3-29-2001

Re Izaak Walton Killam Grace Health Centre for Children, Women and Families and NSNU

Innis Christie

Re Izaak Walton Killam Grace Health Centre for Children, Women and Families and Nova Scotia Nurses' Union

[Indexed as: Izaak Walton Killam Grace Health Centre for Children, Women and Families and N.S.N.U. (Re)]

Nova Scotia
I. Christie

Heard: October 26 and 27, 2000
Decision rendered: March 29, 2001

UNION GRIEVANCE concerning retroactive pay for clinical leaders. Grievance dismissed.

L. MacMillan and others, for the union.
J. McIntosh and others, for the employer.

AWARD

Union grievance dated November 19, 1999, alleging breach of Articles 3, 4 and 8 of the Collective Agreement between the Employer and the Union effective November 1, 1997-October 31, 2000, in that the Employer failed to adjust the wages of Clinical Leaders at the site of the former IWK Hospital to the level of those of Clinical Resource Nurses at the site of the former Grace Maternity Hospital. The Union requested an order that the Clinical Leaders at the IWK site be paid retroactively from November 1, 1997 to August 31, 1998 at the level of the rates paid during that period to Clinical Resource Nurses at the site of the former Grace Maternity Hospital.

The Employer made a preliminary objection to the timeliness of this Grievance, based on non-compliance with the Collective Agreement and alternatively on undue delay in filing the Grievance. Subject to my decision on that objection, at the outset of the hearing in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, including the determination of the entitlement of individual nurses and the quantification of any payments due, and that all other time limits, either pre- or post-hearing, are waived.

The issue here is whether, as the Union claims in its Grievance, from November 1, 1997 to September 1, 1998, the Employer breached the Collective Agreement by paying "Clinical Leader" nurses at the former IWK Hospital site less than it paid "Clinical Resource Nurses", whom the Union alleges were their counterparts, at the former Grace Maternity Hospital site. Since September 1, 1998, the Employer has, in fact, paid the Clinical Leaders the same as the Clinical Resource Nurses at the Grace site. The Union's position is that this should have been made effective retroactively to the commencement of the Collective Agreement on November 1, 1997. The Employer's position is that this increase in pay effective September 1, 1998 was made by the Employer in its discretion and should not be used against it.

Regardless of title, the Union alleges, the Clinical Leaders were performing the core duties of "Clinical Resource Nurse" and were, therefore, similarly entitled by the Collective Agreement to be paid

at "Head Nurse rates". The Employer's position is that the Collective Agreement specifically entitles a "Clinical Resource Nurse" to be paid at "Head Nurse rates" but says nothing about Clinical Leaders, although that position was in existence at the time of bargaining for the Collective Agreement. Therefore, the Employer, submits, the parties must be taken to have intended to differentiate between the two and there is no basis under the Collective Agreement for directing that they be paid at the same rate, retroactively.

Alternatively, the Union alleges "Clinical Resource Nurse" was a "new classification" within the terms of Article 8.05 of the Collective Agreement, and once the rate for it was decided by the parties it was payable retroactively to the date when the former Clinical Leaders commenced to perform the duties of "Clinical Resource Nurse". The Employer does not agree that this was a new classification.

The Employer made a preliminary objection to the arbitrability of this Grievance based on the fact that the Union did not file what the Employer alleges are individual grievances within the 10-day limit established by Article 14.01, Step 1, of the Collective Agreement, with consequent prejudice to the Employer. Alternatively the Employer alleged undue delay in filing the Grievance. I have denied the preliminary objection for the reasons set out below but I have, in the final result, also denied the Grievance. The provisions of the Collective Agreement relevant to the Employer's preliminary objections and to the issue on the merits are also set out below, in the context of my determination of each of these issues.

Some general background is useful before addressing the issues separately. When, in 1996, the Government of Nova Scotia combined the Grace Maternity Hospital and the Izaak Walton Killam Hospital for Children to create the IWK-Grace Health Centre, which is the Employer here, nurses at the Grace Maternity Hospital had been unionized and had a collective agreement for some years. Nurses at the IWK Hospital were not unionized until 1996 and they had never had a certified or voluntarily recognized bargaining agent. By Order of November 5, 1996 the Nova Scotia Labour Relations Board declared the Employer to be the successor employer to the IWK and Grace hospitals under s. 31 of the *Trade Union Act*, R.S.N.S. 1989, c. 475, as amended, and in the alternative that those employers were one under s. 21 of that *Act*, for purposes of dealing with several unions, including the Grace Maternity Local of the Nova Scotia Nurses Union, and non-unionized employees. By Order

of September 16, 1997, with retroactive effect to November 29, 1996, with the agreement of the parties to its proceeding, the Board brought into being a bargaining unit of all of the Employer's nursing employees, to be represented by the Union.

