life of the contract will be put on scale.

JS: New hires will get full credit for previous experience. Only people in the system now probably will not.

GK: ... we have brought it within the parameters we agreed to. I think the language is eminently reasonable. I do thoroughly hope that this does the job.

CSR: Certainly from my preliminary knowledge of it, you have attempted to come within the guidelines, and I express my appreciation for that.

JS: ... People who come forward to the parity committee. We implement this. We have this $400,000 fund and a professor comes forward and says. 'I think I need more' and they say 'Yah you have prior experience'; and 'Y' goes up by three, and there is only enough money to go up one step, what happens to that person in April 1991, in terms of his peers?

GK: contract ends and there is no legal (He did not finish this sentence).

JS: Yah

GK: No. That would be an opportunity in which to negotiate. None of this exists. I have eight years prior experience at Dalhousie. I suspect if I or any one gets one -- I will be short seven. In 1991, I will hope that my Union bargaining team, of which I will not be there, is going to fight hard to both get the scales up and to get some additional recognition of my 'Y' factor which has gone relatively unrecognized for the last few years. Before the University will hire people higher on scale with much of their -- which in our view is right. ...

At 5:45 a.m. the group at the Department of Labour was joined by Dean Stavely, who had come to make a last minute plea for more recognition of merit. However, there was an exchange between him and Dr. Kealey which goes as well to the question of intent to cap the recognition of prior experience;

> MS: ...but my first concern is that some of the best people are not treated as well -- mostly Full Professors -- and we have a whole category of people who have rather, by the meaning 'full experience' in universities -- who lose out on this. We wonder if you can accommodate some moves to accommodate these people. There may be as many as 2,500 or as little as 1,500 accumulated university experience. You have some yourself (to Dr. Kealey). We have no money. ...
>
> GK: Yes. According to the data that you compiled and using 2,538 "Y" of direct prior experience -- seven or eight of mine are there -- it is too expensive. We did not set the parameters of the package as you well know. The parameters are there and for better or worse we played. ...

Finally, at the last meeting before the signing of the Memorandum of Agreement there was further discussion which casts light on the shared intent of the negotiators with respect to the effect of the anomalies fund and its "capping" effect on the recognition of prior experience in the two non-retroactive years of the Collective Agreement. Cyril Colford, the conciliation officer raised a question as the meeting began;

> CC: That anomaly fund I know you want is made retroactive to first April, 1988. As we are reading it, the fund is for the whole of the contracted period. A lot fewer people will participate in the fund than if you triggered it first April, 1989.
>
> GK: It will be paid out in 1989.
>
> CSR: But it will be retroactive to April 1988.
>
> JS: It would come out of the 1989 budget which is also for April 1, 1988, no matter how it was paid. If you give 1,200 to someone for that in 1988, when that is added on for the salaries in 1989 and '90. Every 1,200 is 3,600 over the life of the collective agreement, every unit. We were wondering if you would consider putting it into '89-'90; 111 people are eligible in 1988 to receive a 1,200 amount for past experience.
>
> CSR: Looking at spreading it over far more people. In '89 it would be 165.
>
> GK: Let us think about that. ...[the parties caucused on this, among other points].
>
> JE (John Evans): ... it was a late realization on our part that the $400,000 is for the life of the collective agreement, and not for a year. If you increase the salaries by $1,200, then it is there the next year and the next year. It is like spending $3,600.
>
> CSR: ... If what you want is first April, 1988 -- fine.

There was some discussion of how the parties had each costed the anomalies fund; in the course of which Dr. Strawbridge stated that the Employer had been thinking in terms

of payments starting in 1989 rather than 1988, but also acknowledged that originally the anomalies fund had been talked about in terms of 1% per year. After another caucus the matter was concluded as follows;

> CSR: That is alright. Retroactive to April 1, 1988, but the figure, Harold put the figure as 404,542. ... we talked about a one percent anomalies fund. I don't think there is any disagreement on that. That is the figure I mentioned. ...
>
> JS: 404,543 -- we have a figure here
>
> CSR: Okay.
>
> GK: Back to April 1988
>
> CSR: You give me a memorandum of agreement, and I will give you a memorandum of agreement on Webber. No change in the figures. ...
>
> GK: Let's go.

In the course of his testimony Mr. Rennie elaborated on his understanding of some of these statements, but in all crucial respects they appear to speak for themselves in corroborating his testimony with respect to the shared understanding and intentions of the negotiators.

Dr. Strawbridge also testified that in the final stages of the negotiations no one questioned that the upper limit on the cost of the package was to be 29.9%. With respect to the funding of non-MUN experience he testified that the Employer's team "pleaded with the MUNFA team" to be sure they knew what they were doing, and the response was that they had other priorities.

Harold Squires, the Employer's Director of Budgets, Audits and Institutional Analysis, testified with respect to his role in costing the various proposals made throughout the bargaining. Specifically he testified about his efforts, co-operatively with Drs. Schrank, Evans and Neuman of the Union, through the night of February 9 and the early morning of the 10th to bring various scenarios proposed by the bargaining teams within the 29.9% limit. Mr. Squires identified the document which was passed on to the bargaining teams meeting at the Department of Labour Offices as the most satisfactory scenario within the government-imposed limit. It allowed for only a little more than $400,000 per year to fund non-MUN experience.

Dr. Michael Stavely, Dean of Arts, also corroborated Mr. Rennie's evidence that the final bargaining sessions had been directed to the shaping of what everybody on both bargaining teams understood was to be a package that would cost no more than 29.9% compounded over the three years of the Collective Agreement. His concern had been with what he saw as serious faults in the structure proposed, which he thought the

MUNFA team might not have understood. The comments of the Union's chief negotiator had convinced him that they knew what they were doing.

Dr. Stavely identified three "Faculty Association" documents, two entitled "Negotiation News", dated February 15 and 18, 1989, and a memo to "All Members of the MUNFA Bargaining Unit" dated February 27, 1989, the subject of which is "Recommendation for Ratification of the Collective Agreement". We return to those documents below.