The parties were bound by the public sector wage freeze in effect in Nova Scotia from 1994, which ended October 31, 1997. Nevertheless, on July 31, 1997 they signed a Collective Agreement with an expiry date of November 1, 1997. It complied with the freeze legislation by making no change in pay scales. This necessarily meant that there were different scales for nurses at the Grace site and the IWK site. On October 31, 1997, as part of province-wide bargaining between the NSAHO representing various employers of nurses and the Union, the parties returned to the bargaining table and finally, on May 15, 1998, signed the Collective Agreement that applies here, stating in Article 30 "This Collective Agreement shall be for the period commencing November 01, 1997 . . .".

As a result, in June of 1998 members of this bargaining unit received cheques for retroactive pay. When they got their cheques Clinical Leader nurses on the IWK site realized that their retroactive pay had been based on the rate scale for staff nurses, not that for head nurses or special unit head nurses. From that point until September of 1998 there were discussions involving those Clinical Leaders and management in which the Clinical Leaders claimed entitlement to the head nurse rate.

It is clear, in particular from the evidence of Kathleen Mahon, who was a Nurse Manager at the IWK hospital prior to 1996 and became a Health Care Services Manager in May of 1998, that in 1996, when the job description of Clinical Leader was reviewed, that job carried no Head Nurse premium. She was one of the two co-authors of the job description in 1996. At the request of Sharon Gavin and Jackie Croft, two Clinical Leaders who worked with her, she had specifically asked senior nursing management that question and been told that it did not. The job was different from that of a staff nurse but had some advantages in terms of shift and weekend work, so it was determined that there should be no premium.

However, in the context discussed more fully below, in December 1998 the Clinical Leaders received an increase in pay to the head nurse rate, retroactive to September 1, 1998. This was not the result of a Grievance nor, in the Employer's submission, was it required by

the Collective Agreement. Clinical Leaders are nowhere explicitly referred to in the Collective Agreement, in contrast with the provision in Appendix "A" — HN to the Collective Agreement, which explicitly provides that "Head Nurse rates apply to . . . IWK/Grace-Clinical Resource Nurse".

The Union did not become involved with this issue until six months later, in June of 1999, and this Grievance, in which the "IWK/Grace Local of NSNU" is identified as the "grievor", was filed another four months later, on November 19, 1999. In it the Union seeks the Head Nurse rate for the Clinical Leaders retroactive to November 1, 1997, the effective date of the Collective Agreement. I return below, in considering the Employer's preliminary objection, to the testimony about the Employer's dealings with the Clinical Leaders and then with the Union.

The Grievance states as follows:

> 1) Details of Grievance
>
> When the IWK staff first unionized in 1996 nurses were informed by management that there would be no wage increases until Provincial legislation freezing wages expired and contract negotiations were finished. Nurses were advised that that wage increases would be paid when the new contract was signed. Prior to the signing of the contract SCN [Special Care Nursing] amalgamated and the IWK Clinical Leaders had their wages changed to that of clinical resource leaders on the Grace side. This practice reassured IWK Clinical Leaders that their wage rates would be adjusted in July/August of 1998. Janet Knox/Jane Mealy considered the matter and agreed that both groups should be paid the same rate.
>
> 2) If grievance relates to a collective agreement, what articles have been violated? 3:00, 4:12, 8:08
>
> CORRECTIVE ACTION REQUESTED
>
> Payment of retroactive pay to Clinical Leaders at the IWK site — to the beginning of the present Collective Agreement.

The most directly relevant provisions of the Collective Agreement are clauses 8.06 and 8.08, which provide:

> 8.06 Retroactivity shall only apply to the provisions of the salary adjustment in appendix "A", annexed hereto. Otherwise the provisions become effective on the date of signing the renewal collective agreement.
>
> . . . . .
>
> 8.08 The Employer shall pay each Nurse every two (2) weeks. The amount shall be in accordance with the applicable hourly rate for the Nurse's classification and increment level listed in Appendix "A" annexed hereto.

Appendix A is a an elaborate set of pay scales the only portion of which directly relevant here is the following note to the words "Head Nurse" in Appendix "A" — HN (*i.e.* the rates for the position of Head Nurse), applicable, according to the dates in the lower left hand corner of the page, "November 1, 1997 - October 31, 2000":

> ** Head nurse rates apply for Enterstomal Therapist, Parent Educator, Staff Health Nurse, OH&S Nurse, Instructor, IWK/Grace-Clinical Resource Nurse

On May 1, 1998 the management of the newly combined hospital was reorganized, moving to "a program based health care model". In that context the position of "Nurse Manager" ceased to exist and "Health Service Managers" came into being. As that position evolved so did that of Clinical Leader, to some extent at least. With these changes the Nursing Practice Council, a professional body set up in January 1997 or earlier, which is not referred to in the Collective Agreement, played an important role. Part of its mandate was to work on the development of new job descriptions and titles for nurses. One of the tasks of the Nursing Practice Council was to reconcile job descriptions and find common titles for similar jobs which had existed at the two hospital sites.