Dr. Greg Kealey, chief negotiator for the Union throughout the 1988-89 negotiations, was the only witness called by the Union. He testified that as far as he could remember the minutes put in evidence by Mr. Rennie were accurate. He stated specifically that he did not challenge the minutes as they related to the "walk through" of Article 16.1.3.

Dr. Kealey testified that he had had no mandate to "initial" a 29.9% settlement, nor had he done so, but he said that the 29.9% had "taken on a cosmetic reality" for the Union as well as for Mr. Rennie and the conciliation officer. He said that there had been great pressure not to concede on the Webber issue. "At the end," he said in cross-examination, "we were working with 29.9%". He did, however, make the point that methods of calculating percentage increases are sufficiently various and there were enough uncertainties in the data base, such as who would leave or retire and who would be hired and at what level, that he was sceptical throughout of the "certainty" of any such number.

Nevertheless, Dr. Kealey testified that the Union bargaining team realized on the night of February 9 and the morning of the 10th that the 29.9% increase would not be enough to fund non-MUN experience. He said explicitly that what the Union team thought the proposal meant was that for each year of the Collective Agreement there would be something over $400,000 to fund the non-MUN experience. He agreed that at no point in the discussions had he or Dr. Evans ever indicated to the Employer's negotiators that their intent, or the purpose of Article 16, was to achieve full funding of "Y" values based on non-MUN experience during any part of the life of the Collective Agreement being negotiated. In other words his understanding and intent, and that of his bargaining team, was exactly what Mr. Rennie and the other witnesses called by the Employer had perceived it to be.

Dr. Kealey did point out that this was one of two cases where words with a meaning that had seemed apparent to him had been read quite differently by others; in this case by others in the Union and by this Arbitration Board, and in the other by the Employer and the Newfoundland courts.

Dr. Kealey testified that it had been clear throughout that the Memorandum of Agreement was subject to ratification. Prior to ratification the negotiating team published issues of "Negotiation News" to help inform the membership, and the executive of the Union published information bulletins. In cross-examination he addressed his attention to the "Negotiation News" dated February 15, 1989, to which the full text of Article 16, in typescript, was attached.

After explaining other aspects of the salary clause the "News" stated;

> The scale provides no immediate credit for experience prior to your appointment at Memorial University. This will be assessed and adjusted retroactively to April 1, 1988, by the Salary parity committee (clause 16.1.3); actual salary adjustments in the period of the first collective agreement will be constrained by the size of the salary parity fund. The fund will be used to cover retroactive increases to bring individuals to their proper salary level after adjustments to the initial Y-value by the Parity Committee. (Salaries from April 1, 1988, onward, including the first step increase, will come from the regular salary budget.)

This was further elaborated upon in the February 21 "Negotiation News";

> By late Thursday evening, we were convinced both that a strike would be required to get more than 29.9%, and that to avoid a strike the administration would give us virtually everything else that remained unsettled (grievances, discipline, governance, and the settlement of censure) in return for our accepting 29.9%. During the night of Thursday/Friday, a team of three members of the Negotiation Committee worked on salary simulations based on the 853 members, trying to incorporate past university experience into the Y-structure. "Other experience" was omitted from the direct Y-scale formula since the available data were too weak for use, and adding other experience would have made the package even more expensive. It became apparent to the MUNFA team that, if the 29.9% figure were firm, then about $300,000 that was unavailable would be necessary to account for all of prior university experience if the floors and total scale were not to be lowered, if the 7% minimum increase for April 1988 were to be maintained, and if the 6% minimum increase for April 1989 were to be maintained.
>
> ...
>
> We still believe that the original concept of prior experience included in the April 1988 contract proposal was valid, and was not fully compensated for in the compromise formula. For this reason, at our behest, the collective agreement in Article 16.1 contains three sections in addition to the salary scale itself. These sections state that:
>
> 1) There is to be a Salary Parity Committee to validate claims for prior experience and other factors in the adjustment of initial placement of individuals on the Y-scale. By October, 1989, this committee will establish the appropriate scale position for every claimant as of April 1, 1988, and from this, the salary they ought to be receiving. Actual retroactive salary adjustments under this collective agreement will be limited by the size of the Parity Fund, but a clear case for future retroactive adjustments of any shortfall will have been established.

> 2) In 1990 a joint committee of MUNFA and the Administration is to be established to look into salary inequities which remain after the work of the Parity Committee has been completed, and into possible revisions of the scale structure, for negotiation of the next collective agreement, to take effect April 1, 1991.
>
> 3) Bargaining unit members hired on April 1, 1989, or after shall be paid a minimum salary determined by the Y-scale which includes past experience, as validated by the Parity Committee.

The substance, and perhaps a bit of the flavour, of what was going on on the campus after the signing of the Memorandum of Agreement is conveyed by the words of the February 27, 1989 memorandum from the MUNFA Executive to "All Members of the MUNFA Bargaining Unit";

> Particular concern has been expressed by some members about the way in which the salaries clause deals with experience prior to employment at Memorial. The executive has received notice of a motion which may be put to the Membership which would direct the Executive and Negotiation Committees to seek to reopen negotiations in order to make changes in the agreed method of allocating salary increases. The Executive opposes such a motion ...
>
> The position of the Executive on past experience remains that embodied in the original proposal to the administration dated April 15, 1988: relevant past experience should be fully taken into account in establishing the scale position on salaries of individuals. The negotiated agreement does not fully meet this objective within the contract period; within the 29.9% limit this was not possible. But it lays the groundwork for identifying the remaining inequities for rectification in the next contract.

Dr. Kealey's comments on these publications are of no great relevance, but the publications themselves are relevant to an understanding of this whole proceeding.