By September 1998, as a result of the work of the Nursing Practice Council, "Clinical Leader" was redefined, taking some functions from each of the Employer's sites, so that, while the core duties remained the same, there was some change, some difference in emphasis. Management, that is Janet Knox, Program Director, Children's Acute and Continuing Care and Jane Mealy, Program Director, Children's Acute and Emergency Care and Rick Kelly, Human Resources Manager, then decided to pay the Clinical Leaders the higher Clinical Resource Nurse rate, on the assumption that the Union would be pleased. They had no discussion of retro-activity, and Ms. Knox did not talk about it with the Clinical Leaders, collectively or individually. They chose September 1 as the effective date, because the decision to increase the Clinical Leaders' pay was made about then. Senior management did not tell Rick Kelly, the Human Resources Manager, to advise the Union directly and officially of the increase and the evidence is that he did not do so.

THE ISSUES

1. Should this Grievance be dismissed on the basis that the Union did not file what the Employer alleges are individual grievances within the 10-day limit established by Article 14.01, Step 1, of

the Collective Agreement with consequent prejudice to the Employer, or simply because the Union filed it with undue delay?

2. Are the former Clinical Leaders entitled to be paid at the head nurse or special unit head nurse rate retroactively for the period from November 1, 1997 to September 1, 1998 because their core duties were the same as those of Clinical Resource Nurses for that period and differed from those of a staff nurse? Is the interpretation or application of the Collective Agreement in this respect affected by the fact that the Employer paid the Clinical Leaders at the head nurse rate from September 1, 1998 on or by what members of management said to the Clinical Leaders? Is the interpretation or application of the Collective Agreement in this respect affected by the fact that Elise Ladouceur and Karen Van were paid retroactively to November 1, 1997 at the head nurse rate although they too were referred to as Clinical Leaders?
3. For the period in issue, was a new classification created within the bargaining unit as is provided for by Article 8.05, for which a rate was decided by the parties, that being the rate paid Clinical Leaders effective September 1, 1998?

DECISION

1. Individual grievances not filed within the 10-day limit established by Article 14.01, Step 1? Undue delay?

The general time limit on the filing of a Grievance under this Collective Agreement is in Article 14.01, which provides that:

> 14.01 *Step 1*
>
> When a Nurse has a grievance the Nurse shall within ten (10) working days of the discovery of the occurrence of the incident giving rise to the grievance first discuss the matter with the Nurse's Immediate Management Supervisor . . .

On the face of the Grievance the Grievor here is the Union, and Article 14.02 provides:

> *Policy or Group Grievance*
>
> 14.02 Where a dispute involving a question of general application or interpretation occurs, or the Union has a grievance, Steps 1 and 2 may be bypassed.

There is no time explicit time limit on grievances commenced at step 3. However, I am not satisfied that this means that simply by characterizing a grievance as a "Union grievance", or grieving in the name of the Union, the Union can escape the time limit in Step 1. A Union grievance would generally be understood to mean a grievance

over the denial of right or claim of the Union as an institution, not a grievance over the alleged denial of a Collective Agreement right to specific individual members of the bargaining unit.

The phrase "a dispute involving a question of general application or interpretation" is less easy to define. Here, the dispute does involve a group of people in the bargaining unit so it might be said to be of general application, but the parties cannot be taken to have intended that a grievance that does not involve "a question of general application or interpretation" within the terms of Article 14.02 becomes a grievance appropriate for filing in accordance with that provision simply because more than one member of the bargaining unit has the same grievance.

Counsel for the Employer relied on the unreported award of a board in an arbitration between this Union and All Saints Hospital, Springhill, N.S. dated April 16, 1981 (Langille, Chair), in which almost identical language was held to render an individual grievance untimely even though it involved an issue of interpretation that would affect others in the bargaining unit. I do not disagree with the reasoning or the result there, but, because of the wording of this Collective Agreement and context in which this Grievance arose and was dealt with, I have reached a different result. Without reaching any firm conclusion on whether this Grievance properly fell under Article 14.02, on the basis of the evidence to which I now turn, I rely on Article 14.11 to relieve against the time limit in Step 1, if it is applicable.

Apparently, there was no equivalent to Article 14.11 in the collective agreement considered in *All Saints Hospital*, and the general impression left by the award is that even if there had been the board there would not have allowed it to be invoked.

Article 14.11 provides:

> 14.11 Time limits are directory and an Arbitrator or Arbitration Board shall be able to overrule a preliminary objection that time limits are missed providing the board is satisfied that the grievance has been handled with reasonable dispatch and the other Party's position has not been significantly prejudiced by the delay.

Counsel for the Employer asserted that, because of the delay between December 1998, when at least one of the Clinical Leaders realized that she had been paid at the head nurses' rate only from that September 1 and not retroactively from November 1, 1997, and the filing of the Grievance on November 19, 1999, the Employer was disadvantaged in meeting this Grievance. Since then the Human

Resources Director, Rick Kelly, has left the Employer and been replaced, and a consultant who was involved with these issues moved to western Canada. In fact Mr. Kelly was a witness in this matter, and Union counsel offered to agree to telephone testimony by the consultant. On balance I am unable to conclude that the Employer's position had "been significantly prejudiced by the delay".