The ratification vote was held on February 28, 1989. The Memorandum of Settlement was duly ratified, with no amending motions being passed. The limited recognition of non-MUN experience was undoubtedly contentious, but there was no suggestion that the ratification was other than proper.

There was a good deal of evidence about the process of the Salary Parity Committee established pursuant articles 16.3.1 and .2. Its role and ultimate report are described on pp. 3-12 of our Preliminary Award. The Report is dated simply "December 1989". The point of dealing with its publication for present purposes is the submission by the Union that until the Committee had completed its work Faculty members could not know exactly how much they were going to be paid for non-MUN experience, so the Union could not be have been in a position to file this grievance on behalf of them.

The interpretation of the retroactivity clause as it applied to the salary parity fund which we now know had been intended by the negotiators for both parties was the basis upon which the Salarty Parity Committee acted. We are satisfied that the Union executive knew this by mid-December if not earlier. In a letter dated December 14, 1989 to Dr. William Machin, Chair of the Salary Parity Committee, Dr. Schrank, then President of MUNFA, urged the completion of the Committee's work by December 20. The second paragraph of his letter reads;

> The MUNFA Executive Committee would like to emphasize the importance of completing the work of the committee by that time. [December 20, 1989] The committee has more that $400,000 to distribute, retroactive to April 1, 1988. This means that more than $700,000 ($400,000 for 1988-89, plus a pro-rated portion for 1998-90) will be distributed to faculty members and librarians at Memorial once your committee reports. As you are aware, about three hundred fifty individuals have been waiting patiently for six months or more to learn, finally, what their 1988-89 salaries will be. For them, your report will end (we hope happily) their understandable anxiety about their salaries.

The "pro-rated portion" refers to what those with pre-MUNFA experience would get for 1989. The fact that Dr. Schrank expected it to be a total of $300,000, in round figures, for the first nine months of the 1989-90 year of the Collective Agreement indicates clearly that at that time he and, we must presume, the rest of his executive, knew how the Collective Agreement was to be applied. This letter is marked "c.c. All MUNFA Members".

There was no evidence of who actually received these letters or how they were understood, but there was considerable additional evidence relating to when individual Faculty members must be taken to have known how the Collective Agreement was being applied to them.

With a memo dated "1990 01 19", Mr. Rennie sent a copy of the first six pages of the Salary Parity Committee's Report to "Academic Staff Members". Those pages explained what the Committee had done but did not include the specifics of how individual Faculty members had fared. Then the following memo was sent to "All MUNFA Members" from "The MUNFA Executive", "RE: Implementation of the Report of the Salary Parity Committee" bearing the date "1 February 1990";

> Recently, members of the bargaining committee have received the body of the report of the Salary Parity Committee. This Committee was set up under Clause 16.1.3 of the Collective Agreement to adjust the "Y" factor for faculty members who believed that their "Y" value had been incorrectly determined. The Committee's report was submitted before Christmas. In early January, the MUNFA Executive sent a letter to Dr. Leslie Harris stating that MUNFA wanted the decisions of the Committee to be implemented immediately. The Administration has notified MUNFA that they intend to implement the decisions of the Salary Parity Committee with the payroll of February 22, 1990.

However, the evidence is that members of Faculty were not advised of what they had been awarded by the Salary Parity Committee until each received an individualized memorandum from the Employer's Director of Human Resources dated February 19, 1990, of which the following is a sample;

> Professor Gordon Bennett
> Department of Biology
> Memorial University of Newfoundland
>
> Dear Professor Bennett:
>
> We have been advised by the Salary Parity Committee that, pursuant to the collective agreement between the University and MUNFA, the Committee has reviewed your application and has determined that you are eligible to receive a salary adjustment.
>
> For the purpose of the salary parity provision of the agreement, your experience has been assessed as equivalent to year(s) of service under Section 16.1.3.3.(c). The total has been recognized to the extent stated in the memorandum regarding salary parity, issued on January 19, 1990.
>
> Your revised salary is $ April 1, 1988, and $ effective April 1, 1989.

The Salary Parity Committee's determinations were, in fact, acted upon for the February 22 payroll.

A Faculty member who, like this Board of Arbitration in its Preliminary Award, did not understand the way in which the Union negotiators, the University and the Salary Parity Committee had intended and interpreted the retroactivity provisions of the Collective Agreement dealing with the salary parity fund would still only have gained that understanding by working though the mathematics of his or her salary effective April 1, 1989. Thus, this memo was supplemented by a further one from Mr. Rennie dated "1990 03 08";

> This memorandum is further to the letter dated February 19, 1990, from the Director of human Resources concerning the decision of the Salary Parity Committee, as it affected you.
>
> In order to assist you in understanding the decision, I am attaching herewith the pages of the report dealing with the distribution of the salary parity fund set out in Article 16, Clause 16.1.3.4, of the Collective Agreement between the University and the Memorial University of Newfoundland Faculty Association. In order that you may be able to follow the calculation, we have provided the data from the Salary Parity Report concerning your case.

> Article 16, Clause 16.1.3.3, of the Collective Agreement requires the Salary Parity Committee to establish Y-values for the experience prior to appointment at Memorial University of Newfoundland. The establishment of these Y-values by the Committee was only for the purpose of enabling the Committee to distribute the funds provided for in Clause 16.1.3.4 in accordance with Clause 16.1.3.6.

Next, this grievance was filed by a letter dated March 30, 1990 to the President of MUN from Dr. Schrank, as President of MUNFA;

> A-90-01
>
> March 30, 1990
>
> Dr. Leslie Harris
>
> President
>
> Memorial University of Newfoundland
>
> Dear Dr. Harris,
>
> In accordance with Articles 7.1.4. and 7.1.5 (Step 2) of the Collective Agreement, the Association initiates Association grievance A-90-01.
>
> The Association contends that the University is in violation of Article 16 and other relevant articles of the Collective Agreement in not paying Academic Staff Members at their Y-value (salary scale placement) as revised by the Salary Parity Committee.
>
> The Salary Parity Committee revised Y-values The Salary Parity Committee revised Y-values (salary placement) for a large number of members. It has recently become clear that many members are not being paid in accordance with the Collective Agreement, and in particular, not in accordance with Sections 16.1.1 and 16.1.2.14.
>
> Please convene a grievance resolution meeting at your earliest convenience.

In its initial reply to the grievance the Employer took the position that the grievance was untimely, as well as putting forward its interpretation and pleading estoppel. On this point the Union replied that it considered "the issue of salary a continuing grievance".

The Issues:

In its Brief of Argument the submissions on behalf of the Employer were introduced as follows:

> M.U.N. submits first of all that the Grievance is untimely. In the alternative, M.U.N. submits that it is not obligated to fund all affected salaries fully effective 1 April 1989 and that the Salary Parity Fund established under Clause 16.1.3.4 of the Collective Agreement contains the full funding entitlement of faculty members whose salaries were adjusted by the Salary Parity Committee for the life of the Collective Agreement. In the further alternative, M.U.N. submits that, if the Collective Agreement on its face does not support M.U.N.'s position, the Collective Agreement is ambiguous and that ambiguity ought to be resolved in M.U.N.'s favour and, further, that M.U.N.F.A. is estopped from making its claim. M.U.N. also submits that if it is unsuccessful on the preceding points, no compensation is payable because it was not payable, it is payable only with effect from ten days prior to the submission of the Grievance.

The Union's Brief of Argument states:

> M.U.N.F.A. submits, contrary to the position of M.U.N., that the grievance is timely and that the majority award has already determined that the agreement requires full salary payment after the retroactive period. M.U.N.F.A. also submits there is no ambiguity, patent or latent, and that the requirements to establish an estoppel have not been met. M.U.N.F.A. further submits that compensation by the payment of salary is required from the end of the retroactive period or alternatively from 35 days prior to the grievance being filed.

This Award deals first with the issue of estoppel. Because we have decided in the Employer's favour on that issue it is probably, strictly speaking, not necessary for us to consider the others. However, because the other issues are before us, because a significant part of the evidence related to them and because they were argued in the written briefs submitted by counsel, we have dealt with them in this Award. We are mindful of the fact that if we were to be found in another forum to have been wrong in our conclusions on the issue of estoppel the proper resolution of the other issues would become very important. Accordingly, we deal next with the issue of latent ambiguity, then with the issue of timeliness and finally with the remedial issue.

Decision;

ESTOPPEL. Brown and Beatty, Canadian Labour Arbitration (3rd ed., looseleaf) state in para. 2:2210 that the essentials of the doctrine of equitable estoppel are;

> [1] a finding that there was a representation by words or conduct, which may include silence, [2] intended to be relied on by the party to which it was directed, [3] some reliance in the form of action or inaction, and [4] detriment resulting therefrom.

Where these requirements are met the party against whom the estoppel is set up will not be allowed to enforce the rights it has represented itself as undertaking to forego, at

least not until the party setting up the estoppel has had a fair opportunity to escape the effects of its detrimental reliance.

Although the doctrine of estoppel has been applied in countless labour arbitration decisions, it has been suggested in some other Canadian jurisdictions that it cannot be applied by labour arbitrators. That, however, is not the prevailing view . In Re C.N.R. Co. et al and Beatty et al (1981), 128 D.L.R. (3d) 236, in upholding the decision of Professor Beatty in Re CN/CP Telecommunications and Canadian Telecommunications Union (1981), 1 L.A.C. (3d) 204, Osier J. established the Ontario position, which is that equitable estoppel is available in labour arbitration; and in The Crown in right of Nova Scotia (1985), 21 L.A.C. (3d) 35 (Darby) and Consolidated Bathurst Inc., Bathurst Division (1985) 19 L.A.C. 231, at p.233 (Kuttner), those arbitrators, like many others, after careful consideration, held the doctrine to be available to them.

These introductory comments are probably superfluous because the parties here have expressly agreed in their briefs of argument that the doctrine of equitable estoppel is available to labour arbitrators in Newfoundland, as held by Barry, J. in United Food and Commercial Workers, Local 1252 v. Lewisporte Wholesalers Ltd. (1990) 79 Nfld. and P.E.I. Reports 237, at p.246 and by Adams, J. in Newfoundland Association of Public Employees v. Newfoundland (Treasury Board) (1988), 71 Nfld. and P.E.I. Reports 78; 220 A.P.R. 78.

On the evidence before us here each of the requirements of equitable estoppel is satisfied. The whole tenor of the discussion during the four final bargaining sessions, the minutes of which have been quoted extensively above, was that the three year compounded cost of the package would be kept within the "under 30%" increase. There is no doubt whatever that if the Collective Agreement, as we have interpreted it in our Preliminary Award, is given effect the cost will be much higher than that. Clear acquiesence in this underlying assumption by the Union negotiators constituted a representation for purposes of equitable estoppel.

Even more clearly, Dr. Greg Kealey's comments in "walking through" Article 16 with the Employer's negotiators constituted a representation which can be the basis of an estoppel. The representation was that the proposed words of the Article would be taken to mean that the salary parity fund would cap the amount of money to be put into the adjustment of anomalies as a result of the work of the Salary Parity Committee, not just for the first, retroactive, year of the Collective Agreement, but for all three years. Dr. Kealey' s words to this effect are quoted extensively above. It is to be noted that Dr. John Evans, also speaking on behalf of the Union, acquiesced by silence in what Dr. Kealey had to say in each of the four meetings for which we have minutes. And in the course of the final meeting, he made a statement that is to precisely similar effect, when he said;

> ... it was a late realization on our part that the $400,000 is for the life of the collective agreement and not for a year. If you increase only the salaries by $1200, then it is there the next year and the next year. It is like spending $3600.