The other question in applying Article 14.11 is whether the Grievance was "handled with reasonable dispatch". Before dealing with that question I note that the Employer relied most heavily on the general notion that even in the absence of explicit time limits untimely grievances should not be allowed, quoting from the old award of a Board chaired by Professor Bora Laskin, as he then was, in *Re Canadian General Electric Co. (Davenport Works) and United Electrical, Radio and Machine Workers of America* (1952), 3 L.A.C. 980, at p. 982:

> Neither the Agreement under which this grievance was filed nor the preceding Agreement contains any time limitation for the filing of grievances. Is there, then, any basis on which a grievance can justly be declared "stale" or "out of time," and thus subject to rejection without consideration of its merits . . . In considering this problem it is safe to start with the proposition, abstract though it may be, that a grievance about any alleged violation of a Collective Agreement should be brought within a reasonable time after the alleged violation has occurred. It should make no difference to the application of this proposition that the grievors were unaware that they had a right to complain, unless they were in some way misled by the Company . . . Absent bad faith on the part of the employer, a Union which misconceives its rights or those of employees and thereby fails to press them, should not be permitted to make a retroactive claim to re-open, after the lapse of a reasonable time, transactions which have been completed . . .
>
> . . . . .
>
> The efficient and expeditious conduct of labour relations or, what is much the same thing, the proper administration of a Collective Agreement, requires mutual recognition by the parties of a principle of repose as to all claims under the Agreement not asserted within a reasonable time and involving matters which have, to all outward appearances, been satisfactorily settled between the parties.

In Brown and Beatty, *Canadian Labour Arbitration* (looseleaf), para. 2:3210, the authors cite this award as support for the general proposition that:

> Where the collective agreement does not provide for any time-limits, or time-limits which are merely directory exist for the filing and processing of grievances, a grievance may nevertheless be dismissed or declared to be inarbitrable because of undue delay.

They go on to observe:

> Barring a grievance from arbitration on the merits for that reason, however, is not a matter which goes to the jurisdiction of the arbitrator. Rather, declining to deal with a dispute on the basis of undue delay is akin to the equitable doctrine of laches as applied in civil courts, and the decision in each case is a matter for the arbitrator to make in his discretion after considering the effect of, and any explanation for, the delay. Accordingly, it has been held that where the delay arose because one party was unaware of the violation, the grievance was held not to be inarbitrable on the ground of delay . . . As with the doctrine of laches, mere delay alone usually will not be a bar to arbitration. In each case the critical factor will be whether the delay caused prejudice to the party objecting. In this regard, arbitrators have held that the absence of an important witness . . . the destruction of important records, a lessening of the company's ability to deal with the dispute or to have a "fair hearing", caused sufficient prejudice to warrant dismissal of the grievance. On the other hand, where fault could not be attributed to the grievor and where both the company and the union contributed to the delay, the grievance was not dismissed. [Footnotes omitted.]

I quote this passage as well as the extract from the Laskin Board relied on by the Employer here because, while it demonstrates that what that Board wrote has stood the test of time very well, it does soften considerably the Laskin suggestion that the fact that grievors were unaware that they had a right to complain is irrelevant unless they were misled by the Employer.

Both questions, whether this Grievance can be said to have "been handled with reasonable dispatch" under Article 14.11, which I think is the real timeliness question here, and whether I should dismiss it because of "undue delay", must be answered in the context of the way this dispute developed and was dealt with by the parties.

In July of 1998, Janet Knox, Program Director for Children's Acute and Emergency Care and Jane Mealy, Program Director, Children's Acute and Emergency Care, first became aware, from Rick Kelly, Human Resources Manager, of the concern of the Clinical Leaders on the IWK site that they were not receiving head nurse pay as were the Clinical Resource Nurses on the Grace site. The matter had been first raised with him at a meeting on July 13, 1998.

Ms. Knox and Ms. Mealy met with the Clinical Leaders and the Health Service Managers on July 23, 1998 to discuss the evolution of those positions. There was some conflict in the evidence, but I am satisfied that there was some discussion of the pay differentiation issue. They acknowledged to the group that Rick Kelly had advised them that he had heard about the pay issue, but made no commitments and did not mention retroactivity. After discussion with Janet

Walls, Chief of Nursing, they decided to put the matter to the Nursing Practice Council.

Elise Ladouceur, who was a member of that body, testified in this respect as well as about her own pay. It was clear from her testimony, as well as that of Ruzica Howell, who had been a Clinical Leader on the IWK site since 1995, that the Clinical Leaders took the work of the Nursing Practice Council very seriously and saw it as the vehicle for correcting what they thought to be an error in the way they were paid. Shane Calder, a staff nurse, is and was the Chief Shop Steward. He first met with the Clinical Leaders on this issue in June of 1999 and first learned of the issue of Clinical Leaders' pay shortly before that meeting. He was not surprised by the fact that the Clinical Leaders had put their faith in the Nursing Practice Council rather than the Union because the Union had not been much in favour among the nurses on the IWK site. The Clinical Leaders particularly had previously tended to identify with management and were inclined to continue to work out their problems with management, as they had before unionization.