There can be no question that these statements were intended to be relied on by the Employer's negotiators. The obvious reason for making them was to assure Mr. Rennie and Dr. Strawbridge that they could accept the proposed language of Article 16 without further amendments or additions and achieve the result they sought, which was to fund non-MUN experience only to the extent of something over $400,000 for each year of the Collective Agreement.

The statements by Dr. Kealey and Dr. Evans were relied on in that the Employer's negotiators signed the Memorandum of Agreement, and the Employer subsequently ratified and signed the Collective Agreement, without seeking further or other wording to ensure that what the negotiators had agreed was the purpose of, and intent behind. Article 16 had been achieved by its wording.

The "detriment" resulting from the Employer's reliance on the statements of Dr. Kealey and Dr. Evans was that the Employer lost the opportunity to negotiate to have included in the Collective Agreement words which would have said what the negotiators agreed was their shared intent and purpose in negotiating Article 16.1.2.1, 16.1.2.14, 16.1.3.4 and 16.1.3.6; instead of words which, as we have held in our Preliminary Award, appear to say something different.

It is well established that equitable estoppel may arise from representations made in the course of collective bargaining (Brown and Beatty, supra, at footnote 12), but for good reason arbitrators have insisted that the evidence upon which an estoppel is to be based in this context be "clear and cogent". As arbitrator Adams said in Sudbury District Roman Catholic Separate School Board (1985), 15 L.A.C. (3d) 284 at pp. 286-7;

> ...I emphasize that evidence establishing an estoppel in the form of a representation made during negotiations and inconsistent with the clear wording of a collective agreement must be in the form of clear and cogent evidence. Labour relations statutes in all Canadian jurisdictions require that a collective agreement be in writing and it is simply too easy for parties in difficult negotiations, on the conclusion of the collective agreement, to allege that representations were made contrary to the document signed. Much is said in collective bargaining negotiations and because of the nature of that process, parties tend to hear what they wish to hear. Tactic and strategy underlie the communications between the parties as they attempt to persuade and cajole each other each other into agreement. But it is well understood that on the conclusion of a collective agreement, the parties' rights are to be found in the agreement and not in the rationale and arguments made during the negotiations preceding the document's execution.

In concluding that the case for estoppel had not been made out before him, arbitrator Adams drove his point home, at p.293;

> ...collective bargaining negotiations are conducted under considerable pressure and often, as in this case, agreements are arrived at under physically trying

> circumstances. In collective bargaining negotiations much is said and much can be misunderstood or misinterpreted. But what should be clear to parties involved in the process is that the language they have achieved in their agreements is the language on which they must generally rely. More substantial and concrete evidence of an oral representation is required than was adduced before me in order to avoid the express terms of a collective agreement.

This does not, however mean that estoppel can never be based on representations at the bargaining table. Brown and Beatty list six such arbitration awards bearing dates later than the Sudbury award. The Employer's brief includes one of them; Rogers Cable T.V. British Columbia Ltd. (Victoria Division) (1988) 29 L.A.C. 441, in which the comments of arbitrator McColl at pp. 447-8 are clearly on point;

> The question in this dispute is whether or not when there, as I have already found, is no such ambiguity the doctrine of estoppel still operates to defeat the proponent's claim. I think it does.[emphasis added]
>
> ... Once the question of purpose or intent is raised, as it was in this case, the union is under a duty and obligation to express its true purpose and intent.... There was no need for the employer to investigate or pursue the matter further once the union's expression of intention had been given.

In none of the cases cited to us did the estoppel based on negotiations arise in a first collective agreement. Most commonly such estoppels are based on an explicit or implicit undertakings that an existing practice will continue and that therefore the collective agreement need not be changed. Obviously that precise scenario could not be played out in negotiating a first collective agreement, but the simple fact alone that a first collective agreement is involved is plainly not relevant. It is not, and could not logically be, part of any statement of the doctrine of equitable estoppel.

In the case before us the Union's "expression of purpose and intent" was sufficiently "clear and cogent" to justify Mr. Rennie and the other members of the Employer's bargaining team in relying, in all the circumstances, on what had been said to them. Moreover, the evidence leaves no doubt that the Employer did in fact rely on those statements; and not, as the Union has argued, "on its own expertise".

In Hallmark Containers Ltd. (1983), 8 L.A.C. (3d) 117, pp. 129-31, arbitrator Burkett found the evidence of representations made in the course of negotiations sufficiently "clear and cogent" to found an estoppel in the following circumstances;

> ... the union, after proposing the language in question, gave a full explanation of the purpose and meaning of the language which it was proposing. The employer did not ask for clarification or in any way signal the union that, although prepared to accept the language, it was not accepting, or at least had reservations, with respect to the interpretation placed on the language by the union. Instead, the employer accepted the union's proposal in writing. The union in response to the

> written acceptance of the employer, made no attempt to clarify or otherwise modify the language. The company now seeks to rely on the plain meaning of the language which does not support the interpretation put on it by the union. These are the salient facts upon which we must decide if the employer in this case is now estopped from asserting the plain meaning...
>
> The company, for whatever reason, acted in a manner designed to convey to the union its acceptance of the union's interpretation of the language at issue. ... The conduct of the company had the effect of denying the union the opportunity to clarify or rewrite the language to reflect its understanding of the meaning of the clause.

Here, the evidence is at least equally clear and cogent. The Union did not merely acquiesce by silence. Its negotiators actively represented to the Employer that Article 16 had the meaning now asserted by the Employer. Insofar as there is any room for argument about what the quoted phases used by Dr. Kealey or Dr. Evans meant or might have been taken to mean, we have Dr. Kealey's direct testimony that he thought the negotiators were agreeing to the very arrangement now asserted by the Employer. When his comments, and those of Dr. Evans, are put in the context of the understanding about the overall cost within which the parties were clearly operating, any possible uncertainty about the issue before us dissappears.