The Clinical Leaders had no reason to turn to the grievance process before December 1998 because they thought the issue of their pay rate was being addressed by the Nursing Practice Council and by management. Ruzica Howell testified that only when she got her cheque in December 1998 did she know that she had been paid at the Head Nurse rate retroactively to September 1, 1998, not to November 1, 1997, the effective date of the Collective Agreement.

The approach of the Clinical Leaders to correcting what they thought of as an error in their pay rate continued after December 1998. They then thought that an error had been made with respect to retroactivity, an error which, again, would be corrected once management "understood". This is exemplified by a letter of April 14, 1999 from the Clinical Leaders to Dawn Madison, Team Leader, Staff Relations, in the Human Resources Department, copied to Janet Knox and Jane Mealy, the two Program Directors who, with Rick Kelly, the Human Resources Manager, had made the decision to increase the pay rate of the Clinical Leaders effective September 1, 1998. It was also copied to six Health Service Managers. The letter stated in part:

> In December, 1998, the clinical leaders received an increase in their rate of pay as well as retroactive pay to September 1, 1998. It appears that an arbitrary decision was made to limit the retroactive pay to that time frame. In speaking

> to the health service managers, particularly Kate Mahon, we were informed that there was no intent to limit the retroactive pay to this period. In fact the health service managers understood the equity of pay would be retroactive to November 1, 1997. We the clinical leaders of the Children Services site, IWK Grace Health Centre feel that his may be an oversight and would like the process to be reviewed and rectified. Please direct further inquiries to Sharon Gavin (W -428-8584/ [etc.]).

This letter was not answered until June 22, when Ms. Maddison wrote Ms. Gavin as follows:

> I have discussed the concerns raised in your letter of April 14, 1999 with Janet Knox and Jane Mealy.
>
> I was advised by these Program Directors that the decision on retroactivity for the Clinical Leaders was not made arbitrarily. The decision was made to go back to September 1, 1998, as it was early September when the issue was raised initially. Because this matter was not raised during the collective bargaining process, there was never an intent to apply the new rates retroactively to November 1, 1997, the date the collective agreement became effective . . .

While it may be understandable because of vacations and the like, this delay of over two months in answering was clearly a management problem. When asked why there were no meetings on this issue thereafter, well into the autumn, Ms. Knox replied that she had not been in the office through that period, that someone had been acting in her place and that she had not been aware that her absence was holding this up.

I note that at no time did the Employer ever indicate to the Union that this Grievance was, or was about to become, untimely or that it would object to the process on that basis unless the Union proceeded more expeditiously. My conclusion is that the Employer cannot rely on any delay in filing the Grievance on the part of the Union after April 14, 1999.

2. *Are the former Clinical Leaders entitled to be paid at the head nurse or special unit head nurse rate for the period from November 1, 1997 to September 1, 1998 because their core duties were the same as those of Clinical Resource Nurses? Is this affected by what the Employer said or did subsequently?*

The first part of this issue involves two questions. First, does Article 8.08 of the Collective Agreement and Appendix A, which it incorporates by reference, entitle the Clinical Leaders to be paid at the Head Nurse rate because they did essentially the same job as the of Clinical Resource Nurses? To answer I must determine whether, in fact, the Clinical Leaders did essentially the same job as the

Clinical Resource Nurses and, if so, whether that means the Collective Agreement entitled them to the head nurse premium.

I must add that I do not see this as a situation in which employees in one job classification have been directed to perform the core duties of another more highly paid classification rather than their own, such that they can claim to be entitled to the pay of the higher rated job. The Clinical Leaders performed the work of their own classification throughout. I therefore do not find either *Re Saint Lawrence Seaway Authority and C.B.R.T. & G.W.* (unreported, April 26, 1991) Arbitrator Saltman, or *Re Winnipeg (City) and C.U.P.E., Loc. 500* (1991), 20 L.A.C. (4th) 394 (McGregor), helpful, except insofar as they relate to retroactive entitlement to pay, an issue that, in the result, does not arise here.

In response to the submissions on behalf of the Union I must also determine whether the Clinical Leaders' entitlement is affected by anything the Employer did to lead them to believe that they were so entitled? I will consider three things the Employer did; the fact that the Employer agreed to pay, and did pay, the Clinical Leaders at the Clinical Resource Nurse rate from September 1, 1998 onward, what the Employer's representatives said to the Clinical Leaders and the Union and the fact that Elise Ladouceur and Karen Van were paid retroactively to November 1, 1997 at the Clinical Resource Nurse rate although they were referred to as Clinical Leaders.

Retroactivity

While I agree generally that this is a matter of "salary adjustment" so that if the Clinical Leaders are entitled under the Collective Agreement to be at the head nurse rate the entitlement would apply retroactively to November 1, 1997, I do not need to consider the issue of retroactivity because I have decided the Clinical Leaders are not entitled to the head nurse rate under Article 8.08 and Appendix A of the Collective Agreement as signed on May 15, 1998. They have been paid that rate from September 1, 1998 onward because the Employer changed their rate. That change may not have been one the Employer had the power to make unilaterally, but, understandably, the Union has not grieved it. In saying this I am not, of course, suggesting that the Union agreed that the change should be effective only from September 1, 1998 onward and not retroactively from November 1, 1997, but I am saying that the parties have, in effect, agreed on the rate of pay for the Clinical Leaders from September 1, 1998 onward.