Counsel for the Union has submitted that because Dr. Kealey refused to initial an agreement to the effect that the cost of the package would not exceed 30% the Union could not be taken to have agreed to the Mr. Rennie's concept of the parameters within which Article 16 was to operate. In our view there were other reasons, mainly tactical considerations having to do with the Webber issue, for Dr. Kealey's refusal, and the evidence on the point before us is clear.

Counsel for the Union has also submitted, in effect, that the clear words of the Collective Agreement having been accepted by the membership through ratification, the Union could not be bound by "the understanding of any one individual", referring presumably to Dr. Kealey. Almost inevitably, however, estoppel is based on the words or deeds of some individual having authority to bind one or other of the parties. There is no question that Dr. Kealey was the Union's chief negotiator and had authority to speak for it in negotiations. We recognize that the concern underlying this submission is serious. It gives added thrust to the caution expressed by arbitrator Adams in the Sudbury award quoted above, against too readily allowing estoppel to be founded on weak or controverted evidence of representations at the bargaining table. But to put it higher than that would be to hold that in virtually every case (i.e. wherever the memorandum of settlement was subject to ratification and there was no proof that the union membership or the employer's ultimate decision maker had ratified with knowledge of the representation in issue) there could be no estoppel based such representations, no matter what had been said. That is not our view of what the law is or should be.

We have not dealt with any of the post-Memorandum of Understanding evidence of what the Union's publications represented to be its understanding of the effect of the cap on salary parity funds. The Employer's reliance on any such representations is much less clear and, in light of the conclusion we have reached on this issue, consideration of this possibly buttressing evidence is unnecessary.

The grievance before us fails because the Union is estopped from asserting that the Employer is, or was, obligated to fund non-MUN experience in the final two years of the Collective Agreement beyond the cap imposed by the understanding reached in negotiations that the salary parity fund of $404,543 would limit the funding of payment for such experience in each of the three years of the Collective Agreement.

LATENT AMBIGUITY. As has already been set out above, in our Preliminary Award the majority of this Board of Arbitration held, at p. 21, that "On its face, the Collective Agreement makes those limiting provisions [Article 16.1.3.4 and the last two sentences of Article 16.1.3.6] applicable only to the period of retroactivity, from April 1, 1988 to March 16, 1989." After that decision it was too late for the Employer to simply argue that the Collective Agreement is patently ambiguous. Words are ambiguous where they can reasonably be thought to have more than one meaning.

Apart from estoppel, which is an entirely different legal concept, after our Preliminary award the questions that remained were (i) whether the Collective Agreement is latently ambiguous; that is whether there is an ambiguity which does not appear on the face of the Collective Agreement but which could be disclosed by appropriate evidence, admissible for that purpose, and (ii) if so, how is that ambiguity to be resolved, in light of evidence admissible for that purpose. All of the evidence of the negotiations was admitted subject to the Board's reserving its decision on the objection by counsel for the Union that it was not properly admissible to show ambiguity. His submission was that such evidence is only properly admissible and therefore should only be taken into account where the Board has decided that there is an ambiguity. It should not be used to show that apparently clear words are ambiguous.

To put the legal issue simply; it is not disputed that where, in the opinion of the arbitrators, there is an ambiguity, evidence extrinsic to the Collective Agreement can be used to to show which possible meaning the parties actually intended. Such evidence may be either evidence of context and application, usually of past practice under the collective agreement (which is not relevant here), or evidence of negotiation history, which includes direct evidence of what the parties said to one another in the course of negotiations. What is disputed is the use of this last sort of evidence to convince the arbitrators that words which appear to be reasonably clear are in fact ambiguous. The legal authorities are clear that evidence of the context in which a collective agreement operates, including the past practice of the parties under it, may be used for both purposes. The submission on behalf of the Union is that direct evidence of what was said in negotiations should not be used to disclose an ambiguity; only to resolve an ambiguity which is either apparent from a reading of the text or which is disclosed by evidence of context, such as evidence of past practice.

In our opinion, for the reasons set out below, the Union's submission is not correct and must fail. It follows that the evidence upon which we have relied in deciding in the Employer's favour on the basis of estoppel can also be relied upon to conclude that the words of the Collective Agreement are latently ambiguous.

In other words, even if estoppel had not been shown we would not have disregarded what we now know to have been the real intent of the negotiators.

Arbitrators must be hesitant to accept evidence of what went on in negotiations to show that apparently clear words are in fact ambiguous. The reasons of this are precisely those set out by Arbitrator Adams in his Sudbury District School Board award quoted above in the context of estoppel. The parties to collective bargaining must find their rights in the collective agreement, "not in the rationale and arguments made during negotiations" when "much is said and much can be misinterpreted". Nevertheless, it is well established that this stricture is relaxed not only where the elements of estoppel are established and where the words of the collective agreement are patently ambiguous, but also in cases such as this, where there is evidence not only of "rationale and argument" in the course of negotiations, but clear and cogent evidence that apparently clear words were given a special meaning by both parties.

The authorities are clear that the extrinsic evidence properly admissible to show a latent ambiguity may include direct evidence of what the parties said in negotiations. The Employer's brief cites three authorities in this connection. Brown and Beatty, Canadian Labour Arbitration (3rd ed., looseleaf), state in para. 3:4400;

> ...the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. ...
>
> Although many arbitrators have accepted the common law principles and limited the introduction of extrinsic evidence accordingly, others have taken the view that the legislative provisions, such a s. 44(8) of the Ontario Labour Relations Act, permit the admission of parol evidence at the discretion of the arbitrator. ...Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once established but also to disclose the ambiguity.

The learned authors footnote the non-labour law case of Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (1969) 3 D.L.R. (3d) 161 (Ont.C.A.) as support for the proposition quoted. They also cite half a dozen arbitration awards, including CKF Inc. (1990), 12 L.A.C. (4th) 1 (Darby, chair), which is the third authority relied upon by the Employer in its Brief.

In para. 3:4420 Brown and Beatty state that, apart from past practice, the most significant form of extrinsic evidence is the history of negotiations. They state that documentary evidence forming part of the negotiations of a collective agreement may be introduced to assist in its construction and go on to say;

> Such documentary evidence may include a related agreement which was used as a point of reference, an interest arbitration award, as well as proposals made, discussions held and agreements reached during negotiations, although reservations have been expressed to admitting evidence as to the give and take of negotiation. Evidence of that kind, however, must address the issue of interpretation and ought to be relied upon only if it is unequivocal.

Like most arbitrators dealing with issues of latent ambiguity, the board in CKF Inc. relied on and quoted, at p. 23, from the reasons of Gale C.J.O. in Leitch Gold Mines, where his Lordship said, at pp. 215-6;

> Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of a case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to effect its interpretation. On the other hand, where the language is equivocal or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied to all cases of doubtful meaning or application.
>
> ...
>
> Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or its application to the facts, and also to resolve it, but it is to be noted that the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it. Thus, evidence of relevant surrounding circumstances can be accepted to ascertain the meaning of the document and may clarify the meaning by indirectly disclosing the intention of the parties.
>
> If the surrounding circumstances, however, do not explain the latent ambiguity an equivocation is said to be established, in which event, in addition to evidence of circumstances, direct evidence of the parties' intentions may be received to resolve the equivocation.

There is room to suggest that this last sentence implies that direct evidence of the parties' intentions, such as the evidence here of what was said during negotiations, may only be used to "resolve the equivocation" and not to establish it, as submitted by counsel for the Union. That may have been what Chief Justice Gale intended. Certainly such a rule would lend substance to his comment that "the evidence allowed in to clear up the ambiguity may be more extensive than that which reveals it." However, this suggestion was explicitly negatived by the Ontario Court of Appeal in Re Noranda Metal

Industries Ltd., Fergus Division v. International Brotherhood of Electrical Workers (1983), 44 O.R.(2d) 529, a case in which the issue was whether the arbitrator had erred in relying on evidence that during negotiations the parties had agreed on a special meaning for words in the collective agreement.

At p. 536 of the Noranda decision, after quoting the last sentence from Leitch Gold Mines set out above, Dubin J.A. said;

> ...assuming that [the arbitrator] failed to make that finding [that the words in question were ambiguous] before admitting the extrinsic evidence, it was unnecessary for him to do so since he was entitled to entertain the extrinsic evidence with a view to determining whether that evidence disclosed the ambiguity in the words expressed.

The only extrinsic evidence under consideration there was evidence of what had been said during negotiations.

On this highly persuasive authority we can only conclude that evidence of what went on in negotiations is admissible to show that apparently clear language is in fact ambiguous. Arbitrators should, undoubtedly, be even more cautious about admitting and relying on such evidence than on evidence which is introduced to clear up a patent ambiguity or a latent ambiguity which been revealed by other extrinsic evidence.

The evidence set out above reveals that Article 16.1.2.14 and Article 16.1.3 are not in fact only capable of bearing the obvious meaning which this Board of Arbitration attributed to them in our Preliminary Award. Clearly, although they do not say so, the parties did intend there to be a Salary Parity Fund of the same quantum which would come into play each year, and they intended it to constitute a cap on the recognition of pre-MUN experience in all three years of the Collective Agreement. Read in light of the evidence of what was agreed in negotiations, as set out above, it is possible to attribute such a meaning and intent to Articles 16.1.3.4, 16.1.3.6, 16.1.2.13 and 16.1.2.1.

In this case the evidence of what the parties agreed to is sufficiently unequivocal that it can and should be relied upon both to show that the apparently clear words are ambiguous and that the ambiguity must be resolved against the Union and the Faculty members upon whose behalf it has grieved.

TIME LIMITS. Counsel for the Employer submitted in his Brief of Argument that, even if his other arguments were not accepted, the Union's grievance must fail because it was untimely; and in the further alternative, that if the grievance was held not to be out of time because it was a continuing grievance, compensation is payable only with effect from ten days prior to the submission of the grievance.

As the Grievance itself states, it was filed "In accordance with Articles 7.1.4. and 7.1.5 (Step 2)". The relevant parts of Articles 7.1.4 and 7.1.5 are;

> 7.1.4 The Association shall have the right to originate a grievance on behalf of an Academic Staff Member, or a group of Academic Staff Members, or on its own behalf. Association grievances shall be originated at Step 2.
>
> 7.1.5 A grievance shall be resolved in accordance with the following procedures:
>
> STEP 1. The aggrieved Academic Staff Member...[and the Association], shall within twenty-five (25) days of the date he/she knew or ought reasonably to have known of the occurrence of the grievance... submit the grievance in writing to the Department Head [or other first line manager, who]...shall within twenty-five (25) days of receipt of the grievance render a decision in writing...
>
> STEP 2. If the decision rendered by the Department Head [or other first line manager] at Step 1 is unsatisfactory, the grievance shall be submitted to the President within ten (10) days. The President or his delegate [shall attempt to settle]. The University shall forward its decision to the Association within twenty-five (25) days of receipt of the grievance by the President.

Counsel for the Employer submitted that these provisions impose a ten day time limit on Association grievances. Counsel for the Union submitted that they impose a thirty-five day, or alternatively a twenty-five day, limit on such grievances. We think the Union's alternative submission is correct.

The first sentence of the paragraph starting "STEP 2" prescribes what is to happen if the Employer's decision in Step 1 of the process is unsatisfactory. It cannot logically or grammatically apply where there is no Step 1, as is the case with grievances originated by the Association. However, we should not assume that the parties intended there to be no time limit on such grievances, so it makes sense to assume that they intended that the ordinary time limit of twenty-five days for the initiation of a grievance would apply. As submitted by the Union, the Collective Agreement does not say, and it makes no sense to assume, that the parties intended to provide only ten days for the filing of a grievance simply because it was originated by the Association and going direct to the President. A ten day time limit running from the well defined rendering of a first-step decision is quite a different proposition from a ten day time limit running from the date an Academic Staff Member or the Union "knew or ought reasonably to have known of the occurrence of the grievance".