Entitlement Under the Collective Agreement

Why have I concluded that the Clinical Leaders are not entitled to the head nurse rate under Article 8.08 and Appendix A of the Collective Agreement as signed on May 15, 1998, considering what the Employer did that allegedly led the Clinical Leaders to believe that they were so entitled? I requote Article 8.08 and the relevant part of Appendix A here for convenience:

> 8.08 The Employer shall pay each Nurse every two (2) weeks. The amount shall be in accordance with the applicable hourly rate for the Nurse's classification and increment level listed in Appendix "A" annexed hereto.

In Appendix "A" — HN (*i.e.* the rates for the position of head nurse), the note:

> ** Head nurse rates apply for Enterstomal Therapist, Parent Educator, Staff Health Nurse, OH&S Nurse, Instructor, IWK/Grace-Clinical Resource Nurse.

Counsel for the Union submitted that there is no definition of the term "classification" in the Collective Agreement, which is the case, although the term is used in Article 14.12 and 14.13 in connection with promotion and advances on the increment scale within a classification. In this context counsel stressed that what the Clinical Leaders on the IWK site did was in fact the same as the duties of the Clinical Resource Nurse on the Grace site. She pointed to the testimony of Ruzica Howell who was a Clinical Leader at the IWK in 1996, 1997 and 1998.

Similarity in the Roles

Ms. Howell also testified that the role of the Clinical Leaders was quite different from that in the "Job Profile" of the Registered Nurse employed by the Employer approved by the Nursing Practice Council in September 1999, which is in evidence. A staff nurse may be assigned for a three-month block to be team leader. In that role the staff nurse has responsibilities for the twelve-hour shift, to make assignments as new patients come in or patient activities change. Most staff nurses serve as team leader from time to time, but that position, which does not carry extra pay, is quite different from the position of Clinical Leader.

The Clinical Leader has longer term supervisory responsibilities. The Clinical Leaders' role was, Ms. Howell testified, very similar to that set out in the "Position Description" of the Clinical Resource Nurse in the Labour/Delivery/Recovery Unit of the Grace Maternity

Hospital adopted in 1995, which, in turn, is very similar to the "Position Description" of the Clinical Resource Nurse in the Postpartum Nursing Services Department currently in use by the Employer, both of which are in evidence. This has been the case, she testified from the signing of the Collective Agreement. In 1997 Clinical Resource Nurses at the Grace were doing the same things she was doing as a Clinical Leader at the IWK.

In the summer of 1998 the Nursing Practice Council examined the duties of the Clinical Leaders in the various parts of the IWK site. Elise Ladouceur was in the sub-committee that actually performed this work. The job descriptions of Clinical Leaders in various parts of the IWK site and of the Clinical Resource Nurses at the Grace site collected by the sub-committee were put in evidence through her. They are not uniform but for purposes of this proceeding I find that Clinical Leaders throughout the IWK site, including the Special Care Unit where Elise Ladouceur and Karen Van worked, performed essentially the same duties. I return below to the evidence with respect to the Special Care Unit.

More importantly, I am also satisfied on the basis of Ms. Howell's testimony, Ms. Ladouceur's testimony, the job descriptions put in evidence through her and the testimony of Ms. Knox and Ms. Mealy that the work of the Clinical Leaders on the IWK site and of the Clinical Resource Nurses on the Grace site were very much the same when the Collective Agreement was signed on May 15, 1998. Indeed, I do not think there is any serious dispute about that, although the Employer's witnesses certainly did not testify that they were the same job.

Interpretation and Application of the Collective Agreement

The serious question then is whether, because the work done by Clinical Leaders and the Clinical Resource Nurses was essentially the same, I should interpret the Collective Agreement as providing that they were to be paid the same, *i.e.* the Clinical Leaders were to be paid the head nurse premium as were the Clinical Resource Nurses. It is not for a grievance arbitrator to determine whether two jobs are sufficiently similar that they should be paid the same. My job is to decide whether that is what the parties intended, as derived from the words they used in the context, and, if those words are ambiguous, any other relevant evidence.

Obviously, on its face the Collective Agreement provides for payment of that rate of pay to the Clinical Resource Nurses and says nothing about the Clinical Leaders. The Clinical Leader position existed at the time of the negotiation and was known, or should have been known, to both the Employer and Union negotiators. I have no basis for thinking that either party adverted specifically to that position and, indeed, it seems likely that neither did. But that is not a basis upon which I as arbitrator can write special pay for the position into the Collective Agreement.