We are of the opinion that, in the terms used in Article 7.1.4, this is a grievance originated by the Association "on behalf of... a group of Academic Staff Members." We accept the Union's submission that the individual Academic Staff Members whose non-MUN experience was not fully funded were not in a position to have filed the grievance until it was made clear to them both what the Salary Parity Committee had decided and on what basis. In other words, until then they were not in a position where they "knew or ought reasonably to have known of the occurrence of" what they were grieving against. In our opinion they were not shown by the evidence to have been in that position until they received Mr. Rennie's memo dated March 8, 1990, at the earliest.

We say "March 8, 1990, at the earliest" because we think that the date of the Employer's full explanation of its intention to pay less than the grievors allege they were entitled to is to be regarded as "the date he/she knew or ought reasonably to have known of the occurrence of the grievance" for purposes of article 7.1.5.

It is quite evident that Dr. Schrank and presumably other members of the executive of the Association knew much earlier that as a matter of policy the University intended to cap the funding of non-MUN experience for the second and third years of the Collective Agreement, as well as for the retroactive first year. That intention did not, however, in our view constitute "the occurrence of the grievance" for purposes of Article 7.1.5. Presumably this somewhat awkward phase is intended to refer to the occasion when the Collective Agreement is breached, or allegedly breached. In our opinion the first such occasion would have been when the Employer's payroll department acted upon the determinations of the Salary Parity Committee. Those actions would have been felt by the Academic Staff Members with the payroll of February 22, 1990. The earliest the 25 (week)day time limit could possibly have started to run would have been February 22, 1990, but we hold that it did not start to run until March 8, when the members had full information of what had happened.

We are also of the view that this is a continuing grievance. The payment of wages on a basis not countenanced by the collective agreement would seem to be the prototype of the continuing grievance. In Toronto Parking Authority (1974) 5 L.A.C. (2d) 150, at p. 152 arbitrator Adell defined continuing grievances as;

> [G] rievances which do not relate to a single act possessing substantial finality, such as a discharge or promotion, but relate instead to a continuing course of conduct - conduct which is renewed at regular intervals and is capable of being considered as a series of separate actions rather than as one action which may just happen to have continuing consequences.

Palmer, Collective Agreement Arbitration in Canada (3rd ed., 1991) puts "payment of wages" first in his list of examples of continuing grievances at p.189, and states;

> In situations where the grievance can be categorized as one relating to the payment of wages, the reported awards are unanimous that this constitutes a continuing grievance.

Brown and Beatty, Canadian Labour Arbitration (3rd ed., looseleaf) state;

> Continuing violations consist of repetitive breaches of the collective agreement rather than simply a single or isolated breach. They usually involve the non-payment of money [or other examples]. It has been suggested that the correct test is the one developed in contract law, namely, that there must be a recurring breach of duty, not merely recurring damages [citing two awards, including that of arbitrator Getz in Province of British Columbia (1982), 5 L.A.C. (3d) 404, which was relied on by the Employer here]. Where it is established that the breach is a

> continuing one, it has been held that the failure to initiate it will not render it inarbitrable. But, the relief or damages awarded retroactively in such circumstances may be limited by the time limit.

It seems to us that if the Employer here had in the end been held to have had an obligation to pay fully on the basis of adjusted "Y" values in the final two years of the Collective Agreement there would have been a breach of that duty each time it wrote a salary cheque for less. Having denied the grievance on two grounds, it is not appropriate to belabour this but we do wish to point out that, while the Getz award relied on by counsel for the Employer may hot be distinguishable, it appears to be contrary to the views of most arbitrators.

The final sentence of the quote from Brown and Beatty sets out a doctrine to which we subscribe, which ensures that employers against whom continuing grievances are filed are not unfairly treated. Indeed, arguing in the alternative, counsel for the Employer relied on this doctrine.

THE NATURE OF THE GRIEVANCE. Counsel for the Employer submitted in his Brief of Argument that the Union had not requested any relief in its grievance, and that there was "nothing in Dr. Kealey's evidence to suggest that M.U.N.F.A. is looking for monetary compensation".

The latter point hardly requires consideration. Dr. Kealey was a witness, not counsel or a spokesperson for the Union in the grievance arbitration before us.

The fact that the grievance did not explicitly request compensation for Members of the Academic Staff who allegedly were not paid in accordance the Collective Agreement does not mean that if the grievance had succeeded no compensation would have been ordered. As we noted at the outset of our Preliminary Award, counsel for the Union took issue with this stance by the Employer from the commencement of the hearings before us. There was no lack of opportunity for the Employer to meet the case on the basis that it did involve a request for compensation.

The issue need not be decided here, but we would have assumed that a request for compensation is implicit in the group grievance against failure to pay salaries in accordance with the Collective Agreement. If the final determination of this issue by us were to become significant we would offer the parties an opportunity for more full argument on this point and to present evidence, if any is available, as to their shared intent in providing for the various forms of grievances contemplated by Article 7.1.2,3 and 4.

CONCLUSION AND ORDER. The grievance before us is dismissed because the Union is estopped by the representations made by its negotiators from asserting the claims of members of the Academic Staff to full payment for "Y" values based on non-MUN experience. The Employer is obliged to compensate such experience only to the extent permitted by the provision of a Salary Parity Fund in accordance with Article 16.1.3.4 for

each of the three years of the Collective Agreement. This is so both because the Union is estopped from asserting claims for more and because, when it is interpreted in the light of the evidence of negotiation history properly before us, that is what the Collective Agreement provides.

The grievance was not out of time, and was, in any event, a continuing grievance. We have reached no final conclusion on the question of whether the grievance was properly framed to request compensation.

Innis Christie
Chair

Gerard McDonald
Employer Nominee

Rick McGaw
Union Nominee