Even if I were to conclude that the Collective Agreement is in some way ambiguous about the pay rate of the Clinical Leaders there is nothing in the evidence that satisfies me that the parties shared any intent to include them in the reference to Clinical Resource Nurses in the note to Appendix "A" — HN quoted above. Shane Calder has been Chief Shop Steward for the IWK-Grace Local of the Union for three years. He was a member of the Union's provincial negotiating committee for the current Collective Agreement. In his recollection there was no discussion of the rate of pay for Clinical Leaders on the IWK site in the negotiation of the Collective Agreement. He testified that when a tentative agreement was finally reached in March of 1998 the "dotting of the i's and the crossing of the t's" was left to the chief negotiators and the Union President. He had no recollection of how the wording of the note marked ** to Appendix "A" — HN, quoted above, came to be.

Rick Kelly, who at the time was Human Resources Manager for the Employer and on the bargaining team on the employer side, testified to the same effect. Janet Knox, who is Program Director for Children's Acute and Emergency Care, was also on the bargaining team on the employer side, representing this Employer. She confirmed that there was no discussion at all of Clinical Leaders' pay rate during that process. It was clear, however, that positions with special rates of pay would remain unchanged from the previous Collective Agreement. The note marked ** to Appendix "A" — HN, quoted above, was, she testified, intended to list the nursing positions throughout the Province receiving the head nurse scale of pay.

On the basis of all of this testimony I find nothing to suggest a shared intention on the part of the parties to add to or derogate from the words used.

The fact that the Employer agreed to pay, and did pay, the Clinical Leaders at the Clinical Resource Nurse rate from September 1, 1998 onward

As I have already said, in interpreting and applying the Collective Agreement, including the pay scales in Appendix A, I, as grievance arbitrator, must attempt to give effect to the shared intent of the parties. Normally this is expressed in the words they have used, but where those words are ambiguous I can and should look at other, extrinsic, evidence of their shared intent at the time they signed the Collective Agreement. Next to the words they used, the best extrinsic evidence of their shared intent is evidence of what the parties said and did at, or prior to, the time of signing the agreement, but the way in which the Collective Agreement was subsequently applied by the Employer, without objection by the Union, may also be relevant to finding what their shared intent was at the time of signing.

That must be the logic behind the Union's submission that the fact that the Employer agreed to pay, and did pay, the Clinical Leaders at the Clinical Resource Nurse rate from September 1, 1998 onward is a basis upon which I should find that the Clinical Leaders were in fact entitled under the Collective Agreement to be paid at that rate from November 1, 1997 onward. I reject that submission because, on the evidence, I do not find that the payments made in December 1998, retroactive to September 1, 1998 demonstrate any such intent or understanding of Appendix "A" — HN to the Collective Agreement on the part of the Employer. Quite clearly the Employer intended to pay over and above what it understood it was obligated to pay. Whether it did so properly without the Union's agreement is another issue, which is not before me. I note Article 4.15 of the Collective Agreement in this connection, as well as the Employer's duty under the *Trade Union Act*.

The only other basis upon which the fact that the Employer agreed to pay, and did pay, the Clinical Leaders at the Clinical Resource Nurse rate from September 1, 1998 onward could be relevant is that doing so estopped the Employer from refusing to also pay for the period from November 1, 1997 to September 1, 1998. A party to a Collective Agreement may become bound by its words or actions where they lead the other party to act to its detriment in reliance on the belief that the first party is foregoing rights under the

Collective Agreement. This doctrine can have no application here. The Union is relying on the grant of pay retroactive to September 1, 1998, not the foregoing of any right by the Employer. Moreover, there was no detrimental reliance here, because the Clinical Leaders have not been adversely affected into the future by any reliance on the fact that Employer agreed to pay, and did pay, the Clinical Leaders at the Clinical Resource Nurse rate from September 1, 1998 onward.

What the Employer's Representatives Said

I will not reiterate here the facts set out above in connection with the Employer's objection to the delay in filing this Grievance. While I concluded there that the interaction of the Employer with the Clinical Leaders and the Union was such that I would not hold that the Union was barred from proceeding with this Grievance, it does not follow, nor do I find, that the Employer's behaviour affected the merits of this Grievance.

Nothing that the Employer said or did from July 13, 1998, when Mr. Kelly learned of the Clinical Leaders' dissatisfaction, to September 1998, when the Employer decided to pay them from then on at the Clinical Development Nurses' rate, demonstrated that the Employer's intent in negotiations had been to pay Clinical Leaders on the same basis as Clinical Development Nurses or in some way estopped the Employer from paying the Clinical Leaders at the staff nurses' rate from November 1, 1997 to September 1, 1998. Ms. Howell testified that at the meeting of July 23, 1998 nothing was said about the retroactivity of any increase in the pay of the Clinical Leaders. She testified that her idea that any increase would be retroactive to November 1, 1997 derived from the fact that Elise Ladouceur had been paid on that basis. I address that aspect of this issue under the next heading.

The Clinical Leaders may have been told by a Health Services Manager that the increase to the Clinical Development Nurses' rate would be retroactive to November 1, 1997, but I do not think that would either be determinative of the Employer's intent at the time of signing the Collective Agreement or raise an estoppel.

After the payment was made retroactive only to September 1, 1998 the Employer did nothing to affect the merits of this Grievance. It did not always respond with alacrity to the Clinical Leaders, or to the Union, and I have taken that into account in dealing with the Employer's objection to the delay in filing the Grievance. That,

however, cannot confer rights to payment on the Clinical Leaders that they do not have under the Collective Agreement.

Payment of Clinical Leaders in the Special Care Unit

Was the entitlement of the Clinical Leaders affected by the fact that Elise Ladouceur and Karen Van were paid retroactively to November 1, 1997 at the Clinical Resource Nurse rate although they were referred to as Clinical Leaders?

When Ms. Ladouceur received her cheque in June of 1998 for her collectively bargained increase retroactive to November 1, 1997, it was based on the special unit head nurse rate, apparently in accordance with Appendix "A" — HN to the Collective Agreement, which provides that "Head Nurse rates apply to . . . IWK/Grace-Clinical Resource Nurse", although she had never been given that job title. The same was true, apparently, of Karen Van, who had also worked in the Special Care Nursing Unit.

Prior to the merger of the two hospitals there was a neo-natal Infant Care Unit at the IWK, which was manned by staff nurses and team leaders. On the Grace site there was also a special neo-natal care nursery called the "clinical development unit". It was manned by staff nurses and two "Clinical Development Nurses", who were paid on a higher scale than the staff nurses. In the Autumn of 1996 the two units were merged to create the Special Care Nursing Unit.

At that time two positions for "Clinical Leader" were posted at the IWK site. The posting, which is in evidence, lists the responsibilities of and competencies for the position. Elise Ladouceur and Karen Van were the successful applicants. They worked closely with the Clinical Development Nurses and staff nurses from the Grace site as well as with the staff nurses from the IWK site, and did the same work as the two Clinical Development Nurses. Following the signing of the Collective Agreement their rates of pay were adjusted retroactively to November 1, 1997, so that they were paid the same as the Clinical Development Nurses on the Grace site with whom they worked. They each worked in that position for a two-year term. At the end of that term the positions were again posted and they were awarded them on a permanent basis. This second posting also called the position "Clinical Leader". Ms. Ladouceur and Ms. Van were never referred to as Clinical Development Nurses.

As I stated above, I am satisfied that at the time of the merger the duties of other Clinical Leaders on the IWK site were essentially the

same as those of Ms. Ladouceur and Ms. Van, and the same as those of the Clinical Development Nurses on the Grace site. What, then, is the significance of the fact that Ms. Ladouceur and Ms. Van alone among the Clinical Leaders received the pay increase granted to the Clinical Development Nurses, retroactively to November 1, 1997, at the same time the Clinical Development Nurses received it?

The submission of counsel for the Union is that this raised the expectations of the other Clinical Leaders. As I stated above, I have no doubt that from the summer of 1998 right through to the autumn of 1998 the Clinical Leaders as a group thought that the Employer had simply made an error in not paying them the same as the Clinical Development Nurses, which would be rectified once management "understood". The fact that Ms. Ladouceur and Ms. Van had been retroactively paid the head nurse premium may well have created that expectation, and certainly reinforced it. If they had not in fact been reclassified, evidently some member of management had wrongly characterized them as Clinical Development Nurses because they were working in a fully merged unit. For some unexplained reason that is how the Employer's paymasters viewed them.

Unequal treatment of Clinical Leaders in one particular unit of the merged hospital was clearly undesirable but I am unable to conclude that the payment to Ms. Ladouceur and Ms. Van either manifested an intent on the Employer's part to pay Clinical Leaders generally on the same basis as Clinical Development Nurses or in some way estopped the Employer from paying other Clinical Leaders differently.

3. For the period in issue was a new classification and rate created as is provided for by Article 8.05?

Counsel for the Union argued, in the alternative, that the Employer had created a new classification of Clinical Leader as provided for by Article 8.05, for which a rate was decided by the parties, that being the rate paid Clinical Leaders effective September 1, 1998.

New Classification

8.05 Should a new classification be created within the bargaining unit during the term of this Agreement, the Employer and the Union will decide the rate of pay. Nothing herein prevents the Employer from filling such positions and having Nurses working in such positions during such negotiations. The salary when determined shall be retroactive to the date on which the successful candidates commenced work in that classification.

The Clinical Leaders, counsel submitted, were therefore entitled to be compensated retroactively at the rate set in September 1998 from the time they had commenced to work as Clinical Leaders.

Counsel for the Employer took the position that there was simply no evidence of the creation of a new classification of Clinical Leader. That position had existed for some time before the amalgamation of the two hospitals, the Collective Agreement and the adoption of the new management model. The position may have evolved, although there is no convincing evidence that it changed very much through the period in question. Certainly it was not a new classification. Counsel for the Employer pointed out that if the parties had in fact viewed what had happened as the creation of a new classification the "new position" would have had to have been posted in accordance with Article 12.

I reject this alternative argument by the Union. There is no evidence that the Employer intended to create a new classification as contemplated by Article 8.05 or that the Union perceived it as doing so.

CONCLUSION AND ORDER

For all of the foregoing reasons this Grievance is dismissed.